AVOIDING FALSE ADVERTISING CLAIMS

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I. OVERVIEW

Creative advertising can be the lifeblood of a franchise system. If handled correctly, it can build brand recognition, promote sales, and create consumer loyalty. If done incorrectly, however, it can create headaches, lawsuits, and the potential for substantial damages awards. In order to avoid being on the receiving end of a false advertising claim, both franchisors and franchisees need to be aware of some of the basic rules governing the world of marketing and advertising law, take some relatively easy preventative steps that can help avoid false advertising claims, and know the various legal options available to competitors and consumers when they believe that advertising has crossed the line.

This paper provides a general overview of these issues, outlines the applicable policy and guidelines issued by the Federal Trade Commission (the “FTC”), and offers illustrative examples of cases involving a variety of false advertising claims and issues. It also contains practice pointers and resources for franchisors and franchisees who are already players in the world of marketing and advertising or simply considering whether they want to begin promoting their goods and services through an active marketing and advertising campaign.

A. The Legal Framework

As with many other areas of the law, the law governing false advertising claims has its foundation in federal statutes and regulations, as well as common law. In addition, specialized groups, such as the National Advertising Division of the Council of Better Business Bureaus (“NAD”), have reviewed numerous false advertising claims and have published detailed opinions regarding the merits of these claims. This section will briefly outline the general legal framework for understanding and analyzing typical false advertising claims.

1. FTC

The Federal Trade Commission Act (“FTC Act”) created and established the FTC. The FTC Act empowers and directs the FTC to prevent persons, partnerships, or corporations from using unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. It further authorizes the FTC to establish and enforce rules and guidelines regarding labeling and advertising (the “FTC Guidelines”).

The FTC Guidelines are generally the most comprehensive source of overall advertising guidance and touch on various topics of significance to franchisors and franchisees, including deceptive advertising and comparative claims; coupon offers, free promotions, rebates, and limited quantity advertising; endorsements and testimonials; and sweepstakes.

^1See FTC Act, 15 U.S.C. § 45(a) et seq.
The FTC has created an extremely user-friendly “Business Briefcase” CD that contains many of these guidelines and regulations. Copies will be circulated at the Workshop on this topic. Anyone involved in the process of creating, reviewing or substantiating advertising should become familiar with these general rules and guidelines or consult with an attorney who is familiar with them before commencing an advertising campaign that is likely to raise challenges.

The FTC has the power to challenge advertising under both Sections 5 and 12 of the FTC Act. Section 5 prohibits “deceptive” and “unfair” trade practices in commerce.\(^2\) Section 12, in turn, prohibits the dissemination of any false advertisement pertaining to food, drugs, devices, or cosmetics, as those terms are defined in the FTC Act.\(^3\) Given its expertise, the FTC is often in a better position than a court to determine whether a claim is deceptive.\(^4\)

To effectuate the FTC’s enforcement ability, the FTC Act grants the FTC the power to commence a civil action to recover a civil penalty and/or an injunction in a district court of the United States.\(^5\) The FTC can also institute an administrative action before an Administrative Law Judge seeking a cease and desist order prohibiting a challenged practice or act.\(^6\) Given that most FTC enforcement actions are resolved by confidential settlement arrangements, there are not many published decisions on point, but the FTC’s website often refers to these settlements.\(^7\)

2. **State Consumer Protection Statutes**

State statutes govern false advertising alongside the FTC Act. Since most consumer protection statutes are based upon the principles embodied in Section 5 of the FTC Act, compliance with the substantive standards of the FTC Act is often, but not always, sufficient to comply with state statutory requirements as well. Generally speaking, there are three types of state consumer protection statutes that apply to false advertising claims:

- State “Little FTC Acts” that also prohibit unfair and deceptive trade practices.\(^8\)
- General unfair and deceptive trade practices acts that contain a list of specific prohibited practices and, in some instances, a catch-all provision regarding certain groups of unspecified practices that also may be deemed deceptive.\(^9\)

