Insights: Perspectives

Takeaways | Key Takeaways from the Frontlines of Ad Campaigns Gone Wrong and Critical Claim Substantiation Missteps

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Barry M. Benjamin, managing partner of Kilpatrick's New York office and chair of its Advertising and Marketing group, was honored to present alongside La Toya Sutton of the Clorox Company, at the American Conference Institute's 8th Annual Legal, Regulatory, and Compliance Forum on Advertising Claim Substantiation. Mr. Benjamin's and Ms. Sutton's presentation was titled **"Key Takeaways from the Frontlines of Ad Campaigns Gone Wrong and Critical Claim Substantiation Missteps."** As the title indicates, the session provided crucial lessons learned for in-house counsel, as well as marketers, around disasters and legal risks that arose out of real-world advertising campaigns. Takeaways from the program include:

1. A Reasonable Basis and Amount of Evidence

The most basic legal requirement for substantiating an advertising claim is to have a reasonable basis for making it, that is, reliable, objective, unbiased evidence of the truth of the claim. To elaborate, what does NOT generally provide a reasonable basis for a claim is letters from satisfied customers (not every person who experiences a product will write the company); an 'expert' review (just because one so-called expert had a good experience does not mean all purchasers will); nor a low history of product returns (not every dissatisfied customer will return a product). A consistent question from the business team is how much evidence is sufficient. To answer that, consider several factors, including (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.

2. Continually Train About Email

Employees must be continually reminded of the concept of document discovery, and the fact that emails can and will be used against the company in a court of law. Emails where an employee says the following are a goldmine for adversaries and class action lawyers: “Our sales and marketing guys continually make claims that we can't possibly meet in the real world. This opens us up to tons of exposure from a legal standpoint. Everyday we are putting stuff out there that can't and won't live up to the marketing spin!” Yes, this is a real email.

3. It is OK Not to Use the Industry Standard Test, But You Better Have an Awesome Reason

Among the basics of claim substantiation is that all reasonable interpretations of an advertising claim,

whether express or implied, and whether intended or not, must be substantiated. Tests must be provably valid and reliable, and industry standard protocols are usually the best methods for substantiating claims. It is not necessarily mandated to use industry standards, though, if there is a good reason to deviate from them. Just be ready to justify the deviation. Indeed, courts have held that a new test should be a "superior alternative to the industry standard" under the circumstances.

4. Be Wary of Marketing-Creep

Like everyone else, marketers want to do a good job. For marketers, that often means coming up with something new, a new spin on an old idea, or something newer and snappier than the current campaign. The new spin or snappier slogan, however, may not just be a new turn of phrase; rather, it could change the meaning of a claim altogether. For example, if a laundry detergent ad claims that it won't cause stretching, shrinking or fading – the original claim – but that turns into a new slogan of "No stretching, no shrinking, no fading" – that changes things. It's one thing to say the detergent itself won't cause the stretching, shrinking, or fading. It's another thing entirely to claim that if you use the laundry detergent, there won't be any stretching, shrinking, or fading at all. Slight changes in phrasing can turn into big differences in meaning.

5. Price Comparisons Are Difficult to Make and Maintain

Pricing is among the most difficult questions in business, and making comparisons to competitor prices is even more fraught. Prices can change very quickly, and comparisons can become just as quickly outdated, stale, and false. If a grocery store posts a price comparison poster at the front of the store and updates the prices on the poster once a week, that may not be fast enough to keep up with the competitor's price changes. Also, on what day was the comparison pricing checked? It may have been the day before prices changed, meaning the prices were outdated for six days. Prices can change "with great rapidity," so it is incumbent upon advertisers to take steps to ensure that a comparison is current and accurate.

Counsel to advertisers which make claims about their own products or comparing their products with competitors would do well to familiarize themselves with how to conduct appropriate claim substantiation testing. While claim substantiation is a bedrock principle of advertising law, clients constantly ask lawyers "what is enough substantiation?" Advertising lawyers need to know how to analyze and test their own clients' claims, as well as competitors' claims when the business team asserts that they are false.

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