



INTELLECTUAL PROPERTY DESK REFERENCE

PATENTS, TRADEMARKS, COPYRIGHTS AND RELATED TOPICS

OTHER TOPICS

Advertising Basics

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I. Laws, Regulations, and Other Authorities Governing Advertising

At the federal level, two primary sources of law govern advertising claims: the Lanham Act and the Federal Trade Commission Act (“FTCA”). The Lanham Act, particularly § 43(a), proscribes false or misleading statements and gives competitors standing to sue.¹ The FTCA grants the Federal Trade Commission (“FTC”) authority to regulate advertisements with the goal of protecting consumers.²

Most states have passed Unfair and Deceptive Trade Practices Acts, with some adopting the Uniform Unfair and Deceptive Trade Practices Act to govern state-law claims.³ Several states have also passed false advertising statutes as a supplement or alternative to the Uniform Act.⁴

Advertising claims may also be subject to industry-specific laws and regulations. For example, the Textile and Wool Acts provide a number of rules for the advertisement of clothing,⁵ and advertising practices associated with food and drug advertisements are heavily regulated as well.⁶ Television networks have also promulgated Network Advertising Guidelines that articulate important factors in determining which advertisements are proper for television viewing.⁷

II. General Principles and Frequent Topics in Advertising Law

Courts have interpreted the elements of a false advertising claim under the Lanham Act, § 43(a), as: “(1) a false statement of fact by the defendant in a commercial advertisement about its own or another’s product; (2) the statement actually deceived or has the tendency to deceive a substantial

1 “Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol or device, or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.” Trademark Act of 1946, 15 U.S.C. § 1125(a)(1) (2006) (“Lanham Act”).

2 Section 5 of the FTCA declares that “[u]nfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.” 15 U.S.C.A. § 45(a)(1) (2006). This section, in combination with § 12(a)—which discusses the dissemination of false advertisements and states that “[i]t shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics”—establishes the authority for false advertising enforcement in the FTC. *Id.* § 52(a). Section 13(b) then authorizes the FTC to seek preliminary and permanent injunctions for violations of the FTCA. *Id.* § 53(b). The full text of the FTCA is available online at <http://www.fda.gov/opacom/laws/ftca.htm>.

3 See, e.g., COLO. REV. STAT. ANN. §§ 6-1-101 to 6-1-115 (West 2002 & Supp. 2008) (1966 revision); GA. CODE ANN. §§ 10-1-370 to 10-1-375 (2000 & Supp. 2008); MINN. STAT. §§ 325D.43–48 (1966 revision); OHIO REV. CODE ANN. §§ 41.4165.01–4165.04 (West 2007 & Supp. 2008) (1966 revision); OKLA. STAT. ANN. tit. 78, §§ 51–55 (West 2002 & Supp. 2008); OR. REV. STAT. ANN. §§ 646.605–.656 (West 2003 & Supp. 2008) (1966 revision); see also <http://law.findlaw.com/state-laws/deceptive-trade-practices>.

4 See, e.g., CAL. BUS. & PROF. CODE ANN. § 17500 *et seq.* (West 2008); GA. CODE ANN. §§ 10-1-420, -421 (2000 & Supp. 2008); N.Y. GEN. BUS. § 350 (McKinney 2004 & Supp. 2008). See also <http://law.findlaw.com/state-laws/deceptive-trade-practices>.

5 See *Facts for Business: Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts*, available at <http://www.ftc.gov/bcp/edu/pubs/business/textile/bus21.shtm>.

6 See, e.g., Bruce I. McDaniel, *What Constitutes “False Advertising” of Drugs or Devices Within § 5 and 12 of the Federal Trade Commission Act* (15 U.S.C.A. § 45, 52), 49 A.L.R. FED. 16 (1980); Bruce I. McDaniel, *What Constitutes “False Advertising” of Food Products or Cosmetics Within § 5 and 12 of the Federal Trade Commission Act* (15 U.S.C.A. §§ 45, 52), 50 A.L.R. FED. 16 (1980).

7 See, e.g., *ABC Television Network Advertising Standards and Guidelines* (on file with the FTC), and reprinted in 1 Do’s & Don’ts OF ADVERTISING § 4 at 60 (Council of Better Business Bureaus Sept. 2002).

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segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.”⁸

The FTC, which brings administrative actions under the provisions of the FTCA, issued its *Policy Statement on Deception* in 1983 to address the factors the FTC considers in evaluating false advertising claims.⁹ The FTC enumerated three primary factors: (1) “a representation, omission or practice that is likely to mislead the consumer;” (2) “the perspective of a consumer acting reasonably in the circumstances;” and (3) “the representation, omission, or practice must be a ‘material’ one.”¹⁰ In summary, “the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹¹

A. “Puffery” is not Actionable

Statements perceived as exaggeration or boasting, sometimes called “puffery,” are generally permitted and are not actionable as false or misleading advertising. The distinction turns on whether the statement is one of fact, and thus objective, or one of general opinion, and thus subjective. A statement of fact is actionable, while a statement of general opinion is not.¹²

Courts have held that puffery can arise in at least two forms: “(1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”¹³ Nevertheless, if this vague, “general claim” of superiority becomes objectively concrete when viewed in the context of the overall advertisement, puffery may become actionable false advertising.¹⁴

The line between puffery and an actionable claim can be murky. For example, courts have found the following statements to be non-actionable puffery:

- (1) “Best Beer in America,”¹⁵
- (2) “the Most Advanced Home Gaming System in the Universe,”¹⁶
- (3) “less is more,”¹⁷ and

8 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). See also *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922–23 (3d Cir. 1990).

9 *FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

10 *Id.*

11 *Id.*

12 See, e.g., *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 495–96 (5th Cir. 2000).

13 *Id.* at 497.

14 See, e.g., *id.* at 496.

15 *In re Boston Beer Co.*, 198 F.3d 1370, 1372 (Fed. Cir. 1999).

