

BREAKOUT 5D: CLAIM SUBSTANTIATION NOVEMBER 11-13, 2024

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

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# Claim Substantiation

## *AGENDA*

- 1. Basics of Claim Substantiation**
- 2. Puffery**
- 3. Testing**
- 4. Influencers / Others making claims about your products**

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# 1. Basics of Claim Substantiation



# Basics of Claim Substantiation

- Risk tolerance – companies have different levels.
  - What is the C-Suite's position
  - How extensively to CYA?
  
- Analyze where the risk is:
  1. Public Relations
  2. Government (FTC, State AG, other regulator)
  3. Competitor
  4. Consumer class action
  5. Do-Gooder organization



# Basics of Claim Substantiation

**What is a Claim?** *(let's understand some terminology)*

- **Objective Claim:** verifiable; observable; independent of personal beliefs, opinions, or interpretations; backed by empirical evidence.
- **Subjective Claim:** influenced by personal feelings, interpretations, or opinions.
- **Sensory Claim:** Any of the five senses, but often taste and smell

***As viewed from the consumer's perspective!!***

# Basics of Claim Substantiation

**What is a Claim?** *(let's understand some terminology)*

- **Monadic versus Comparative Claim:**

- Monadic = reference to oneself
  - “Excedrin relieves headaches fast.”
- Comparative = references competitors
  - “Energizer batteries last longer than Duracell batteries.”
    - Competitor named
  - “[Smile White] works easier and faster than other at-home bleaching products.”
    - Competitor NOT named – same risks?

***As viewed from the consumer's perspective!!***

# Basics of Claim Substantiation

**What is a Claim?** (*let's understand some terminology*)

- **Parity versus Superiority claim:**
  - Parity: advertised product is at least **equal** in some (or all) respects to the competitor product e.g.: "No one beats our prices"; "As effective as the leading brand"; "Unsurpassed"; "Unbeatable"
  - Superiority: advertised product is **better** in some or all respects than competitor products: Our prices are lower!! Consumers Prefer X Over Y; Consumers Prefer X Over the Leading Brand; The Fastest Broadband.

***As viewed from the consumer's perspective!!***

# Basics of Claim Substantiation

- **Objective Claims naming competitors:**
  - “Campbell has more soups without MSG than Progresso has soups”
  - “It is undisputed that the cost of Verizon’s Unlimited four-line plan is double that of Sprint Unlimited’s four-line plan.”
  - “Xyzol Allergy 24 HR works Twice as fast as Claritin” and provides “relief that starts at hour 1 instead of hour 2.”
    - ***NAD #6202 (July 2018)***



# Basics of Claim Substantiation

- **Objective Claim can be both EXPRESS and/or IMPLIED:**
  - **Express Claim:** *“With real fruit juice, 10% of daily calcium and only 10 calories in every 8 oz. serving, it tastes so good you can feel it in your bones”*
  - **Implied Claim: Implied Claim (visual message):** Contains many different kinds of fruit juices



# Basics of Claim Substantiation

## NAD'S HOLDING:

- **Fruit juice was 5%, all apple juice**
- **Picture of fruit problematic:**
  - **Apple juice ONLY, other fruits shown just flavoring; and**
  - **large number of fruits in picture could be understood to mean the product contains more fruit juice than 5%**
- **So: disclose source and amount of juice**



# Basics of Claim Substantiation

- **Objective Claim literally true, but false adv'g:**
  - The truth is not always a defense, in advertising.
  - A literally true claim can still be deceptive. Focus on the overall net impression to the consumer.
  - Duncan Hines claims its chocolate chip muffin mix contained “50% more chocolate chips” than General Mills.



# Basics of Claim Substantiation

- **Objective Claim literally true, but false adv'g:**
  - "50% more chips" = literally true, but implication was that DH mix had more chocolate, which was not true.
  - DH mix had more, smaller chips, but GM had more total chocolate
  - Held: literally true objective claim was false advertising.
    - *NAD Case Report No. 3623 (Feb. 1, 2000)*



# Basics of Claim Substantiation

- **Objective Claims – Price Comparisons are hard:**
  - “[I]f 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 that comparison is current and accurate.”
    - *Walmart, Inc. v. Winn-Dixie Stores, Inc.*, NAD Case No. 3324 (Aug. 1, 1996).
  - Substantiation at the time the claim is made, and prices change quickly and often.

# Basics of Claim Substantiation

- **Subjective Claims:** Opinion-based claims, require studies, surveys, or other rigorous testing methods.
- “Consumers prefer our butter to the leading brand two to one.”

