

5 KEY TAKEAWAYS

“Advertising Claim Substantiation: Challenging Competitor Claims and Substantiating Your Own,” from the 2023 ANA Masters of Advertising Law Conference

[Barry M. Benjamin](#), managing partner of the New York office and chair of Kilpatrick’s Advertising and Marketing group, was honored to moderate a panel at the ANA’s 2023 Masters of Advertising Law Conference, titled Advertising Claim Substantiation: Challenging Competitor Claims and Substantiating Your Own. As the title indicates, the session provided an overview of the content, terminology, testing, and process required to substantiate advertising claims and challenge competitor claims. Takeaways from the program include:

1

Substantiation is Required for Objective Claims, But Not Puffery.

Substantiation is required for all reasonable interpretations of advertising claims, whether express or implied. However, claims that are mere puffery, rather than an objective claim, are not subject to challenge. Puffery is exaggeration or hyperbole, and is not subject to real proof or substantiation, because those statements are not viewed as something reasonable consumers would understand as an objective statement of fact capable of being relied upon.

2

Express or Implied? 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.

3

A Reasonable Basis and Amount of Evidence. Claim substantiation is rooted in the concept of having a reasonable basis for claims, at the time the claim is made. What evidence and level of substantiation constitutes a “reasonable basis” is always the subject of debate, and therefore, 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.

4

Influencer Claims Require the Same Level of Substantiation. With the expansion of social media and the introduction of new digital platforms, brands are looking to connect with consumers in fast, real-time, personalized ways. Brands have gravitated towards and embraced the opportunity to participate in influencer marketing through these different social media platforms. Yet it must be remembered that branded influencer claims, posted to promote an advertiser’s product or service, requires the same level of substantiation as if the advertiser itself was making the claim. Moreover, both advertisers and endorsers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.

5

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. 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.

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.