16 *Atari Corp. v. 3DO Co.*, 31 U.S.P.Q.2d 1636, 1636 (N.D. Cal. 1994).

17 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997).

- (4) “anything closer would be too close for comfort.”¹⁸

On the other hand, courts have held these statements to be verifiable facts rather than puffery:

- (1) “longer engine life and better engine protection,”¹⁹
- (2) “50% Less Mowing,”²⁰ and
- (3) “stops pain immediately.”²¹

A single advertisement may contain both types of advertising claims. In a case involving advertisements for laundry detergent, the statement “whiter is not possible” was held to be an implied direct comparison to chlorine bleach, while other statements, including “hit the white spot with just one shot,” were held to be vague, unspecified boasting typical of puffery.²²

Pizza Hut v. Papa John’s provides a good example of how the context of an advertisement can transform a statement that otherwise might be puffery into an actionable statement of fact. In that case, Pizza Hut sued Papa John’s for use of the advertising slogan “Better Ingredients. Better Pizza.”²³ In its analysis, the Fifth Circuit first considered the slogan standing alone and dissected the two sentences to determine whether each part was a statement of fact or opinion. Finding both parts of the statement to be non-actionable opinion, the court reasoned that “it is clear that the assertion by Papa John’s that it makes a ‘Better Pizza’ is a general statement of opinion regarding the superiority of its product over all others. This simple statement . . . epitomizes the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer would reasonably rely.”²⁴ The court continued that “it is difficult to think of any product, or any component of any product, to which the term ‘better,’ without more, is quantifiable,”²⁵ and concluded that the four word slogan, taken as a whole, was non-actionable puffery.²⁶

The Fifth Circuit then addressed the use of the slogan in a series of comparative advertisements that compared Papa John’s sauce and dough to that of its competitors in the pizza delivery business, including Pizza Hut.²⁷ Affirming the jury’s verdict, the court held that the commercials were misleading statements of fact actionable under the Lanham Act.²⁸ When evaluated within the comparative advertisements, the court agreed that the message communicated by the slogan “is expanded and given additional meaning” such that it is no longer an opinion but instead an

18 *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 130 (D. Mass. 1996).

19 *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 941, 946 (3d Cir. 1993).

20 *Southland Sod Farms*, 108 F.3d at 1145 (stating that “50% Less Mowing” is “a specific and measurable advertisement claim of product superiority based on product testing and, as such, is not puffery”).

21 *Am. Home Prods. Corp. v. Abbott Labs.*, 522 F. Supp. 1035 (S.D.N.Y. 1981).

22 *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 28, 39 (1st Cir. 2000).

23 *Pizza Hut*, 227 F.3d at 491.

24 *Id.* at 498. See also *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004) (holding “America’s favorite pasta” statement to be puffery).

25 *Id.* at 499.

26 *Id.*

27 *Id.* at 500–03.

28 *Id.* at 502.

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actionable statement of fact, reasoning that the context of the commercials had transformed the general word “better” into a modifier for specific items that could be measured objectively.²⁹ In the end, the court found that the misleading statements were not material to the consumer purchasing decision and, as a result, Papa John’s prevailed in the suit.³⁰ The case nevertheless offers a good example of the contextual factors that can transform even the most evident puffery into an actionable statement of fact.

B. Both Express and Implied Claims can be False or Misleading

Advertising claims are actionable under the Lanham Act regardless of whether the claim is expressly stated or simply implied. The fundamental difference between the two types of statements is that “[e]xpress claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.”³¹

Implied claims can arise in a variety of situations. A combination of elements such as slogans, descriptions, and photographs may result in a misleading impression, even though each standing alone is non-actionable.³² Likewise, an entire package, taken as a whole, may be implicitly misleading, even though the labels themselves are not.³³ An advertisement stating that each slice of cheese is made with five ounces of milk, while truthful, still falsely implied to reasonable consumers that each slice contained as much calcium as five ounces of milk and was therefore held to be misleading in *Kraft, Inc. v. FTC*.³⁴ In yet another case, a statement that a product offered “the strong relief of aspirin” was interpreted by the court to contain an implied claim that the product actually contained aspirin, when it did not.³⁵

C. Substantiation: All Verifiable (Objective) Statements Must Be Supported

The concept of substantiation arose in the FTC in the mid-1980s, with the D.C. Circuit’s holding in *Thompson Medical Co., Inc. v. FTC*.³⁶ Unlike prior jurisprudence, this case and the ensuing *FTC Policy Statement Regarding Advertising Substantiation* established that advertisers could no longer make statements without a “reasonable basis” for their claims, and that all claim substantiation must occur prior to the advertisement and cannot later be established through post-advertisement testing.³⁷ More than twenty years later, the rule is the widely-accepted standard in federal court.

²⁹ *Id.* at 501–02.

³⁰ *Id.* at 504.

³¹ *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 n.4 (7th Cir. 1992).

³² *Stanley Labs. v. FTC*, 138 F.2d 388 (9th Cir. 1943) (use of “M.D.” in conjunction with the phrase “dependable safeguard” may lead to the conclusion that the product has contraceptive uses).

³³ *Kenny v. Gillet*, 17 A. 499 (Md. 1889).

³⁴ 970 F.2d 311.

³⁵ *In re Thompson Med. Co.*, 104 F.T.C. 648, *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

³⁶ 791 F.2d 189 (D.C. Cir. 1986).

³⁷ *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), available at <http://www.ftc.gov/bcp/guides/ad3subst.htm>.

The FTC's 1984 *Policy Statement Regarding Advertising Substantiation* set forth the substantiation requirement for advertising.³⁸ At the first level, puffery requires no substantiation at all, since it is non-actionable.³⁹

The next level requires the advertiser to have a "reasonable basis" for any product claim that makes "objective assertions about the item or service advertised," but does not provide "an express or implied reference to a certain level of support."⁴⁰ In making this "reasonable basis" determination, the FTC evaluates six factors: "(1) the product involved; (2) the type of claim made; (3) the benefits of a truthful claim; (4) the ease of developing substantiation; (5) the consequences to the consumer of a false claim; and (6) the amount of substantiation which experts in the field consider reasonable."⁴¹ For challengers of the advertisement, evidence showing the assertion's falsity is required.

