



2024 ANA MASTERS OF ADVERTISING LAW CONFERENCE

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**CLAIM SUBSTANTIATION: YOU BETTER BE ABLE TO PROVE THAT YOU ARE
BETTER, BIGGER, STRONGER, AND FASTER THAN THE COMPETITION**

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I. ADVERTISING LAW

A. Overview

All advertising is subject to the laws that govern traditional forms of advertising. The Federal Trade Commission ("FTC") is the leading regulator for advertising, and it acts pursuant to its jurisdiction under the Federal Trade Commission Act, 15 U.S.C. 45. States and municipalities also regulate advertising, pursuant to their own statutes and regulations governing advertising.

Under the FTC Act, advertising must be truthful and non-deceptive, advertisers must have evidence to back up their claims, and advertisements cannot be unfair.

Section 5 of the FTC Act specifically prohibits **unfair** and **deceptive** practices that are in or affect commerce. Most cases are brought under the FTC's 'deception' authority. An advertisement is considered deceptive if it (a) contains a statement or omission, (b) that is likely to mislead reasonable consumers, (c) in a material way (that is, about an issue of importance to consumers in buying or using the product). A statement may be deceptive if the advertiser does not have a reasonable basis to support its claims.

B. Common Sources of Advertising-Related “Litigation Risk”

A. FTC Act, Section 5 (15 U.S.C. § 45)

- a. FTC authority to prohibit “unfair or deceptive acts or practices”

B. Lanham Act, Section 43(a) (15 U.S.C. § 1125(a))

- a. Establishes a private right of action by competitors and other third parties to pursue any “false or misleading representation of fact”

C. State consumer protection and deception statutes (class action)

D. Fraud statutes

E. Common law causes of action for misrepresentation, trade libel, product disparagement, interference with contractual relations, trademark infringement and trademark dilution

F. Inquiries from and competitive challenges before the National Advertising Division of the Better Business Bureau and television networks

C. Unfair or Deceptive Trade Practices: Unfair Advertisements

An advertisement or business practice is **unfair** if it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid, and is not outweighed by the benefit to consumers. The more common type of false advertising, however, is deceptive advertising.

D. Unfair or Deceptive Trade Practices: Deceptive Advertisements

There are three types of deceptive ads: (1) those that contain a false or misleading claim; (2) those that contain an objective claim that is not supported by a reasonable basis at the time it is made (i.e. one that is unsubstantiated); and (3) those that omit material information that, in light of the statements made in the ad, causes consumers to be misled (e.g. a 'half-truth').

1. False or misleading claims

Determine the message the ad conveys to the consumer. Claims can be **express** or **implied**. Express claims directly state the proposition, while implied claims suggest a certain message indirectly.

a) Express claim: "Our toothpaste reduces plaque"

b) Implied claim: "Our toothpaste kills the germs that cause plaque"

The FTC and U.S. courts focus on the overall net impression that an advertisement

conveys to **reasonable** consumers, and **not on the literal truth** of the advertisement's individual elements.

For example: an advertisement by a cookie maker that expressly states that its cookies have more chocolate chips than its competitor's cookies. Literally true, yes, **BUT** the chocolate chips were half the size, and overall, each cookie contained less chocolate than the competitor's cookies.

2. Unsubstantiated claims

Objective claims must be supported by a reasonable basis **at the time they are made**. The substantiation must consist of competent and reliable scientific evidence: "Tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results."

What is the appropriate level of substantiation? For specific, express claims, the advertiser must possess at least that level of evidence. For implied claims, several factors are considered, including the type of claim and product, the benefit if the claim is true and the costs if the claim is false, and the amount of evidence experts in the field would require.

3. Deceptive omissions

The failure to disclose material information necessary to prevent an advertisement from being deceptive, in light of the representations made in the ad, constitutes a deceptive omission. If only part of the truth is disclosed in the ad, leading to an overall misleading impression in the ad, the ad is deceptive.

Disclaimers may be used to prevent an advertisement from misleading consumers. Disclaimers must be 'clearly and conspicuously disclosed' meaning simply that the disclaimer is

effectively communicated to the consumer. Use clear and unambiguous language, avoid small type, avoid inconsistent or distracting elements that detract from or contradict the disclosure.

II. Identifying Appropriate Substantiation Standards for Claims

A. Identify the Claims Being Made.

Prior substantiation is required for all reasonable interpretations of advertising, express and implied. It is irrelevant what the advertiser *intends* with an advertisement – what is crucial is the message or claims that *the audience takes away or interprets* from the advertisement.

