



FALSE AND MISLEADING ADVERTISING

Understanding and
Navigating Ad Claims

Advertisements are full of claims. It is quite easy to gloss over these phrases and accept them at face value – but there is a larger implication behind these statements. Ad claims might express ideas that have not, or cannot, be proven to be true. They can make implications that compare products to their competitors or imply benefits that are not true. So, what exactly is a claim? And what can you, as a marketer, do to increase the likelihood of an accurate claim, and minimize the potential for argument that you have misled consumers?

TYPES OF CLAIMS

There are three types of advertising claims: **EXPRESSED** | **IMPLIED** | **PUFFERY**

EXPRESSED CLAIMS

According to the Federal Trade Commission (FTC), an express claim is a claim directly made in the ad.

For example:

“Rated best toothbrush by dentists”

“Most legroom in its class”

“Smoother looking hair guaranteed”



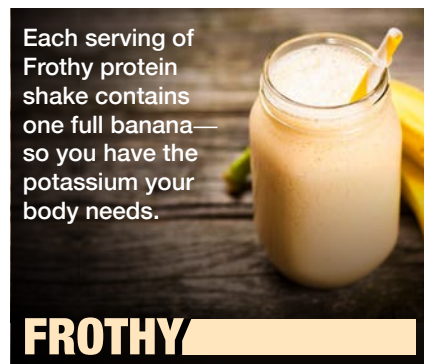
IMPLIED CLAIMS

According to the FTC, an implied claim is one made indirectly or by inference.

For example:

“Each serving of Frothy protein shake contains one full banana—so you have the potassium your body needs.”

Implied claim: One serving of Frothy gives you your daily recommended value of potassium.



PUFFERY CLAIMS

Puffery is non-specific, favorable statements that cannot be proven, and are not likely to be relied upon by consumers. Often these claims are hyperbolic in nature but can open-up a grey area of what could be potentially an express or implied claim.

For example:

“The world’s most refreshing beer”

“Best cup of coffee in the universe”



LEGAL IMPLICATIONS

When making a claim it is crucial to understand your legal liability as a marketer and to seek and obtain competent legal opinions relative to the claims. No matter how the claim is made, it is your sole responsibility to ensure that advertising laws are being followed. The FTC states, “Advertisers [must] substantiate express and implied claims, however conveyed, that make objective assertions about the item advertised...”

Not only are advertisers responsible for any directly intended claims, but they are also responsible for all reasonable interpretations of their claims, whether those claims were intended or not. Additionally, the ad is evaluated as a whole. For example, if you are making a claim that you can substantiate, but the framing of the claim within the ad (through copy, visual cues, or otherwise) implies something additional or different, you could be in jeopardy of creating a misleading ad if you do not have substantiation for the additional or different implied claims.



Since I started using Saucy, I feel like I’ve made better pizza. Out of all the sauces I’ve used in my restaurant, Saucy has been the best.

— Chef John Dough

Saucy

These laws are enforced and penalties can be substantial. The FTC is the primary government watchdog and enforcer when it comes to ad claims. But given the number of requests and cases they oversee, the onus often falls within industry-specific regulatory bodies such as the Food and Drug Administration and self-regulatory groups such as the National Advertising Division (NAD) of the Council for Better Business Bureaus, special interest groups, industry watchdogs, and private parties (in particular consumer class action lawsuits). Depending on the severity of the case, penalties can include, but are not limited to: cease and desist orders, injunction relief, monetary damages, product recalls, affirmative disclosure, and/or corrective advertising.

Groups and Government Agencies Overseeing Advertising

- ▶ **Federal Trade Commission**
- ▶ **Food and Drug Administration**
- ▶ **Self-Regulatory Groups**

National Advertising Division of the Council for Better Business Bureaus

National Advertising Review Board

- ▶ **Special Interest Groups/Industry Watchdogs**
- ▶ **Private Parties**

Competitors

Consumer Class Actions



THE KEY TO MAKING CLAIMS

Substantiation. Plain and simple.

First, consult with competent legal counsel. The FTC advertising substantiation policy states, “Objective claims for products represent, explicitly or by implication, that the advertiser has a reasonable basis supporting these claims”. It goes on to state, a “reasonable basis” means “objective evidence that supports the claim” and “at a minimum, an advertiser must have the level of evidence that it says it has.” “If the ad is not specific, the FTC looks at several factors to determine what level of proof is necessary, including what experts in the field think is needed to support the claim.”

If available for the type of claim, competent and reliable scientific evidence is the gold standard, which can be done through third-party companies who provide that service, or through in-house evaluations if they meet the required criteria. The FTC states competent and reliable scientific evidence is “tests, studies, or other scientific evidence that has been evaluated by people qualified to review it. In addition, any tests or studies must be conducted using methods that experts in the field accept as accurate.”

POPULAR METHODS OF MAKING CLAIMS

Here are a few examples of popular types of claims, and why substantiation needs to be used to make them:



“Best” Claims – These stand-alone claims don’t mean much alone but given comparative context they can have much bigger implications. If a product is labeled as superior there may be an implication that it is being compared to its competitors. Even if that statement is true, it must be adequately disclosed and substantiated.



Demonstrations – Demonstrations are claims and any time one is used to make a claim, it must be true, accurate, and done without product alteration or deceptive camera techniques. It is also important to note that making a disclosure that the demonstration is fictionalized will not absolve you of making an unsubstantiated, false, or misleading claim.



Consumer Testimonials – Consumer testimonials are claims themselves, and when used all consumer testimonials must still be true and substantiated. Testimonials themselves are NOT substantiation – rather, they create a need for substantiation.



Disclosures – When making a disclosure to clarify a claim, the consumer must be presented all relevant material information that is needed to substantiate the claim. These disclosures must be clear, concise, and relevant to the claim being made.

Key Takeaways

When making a claim, keep these tips in mind:

- Obtain the opinions and advice of competent legal counsel
- Determine all reasonable interpretation of each claim
- Determine whether the claim is material
- Separate objective claims from puffery
- When in doubt, assume the claim requires substantiation

Advertisement claims are an extremely important marketing tool. They are a quick and efficient way to inform consumers about why they should buy your product. However, it is important to understand exactly what is being said when making a claim. Although you may feel that the claim is representative of your product, without proper substantiation and communication claims can mislead consumers and cause more harm than good.

To learn more about ad claim substantiation, and how ChefsBest's services can help your company create substantiated claims, contact us today.



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REFERENCES

Taylor, A. (2020, January). *Advertising Claims 101: The Building Blocks of a Successfully Substantiated Advertising Campaign* presented at the American Conference Institute's Advertising Claims Substantiation conference, New York, NY.

FTC Policy Statement Regarding Advertising Substantiation. (n.d.). Retrieved April 13, 2020, from <https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation>

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