

Current Advertising Litigation Trends in the Telecommunications and Consumer Goods Industries: *From 5G to 5X*

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Consumer Goods – Unqualified Performance Claims

Consumer Goods – Unqualified Performance

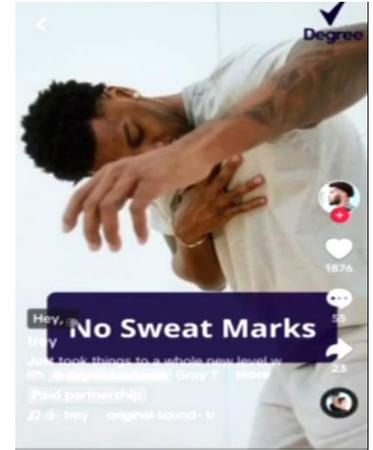
**Unilever United States, Inc. (Degree Advanced Antiperspirant),
NAD Case No. 7273 (Apr. 26, 2024)**

- **Degree Advanced “Gray T-Shirt Challenge”:**

- “I am sweating but nothing on my armpits”
- “Degree deodorant, 72-hour protection and you don’t even see [any] gray armpit stain”
- “After a great workout, we have no sweat stains”

- **NAD Decision: Claims unsupported**

- Advertising conveyed message of **complete** prevention of underarm sweat and sweat marks
- Proffered studies showed only that Degree Advanced was effective at **reducing** sweat



Consumer Goods – Clean & Safe Claims

Consumer Goods – Clean & Safe

- **Amyris Clean Beauty, Inc. (Advertising for Biossance), NAD Case No. 7132 (Mar. 1, 2024)**
- **Claims:**
 - Uses “clean ingredients and clean formulas”
 - Bans “over 2000 ingredients that are known to be toxic to you and the environment”
- **NAD:** Claims unsupported



Consumer Goods – Clean & Safe

The Procter & Gamble Company (Native Brand of Personal Care Products), NAD Case No. 7277 (June 24, 2024)

- **“Safe”:**

- “Cruelty-free, safe & simple products made without harsh ingredients”
- Supported → reasonable consumer would understand “safe” to mean “safe when used as directed”

- **“Simple”:**

- “Clean. Simple. Effective.”
- Supported → claim points to products as a whole; would be understood by consumers to mean product has few or minimal ingredients

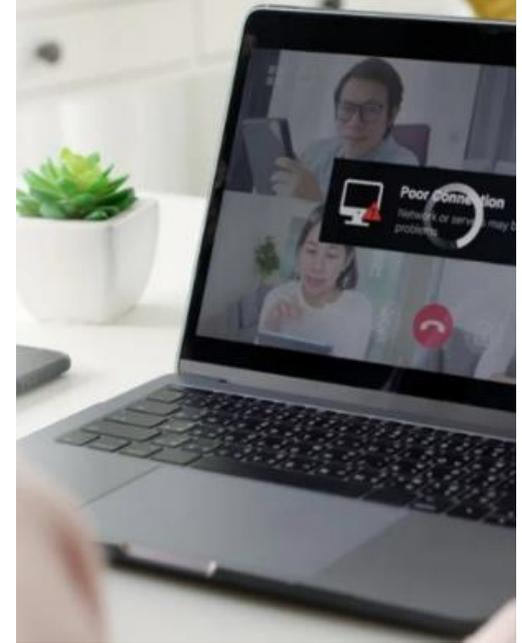


Telecom – Product Demonstrations

Telecom – Product Demonstrations

**Charter Communications, Inc. (Spectrum home internet service),
NAD Case No. 7228 (Nov. 15, 2023)**

- **NAD:** Due to immediately proximate, qualifying language that home internet users **can** – not that they definitely will – experience slower speeds or interference under certain conditions, the frozen videoconference screen did not convey a misleading message



Telecom – Product Demonstrations

Comcast Cable Communications, LLC (Xfinity Internet Service), NAD Case No. 7229 (Nov. 17, 2023)

- **“Life with Verizon” commercial:** On-screen text, as though the viewer is looking at their computer screen: “This is life with Verizon 5G Home Internet.” Pop-ups appear sequentially: “Lag Alert!” “Cell tower too far!” “Congested network!” and “Trees blocking signal.” A large red box covers the alerts: “Problems pop up when you have Verizon 5G Home Internet.”
- **NAD:** Commercial does not depict a product demonstration because it does not show Verizon 5G Home Internet in use or users accessing Verizon 5G Home Internet

