

Regulatory Roulette

ALIGNING MARKETING STRATEGIES WITH
CONFLICTING LEGAL STANDARDS



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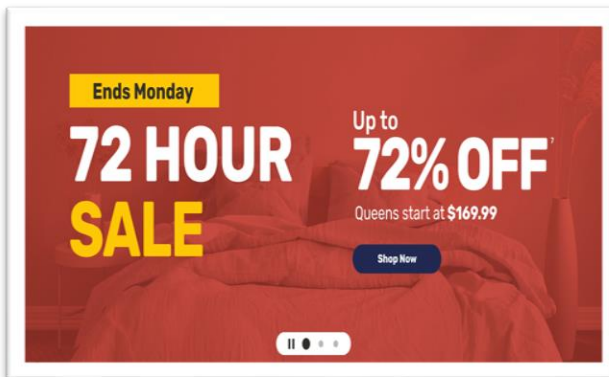
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Topic #1: “Up To” Claims



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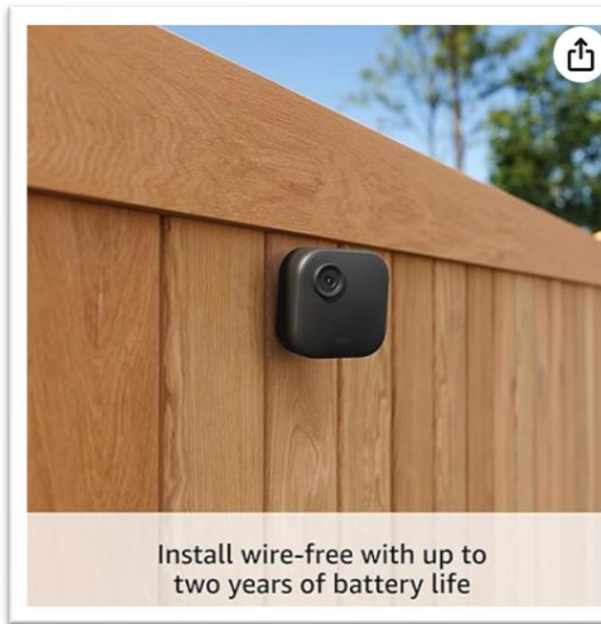
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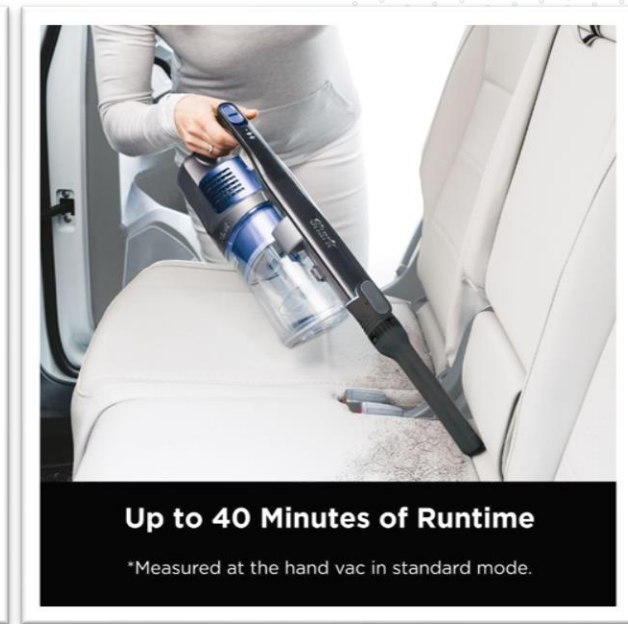
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Install wire-free with up to two years of battery life



Up to 40 Minutes of Runtime

*Measured at the hand vac in standard mode.

The Ninth Circuit



'Up to' promises only an "upper limit of performance (a ceiling of 50%) compared to a certain category of competitors (basic alkaline batteries) in a subset of applications (demanding devices)..."

These words [up to] are not particularly technical or difficult to understand, and though not exact, they cabin the scope of Energizer's claim in a way that renders Plaintiffs' reading of the advertising unreasonable."

The NAD

Does the evidence support that an “appreciable number” of consumers will obtain the advertised level of performance under consumer-relevant circumstances?

