

5 KEY TAKEAWAYS

Claim Substantiation: You Better Be Able to Prove That You Are Better, Bigger, Stronger, and Faster Than the Competition

Barry M. Benjamin, managing partner of the New York office and chair of Kilpatrick's Advertising and Marketing group, was honored to host a panel at the **ANA's 2024 Masters of Advertising Law Conference**, titled "**Claim Substantiation: You Better Be Able to Prove That You Are Better, Bigger, Stronger, and Faster Than the Competition.**" As the title indicates, the session provided an overview of the ins and outs of substantiating claims, testing, surveys, puffery, and dealing with influencers making claims. Takeaways from the program include:

1

Determine Your Company's Risk Tolerance Level. Just as people have different risk tolerance levels, advertisers do as well. Does the C-Suite find it acceptable to be on the receiving end of demand letters and risk defending potential lawsuits, based on aggressive marketing claims? Or is there no tolerance for spending on legal fees, settlements, and potential monetary judgments to defend any claims, which means advertising may be limited to simple brand building, rather than aggressively taking on the competition with comparative claims. The heads of marketing and legal may have very different views of this topic, and it is crucial to level-set the overall tolerance level for incurring advertising risk.

2

Understand the Basics. Advertising claims can come in all shapes and sizes – objective versus subjective, express versus implied, monadic versus comparative, parity versus superiority. And these different types of claims can have different types of substantiation requirements. A full explication of these terms and substantiation requirements is beyond the scope of this summary, but it is important to understand them to determine what is necessary to best mitigate the legal risks of making any advertising claim.

3

How Much Substantiation is Enough? Ah, the ever-present question of what is enough? As a smart, knowledgeable lawyer, responding with "it depends" to the marketing team's very reasonable question of what, exactly, is enough substantiation is pretty lame. It also has the unfortunate benefit of being correct. The general legal requirement is to have a "reasonable basis" for making a claim. But what evidence and level of substantiation constitutes a "reasonable basis" is always the subject of debate, and therefore, dispute. The nature of the claim itself drives what kind of substantiation – the type and level of evidence or proof – is ultimately necessary. Thus, substantiation can take many forms. The most basic legal requirement is to have reliable, objective, unbiased evidence of the truth of the claim. Factors to consider include **(a)** the type of product, **(b)** the type of claim, **(c)** the benefit to the consumer from a truthful claim, **(d)** the ease of developing substantiation, **(e)** the harm or consequences of a false claim, and **(f)** the amount of substantiation that experts in the industry believe is reasonable under the circumstances.

4

Puffery Does Not Require Substantiation, But What Is Puffery?

Substantiation is required for all reasonable interpretations of advertising claims, whether express or implied. However, claims that are mere puffery, rather than an objective claim, are not subject to challenge. Puffery is exaggeration or hyperbole and is not subject to real proof or substantiation. Prosser and Keeton have called puffery a "seller's privilege to lie his head off" on the theory that no reasonable person "would be influenced by such talk." But that's the entire point of puffery! To influence potential buyers to become actual buyers! How this dichotomy is dealt with gets to the heart of puffery, and how courts define puffery becomes extremely important. Puffery has many legal definitions, and while discerning the dividing line between puffery and an objective claim may not be too far from "I know it when I see it," there are some measuring sticks - the context of the claim, was it reasonable to rely upon, were there measurable attributes mentioned, did the statements go beyond any standard of vagueness, or are the statements mere opinions.

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Claims by Influencers Require the Same Substantiation. It may seem obvious, but some still ask whether advertisers are responsible for product claims made by influencers. The response is that you can't pay someone to say something that you can't yourself say. Pretty obvious, right? If an advertiser pays for or incentivizes an influencer to post and make claims about the advertiser's product or service, then the advertiser is responsible for what the influencer says. Advertisers are not responsible for policing the entire social media landscape for the truth or falsity of all posts and all commentary about their products or services when they have zero connection with those posters, but for influencers that the advertiser has paid? Yes, that is the advertiser's responsibility. Influencer claims posted to promote an advertiser's product or service require the same level of substantiation as if the advertiser itself was making the claim.

While claim substantiation is a bedrock principle of advertising law, clients constantly ask lawyers "what is enough substantiation?" First determining your company's risk tolerance level is one key to answering that question. Then, it is crucial to figure out **(a)** whether the claim is puffery or requires substantiation; if objective, **(b)** what claims, express and implied, are being conveyed; and **(c)** what the right tests are to conduct that produce the right results to substantiate all claims made. Understanding all aspects of the claim substantiation process is key to mitigating the risks involved in the fraught world of competitive advertising.