The highest level of proof is necessary when an advertisement, either explicitly or implicitly, claims to be supported by testing or scientific research, or indicates any specific level of support.⁴² These claims, sometimes called "establishment claims," require the advertiser to show the same level of substantiation as presented in the advertisement. With establishment claims, false advertising can be shown by demonstrating that the tests on which the statement relies are "not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited."⁴³ Thus the standard of proof for a challenger is lowest for establishment claims, as the challenger must show only that the tests fail to support the advertiser's claim to prevail, rather than proving that the product lacks the claimed characteristic.

D. Literally False Statements as well as Literally True but Misleading Statements are Actionable

Courts recognize two primary types of claims in false advertising: (1) those statements that are literally false on their face; and (2) those statements that, while literally true, still have a tendency to mislead or deceive relevant consumers.⁴⁴ Some courts recognize a sub-category of literally false claims—those that are literally false "by necessary implication."⁴⁵

In distinguishing the two types of claims, courts state that "[a] literally false statement can be determined as a matter of law, but whether a statement is misleading is considered a matter of fact."⁴⁶ This delineation has the practical consequence that, "[w]hen a merchandising statement

38 *Id.*

39 *Id.*

40 *Id.*

41 1A LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:21 (4th ed. 2008).

42 *FTC Policy Statement Regarding Advertising Substantiation*, *supra* note 37.

43 *Castrol*, 987 F.2d at 958 n.13 (quoting *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984)). *See also United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1182 (8th Cir. 1998).

44 *Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988).

45 This category of claims has been considered by the First, Second, Third, Fourth, Ninth, and Tenth Circuits. *See, e.g., Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24 (1st Cir. 2000); *Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144 (2d Cir. 2007); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578 (3d Cir. 2002); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264 (4th Cir. 2002); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *Zoller Labs, LLC v. NBTY, Inc.*, 111 F. App'x 978 (10th Cir. 2004).

46 *Allsup, Inc. v. Advantage 2000 Consultants Inc.*, 428 F.3d 1135, 1138 (8th Cir. 2005).

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or representation is literally or explicitly false, the court may grant relief without reference to the advertisement's impact on the buying public . . . [but when] the challenged advertisement is implicitly rather than explicitly false, its tendency to violate the Lanham Act by misleading, confusing or deceiving should be tested by public reaction."⁴⁷ In other words, a competitor challenging an advertising claim that is literally true, but allegedly misleading, will need to present evidence that the claim does in fact mislead consumers. The challenger usually gathers evidence by conducting surveys in which consumer perceptions of the advertisement are tested.

1. Literally False Claims: Courts Presume that Consumers are Deceived

Statements that are literally false do not require a challenger to show evidence of consumer confusion or deception. If an advertisement is false on its face, a competitor harmed by it can obtain an injunction without having to show extrinsic evidence that consumers were actually misled by the advertisement. Furthermore, if the challenger is seeking a preliminary injunction, the court may presume that irreparable injury will result should the injunction be denied.⁴⁸ Basically, if a claim is literally false, courts will presume actual deception.⁴⁹

As a preliminary matter, however, one must first determine that a statement is, in fact, false on its face. "In analyzing whether an advertisement . . . is literally false, a court must determine, first, the unambiguous claims made by the advertisement . . . , and second, whether those claims are false."⁵⁰ The Third Circuit undertook this analysis in *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, and concluded that "only an unambiguous message can be literally false."⁵¹

In *Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Avenue*, for example, the First Circuit found that a presumption of consumer deception attached to literally false label statements, such as those wherein blazers containing less than 1% of cashmere were advertised as "10% cashmere" and where labeling the blazers as "cashmere" rather than "recycled cashmere" was literal falsity.⁵²

a) Claims that are Literally False by Necessary Implication

Some courts recognize claims that involve a statement that, while not literally false on its face, is nevertheless literally false given the circumstances.⁵³ Such claims arise "when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated."⁵⁴ In determining whether a claim is false by necessary implication, courts inquire whether, based on a facial analysis of the product name or advertising, the consumer will unavoidably receive a false message from the product's name or advertising.

47 *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982), *abrogated on other grounds* by Fed. R. Civ. P. 52(a).

48 *Altman & Pollack*, *supra* note 41 § 5:23.

49 *See, e.g., U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040 (9th Cir. 1986).

50 *Novartis Consumer Health, Inc.*, 290 F.3d at 586.

51 *Id.* at 587 (emphasis in original).

52 284 F.3d 302 (1st Cir. 2002).

53 *See supra* note 45.

54 *Clorox Co. Puerto Rico*, 228 F.3d at 35.

For example, in *Cuisinarts, Inc. v. Robot-Coupe International Corp.*, a federal district court found literal falsity by necessary implication in an advertisement for professional food processors.⁵⁵ The advertisement stated that all fine French restaurants chose Robot-Coupe's professional processors over those of competitor Cuisinart, thus necessarily implying that Cuisinart not only produced a professional model food processor (which it did not) but also that the restaurants in question had chosen the Robot-Coupe over the Cuisinart model (which they had not).⁵⁶

Similarly, the Third Circuit in *Novartis* analyzed whether statements associated with the advertising of Mylanta Night Time Strength were literally false by necessary implication. Although the product advertised nighttime relief, the product formulation was that of an extra strength antacid, without any additional enhancements or sleep aids. Holding that the name of the product—Mylanta Night Time Strength—necessarily implied that it was specially formulated for nighttime relief of heartburn, the court upheld the lower court's decision and further noted that "the greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion . . . the less likely it is that a finding of literal falsity will be supported."⁵⁷