SMART-HEAL
HYDROCOLLOID GEL BANDAGES

100% WATERPROOF SEAL
protects against germs and
supports body's natural healing

SMART-HEAL
TECHNOLOGY

PROMOTES UP TO
2X FASTER HEALING*

- Lasts up to **7 days**
- Drug-free
- Helps **reduce scarring†**

Ideal for:
MULTI-USE

20
BANDAGES

STERILE • ALL ONE SIZE
0.78 IN x 2.36 IN (20 mm x 60 mm)

NAD – “up to” interpretation depends on context

- “Up to 35% vs. Energizer Max*”
- “Up to 15% vs. Energizer Max*”
- *AA size. Results vary by device and usage patterns.



Based on ANSI testing across a range of devices and considering the likelihood that consumers purchase batteries in multi-packs for use in varying devices, NAD determined that the claims reasonably conveyed the message that Coppertop and Quantum batteries will generally last longer than Energizer Max batteries “up to” a realistically attainable quantified amount and that these claims were supported.

The FTC: “Up to” conveys a typical result, not a maximum.



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FTC Dissents: “Up To” is Highly Contextual

WORK HARD, PLAY HARD

Boasting a Best-in-Class Available Max Hybrid Towing Capacity of up to 12,750 pounds¹ when outfitted with the Class-Exclusive available 5.7L HEMI® V8 engine with eTorque¹, the 2024 Ram 1500 has serious strength for both work and play.

BEST-IN-CLASS POUNDS MAX TOWING¹

12,750



“Up To” is Highly Contextual



Seat up to eight with third-row seating, stargaze under the available panoramic moonroof, or stay cozy with its available heated and ventilated front seats.

Takeaways

“Up to” claims based on specification (towing capacity) or components (number of seat belts) are likely lower risk because the results should be less variable.

“Up to” claims relating to product performance likely require controlled testing and clear and conspicuous disclosures to qualify the result. NAD and the Ninth Circuit generally interpret as a maximum result. The FTC interprets as a typical result.

“Up to” earnings claims may be uniquely risky, particularly in the “gig” economy.

Topic #2: Disclosures

The NAD

- NAD: Glad's "25% more durable" claim was misleading because the claim was not adequately disclosed when packaging disclosures were not on the same panel as the claim.
- NARB: The packaging disclosure was sufficient. Consumers understand that ForceFlex Max Strength is a line extension and the reference is to other brand family members. The asterisk signifies that more information is available.





12
MEGA =
48
REGULAR ROLLS

PREMIUM COMFORT
MADE SUSTAINABLY
100% ENVIRONMENTAL BENEFITS 80%

— NEW —
RECYCLABLE
PAPER
PACKAGING

QUILTED
• NORTHERN •

ULTRA SOFT & STRONG®

3 MILLION
TREES
PLANTED AND
GROWING THROUGH
THE ABSORB DAY
FOUNDATION

WE PROUDLY PARTNER WITH
FSC
Absorb Day

SEPTIC
SAFE

UNSCENTED BATHROOM TISSUE • 12 ROLLS • 415.4 SQ FT (38.1 m²) • 328 2-PLY SHEETS PER ROLL • 3.8 IN X 4.0 IN (9.6 cm X 10.1 cm)



Consumers Challenge Front Panel Disclosures

- A class of consumers challenged Aldi's use of "Simple.Sustainable.Seafood" on Atlantic salmon packaging, claiming that the claim is misleading.
- Aldi's defense was that the salmon are primarily sourced from fishermen who meet the "Best Aquacultural Practices" certified standard, as expressly disclosed immediately above the "Simple.Sustainable.Seafood" logo.



The Ninth Circuit: When the front of the package is ambiguous, the back panel can be used to clarify. (McGinity v. P&G)



Clean at Sephora (N.D.NY)

- A reasonable consumer would not interpret cosmetics labeled as “clean” to mean that they are free of all synthetic or harmful ingredients when the marketer specifically defined “clean” to mean that they cosmetics were free from a narrow list of ingredients (even when those limitations were not directly on pack).



Takeaways

The standard for disclosures is always clear, conspicuous, and in close proximity to the claim that the disclosure modifies.