Consumer Goods – Natural Claims

Consumer Goods – Natural

Fleming v. Dr. Squatch, LLC, 2024 WL 1676943 (N.D. Ill. Apr. 18, 2024)

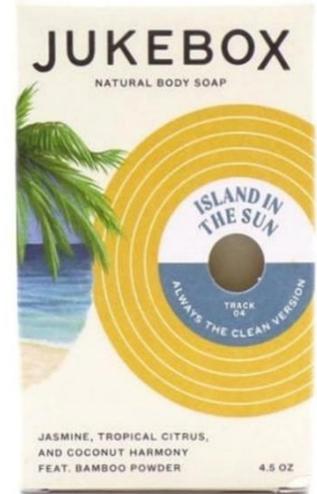
- Grant/Deny Motion to Dismiss (MTD): Plaintiffs adequately alleged representations on Dr. Squatch shampoo products were misleading and that ingredient lists disclosing that two ingredients were “man made” was not sufficient to dispel confusion
- But dismissed plaintiffs’ “barebones” common law fraud claim and claims seeking injunctive relief, noting that courts have repeatedly reached similar outcomes in other cases filed by plaintiffs’ counsel



Consumer Goods – Natural

Dr. Squatch, LLC (Jukebox Soap), NARB Panel No. 323 (Oct. 23, 2023)

- **Claim:** Jukebox Soap is “Natural”
- **NARB:** “Natural” claim supported:
 - **Standard:** Whether processing of naturally derived ingredients alters it in a manner that is inconsistent with consumers’ reasonable understanding of a “natural” product
 - Traditional, ancient soap-making process aligns with consumer expectations for natural products



Telecom – The “G”s

Telecom – “10G”

Comcast Cable Communications, LLC (Xfinity 10G Network), NARB Panel No. 325 (Jan. 16, 2024)

- **Claim:** “Xfinity 10G Network”; “10G”
- **NARB** unanimously concluded that 10G as used by Comcast **communicates the express claim** that the Xfinity network provides subscribers with **10 Gbps speeds**:
 - Conclusion bolstered by the evidence of the **meaning** of the term 10G **given to it by the cable industry**
 - Also relevant is the meaning ascribed to the term 10G by the cable **industry commentators**
 - **Open-ended survey questions** provide further support for the conclusion that the term 10G communicates that subscribers to the Xfinity network receive 10 Gbps speeds



Telecom – “5G”

Verizon Communications, Inc. (Verizon Home Internet), NAD Case No. 7298 (Aug. 7, 2024)

Claim: “5G” Home Internet

NAD: Rejected challenger’s reliance on 10G cases

- “5G” differs from “10G”
 - “10G” was largely unknown to the general public until Comcast adopted it as part of its brand name
 - In contrast, “5G” is well known and has been marketed to consumers as a successive improvement in wireless technology that follows each generation of improvements from 3G, to 4G to 5G
- Survey result that 23% of Americans familiar with “5G” believed it stood for 5 gigabits **could not support** the conclusion that a significant minority of consumers take away the message that 5G means 5 Gbps **as a result of Verizon’s advertising claims**



Telecom – Denigration of 5G Home Internet

Comcast Cable Communications, LLC (Xfinity Internet Service), NAD Case No. 7229 (Nov. 17, 2023)

- **Ad:** Commercial with consumer pulling a fire alarm to make his neighbors leave the building in order to use Verizon 5G Home
- **NAD:** Commercials denigrating Verizon 5G Home Internet communicated that limitations rendered the service unusable
- **Claim:** “Verizon 5G Home Internet is for phones, not homes”
- **NAD:** Unsupported implied message that service is ineffective, intolerably slow, unreliable and prone to subpar performance that renders the service unreliable



Consumer Goods – Product Contamination Lawsuits

Consumer Goods – Product Contamination

Hernandez v. The Wonderful Company LLC, 2023 WL 9022844
(S.D.N.Y. Dec. 29, 2023)

- **Grant MTD:** Dismissing suit alleging that “**100% Pomegranate Juice**” and “**All Natural**” representations on POM juice were false because product contained PFAS
 - Plaintiff failed to plausibly allege that the product contained PFAS

Lowe v. Edgewell Personal Care Co., 2024 WL 150758
(N.D. Cal. Jan. 12, 2024)

- **Grant MTD:** Dismissing suit challenging “**100% Organic Cotton**” representation on o.b. and Playtex brand tampons
 - Plaintiffs’ “testing allegations are cursory” and did not adequately support claims that products contained PFAS



Consumer Goods – Product Contamination

Howard v. Alchemee, LLC, 2024 WL 4272931 (C.D. Cal. Sep. 19, 2024)

- Grant MTD: Claims that the active ingredient in defendants' acne treatments degrades into the carcinogen **benzene** were preempted
- “The FDA mandates disclosure of the active and inactive ingredients on the label, and benzene does not fit the definition of any type of ingredient, because it is not a purposefully added component of the drug.”



