

Substantiating Advertising Claims

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Overview

This video, with Christie Grymes Thompson, examines the standards for claim substantiation in advertising. It discusses the types of claims that require substantiation, the reasonable basis standard for substantiation, testing protocols for claims, and certain claims that require a more nuanced approach to substantiation.

Video chapters:

- Types of Advertising Claims
- The Reasonable Basis Standard
- Test Results as Substantiation and Product Demonstrations
- Advertising Claims That Require Additional Attention to Their Substantiation



Video transcript

Introduction

Christie Grymes Thompson: Hello. Welcome to this video on substantiating advertising claims. My name is Christie Grymes Thompson. I'm a Partner of the law firm Kelley, Drye & Warren. I spend my days helping companies protect their brands and a lot of that involves substantiating the claims that they make about those brands. So today, we're going to talk about that. We'll focus on the types of claims that require substantiation, the Federal Trade Commission's standards for developing adequate substantiation, what testing needs to be done when testing is required to create sufficient substantiation, and then the types of claims that might have some nuances when developing that substantiation.

Types of Advertising Claims

The Federal Trade Commission (FTC) has set some standards for the types of claims that require substantiation and they've basically said that any objective claim about a product or service that a reasonable consumer can take away requires substantiation. So the next question is what types of claims could that cover?

First, it can cover express claims, things that you expressly state about the product or the service, something like "kills 99% of germs."

The second type is an implied claim. That's something that a reasonable consumer might take away from the message based upon other clues within the message, things like graphics, images, and other claims and phrases around it. So an example of an implied claim that might be taken away from the express claim of "kills 99% of germs," is if you have a person sniffing and sneezing and a red, stuffy nose, you might think it kills the germs that cause colds.

So those are the objective claims that require substantiation.

An important part to remember is that for the implied claim, if only about 15% (10-15%) of consumers think you're making that implied claim, like "kills the germs that cause colds," you're on the hook for substantiating it. So even if you didn't intend to say that the product kills the germs that causes colds, you have to substantiate it. Those are the objective claims that require substantiation.

There are also subjective claims. Those typically do not require substantiation and a lot of people refer to them as puffery. Those are the fanciful, funny, like so far out of the realm of possibility that no one would ever believe them. We often hear from marketers, oh that's puffery, we don't actually need to substantiate that. A word of caution, though, the line for determining what is puffery is not at all bright, it's very, very blurry. The subjectivity determination is actually quite subjective because something that's subjective puffery to one arbiter might not be the same to another. So I always say exercise caution when you're going to rely on claiming that something is puffery and not have substantiation for that claim.

The Reasonable Basis Standard

The FTC requires a marketer to have a reasonable basis for a claim prior to dissemination of the advertisement. A reasonable basis can depend upon the type of claim. So, for example, if in the claim you state something like "tests prove," that's called an establishment claim and you actually need to have the tests that prove whatever characteristic the marketer has identified. Similarly, if you say something like "doctors recommend" or "consumers prefer," you need to have something like survey evidence or something else that demonstrates that doctors actually do recommend this or the consumers do actually prefer that. But without that specific type of substantiation identified in the claim, you generally need to have a reasonable basis.

The FTC has identified certain characteristics to consider when determining what constitutes a reasonable basis, things like:

- The type of product.
- The type of claim. If it's a more substantial claim, then you might need more substantiation.
- What experts in the field believe is reasonable. This sometimes means looking outside of your organization at things like industry standards or other test protocols that might exist to evaluate a certain performance characteristic.
- The ease of developing substantiation. You don't always have to go get the gold standard if that's going to be incredibly expensive or incredibly time consuming, but you do need to make a good faith effort to get sufficient evidence to support the claim.
- The consequences of a false claim. Think about this a lot in connection with health-and-wellness-related claims. If you make a false claim and someone relies on that to the detriment of their health, that could be very significant.
- The benefit of a truthful claim for consumers.

Often the FTC articulates reasonable basis as something that is competent and reliable evidence and that may depend on the type of claim and how easy it is to get the substantiation.

