KILPATRICK TOWNSEND

6 KEY TAKEAWAYS

Advertising Claims Substantiation: The Building Blocks of Success

Barry M. Benjamin, managing partner of the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to recently co-present with Pamela Deese, partner at ArentFox Schiff, at a pre-conference workshop from the 2023 ACI Legal, Regulatory, and Compliance Forum on Advertising Claims Substantiation. As the title indicates, their session provided a comprehensive overview of the content, terminology, testing, and process required to substantiate advertising claims. Takeaways from the program include:

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Determine The Claims. Selling is the lifeblood of capitalism and is ultimately a company's primary goal. To sell, a company must distinguish itself in the marketplace, and the way to do that is often by making claims. However, the law requires that advertising claims that a product or service has a particular quality or attribute, or that it can do something better or different than its competitor, must be substantiated and truthful (not deceptive). Claim substantiation is a necessary and crucial part of the advertising legal compliance process. Usually within a company, all three of the marketing department, the research and development team, and the legal department, work together to determine the appropriate claims to make and how to substantiate them.

Express or Implied? Once the claims are determined and confirmed as substantiated, advertisements promoting the company's products or services are created making those claims. Within any advertisement, claims can be both express or implied, or even express by necessary implication. While express claims directly state a proposition, an implied claim conveys the claim implicitly. Remember too, that images and not just words can convey an express or an implied claim. All claims conveyed to the consumer, whether express or implied, should be identified and substantiated. Do not assume that humor avoids the claim substantiation requirement. Context is important, and while humor may be disarming, it does not justify stretching the truth.

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From the Consumer's Perspective. The standard of review for determining what express or implied claims an ad makes is the overall net impression conveyed to reasonable consumers. An integral part of the legal review process of an advertisement, however, is often viewing things from a distance to understand the overall net impression, because even literally true claims may have to be treated as false

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however, is often viewing things from a distance to understand the overall net impression, because even literally true claims may have to be treated as false advertising if the overall net impression conveyed to reasonable consumers is false. For example, where a cookie maker expressly claims in an ad that its cookies have more chocolate chips than its competitor's cookies, that may be literally true. But, if the advertiser's chocolate chips were half the size of the competitor's cookies, and each cookie contained less chocolate than the competitor's cookies, then the overall net impression of the "more chips" claim – that the cookie contains more overall chocolate – is false and deceptive. Always view the advertisements on which the claims are based from the consumer's perspective.

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A Reasonable Basis and Amount of Evidence. Claim substantiation is rooted in the concept of an advertiser having a reasonable basis for its claims at the time it makes the claim. What type and level evidence or proof is needed to rise to the level of a reasonable basis for making a claim is often the subject of dispute. The nature of the claim itself drives what type of substantiation – the type and level of evidence or proof – is ultimately necessary, and 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.

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Conduct Provably Reliable Tests. When conducting testing, make sure that the test is valid and reliable. What does that mean? Well, Unless the claim specifies otherwise, tests should be conducted on the actual products in the marketplace under typical conditions of use and/or under directed conditions of use. Tests on old products with outdated formulations will not suffice. Tests on product ingredients as opposed to on the product itself will be closely scrutinized and will likely be insufficient unless claims are specifically limited to be only about the ingredients. The ideal is an objective, independent test conducted by qualified experts in the relevant field, but, in-house tests can be objective and reliable if conducted with transparency and under conditions designed to ensure their objectivity. Note you may have to PROVE this in court, so take care in setting up the testing. Results should be evaluated objectively with appropriate analysis related to statistical margins of error. The tests must also be "well designed," meaning methodologies accepted by professionals in the relevant field using established (and ideally published or at least widely known) protocols. Protocols should be clearly stated and followed rigorously and professionally, with documentation available to demonstrate the rigor. Make sure that the sample size is sufficiently large for statistical analysis and conclusions based upon a 95% confidence level. Of course, include safeguards against bias. The so-called "gold-standard" is a well-controlled, double-blind study.

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Take Care with Aspirational Claims. Companies often make aspirational claims about their future environmental benefit activities, whether by reducing plastic use, increasing recycling efforts, or using less water and limiting waste during the manufacturing process. While aspirational claims may seem like puffery, if the reasonable consumer takes one to mean something specific, then the advertiser still needs substantiation for the claim. Do not lightly make aspirational environmental benefit claims. It is safe to

takes one to mean something specific, then the advertiser still needs substantiation for the claim. Do not lightly make aspirational environmental benefit claims. It is safe to assume that consumers (or other interested parties) are watching and will not hesitate to challenge them.

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