2. Literally True but Misleading Claims: Evidence of Actual Deception Required

Unlike literally false statements, the standard for literally true but misleading claims requires a challenger to show that the advertisement has in fact misled or deceived consumers.⁵⁸ Challengers will often rely on consumer surveys to show either consumer deception or lack thereof.⁵⁹ This additional burden of proof was explained by the court in *American Council of Certified Podiatric Physicians and Surgeons*: "[w]here statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception A plaintiff relying upon statements that are literally true yet misleading cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react."⁶⁰

An illustrative case is *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*⁶¹ Finding that Sandoz had failed to establish that an advertisement for Vick's Pediatric Formula 44 was misleading to consumers absent any consumer survey evidence, the Third Circuit explained that "where the advertisements are not literally false, plaintiff bears the burden of proving actual deception by a preponderance of the evidence."⁶² The court reasoned that the "effect of the advertisement on the consumer is the critical determination, and it must be demonstrated by a Lanham Act plaintiff

55 No. 81CIV731-CSH, 1982 WL 121559 (S.D.N.Y. June 9, 1982). Although unreported, this case has been heavily cited in subsequent cases. See, e.g., *Novartis Consumer Health, Inc.*, 290 F.3d 578; *Southland Sod Farms*, 108 F.3d at 1139; *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 941, 946–47 (3d Cir. 1993).

56 *Id.*

57 *Novartis Consumer Health, Inc.*, 290 F.3d at 587 (quoting *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998)).

58 *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165–66 (2d Cir. 1978); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228–29 (3d Cir. 1990).

59 See, e.g., *Am. Home Prods.*, 577 F.2d at 166–68; *Tropicana Prods., Inc.*, 690 F.2d 312.

60 *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 185 F.3d 606, 614 (6th Cir. 1999) (internal quotation marks omitted). See also *Sandoz Pharms. Corp.*, 902 F.2d at 229.

61 902 F.2d 222.

62 *Id.* at 228–29 (internal citation omitted).

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regardless of whether the claim is facially ambiguous.”⁶³ Thus, without evidence of actual consumer misinterpretation, the claim for literally true but misleading statements could not be upheld.

To prove a Lanham Act claim based upon misleading but literally true advertising statements, the plaintiff must present survey or other evidence showing that consumers are actually misled. The FTC, however, has no such requirement in proceedings brought before it under the FTC Act.⁶⁴ The FTC, in its discretion, determines whether to admit extrinsic evidence to show implied falsity. If it chooses, the FTC can determine the implication of an advertisement without the admission of any extrinsic evidence whatsoever. In appeals from such determinations, courts typically defer to the FTC’s practice because “the FTC’s unique expertise and experience regarding consumer expectations allows it to determine for itself the level of substantiation consumers expect to support an advertising claim.”⁶⁵ Such judicial deference is not without critics, however.⁶⁶

Similarly, in alternative dispute resolution proceedings before the National Advertising Division (“NAD”),⁶⁷ the NAD does not require challengers to submit evidence of actual consumer deception in connection with allegedly misleading advertising claims, although it will consider any such evidence submitted. In the absence of surveys or other consumer perception evidence, however, the NAD will rely on its own precedent to reach a conclusion.

E. Images can be False or Misleading

Images used in advertisements can communicate a false or misleading message, either explicitly or implicitly.

For example, the Second Circuit has held that a television advertisement visually representing orange juice made by squeezing oranges and pouring freshly-squeezed juice directly into the carton was false on its face when, in fact, the orange juice was actually pasteurized and prepared through a process of heating and sometimes freezing prior to packaging.⁶⁸

On the other hand, an illustration of mature crabgrass directly above the phrase “prevents crabgrass up to 4 weeks after germination” was held by the Fourth Circuit to be neither literally false, nor literally false by necessary implication.⁶⁹ Although the challenger argued that this image, in connection with the text, would mislead consumers into believing the product actually killed already-existing mature crabgrass, the court found that this inference was unlikely and unsupported. Likewise, the Second Circuit found an Internet image depicting a competitor’s extremely bad television reception to be so exaggerated and inaccurate that no reasonable consumer would believe it to be a realistic depiction and thus, in context, constituted mere puffery.⁷⁰

63 *Id.* at 229.

64 *Id.*

65 *Id.* See also *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1987).

66 *Kraft, Inc.*, 970 F.2d at 327–28 (concurring opinion).

67 See *infra* Section III for further discussion of NAD proceedings.

68 *Tropicana Prods., Inc.*, 690 F.2d at 317–18.

69 *Scotts Co.*, 315 F.3d at 274–75.

70 *Time Warner v. DirecTV*, 497 F.3d 144 (2d Cir. 2007) (Second Circuit reversed district court’s finding of literal falsity).

Advertisers should thus be attuned to the messages communicated to consumers by the visual components of their advertising, and take care that these components are adequately substantiated.

F. Disclaimers and Disclosures Often are Insufficient to Cure a False or Misleading Message

Disclosures and disclaimers are often used by advertisers to correct potential misperceptions by consumers. Although such devices sometimes may be sufficient to cure otherwise deceptive advertising, they often fail to be effective. In particular, merely placing a small or inconspicuous disclaimer at the bottom or in the corner of an advertisement that would otherwise be misleading usually does nothing to fix the advertisement's misleading message. Even when advertisers go so far as to prominently display the disclaimer or qualifying phrase on their advertisements, such language may not negate a message that may be deceptive as a whole.

Courts have sometimes approved disclaimers that explain a potentially misleading message.⁷¹ For example, in *Potato Chip Institute v. General Mills*, the Fourth Circuit noted that "it is well settled that if the contested phrase is susceptible to two meanings so that an explanatory phrase will preclude deception, it is sufficient to require the addition of the explanation rather than prohibit using the ambiguous phrase."⁷² In that case, the court held that the term "potato chip" conveyed a specific impression in the minds of consumers such that they would be misled into thinking the product was made from raw potatoes. When used in conjunction with such phrases as "fashioned from dried potato granules," however, this statement was sufficient to ensure that consumers would not be misled. The court did note, nonetheless, that advertisements for the product on television, in which only the term "potato chip" was used, would no longer be permitted.⁷³

Claims such as "Rated No.1" and "Proved the Best" can also often mislead unless accompanied by a disclosure of the essential facts and the tests on which the claims are made. Such disclosures should include the identity of the organization making the tests upon which the claims are based, the type of tests that were conducted (i.e., lab, clinical), and in what specific respects the product is deemed to be superior. Furthermore, if the advertiser owns or controls the agency making the statement, this fact should be prominently displayed.