Test Results as Substantiation and Product Demonstrations

Any testing to substantiate a claim always needs to match the specific claim. A good first place to look is at what others are using to test their products. So, often there are industry standards that stakeholders in the industry and other consumer groups have developed to objectively evaluate performance. The National Advertising Division (NAD), which is a self-regulatory body that often looks at comparative claims and other types of advertising claims, has also looked at a wide range of testing protocols and issued decisions about whether or not they think those protocols are sufficient. If you identify an existing protocol and you deviate from it, you really need to have a good reason because any evaluator of the claim will look to those third-party sources.

In the absence of an existing protocol, you need to think about some pretty fundamental concepts. One is that any test protocol needs to produce objective results. Similarly, those results need to be repeatable and reliable. So you don't want a test protocol that is going to unfairly advantage your product and you also don't want to rely on results that are kind of one-hit wonders, where you don't get that level of results every time you do the test, or at least pretty consistently when you do the tests. The results should also have a statistical significance of about a 95% confidence level. And, importantly, the results need to be relevant to the consumer use. So if the test protocol is conducted in some extreme situation, because that's how your product performs the best, and the consumer is very unlikely to ever use the product in that extreme situation, then that probably would not be the best protocol to use.

The last point is specific to product demonstrations. Any time you're doing a product demonstration, in line with that last point, it needs to reflect the actual consumer use. So, for example, if you are depicting a bowl of soup, you shouldn't put marbles in the bottom of the soup to bring the bits of meat and other goodies in the soup up to the top because that's not what the consumer is actually going to experience.

All of these factors are important to take into account. And sometimes with testing, you have to have a little give and take because you can't get every one of the factors but you always need to ensure that the testing provides a reasonable basis.

Advertising Claims That Require Additional Attention to Their Substantiation

Certain types of claims require additional considerations for their substantiation.

The first one is comparative claims. So that's when you are comparing your product either to one of your own products or to a competitor's product. As you might imagine, when comparing it to a competitor's product, the stakes go up because the competitor's eyes will be watching closely.

In the United States, it's generally okay to name the competitor either by their brand or as "the leader" or some other way that consumers know the competitor you're talking about. But if you don't identify a particular competitor then you need to have substantiation against basically all of the market because the consumer could think you're talking about any particular competitor. So as a general rule, if you've got substantiation against about 85% of the market, you should be in good shape without identifying a particular competitor.

Another way to try to minimize risk when making a comparative claim is to identify specific characteristics about the competitor's product. So rather than making what's called a line claim where you're comparing a product to every product in the competitor's line or your line to the line of the competitor, you can identify a particular product or particular characteristic about the line or about a product within the line.

It's also okay to make apples-to-oranges comparisons. But, if you do, you'll need to disclose that you are making an apples-to-oranges comparison and that the products of the competitor may not be exactly the same as yours.

Some other types of claims require higher levels of substantiation, in particular health-related claims, because the consequences of making a false claim that could affect someone's health are significant. So the FTC has generally said that marketers need competent and reliable scientific evidence to support health claims. Then you often consider a lot of the factors that we discussed with respect to what experts in the field believe is reasonable.

Another type of claim that might require specific substantiation is an environmental benefit claim. The FTC has issued Green Guides that give marketers some ideas about what they expect when making these kinds of claims.

There are a few general concepts to take away from the Green Guides.

One is that a general environmental benefit claim, something like "environmentally friendly" or "our product is green," is deemed not capable of substantiation. The FTC has said that because those are so broad and consumers can take away so many different messages from them, you shouldn't make them. But an alternative is to make them and then qualify what you mean by that. So you can say that a product is environmentally friendly and then identify a particular characteristic that makes it environmentally friendly.

The FTC has given similar guidance with respect to sustainability, sustainable, and different variations of the word. They've said nobody really has a common understanding of what that term means. So if you're going to use it, because of those multiple interpretations, you need to identify what you mean by sustainable, like maybe it's because of a certain percentage of recycled content or something else. It's important to qualify the actual meaning of the term.

The FTC has also given specific guidance with respect to other types of claims like recycled content. For that, the FTC has said of course you need to substantiate that it has recycled content but if that content is less than 100%, you have to identify the actual percentage because otherwise the consumer will think that it is 100%.

So anytime you're making a particular type of claim, always look at it and think is this one that requires some nuanced aspect to the substantiation. Then always make sure you've got a reasonable basis for that claim.