Insights: Publications

5 Key Takeaways | The Essentials of Advertising Claims Substantiation

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Kilpatrick's **Barry Benjamin** and **Bryan Wolin** were honored to participate in the firm's long-running IP Innovation webinar series, with a presentation on December 3, 2025, covering the essentials of advertising claims substantiation.

Here are five key takeaways from their talk.

1. Advertising Claims Are Under Scrutiny from Multiple "Policing" Authorities
Advertising practices are regulated by a broad range of government and industry bodies, including the Federal Trade Commission (FTC), state Attorneys General, local authorities, and the National Advertising Division (NAD) of the BBB. Additionally, private competitors and advocacy groups routinely challenge advertising under the Lanham Act and state unfair competition statutes. Recent case studies, such as the JBS USA Holdings NAD challenge and follow-on litigation by the New York State Attorney General, illustrate how a single set of claims can attract related challenges across different channels, potentially resulting in significant financial penalties and settlements.

2. Advertisers Should Have Substantiation Prior to Making Claims—Not After
The FTC requires advertisers to possess substantiation for all claims before they are released into the marketplace. Substantiation generated after the fact is likely to be disregarded in FTC enforcement proceedings. This means advertisers should identify the claims they plan to make early in the product development process and ensure that robust, competent, and reliable scientific evidence supports those claims, as well as any implied claims they make, prior to launch. In short, marketers must ask: (1) What claims—express and implied—will my ad convey to reasonable consumers? and (2) Do I have substantiation for all claims reasonably conveyed?

3. Understanding the Types of Claims—and Their Substantiation Burdens—is Critical
Claims fall into several categories, each with different substantiation requirements:
- *Puffery*: Exaggerated, non-specific statements not subject to proof; immune to challenge. Not technically a claim at all!
- *Express Claims*: Direct factual assertions; require substantiation.
- *Implied Claims*: Indirect assertions inferred by consumers; also require substantiation.
- *Comparative and Superiority Claims*: Claims comparing products to competitors require rigorous proof, often through industry-standard testing.
- *Establishment Claim*s: Claims clearly based on tests or studies require the advertiser to possess the level and

type of substantiation the ad communicates.
The more specific or comparative the claim, the higher the substantiation burden, especially for health and safety claims.

4. Disclaimers and Context Matter—But Cannot Cure a False or Misleading Claim
Disclosures must be "clear and conspicuous" to prevent deception. They can clarify or limit claims but cannot contradict them or cure a false claim. Context is king: the overall net impression on the reasonable consumer—rather than the literal text of the ad in a vacuum—determines whether a claim is deceptive. Advertisers must consider how consumers interact with their advertising in real-world contexts, not in isolation, and ensure that disclaimers are prominent and proximate to the claims they qualify.

5. Substantiation Requires Rigorous, Industry-Standard Evidence and Testing
The FTC and NAD demand competent and reliable scientific evidence, such as well-designed studies, usage tests, and consumer surveys, especially for performance and preference claims. Substantiation must meet industry standards and be relevant to the product as sold and the claims made. Key factors include the soundness and repeatability of the testing methodology, the relevance of the tested product and parameters to consumer experience, and the statistical significance of survey results. Letters, testimonials, and anecdotal evidence are insufficient; robust data is required for
substantiation.

For more information on claims substantiation or to discuss specific advertising matters, please contact Kilpatrick's advertising law team.
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