For example, the District of Columbia Circuit held that the term "manufacturer's list price" in a retailer's advertisement misled the public into believing that this price was the price at which the product was customarily sold by competitors in the area. The disclaimer, printed in small print at the bottom of the advertisement and purporting to explain the meaning of the term "manufacturer's list price" was held insufficient to correct the deceptive use of the term.⁷⁴

In evaluating the sufficiency of disclaimers, courts look to the overall impression created by the advertisement. In *American Home Products*, the court held that "[i]f the advertisement contains a definition or disclaimer which purports to change the apparent meaning of the claims and render

71 See, e.g., *Potato Chip Inst. v. Gen. Mills, Inc.*, 333 F. Supp. 173 (D. Neb. 1971), *aff'd*, 461 F.2d 1088 (8th Cir. 1972).

72 461 F.2d at 1089.

73 333 F. Supp. at 181.

74 *Giant Food Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963).

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them literally truthful, but which is so inconspicuously located or in such fine print that readers tend to overlook it, it will not remedy the misleading nature of the claims.”⁷⁵ The court further noted that the meaning of an advertisement to the target audience—and hence, the effectiveness of a disclaimer—is best established through well-designed surveys.⁷⁶

G. Comparative Advertising

A frequently used strategy in advertising is the comparison of a product to a competitor’s similar product. In the United States, comparative advertising is permissible, but only so long as the advertiser can adequately substantiate all claims, whether or not those claims directly reference particular competitors.⁷⁷ Comparative advertising encompasses both superiority and parity claims, as well as claims that are implicit in their comparison to other products.

1. Superiority Claims

Superiority claims are those that make the assertion, whether explicitly or implicitly, that the product advertised is better than all others in the marketplace, or better than the product sold by a specific competitor. In making claims of superiority, statements that a product has the “most sales,” or is the “oldest” or “biggest” in the market are objective claims, requiring the advertiser to substantiate such claims by showing that his product truly is the “oldest,” “biggest,” or had the “most sales” last year. More generalized superiority claims, such as use of the word “best” in advertising, in contrast, are so broad as to be subjectively superior and thus considered non-actionable puffery.

The line between subjectively and objectively superior claims is not always clear. For example, in *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*,⁷⁸ Rhone-Poulenc made the claim that its antacid was the “strongest antacid there is” in television commercials. Although the statement appeared capable of verification through objective testing, the Second Circuit held in favor of Rhone-Poulenc, stating that such a general statement was not actionable as false advertising absent consumer surveys showing that the advertisements misled the public into thinking Maalox was a superior product.⁷⁹

2. Parity Claims

Parity claims are those which compare the advertiser’s product to others in the marketplace and assert that their product is “as good as” the competitor’s. Like superiority claims, parity claims must also be substantiated if they are objectively verifiable.

⁷⁵ *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987).

⁷⁶ *Id.*

⁷⁷ In certain other countries, comparative advertising is prohibited or may give rise to trademark infringement or other claims by the competitor whose product is compared. Before engaging in comparative advertising in a new country, it is prudent to consult counsel well-versed in the advertising and unfair competition laws of that country. *See, e.g.*, European Commission: Consumer Affairs, *Misleading and Comparative Advertising*, http://ec.europa.eu/consumers/cons_int/safe_shop/mis_adv/index_en.htm (last visited Mar. 17, 2009).

⁷⁸ 19 F.3d 125 (3d Cir. 1994).

⁷⁹ *Id.* *See also Chesebrough-Pond’s Inc.*, 747 F.2d 114.

In *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, for example, both manufacturers sued each other for false advertising associated with hand and body lotions.⁸⁰ While Procter & Gamble's advertisements contained claims of superiority, Chesebrough claimed parity for its Vaseline Intensive Care Lotion, making statements such as, "[w]hen it comes to relieving dry skin, no leading lotion beats Vaseline Intensive Care Lotion."⁸¹ Both parties provided clinical tests to substantiate their assertions and the district court held that neither party could show that the other's tests were invalid or misleading. The Second Circuit upheld the district court's decision, allowing both parties to continue their advertising, concurrently making both superiority (Procter & Gamble) and parity (Chesebrough) claims.⁸²

H. Testimonials and Endorsements

Endorsements can be a valuable tool in advertising a product, particularly when made by a high-profile celebrity. Use of endorsements, however, must adhere to particular guidelines to avoid claims of false advertising.

To aid advertisers, the FTC issued Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Endorsement Guides").⁸³ The FTC treats testimonials and endorsements identically in the context of advertising, and describes both as:

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.⁸⁴

The FTC Endorsement Guides also provide examples of advertisements that do and do not constitute endorsements. A famous golfer hitting golf balls in an advertisement for those golf balls would constitute an endorsement, as would a quote from a movie critic used in the advertisement for a new movie.⁸⁵ On the other hand, an advertisement depicting two women in a grocery store, in which one tells the other that she only uses a specific brand to clean all of her family's clothing would not.⁸⁶

If "the advertisement represents that the endorser uses the product, then the endorser must have been a bona fide user of it at the time the endorsement was given" so as not to constitute false advertising.⁸⁷ Nor can the advertisement continue to be used if the advertiser no longer has a "good reason to believe" that the endorser is still a bona fide user of the product.⁸⁸

⁸⁰ 747 F.2d 114.

⁸¹ *Id.* at 116.

⁸² *Id.* at 120.

⁸³ 16 C.F.R. § 255.0 (2008), available at <http://www.ftc.gov/bcp/guides/endorse.htm>.