For monadic claims, there may be less risk in a side or back panel disclosure.

For environmental claims, proximity is key and expect that challengers may question the validity of third-party standards even where disclosed in close proximity.

Some courts (not all) are crediting reasonable consumers with looking to side and back panels and off-pack disclosures.

Topic #3: Claims Support



Aspirational Green Claims – NAD/NARB



2021

JBS Makes Global Commitment to Achieve Net-Zero Greenhouse Gas Emissions by 2040

2023

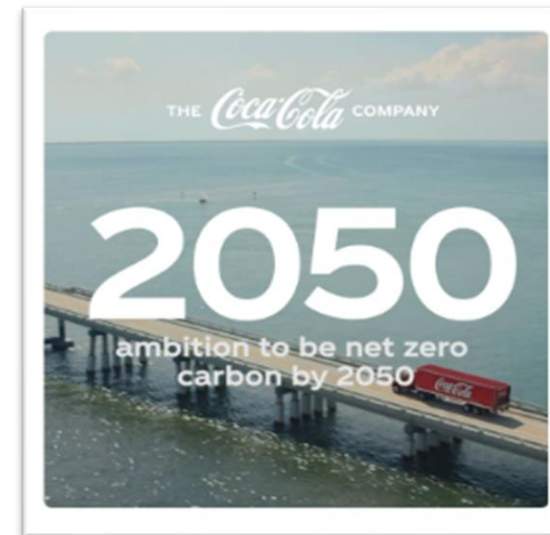
National Advertising Review Board Recommends JBS Discontinue “Net Zero” Emissions by 2040 Claims

Aspirational Green Claims – DC Courts



2022: “[m]any of the challenged statements merely amounted to “general, aspiration corporate ethos” that did not include any “promises or measurable data points” that would render them true or false”

2024: “[B]usinesses cannot insulate themselves from suit simply by avoiding concrete claims.” Thus, even ambiguous aspirational statements, such as Coca-Cola's remarks about creating a “more sustainable and better shared future,” can be actionable.



Health Claims – the FTC’s view

- Less flexible view of “competent and reliable evidence” than in the 1998 guidance. The FTC expects companies to support health claims with randomized, placebo-controlled clinical trials, ideally conducted on the finished product.



NAD – Following FTC’s Guidance

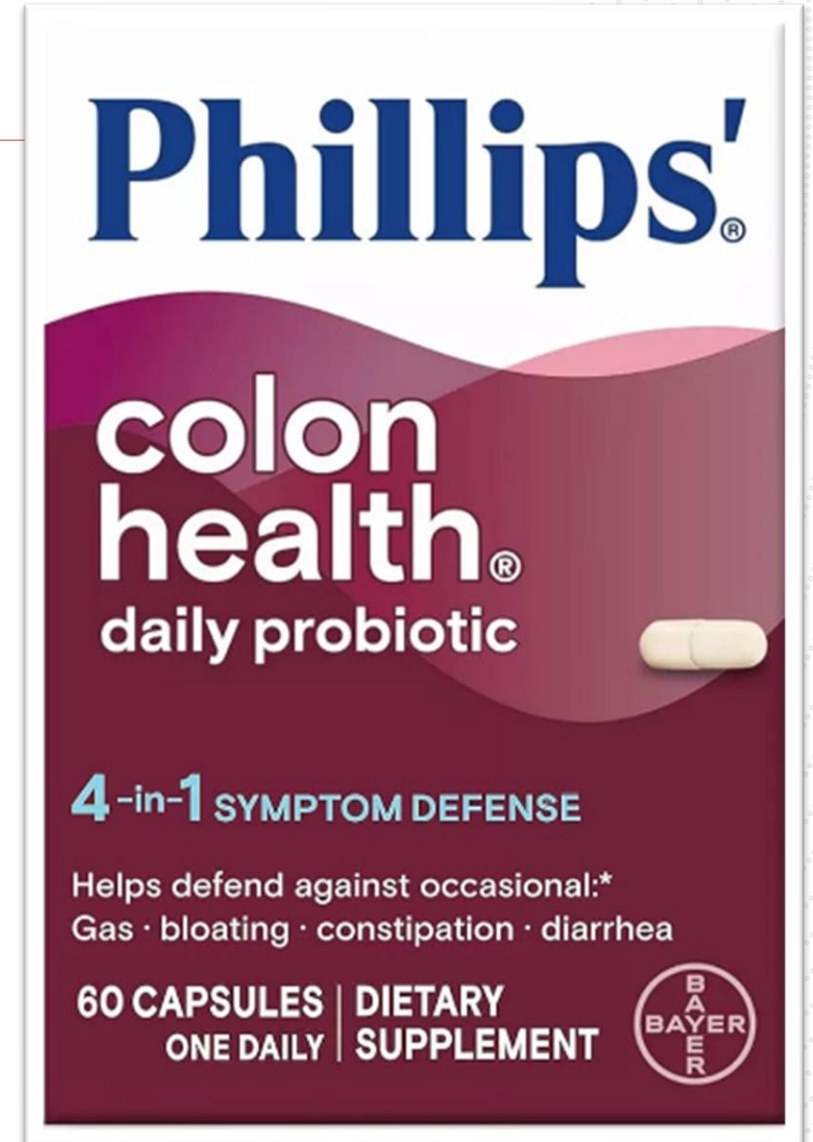
- NAD applied the FTC’s “competent and reliable evidence” standard strictly to finished product and ingredient studies, ultimately recommending that Focus Consumer Health discontinue All “clinically tested,” “scientifically tested,” “mood support,” “calm PMS symptoms,” “ease cramps, bloat and moodiness” and help consumers “experience a better period” claims *and* certain ingredient-based health benefit claims.



