



ACI Resolving and Litigating Advertising Disputes

“The Best Offense is a Good Defense: Bolstering Compliance Programs and Substantiation Practices”

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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. States can also act in unison through NAAG, the National Association of Attorneys General.

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. 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 focuses 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 unspecified 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.

C. **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.

D. Internet Advertising

The laws governing traditional forms of marketing (TV, radio, print, direct mail) also apply to the Internet (desktop, mobile, social) advertising arena. All advertisements must be truthful and substantiated, and as with traditional advertisements, all disclosures must be clear and conspicuous.

1. Limited Space Advertisements

The FTC recognizes that due to size limitations, certain ads cannot include all necessary disclaimers or disclosures, and that consumers understand this. Banner ads, Tweets, and other limited size posts are generally treated as teasers that consumers can click on to obtain all relevant information for the advertisement. Thus, ensure that relevant information concerning the advertisement is contained with the first screen that appears when the consumer clicks on the link.

Endorsements and testimonials in social media are a growing area of regulatory interest, and can present unique compliance challenges. The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising generally provide that an endorsement must: (1) reflect the truthful experience or honest opinion of the endorser; (2) satisfy the same truth-in-advertising and substantiation requirements as if it were made by the advertiser itself; and (3) clearly disclose any material connection between the endorser and the advertiser that a consumer would not expect.

2. Clear and Conspicuous Disclosures

To make disclosures clear and conspicuous, advertisers should do the following:

- Place disclosures near, and when possible, on the same screen as the triggering claim;
- Use text or visual cues to encourage the consumer to scroll down a web page when necessary to view a disclosure;
- When using hyperlinks, make the link obvious, label it appropriately to convey the importance and relevance of the information it leads to, use consistent styles, place it near relevant information and make it noticeable;

- Recognize any technological limitations or unique characteristics of disclosure methods, including frames or pop-ups.

II. CONTROL FOR ADVERTISING-RELATED LEGAL RISKS

A) Business Reputation

- i. Your business reputation is on the line. With social media, consumers are more informed than ever and are more attuned to monitoring the conduct of the companies behind the products and services they choose to support. Failure to “do the right thing” can lead to digital media firestorms for your brand that destroy equity.
- ii. Regulatory enforcement and competitor interest in advertising is heightened. Areas of exposure include:
 - i. FTC scrutiny
 - ii. Lanham Act (competitors)
 - iii. Class actions
 - iv. State Attorneys General
 - v. Television network scrutiny
 - vi. Self-regulatory bodies – the ASRC (Advertising Self-Regulatory Council), including the National Advertising Division (“NAD”) and Children’s Advertising Review Unit (“CARU”)
- iii. It is difficult to complain about another’s advertising if your own advertising is questionable.

B) Continually Educate Internally

- i. Take every opportunity to educate business leaders about the importance of doing the right thing and taking affirmative steps to monitor and control litigation risk associated with advertising.
- ii. Leverage real world disasters, including the FTC's enforcement activities, the NAD's monthly case review, and the media in general to illustrate the importance to business leaders of investing properly in this area. Show them the costs to others from missteps and help create buy-in about your recommendations to control the risks.

C) Invest, Share, Communicate

- i. It's a fast changing landscape, with constantly evolving new media, new claims, new products, and new services. Stay informed and current on the latest "hot button" issues and the latest guidance and outcomes from the FTC, courts, the NAD and elsewhere.
 - i. Be sure to make this a clear expectation for those responsible for this area in your business.
 - ii. Incorporate into formal feedback systems, measure success and reward the team for staying current, attending conferences and other training.
 - iii. Invest in training, stay current, particularly Legal and R&D that generate substantiation for claims.
 - iv. Consider using quarterly or even monthly reviews with the marketing team to highlight evolving issues and standards.
- ii. Share best practices. Communicate across national and jurisdictional boundaries so all teams responsible for advertising development are current.

D) Set Expectations Internally

- i. Make regular training of marketing clients a top priority. Get to them early and often with updates on “hot button” areas as well as illustrations and real life examples of what to do and not to do. Make it a point to illustrate the consequences of poor risk management to this group.
- ii. Create and disseminate guidelines and standards that govern how your company will make claims and assess risks. This permits more efficient use of time and resources so the team can focus on creative solutions to commonly understood issues as opposed to recurrent arguments over basic principles.
- iii. Create and nurture an awareness and culture of compliance. Recognize and reward individuals and teams who demonstrate compliance-centered behavior.

E) Make Decisions The Right Way

- i. Be sure that senior management understands the issues and the consequences and that they actively and visibly support your efforts to identify, assess and ultimately mitigate and manage advertising-related risk.
- ii. Drive clarity in your processes about who can (and should) make a decision regarding advertising risk.
- iii. Established a process to ensure advertising-related decisions are informed and the right people are working on how to mitigate and manage the risks. Bring players together - R&D, Regulatory, Legal, Marketing, Technology, etc. in a way that permits the team to work together to find creative solutions, mitigate the risks and achieve the underlying business objectives.

III. 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
- 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 NAD and television networks

IV. 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.
 - i. 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.
 - ii. 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

i. 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

1. Tests on old products will not suffice

2. 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

ii. Objective

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

1. 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.

2. 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

- ii. Results evaluated objectively with appropriate analysis related to statistical margins of error

iii. Well designed

- i. Methodologies accepted by professionals in the relevant field using established (and ideally published or at least widely known) protocols

1. Makes use of any relevant and applicable industry standard tests as well as any available industry-accepted protocols, conditions, definitions or norms

2. Protocols clearly stated and followed rigorously and professionally, with documentation available to demonstrate the rigor

- ii. Sufficiently large sample size for statistical analysis and conclusions based upon a 95% confidence level

- iii. Safeguards against bias are employed (i.e., blinding, neutral in order, nothing leading, no use of “cues”, etc.)
- iv. Well controlled
 - i. “Gold standard” is double-blind
 - ii. Comparison to a control or placebo cell (particularly critical for clinical or health/safety claims)
 - iii. 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
- v. Results that appropriately “fit” the specific claim and are relevant and material to the consumer
 - i. 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.”

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

SOURCES OF ADVERTISING LAWS AND REGULATIONS

1. Federal Trade Commission: www.ftc.gov
2. FTC Division of Advertising Practices: www.ftc.gov/bcp/bcpap.shtm
3. FTC Advertising and Marketing Basics: <http://www.ftc.gov/tips-advice/business-center/advertising-and-marketing/advertising-and-marketing-basics>
4. NAD Case reports: www.asrcreviews.org
5. Better Business Bureau: Code of Advertising: <http://www.bbb.org/council/for-businesses/code-of-advertising/>
6. Often publishes suits on False Advertising class actions:
<http://www.law360.com/classaction/>
7. Technology and Marketing Law Blog: <http://blog.ericgoldman.org/>
8. 43(B)log: False Advertising and more: <http://tushnet.blogspot.com/>
9. Adweek: www.adweek.com
10. New York State Attorney General's Office: <http://www.ag.ny.gov>
11. John Faber Right of Publicity: <http://rightofpublicity.com>
12. ABA Private Advertising Litigation Committee:
<http://apps.americanbar.org/dch/committee.cfm?com=AT311570>
13. Public Citizen Consumer Law & Policy Blog: <http://pubcit.typepad.com/clpblog>