Nelson v. John Paul Mitchell Sys., 2024 WL 4265198 (N.D. Ill. Sept. 23, 2024)

- Grant MTD: Rejecting allegation that independent testing found “**high levels of benzene**” in three lots of defendants' Invisiblewear Dry Shampoo
- Plaintiffs lacked Article III standing: “*Plaintiffs do not allege that the Product that they purchased contained benzene. . . . Absent allegations that the Product they purchased was from one of the tested lots, these allegations are not particularized to show that Plaintiffs suffered more than an abstract risk of similar financial injury.*”



Role of Humor in Advertising

Telecom – Role of Humor

AT&T Services, Inc. (Satellite Calling), NARB Panel No. 332 (Jul. 18, 2024)

- **Claim:** “Making a satellite connection”
- **NARB:** Humorous/fanciful nature of Ben Stiller's antics emphasized utility of Satellite Calling Technology (SCS) – allowing for calls to be placed from remote locations not currently accessible to mobile service
- The humor associated with Stiller's golf misadventures does not cancel out the consumer communication that SCS service is currently available
- Rejected AT&T's argument that decision will interfere with the use of humor in advertising



Telecom – Role of Humor

- **Comcast Cable Communications Management, LLC (Comcast Xfinity Internet Service), NAD Case No. 7322 (Jul. 18, 2024)**

Ads: Caitlin Clark and Christian McCaffrey commercials stating “Not all [Athlete’s Name] are the same. Just like not all Internet providers are the same.”

- **NAD:** The commercials do not reasonably convey a message that Xfinity Internet is faster, more reliable and more “powerful” than all competing services
- The humor is to exaggerate the message that “not all internet providers are the same”



Consumer Goods – Role of Humor

Promotion In Motion, Inc. (Welch's Fruit Snacks), NAD Case No. 7370 (Sep. 20, 2024)

- **TV spots** for Welch's Fruit Snacks featuring celebrity chef Gordon Ramsey highlighting Welch's "whole fruit" content and disparaging competitor products
- **NAD:** Rejected advertiser's argument that the humor highlights a truthful message about the distinctions between the products
- Messages not narrowly tailored to focus only on the product distinction that Welch's Fruit Snacks are made with fruit puree while others use fruit juice
 - Ash-canning a product for the lack of fruit or fruit flavoring conveys a message that those distinctions make the competing product worthless



Consumer Goods – Health & Wellness Claims

Consumer Goods – Health & Wellness

**ASO LLC (Hydrocolloid Gel Bandages), NAD Case No. 7325
(Aug. 5, 2024)**

- **Challenged Advertising:**

- “2x faster healing” claims
- Whether the advertising conveyed an implied claim that the hydrocolloid bandages were approved for sale by the FDA as Class III medical devices

- **NAD Decision:**

- “2x faster healing” claims unsupported
- Consumers unlikely to take away a message regarding FDA approval due to lack of familiarity with FDA rules on accelerating healing



Consumer Goods – Health & Wellness

Horti v. Nestle Healthcare Nutrition, Inc., 2023 WL 8613601
(9th Cir. Dec. 13, 2023)

- Rev'd grant of MTD: Plaintiff adequately alleged that “**Boost Glucose Control**,” “**designed for people with diabetes**” and “**helps manage blood sugar**” could deceive consumers into believing product could help treat diabetes
- “The labels specifically reference the disease of diabetes and claim to help consumers ‘control’ glucose and ‘manage’ blood sugar. A reasonable consumer could understand these representations to indicate that the product will have a positive effect on diabetes and blood sugar levels.”



Consumer Goods – Health & Wellness

La Rosa v. Abbott Lab., 2024 WL 2022297 (E.D.N.Y. May 7, 2024)

- Grant MTD: Dismissing suit challenging “**Ovulation**” and “**99% Accurate**” advertising on all major brands of at-home ovulation test kits on the U.S. market
- *“Even if on first blush a consumer is deceived into believing that a test kit tests for ovulation with 99% accuracy, the clarifying language on the side or back of the packaging dispels any confusion. . . . Further, the terms ‘ovulation’ and ‘LH’ are not ambiguous in and of themselves, and no claim on the packaging is unsupported.”*



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