1. Puffery. In general, an advertiser is not responsible for supporting “puffery” type statements because those statements are not viewed as something reasonable consumers would understand as an objective statement of fact capable of being relied upon.
2. Others. Many types of other activities qualify as “claims” that must be truthful, accurate and appropriately supported, including visuals, drawings, pictures, images, product demonstrations, dramatizations, transformations, testimonials and endorsements, etc.

B. The General Standard for Support: Reasonable Basis

The nature of the claim itself drives what type of substantiation is ultimately necessary, thus substantiation can take many forms. However, the law requires in all cases that advertisers have a “reasonable basis” of support for all express and implied claims made about the goods or services advertised. Advertisers are required to have the necessary substantiation prior to releasing the advertising to consumers.

What qualifies as a “reasonable basis” will differ depending on the type and nature of the claim. **The most basic requirement is to have reliable, objective, unbiased evidence of the truth of the claim.**

The FTC judges the type and amount of proof needed by considering the following six factors: (i) the type of claim; (ii) the type of product/service; (iii) the benefits to the public if the claim is true; (iv) the consequences to the public if the claim is false; (v) the ease and cost of developing substantiation for the claim; and (vi) the level of proof that experts in the relevant field(s) would agree is reasonable.

C. Valid and Appropriate Tests

1. Reliable

- i. Unless the claim specifies otherwise, tests should be conducted on the actual products in the marketplace under typical conditions of use and/or under directed conditions of use
 - a. Tests on old products will not suffice
 - b. Tests under conditions other than actual use or directed use will not suffice to support an unqualified performance claim
- ii. Tests on product ingredients as opposed to on the product itself will be closely scrutinized and will likely be insufficient unless claims are specifically limited to be only about the ingredients

2. Objective

- iii. The ideal is independent testing conducted by qualified experts in the relevant field, but:

- a. In-house tests can be objective and reliable if conducted with transparency and under conditions designed to ensure their objectivity. Note you may have to PROVE this in court, so take care in setting up the testing.
 - b. Tests conducted by independent, external experts are always preferred and are often required for competitive claims, health and safety claims and other sensitive claim areas
- iv. Results evaluated objectively with appropriate analysis related to statistical margins of error
3. Well-designed tests
- v. Methodologies accepted by professionals in the relevant field using established (and ideally published or at least widely known) protocols
 - a. Makes use of any relevant and applicable industry standard tests as well as any available industry-accepted protocols, conditions, definitions or norms
 - b. Protocols clearly stated and followed rigorously and professionally, with documentation available to demonstrate their rigor
 - vi. Sufficiently large sample size for statistical analysis and conclusions based upon a 95% confidence level
 - vii. Safeguards against bias are employed (i.e., blinding, neutral in order, nothing leading, no use of “cues”, etc.)
4. Well-controlled tests

- viii. “Gold standard” is double-blind
 - ix. Comparison to a control or placebo cell (particularly critical for clinical or health/safety claims)
 - x. Removal of as many variables as possible, i.e., testing and evaluation by the same individuals on the same equipment under identical conditions using materials from the same lots.
5. Results that appropriately “fit” the specific claim and are relevant and material to the consumer.
- xi. Even if statistically significant, a benefit that is marginal, especially in the context of comparative advertising, or not material to the purchasing decision of a significant percentage of consumers, may not support a claim.

D. Support for Specific Types of Claims

One key principle - the support must match the claim. In other words, there must be a proper fit between the evidence offered in the support of the claim and the nature and scope of the claim itself.

Certain types of claims receive a heightened standard of scrutiny, such as consumer health or safety, claims that consumers are not well positioned to evaluate or to make informed decisions about for themselves, claims where consumers are particularly vulnerable to promises of quick relief, and claims touching on regulated industries or products. As a general matter, the standard imposed for many such claims is “**competent and reliable scientific evidence**” in support, defined by the FTC as “tests, analyses, research, studies, or other evidence based upon

the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”

1. Substantiation with Social Media Marketing

With the expansion of social media and the introduction of new digital platforms, brands are looking to connect with consumers in fast, real-time, personalized ways. Brands have gravitated towards and embraced the opportunity to participate in influencer marketing through these different social media. With influencer marketing, brands can connect with consumers by engaging a specific individual to post and share information about a product or service. These posters, who are known as “influencers,” generally have a large or specific audience that brands want to target. This multimillion dollar business has boomed in recent years with new platforms and opportunities to connect with consumers.

Influencer marketing can take place in a variety of situations; for example, an influencer may post: (1) a YouTube video, reviewing make-up products; (2) on Facebook, touting a new restaurant; (3) a fashion blog entry, noting new clothing brands; (4) a video on Snapchat, which includes a discount code for purchasing workout equipment; or (5) on Instagram, highlighting a unique travel destination. The common thread with each of these different types of marketing avenues is the ability to connect on a personalized level with the consumer and provide targeted advertising for a specific product or service.