⁸⁴ *Id.* § 255.0(a)-(b).

⁸⁵ *Id.* § 255.0(d).

⁸⁶ *Id.* § 255.0(d).

⁸⁷ *Id.* § 255.1(c).

⁸⁸ *Id.* § 255.0(d).

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A leading case illustrating how an advertiser can run afoul of endorsement requirements is *Waits v. Frito Lay*.⁸⁹ In that case, Frito Lay used a Tom Waits song sung by a sound-a-like artist without Waits's permission in its advertisement for Doritos. Waits prevailed on a false endorsement theory under the Lanham Act, with the court holding that the unauthorized imitation of his distinctive voice may lead consumers to believe that Waits actually approved of the product and sponsored it.⁹⁰

In December 2008 and January 2009, the FTC accepted comments on its proposed revisions to the Endorsement Guides, particularly regarding "consumer endorsements, expert endorsements, endorsement by organizations, and disclosure of material connections between advertisers and endorsers."⁹¹ The FTC noted that "[o]n the issue of consumer endorsements, the proposed revisions state that testimonials that do not describe typical consumer experiences should be accompanied by clear and conspicuous disclosure of the results consumers can generally expect to achieve from the advertised product or program."⁹² These suggested revisions would affect, for example, advertisements in which a spokesperson states that he has lost fifty pounds using the advertised product, but the typical consumer loses significantly less weight when using the product.

I. Specific Language Used in Advertising

1. "Recyclable," "Biodegradable," "Compostable," and Other Environmental Advertising Claims

The FTC's Guides for the Use of Environmental Marketing Claims, often referred to as the "Green Guides," set out guidelines for use of specific terminology in advertising, but do not purport to define the terms scientifically or offer proper performance standards for those terms.⁹³ For example, when an advertisement or product package uses such terms as "degradable" or "biodegradable,"

[a]n unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal. Claims of degradability, biodegradability or photodegradability should be qualified to the extent necessary to avoid consumer deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation.⁹⁴

89 978 F.2d 1093 (9th Cir. 1992) (voice misappropriation in TV ad).

90 *Id.* at 1111.

91 FTC, *FTC Approves Federal Register Notice on Advertising Endorsements and Testimonials*, Nov. 21, 2008, available at <http://www.ftc.gov/opa/2008/11/endorsements.shtml>; see also <http://www.ftc.gov/os/2008/11/P034520endorsementguides.pdf>.

92 FTC, *FTC Approves Federal Register Notice on Advertising Endorsements and Testimonials*, *supra* note 91.

93 FTC, *Reporter Resources: The FTC's Green Guides*, available at <http://www.ftc.gov/opa/reporter/greengds.shtml> (last visited Mar. 17, 2009). The FTC is currently reviewing its Green Guides to determine whether they should be modified. The Green Guides were first issued in 1992 and modified in 1996 and 1998. The FTC has been reviewing the Green Guides since November 2007, but has yet to issue modifications as of November 2008. See also FTC, *FTC: Eco in the Market: Green Guides Review*, http://www.ftc.gov/bcp/edu/microsites/energy/about_guides.shtml (last visited Mar. 17, 2009). Note that FTC Guides are not binding and generally include the following statement: "This publication provides the FTC Staff's view of the law's requirements. It is not binding on the Commission." See FTC, *Facts for Business, Complying with the Environmental Marketing Guides*, <http://www.ftc.gov/bcp/edu/pubs/business/energy/bus42.shtml> (last visited Mar. 17, 2009).

94 16 C.F.R. § 260.7 (2008).

Likewise, manufacturers may mark a product or package as “recyclable” only “if it can be separated and collected from household and commercial trash for reuse, or to make another product or package, through an established recycling program.”⁹⁵ Furthermore, advertisers may only claim that a product or package is recycled or contains recycled content if “it is made with materials that have been recovered or separated from the trash during the manufacturing process (pre-consumer) or after consumer use (post-consumer).”⁹⁶ The FTC lists previously used newspapers, shipping cartons, plastic bottles, glass containers, and metal cans as examples of post-consumer waste, and leftover manufacturing scraps as pre-consumer waste. If a product contains used, reconditioned, or remanufactured parts, and an advertiser chooses to label the product as “recycled,” “the label also must say the product is ‘used,’ ‘reconditioned’ or ‘remanufactured’ unless that fact is obvious to the buyer.”⁹⁷ It is also important to note that, before labeling a product “recycled,” manufacturers must indicate the percentage of recycled content, unless it is 100%.⁹⁸ Lastly, use of the universal recycling symbol indicates that a product is both recyclable and made of recycled materials.⁹⁹ If either of the two indications is untrue, the advertiser must indicate which does not apply.¹⁰⁰

2. “Free”

Nothing attracts consumers quite like a bargain or deal. Offers of “free,” “two for the price of one,” “buy one, get one free,” and other similar statements used in advertising must adhere to strict guidelines to avoid running afoul of false advertising laws.

To this end, the Federal Trade Commission has issued a Guide Concerning Use of the Word ‘Free’ and Similar Representations.¹⁰¹ In that Guide, the FTC explicitly defines “free” in the context of advertising and sets the acceptable parameters within which the word can be used. For example, the free offer must be “based upon a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be ‘Free.’”¹⁰² The FTC also provides a precise definition for “regular price:” “the price, in the same quantity, quality and with the same service, at which the seller or advertiser of the product or service has openly and actively sold the product or service in the geographic market or trade area in which he is making a ‘Free’ or similar offer in the most recent and regular course of business, for a reasonably substantial period of time.”¹⁰³

The Better Business Bureau (“BBB”) has likewise adopted a definition of the term “free,” which the National Advertising Division (“NAD”) uses in deciding cases.¹⁰⁴ That definition, contained in

95 FTC, *FTC Consumer Alert: Eco-Speak: A User’s Guide to the Language of Recycling* (July 1998), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt049.shtml> (last visited Mar. 17, 2009).

