

5 KEY TAKEAWAYS

Hot Topics in Advertising Claim Substantiation

Barry M. Benjamin, managing partner of the New York office and chair of Kilpatrick's Advertising and Marketing group, was honored to host a continuing legal education program alongside Laura Brett, head of the National Advertising Division of the BBB National Programs, on "Hot Topics in Advertising Claim Substantiation." The session focused on the [NAD background and challenge process](#), sustainability claims, and substantiation testing issues for advertising claims.

Takeaways from the program include:

1

Conduct tests per the industry standard, unless there is good reason not to. 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 using 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.

2

Testing the actual product is best practice. This may seem obvious, but it is most appropriate to test the actual product under typical, real-world conditions of use. Tests on old versions of a product or outdated formulations will not suffice. Also, tests on product ingredients as opposed to on the product itself will be closely scrutinized and will likely be insufficient unless it can be shown that the final product performs the same way, or if ad claims are specifically limited to be only about the ingredients.

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

The NAD is monitoring. The [National Advertising Division \(NAD\) of the BBB National Programs](#) was founded in 1971 as a system of independent industry self-regulation to build consumer trust in advertising and support fair competition in the marketplace. NAD holds national advertisers to high standards of truth and accuracy, by reviewing challenges from businesses, trade associations, and consumers, as well as initiating its own reviews. NAD is not empowered as a court is – it has no ability to issue fines, penalties, money judgments, or issue any order that has the force of law to compel action or compliance. NAD's power is in the voluntary persuasion of compliance, and it levels the playing field for advertisers that could otherwise make false claims. NAD is a very effective cleanser of marketplace pollution, that is, pollution in the form of false advertising. And simply because participation at NAD is voluntary does not mean that nothing happens to a company that declines to participate. If any party declines to participate, or fails to comply with an NAD recommendation, NAD will refer the party to the [U.S. Federal Trade Commission](#), and those referrals receive top priority from the FTC's government enforcers who do have the full gamut of potential legal remedies at their disposal.

5

Green claims are subject to scrutiny. Eco-friendly, environmental "green" and sustainability claims are obviously very popular across the country. Recent NAD decisions, class action lawsuits, and the [upcoming revisions](#) to the Federal Trade Commission's [Green Guides](#) illustrate the extensive scrutiny of eco-friendly claims, including aspirational claims (i.e., future-oriented environmental-related goals). [Recent decisions](#) suggest that advertisers should tread carefully when making aspirational environmental claims, develop adequate substantiation prior to making such claims, and expect targeted challenges and enforcement actions when prominently touting concrete environmental benefits or goals. Indeed, the New York State Attorney General recently [brought an enforcement action](#) against a company that made aspirational sustainability claims, that had been previously the subject of NAD proceedings.

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, as well as the NAD. 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.