Insights: Perspectives

5 Key Takeaways | Advertising Counseling, Substantiation, and Disputes 101

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Kilpatrick hosted a webinar on May 8, 2025, focused on advising lawyers about the legal issues involved with advertising claim substantiation and handling advertising disputes. The event featured Kilpatrick lawyers **Barry Benjamin** and **Bryan Wolin**, and covered the basics of claim substantiation, the nuances of the National Advertising Division and how it differs from litigation, how to litigate advertising challenges, and a panoply of other competitor, consumer, and regulatory risks advertisers should consider.

Here are a few key highlights and takeaways from the webinar:

1. Advertisers are Responsible for All Claims Reasonably Conveyed:
The speakers noted that advertisers are responsible for all claims, express or implied, that a reasonable consumer may take away from a given ad. This includes even implied claims the advertiser did not mean to convey, so it is important to carefully analyze ads prior to publication to avoid unintentionally making unsubstantiated claims.

2. Puffery is Not a Get Out of Jail Free Card:
Puffery is language that no reasonable person would believe to be factual, and which would not influence a purchasing decision. The speakers remarked that there is no bright-line rule separating puffery from claims, and advertisers must always consider context in determining whether an ad is simply "puffing" or conveying a claim to reasonable consumers.

3. Substantiation Testing is Tricky:
The speakers identified key pitfalls to avoid when preparing tests to substantiate an advertising claim: (i) use industry tests where available, unless there is a very good reason not to; (ii) ensure that the test methodology is repeatable, reliable, and unbiased; (iii) make sure to test the actual product at issue, or as close to it as possible; (iv) ensure the test results match the subject advertising claims; (v) ensure the test encompasses typical users of the product under normal use conditions.

4. The National Advertising Division has Persuasive Enforcement Power:
The National Advertising Division is an industry self-regulatory, voluntary forum where the majority of challenges are brought by competitors, but can also be initiated by the NAD itself as well as other non-competitor entities or individuals. The speakers emphasized that, while the NAD cannot force advertisers to comply with its decisions, it has "soft" enforcement powers that lead almost all advertisers to comply.

These include FTC referrals or referrals to other similar agencies, as well as the risk of follow-on class action suits.

5. Advertising is a Team Sport
Finally, it was noted that advertising involves a wide range of internal stakeholders, from the C-suite (who can define risk tolerance and appetite) to social media managers (who require careful training to avoid violating ad law rules and regulations).

The event provided attendees with a solid overview of ad law substantiation and advertising dispute basics.

For further information or follow-up on this event, please contact
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