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 16 C.F.R. § 251.1 (2008).

102 *Id.* § 251.1(b)(1).

103 *Id.* § 251.1(b)(2).

104 See discussion *infra* Part III for more information about the NAD.

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the Code of Advertising, states that the term may be used only when “the advertiser is offering an unconditional gift.”¹⁰⁵ If the “free” item is conditional on a purchase, then this condition must be disclosed by the advertiser clearly and conspicuously next to the “free” offer.¹⁰⁶ Small disclosures, like a mere asterisk next to the word, are considered inadequate.¹⁰⁷ Like the definition in the FTC Guide, the BBB’s definition affirms that the normal price of the goods cannot be increased, nor can the quality or quantity of goods be reduced when offered in conjunction with the “free” offer.¹⁰⁸ Finally, the definition requires that the “free” offer be temporary in nature.¹⁰⁹

3. “New”

According to a widely-followed FTC advisory opinion, codified in the Code of Federal Regulations in 1967, a manufacturer should advertise a product as “new” only within the first six months of the product’s introduction into the market.¹¹⁰ In fact, the FTC has explicitly stated that “it would be inclined to question use of any claim that a product is ‘new’ for a period of time longer than 6 months.”¹¹¹ The FTC nevertheless opted not to adopt a rigid rule, instead establishing “a tentative outer limit for use of the claim . . . leaving itself free to take into consideration unusual situations which may arise.”¹¹² Despite this seemingly flexible approach, the FTC further noted that the “general rule would apply unless exceptional circumstances warranting a period either shorter or longer than 6 months were shown to exist.”¹¹³ Moreover, “[w]hen the word ‘new’ is used to denote an old product made from an improved formula or method, the advertising used should make clear that the word is used in that limited sense.”¹¹⁴

As a general matter, claims that a product is “new”—as opposed to used or recycled—should only be made in connection with merchandise that is “made throughout of new material and parts, has not been subjected to any use since completion of original manufacture, is unimpaired in appearance and condition, and is of a model or style of current manufacture.”¹¹⁵ If the product is not entirely new, it must have been “changed in a functionally significant and substantial respect.”¹¹⁶ “A product may not be called ‘new’ when only the package has been altered or some other change made which is functionally insignificant or insubstantial.”¹¹⁷ In the context of textiles, the fabric cannot be

¹⁰⁵ 2 DO’S & DON’TS IN ADVERTISING § 19 at 275–280 (Council of Better Business Bureaus 1996).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Permissible Period of Time During Which New Product May Be Described as “New,”* 16 C.F.R. § 15.120(d) (1967); see also *Facts for Business: Frequently Asked Questions: A Guide for Small Business* (Apr. 2001), available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus35.shtm>.

¹¹¹ 16 C.F.R. § 15.120(d), *supra* note 110.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ DO’S & DON’TS IN ADVERTISING, *supra* note 105, § 19 at 1054.

¹¹⁵ *Id.* at 1052.

¹¹⁶ 15 C.F.R. § 15.120(b) (1967).

¹¹⁷ *Id.* § 15.120(b).

“new” if it has been reclaimed or respun.¹¹⁸ Likewise, when advertising tires, the use of the word is prohibited if the tires are retreads.¹¹⁹

Notably, advertised products are presumed to be “new,” even if they are not so labeled. Full disclosure must be made that “merchandise is used, second-hand, rebuilt, remanufactured, reconditioned, repaired, overhauled, or repossessed,” as the FTC considers concealment of such facts to be an unfair trade practice.¹²⁰

4. “Made in the U.S.A.”

In 1997, the FTC promulgated the Enforcement Policy Statement on U.S. Origin Claims that requires “all or virtually all” of a product to be made in the United States before any advertising or labeling of the product as “Made in the U.S.A.” is permitted.¹²¹ To help advertisers understand the requirements of this labeling, the FTC also released a Business Guide that provides details and explanations for compliance with the “Made in the U.S.A.” standard.¹²²

Like other advertising claims, claims that a product is made in the United States can be either express or implied. Claims that a product is a “product of the U.S.A.” or that products are “American-made” are express, while the inclusion of the United States flag or a map of the United States on a product’s label, or even an address with U.S. headquarters, can constitute implied claims that the product is made in the United States.¹²³

In evaluating goods under the “all or virtually all” standard, the FTC “focuses on the overall impression of the advertising, label, or promotional material.”¹²⁴ Taking this into consideration and focusing on important considerations for consumers, a product must have been “last substantially transformed in the U.S. into its marketable form” to satisfy the “Made in the U.S.A.” standard. Although this factor is primary, other considerations such as proportion of U.S. manufacturing costs, and how far removed the foreign content is from the finished product are also evaluated.¹²⁵

Even if a product does not fulfill the requirements above, the FTC allows advertisers to make “qualified” “Made in the U.S.A.” claims. These claims must describe “the extent, amount or type of a product’s domestic content or processing” and indicate that a product is not entirely of United States origin.¹²⁶ For example, claims that a product is “made in the U.S.A. of U.S. and imported

118 *Facts for Business*, *supra* note 110.

119 *Id.*

120 Do’s & DON’TS IN ADVERTISING, *supra* note 105, § 19 at 1052.

121 *Enforcement Policy Statement on U.S. Origin Claims* (Dec. 1997), available at <http://www.ftc.gov/os/1997/12/epsmadeusa.htm>.

122 FTC, *Facts for Business, Complying with the Made in the U.S.A. Standard*, available at www.ftc.gov/bcp/edu/pubs/business/adv/bus03.shtm.

123 *Id.*

124 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 29:54.50 (4th ed. 2008). See also FTC, *FTC To Retain “All or Virtually All” Standard for “Made in USA” Advertising and Labeling Claims*, available at <http://www.ftc.gov/opa/1997/12/musa2.shtm>.