Period better
before, during, and after

Health Claims – the Courts

- Bayer's claims that PCH reduced digestive upset were not disease claims, nor did the government show that Bayer advertised the product to treat or cure any disease. The government cannot impose an RCT requirement where the governing order did not do so.



What juries think of health claims....

- March 2024: Quincy Bioscience lacked sufficient support for its establishment claims, efficacy claims that Prevagen provides healthy brain function, a sharper mind, and clearer thinking, and the establishment claim that Prevagen is clinically shown to provide other cognitive benefits were not materially misleading. All of these claims relied on a single finished product study.



Made in USA

The FTC: “all or virtually all” of the product must be made in America. NAD follows the FTC.

The 10th Cir: The FTC’s standard is not binding on cases brought under the Lanham Act. “American Made” is ambiguous and cannot be literally false.



Takeaways

Analyzing claims support requires knowing both the baseline rules and the enforcement trends.

The courts are not necessarily bound by FTC's rules or guidance regarding how certain claims should be substantiated, particularly health claims.


For environmental claims, we're seeing a convergence of opinion that statements of lofty sustainability aspirations once considered puffery are now considered claims that require actionable plans.

Topic #4: Puffery



The FTC on Puffery

A "term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." (1958)



"The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that ordinary consumers do not take seriously." (1983)

Courts May Broadly Construe Puffery

5th Circuit: A claim so vague
“it can only be understood as
a mere expression of opinion.”

- “Better ingredients, better pizza” = puffery (Pizza Hut/Papa John’s 2000)

9th Circuit: “exaggerated
advertising, blustering and
boasting upon which no
reasonable buyer would rely.”
(Southland Sod Farms 1994)

- “Less is More” = puffery
(Southland Sod Farms 1994)

3rd Circuit: claims that are
exaggerated such that no
reasonable person would rely
on them.

- “Better than HMO” = puffery
(U.S. Healthcare, Inc. 1990)

NAD Considers Several Factors

- Can the representation be proven or disproven?
- Are the statements distinguishable from measurable characteristics?
- Does the wording use expressions of opinion that are likely to be discounted by the buyer?
- Is the representation tied to a specific product attribute?
- Is the statement obvious hyperbole?

“Ultimate Energy Bar”



What About Here?

- Cover Maxx
- Maximum Coverage
- Ultimate Coverage
 - Durable Adhesion
 - Fastest Dry Time



But is it puffery if it's funny?



What about here?



Takeaways

- The FTC probably isn't going to spend time on puffery
- Courts like to find puffery
- While NAD's puffery standard seems clear, outcomes vary even on arguably similar ads

Thank you!

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