

Expert Q&A on Advertising Law

Advertising and Marketing

In the past year, several companies have entered into high-profile settlements with the Federal Trade Commission (FTC) over allegations that their products did not work as advertised. For example, Skechers USA, Inc. agreed to pay \$40 million to settle charges that it made unsubstantiated claims about its toning shoes. The terms of those settlements provide valuable insights for all advertisers. Practical Law Company asked Gonzalo Mon of Kelley Drye & Warren LLP to provide an overview of key requirements advertisers should know.



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What advertising claims must be substantiated?

Advertisers are required to have a “reasonable basis” to substantiate every objective claim in their ads. This requirement applies not only to express claims — what an ad actually says — but also to implied claims that a reasonable consumer may take away from an ad, even if the advertiser did not intend to convey that claim. Therefore, it is possible that an ad can be literally true but still misleading if it conveys a claim the advertiser cannot support.

If a claim is not objective, it may qualify as “puffery,” a term used to describe obvious hyperbole or something that cannot be measured (for example, “Ultimate Driving Machine”). You do not need proof for these types of claims, but be careful about how they are presented. A claim that qualifies as puffery standing on its own can take on a different meaning if it is coupled with objective claims. In that case, substantiation may be required.

If an ad is challenged, it will be analyzed from the standpoint of a typical consumer. Accordingly, when reviewing ads, you should step into the shoes of customers who may not know anything about the product other than what is in your ad. Consider how the customers are likely to interpret the ad. If you cannot support every reasonable interpretation, you may need to make some changes.

How much substantiation is required?

In general, what constitutes adequate substantiation depends on six factors: (1) the type of product; (2) the type of claim; (3) the consumer benefit from a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences

of a false claim; and (6) the amount of substantiation experts in the field believe is reasonable.

In most cases, the last factor is the most important. Unfortunately, though, it is not always clear what is “reasonable.”

Where do you start? For many types of claims, the first step is to determine whether there is an industry standard test on point. If there is, you should generally use it. If there is no industry standard test, you may need to develop your own test. Make sure your test mirrors real-world conditions as much as possible, that it is repeatable and that the results are statistically significant.

Keep in mind that certain types of claims, such as health claims, may be subject to stricter standards. For example, in order to settle the FTC investigation, Skechers agreed not to make any weight-loss claims unless it could support them with at least two adequate and well-controlled human clinical studies conducted by different researchers, independently of each other. If you do not know what proof you need, check with an expert.

Are the advertising laws different for social media?

Because social media tends to be a casual medium, many marketers think that laws that govern “traditional” ad campaigns do not apply in social media. However, the same laws do apply. What you say about your products in social media will likely fall under the scope of advertising laws. Among other things, this means that you must be able to substantiate all express and implied claims.

Keep in mind that you could be held responsible for your employees' actions. For example, the FTC has entered into settlements with a number of companies that encouraged employees to pose as consumers and write product reviews. Do not do this. You should require employees to disclose their connection to your company if they write about your products or services in social media.

In some cases, you can also be held liable for what consumers do on your behalf. For example, in their Endorsement Guides, the FTC states that if a company provides an incentive for a blogger to write about a product, and the blogger makes false claims, the company can be held liable for those claims even if it did not approve them. The FTC does note, however, that it will exercise "prosecutorial discretion" and consider the advertiser's efforts to prevent false claims.

Make sure you provide guidelines for anyone who engages in social media on your behalf. The guidelines should require these individuals to clearly disclose any connections they have to your company. You may also want to include some guidelines about what claims people can and cannot make. However, it is not enough to simply have these guidelines. Companies must also monitor campaigns to ensure compliance.

What can a company do if its competitor makes a false claim?

In most cases, the first step is to send a letter to your competitor. How you draft the letter depends on a variety of factors, including the claims at issue, the available evidence and your relationship with the competitor. However, there are some key points that the letter should generally include. The letter should:

- Clearly identify the false claims and explain why you think they are false.
- Demand that the competitor stop making the claims or, if appropriate, demand substantiation.
- Include a deadline and (possibly) an ultimatum.

If the letter does not achieve your goals, you have two key options. First, you can file a challenge before the National Advertising Division (NAD) of the Council of Better Business Bureaus, a self-regulatory body that hears advertising disputes. Alternately, you can file a lawsuit in federal court under the Lanham Act. Each option has its benefits and drawbacks, and which option is best depends on a variety of factors, including the company's goals and budget.

The NAD process is straightforward and generally consists of the following steps:

- The challenger files a challenge.
- The advertiser files a response.
- The challenger can, but is not required to, file a reply.

- If the challenger files a reply, the advertiser can file a final response.

Each party can meet separately with the NAD staff. A challenge before the NAD is much faster and much less expensive than going to court, but there are some drawbacks. For example, although the NAD can recommend that an advertiser change its ads, the NAD cannot enforce its decisions or award damages.

Going to court is more complicated, but it has some advantages. For example, a court can force a company to stop making claims and to pay monetary damages. But, keep in mind that litigation can take a long time and be expensive. Money damages are rarely awarded in Lanham Act cases, and you are likely to face counterclaims. Moreover, the document discovery, depositions and testimony that come with litigation can cause a substantial disruption to your business and possibly lead to the disclosure of damaging facts.

Do not rush into a challenge. You should carefully consider your options and their consequences before moving forward.

ADVERTISING AND MARKETING TOOLKIT

The Advertising and Marketing Toolkit on practicallaw.com offers a collection of resources designed to assist in identifying key legal and business issues when undertaking advertising and marketing activities. The Toolkit includes the following resources:

Practice Notes

- [Advertising: Overview](#)
- [Online Advertising and Marketing](#)
- [Comparative Advertising Law in the US](#)
- [Green Marketing in the US](#)
- [Running a Sweepstakes or Contest in the US](#)
- [Sponsorship Arrangements in the US](#)
- [E-Mail Marketing: CAN-SPAM Act Compliance](#)
- [Direct Marketing](#)
- [Customer Loyalty Programs in the US](#)
- [Sales Promotions, Contests and Sweepstakes](#)

Standard Documents

- [Publicity Waiver and Release](#)
- [Advertising Agreement](#)

Checklists

- [Cause-Related Marketing by For-Profit Companies Checklist](#)
- [Challenging a Comparative Advertisement](#)
- [Online Advertising and Marketing Campaign](#)
- [Sales Promotions, Contests and Sweepstakes Checklist](#)