However, these mediums and opportunities for using influencer marketing have opened the doors for emerging legal issues and considerations. Specifically, brands must be aware of, and analyze the implications of, advertising laws, and incorporate disclosures into the posts to alert consumers of the relationship between the influencer and the advertiser.

The FTC has provided its guidance in the Guides Concerning Use of Endorsements and Testimonials in Advertising (the “Guidelines”). The Guidelines, as explained by the FTC, “reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.”

In other words, advertisers must have adequate substantiation (i.e. competent and reliable scientific evidence) to support any claims made through endorsements on social media in the same way that they would be required if they were making direct representations without an endorsement. Both advertisers and endorsers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see §255.5].

2. Comparative Advertising

There are two general categories of comparative advertising claims – “parity” claims and “superiority” claims.

- Parity claims are those where the advertiser says its product is at least equal to one or more competitor products. These include claims like “no one beats our prices,” “unbeatable prices,” and the like.
- Superiority claims are those where the advertiser says its product is better in some or all respects than the competitor’s product. These include claims like “Our prices are lower!” and “We beat our competitor’s prices.”

(a) Comparative Price Claims:

When making a comparative price claim – e.g. “our prices are lower than their prices” or “compare our product at \$9.99 to their product at \$12.99” – advertisers must ensure that they

have accurately represented their competitor's prices. This can be challenging in volatile marketplaces, where prices may change often. Unfortunately, market volatility does not diminish the advertiser's burden of truth and substantiation. *See Walmart, Inc. v. Winn-Dixie Stores, Inc.*, NAD Case No. 3324 (Aug. 1, 1996) (“If an advertiser ... wishes to make comparative pricing claims in which it is known that prices change with great rapidity, it is incumbent upon that advertiser to take steps to insure that comparisons are correct and current.”) To account for price volatility, an advertiser making a comparative price claim should do the following, at minimum:

- Comparison price shopping to substantiate price claims as often as necessary based on historical time frames for price changes by the competitor; and
- Calibrate comparative pricing ad campaigns so that they will not run for substantially longer than a typical pricing cycle or remain flexible with respect to ad campaign end-dates.

(b) Line Claims

A “line claim” is a claim that pertains to an entire product line, rather than just a single product within a line. For example, “Our Razors are Cheaper than Theirs” would be a line claim, while “Our Hyper-Close Razors are Cheaper than Theirs” would not. When making a line claim, advertisers must ensure that the claim is actually true and substantiated with respect to the entire line.

Advertisers should be careful to avoid vague or imprecise phrasing or ambiguous visuals that can lead consumers to believe the ad refers not just to a single product, but to an entire line. A cautious advertiser will be sure to precisely identify the specific product at issue, limit any claims to only that particular product, and avoid more general or brand references. *Unilever*,

United States, Inc. v. Campbell Soup Company, NAD Case No. 5607 (June 25, 2013) (“NAD has held that to avoid making a line claim—that is to say a claim that reasonably communicates that the performance promised is true for all of the products in the line, a comparative advertisement must expressly specify the exact basis of the comparison in the claim itself.”)

3. Inaccurate Comparisons

Finally, advertisers must ensure that any comparisons in its ads are valid and not misleading. There are two common errors advertisers would do well to avoid in this space.

First, advertisers should not use unusual or outlier examples as comparators. In the comparative pricing context, for example, an advertiser should not use a high price for a product that is found in only a small number of outlets in a given area as a comparator, particularly when the advertisement will be seen by consumers in a much wider geographic range. Instead, an advertiser should use a reasonably representative example – a price most consumers are likely to find – as its comparator. This is because, even if the claim could be literally true – the quoted prices do exist – it is still conveying an unsubstantiated and misleading implied claim.

Second, advertisers should generally stick with “apples to apples” comparisons, avoid comparing unlike products. *eHarmony.com v. Match.com L.P.*, NAD Case No. 4730 (September 21, 2007) (“NAD agreed that the feature comparison chart between Match.com and eHarmony was an apples-to-oranges comparison that did not clearly convey the material differences between the two services.”) For example, it would likely be improper to compare the low price of a budget brand product to the comparatively higher price of a premium brand product sold by a competitor, as these are not equivalent products. Ideally, an advertiser would compare the prices of two identical products, in identical sizes.



**THIS OUTLINE PROVIDES GENERAL GUIDELINES ONLY
AND SHALL NOT BE CONSIDERED LEGAL ADVICE.**