125 FTC, *FTC To Retain “All or Virtually All” Standard*, *supra* note 124.

126 *Id.*

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parts” or “assembl[ed] in the U.S. of foreign components” are acceptable qualified claims. Just as with any other “Made in the U.S.A.” claim, a qualified claim must be truthful and substantiated.¹²⁷

5. “Organic” Food Products

As a result of increased public awareness of the need for healthier products and lifestyles, the United States Department of Agriculture (“USDA”) in 2002 created the “USDA Organic” seal for use on labels and packaging of eligible food products. To qualify for use of this label, a food product must comply with national standards set forth by the USDA under its National Organic Program.¹²⁸ Developed in part based on recommendations of the National Organic Standards Board and public comment, the USDA regulations generally divide eligible food and food products into three categories.¹²⁹

If a product contains only organically-produced ingredients, excluding added water and salt, advertisers may use “100 percent organic” and the “USDA Organic” seal on labels and advertising for that product.¹³⁰ If the food or food product consists of at least 95% organically-produced ingredients, again excluding water and salt, and the remaining 5% of ingredients are “nonagricultural substances approved on the National List or non-organically produced agricultural products that are not commercially available in organic form,” then manufacturers are permitted to use the term “organic,” as well as the “USDA Organic” seal.¹³¹ In the last category of organic products, those food products that contain at least 70% organic ingredients, the label “made with organic ingredients” may be used, but the “USDA Organic” seal is prohibited.¹³²

If a product contains less than 70% organic ingredients, advertisers are not allowed to use the term “organic” on any packaging or advertising associated with that product. Nevertheless, if individual organic ingredients are included in the product, those ingredients can be designated as “organic” on the ingredient list of the product packaging.¹³³

As a note of caution, advertisers should comply strictly with the above labeling requirements, as a civil penalty of up to \$11,000 can be assessed on anyone who “knowingly sells or labels as organic a product that is not produced and handled in accordance with the National Organic Program’s regulations.”¹³⁴

¹²⁷ *Id.*

¹²⁸ See *National Organic Program: Program Overview*, available at <http://www.ams.usda.gov/AMSV1.0> (follow link to “National Organic Program” from main page).

¹²⁹ Susan J. Keri & Elisabeth A. Langworthy, “Organic” – Says Who?, *INTA Bulletin*, Vol. 61, No. 13 (July 15, 2006); *National Organic Program: Organic Labeling and Marketing Information* (April 2008), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004446&acct=nopgeninfo> [hereinafter *Organic Labeling and Marketing Information*].

¹³⁰ See *Organic Labeling and Marketing Information*, *supra* note 129; *National Organic Program: Labeling Packaged Products*, Jan. 2003, <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004323&acct=nopgeninfo> (last visited Mar. 17, 2009).

¹³¹ *Organic Labeling and Marketing Information*, *supra* note 129.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

III. The National Advertising Division: An Alternative to Litigating False Advertising Disputes

The National Advertising Division is a part of the National Advertising Review Council, which was formed in 1971 through the combined efforts of the Association of National Advertisers, the American Association of Advertising Agencies, the American Advertising Federation, and the Council of Better Business Bureaus, with a purpose to ensure accurate national advertising through self-regulation by parties.¹³⁵ The NAD reviews advertisements on its own initiative, and contacts advertisers to request information to assess whether the advertisements are truthful and adequately supported. In addition, competitors and consumers can bring NAD proceedings challenging advertisements they believe to be false, misleading, or inadequately supported.

The NAD provides several advantages to litigating false advertising disputes in the courts. For one thing, it is much less expensive and decisions generally take just a matter of months. From the advertiser's perspective, another advantage is the opportunity to submit proprietary and confidential information to the NAD without having to disclose that information to the challenger, as would be required in traditional litigation. Further, the NAD can choose to exercise its discretion in determining whether survey or other consumer perception evidence is necessary to establish that a literally true claim nevertheless is misleading, whereas there is no such discretion in traditional litigation.

The NAD process is not without drawbacks, however. For a challenger, one disadvantage may be the lack of any opportunity to conduct discovery and potentially uncover helpful evidence for its challenge. Moreover, the NAD's recommendations are not binding on parties, although if a party refuses to participate in the NAD self-regulatory process, or if a party that has participated in this process later refuses to follow the NAD's recommendations, the NAD will likely refer the claim to the FTC for enforcement.

For those seeking a quick and relatively inexpensive resolution of an advertising dispute, the NAD provides a good avenue. Moreover, challengers are free to file suit in court if resolution in the NAD proves unsatisfactory or if a party refuses to comply with the NAD's recommendations.

IV. Conclusion

The scope of advertising law, and the challenges it presents to advertisers, is broad and varied. Before deciding to go forward with any proposed advertisement, whether in print, on television, online, or through any other medium, advertisers should ensure that their advertisement, taken as a whole, conveys only truthful and verifiable messages to consumers. It is prudent to consider the topics discussed above as a starting point, and to consult an attorney to ensure compliance with all aspects of advertising law.

135 See National Advertising Review Council, *NARC Partners*, <http://www.narcpartners.org/about/partners.aspx> (last visited Mar. 17, 2009).

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Appendix A: Online Resources

For more information, please visit the following online resources:

Federal Trade Commission	http://www.ftc.gov
FTC Division of Advertising Practices	http://www.ftc.gov/bcp/bcpap.shtm
FTC Advertising Guides and Policy Statements	http://www.ftc.gov/bcp/menus/resources/guidance/adv.shtm
FTC Green Guides	http://www.ftc.gov/bcp/grnrule/guides980427.htm http://www.ftc.gov/opa/reporter/greengds.shtm
Memorandum of Understanding Between the FTC and the F.D.A. (1971)	http://www.ftc.gov/bcp/menus/resources/guidance/36FR18539.pdf
National Advertising Division of the Council of Better Business Bureaus	http://www.nadreview.org
Better Business Bureau: Code of Advertising	http://us.bbb.org/us/code-of-advertising
Commercial Practices, C.F.R. Title 16, Chapter 1: Federal Trade Commission, parts 0-901	http://ecfr.gpoaccess.gov (search for Title 16)