# Basics of Claim Substantiation

- **Sensory Claim: Any of the five senses, but often taste and smell**
  - Taste – “America prefers the taste of Lay’s over Pringles” (comparative superiority)
  - Taste – Children’s Chewable vitamins.
  - Smell – “Fresh Step cat litter eliminates odor better than Arm & Hammer”
  - Smell – “Glade has a more authentic lavender than Air Wick”



# Puffery





# Puffery

- **Puffery: no need for substantiation, but what is it?**
  - **Exaggeration, hyperbole, not subject to proof**
    - “Kilpatrick has the best lawyers around”
    - “Delta – the on-time machine”
  - **“...a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable [person] would believe him, or that no reasonable [person] would be influenced by such talk.” --*Prosser & Keeton on Torts § 109 at 757 (5th ed. 1984)*.**
  - **Sometimes words may have non-specific meaning(s).**
  - **What does the majority of reasonable consumer *\*think\** it means?**
  - **Risk analysis: Who is going to complain about it?**

# Testing

- **Substantiation Testing: Competent and Reliable Scientific evidence**
  - What is and is not “competent and reliable scientific evidence”?
    - Letters from satisfied customers? NO
    - Testimonials and anecdotal evidence? NO
    - Newspaper articles? NO
    - Low history of product returns? NO
    - **Valid tests, studies, scientific research? YES**

# Testing

- **Substantiation Testing: Key Test Principles.**

- 1. Is there an industry standard test?**

- If YES – use it; BUT if there is a reason to deviate, ok to do that.
  - “When an advertiser wishes to use its own proprietary standard in lieu of an industry standard to support a superiority claim, it must show that its proprietary standard is a superior alternative to the industry standard.”
    - Toto USA, Inc. (Toto Prominence Toilets), NAD Case #3402 (1997)

# Testing

- **Substantiation Testing: Key Test Principles.**

## **2. Is the testing methodology sound?**

- Repeatability and reliability
  - Repeatability: Will the test be consistent each time it is performed?
  - Reliability: Is the methodology reliable?
- Bias? Comes in many forms and is a key concern

# Testing

- **Substantiation Testing: Key Test Principles.**

## **3. Is the study testing the actual product(s) at issue?**

- Testing the ADVERTISED PRODUCT? In CURRENT FORMULATION?
- Test ACTIVE INGREDIENT but in different concentration than in product?

# Testing

- **Substantiation Testing: Key Test Principles.**

**4. Is there a correlation between the test results and the challenged claims?**

- CLAIM must be supported by the TEST

# Testing

- **Substantiation Testing: Key Test Principles.**

## **5. Are the test parameters consumer relevant?**

- Tested BY TYPICAL USERS
- Show a consumer meaningful difference
- Reported difference should be perceptible to consumers (as opposed to a “statistically significant” difference.)

# Testing

- **Substantiation Testing: Competent and Reliable Scientific evidence**
  - **Substantiation = Match Claim.**
  - **Test on current formulation of the product.**
  - **Comparative claims = monitor re changing market conditions, update if necessary.**
  - **Results should be statistically significant and consumer relevant.**
  - **Replicate actual use conditions; control for confounding factors.**
  - **Use standard industry tests; Provide strong support for modifying standard test.**
  - **“Gold Standard” = independent test facility, randomized, double-blind, placebo-controlled, statistically significant results, peer-reviewed and published.**



# Testing

- **Substantiation Testing: Key Test Principles.**

## **To Survey or Not to Survey**

- Federal court, have a survey
- NAD, don't need a survey
- Surveys are expensive and can be difficult to design.
- Participants don't have a great track record of pointing to surveys to convince NAD that consumer confusion (or a lack thereof) exists.

# Influencers

- **Influencers making claims about your products**
  - **FTC Endorsement Guides**
    - Results not typical?
    - Endorsers have potential liability for their endorsements, if false.
    - Ads with endorsements claiming certain performance - interpreted as representing that the product is effective for the purpose depicted in the advertisement.
    - Substantiation required for all express and implied claims, even those made by endorsers / influencers.
    - Consumer endorsements themselves are not competent and reliable scientific evidence.

# Influencers

- **Influencers making claims about your products**

## PRACTICAL ADVICE

- Make sure the product is being used according to directions and safely!
- Humor is not a “get out of jail free” card.
- Consider whether a demonstration is appropriate.
- Provide scripts to influencers? (require disclosures)
- Contract for indemnities from influencers (value?)
- Require reps/warranties of compliance with FTC Endorsement Guides

*Thank You!*

Thank you for your time!  
Any questions, or  
comments. . .



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