\(^2\)Id.
\(^3\)Id., § 52(b).
\(^4\)See, e.g., *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965) (“[t]he Commission is often in a better position than are courts to determine when a practice is ‘deceptive.’”); *Kraft, Inc. v. FTC.*, 970 F.2d 311, 317 (7th Cir. 1992) (“[C]ourts generally lack the Commission’s expertise in the field of deceptive advertising.”).
\(^6\)See FTC Commission Rule 3.42, 16 C.F.R. § 3.42.
\(^7\)See, e.g., [www.ftc.gov/ftc/formal.htm](http://www.ftc.gov/ftc/formal.htm) and [www.ftc.gov/ogc/status/status.pdf](http://www.ftc.gov/ogc/status/status.pdf).
• State consumer protection statutes that permit consumer suits and sometimes suits by competitors, including class actions.10

Violations of any of these state statutes are generally pursued by consumers and/or competitors in state courts. Remedies vary from state to state, but both injunctive relief and statutory damages are usually available. Some states also allow for treble or punitive damages.11 In some instances, State Attorneys General may also become active in bringing joint challenges to certain national advertising campaigns that affect consumers across the country.12

In addition to the general trade practices statutes adopted in some states, special requirements relating to particular products and industries apply in several states. These include statutes relating to alcohol and tobacco products, foods, pesticides, medical devices, prizes, contests and sweepstakes, and direct sales. Advertisers of products that fall within these categories, and those who are interested in promoting products or services through one of these means, should take special care to review and understand these specific statutory provisions.

3. Lanham Act

While the state statutes surveyed above are generally designed to protect consumers, competitors also have standing to challenge false and deceptive advertising under Section 43(a) of the Lanham Act,13 which prohibits any “false or misleading description of fact, or false or misleading representation of fact….” Section 43(a) also provides for a separate cause of action for “any false designation of origin,” but such claims are generally associated with trademarks rather than false advertising claims.

The elements of a false advertising claim under Section 43(a) are often defined as: a) a false statement of fact made by an advertiser about its own goods, services or commercial activities or those of another; b) the false statement actually deceives or has a tendency to deceive a substantial segment of the intended audience; c) the false statement is material in that it is likely to influence purchasing decisions or the audience’s behavior; d) the false


12 See Brown & Williamson Tobacco Corp. v. FDA, 161 F.3d 764 (4th Cir. 1998), aff’d, 527 U.S. 120 (2000) (announcement that 50 states had reached a $51.5 million nationwide settlement with The Ford Motor Company resolving allegations of false advertising by Ford in connection with its marketing and sale of Ford Explorers).

statement is made in connection with goods, services or commercial activities in interstate commerce; and e) the false statement results or is likely to result in injury to the plaintiff. 14

False statements may come in many shapes and forms. As noted above, false statements may be expressly made, but they may also arise from partially correct statements or failures to disclose qualifying or limiting information that, without such disclosure, may make the statement misleading. 15 Similarly, some statements, although literally true, may be false by necessary implication where the statement, when viewed in the overall context of the advertisement, conveys a false or misleading message. 16 Implied claims may also be deemed false if they have a tendency to mislead, confuse, or deceive the consumer, but courts typically require proof of the impact of the implied claim on the target audience. 17 This impact is generally proven through consumer survey evidence. 18

Meeting the deception requirement under the Lanham Act requires a showing that the false advertising has a tendency to deceive a substantial segment of the intended audience. As a general rule, confusion levels of 20-25 percent or more in consumer surveys have been found to be sufficiently high to support a finding of likelihood of deception. 19

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16 See, e.g., Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190 (S.D.N.Y. 1987) (claim that new E.P.T. pregnancy test was a 10-minute test was false by necessary implication where test actually took 30 minutes to provide results); Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 129 F. Supp. 2d 351, (D.N.J. 2000), aff'd, 290 F.3d 578 (3rd Cir. 2002) (finding “Mylanta Night Time Strength” false by necessary implication where no evidence was presented to show that the antacid was formulated specifically for night use); Warner-Lambert Co. v. BreathAsure, Inc., 204 F.3d 87, 92 (3rd Cir. 2000) (finding “BreathAsure” false by necessary implication because the products were ineffective in reducing bad breath); see also Zoller Labs., LLC v. NBTY, INC., 111 Fed. Appx. 978 (10th Cir. 2004).


18 Id.

19 See, e.g., Ortho Pharm. Corp. v Cosprophar, Inc., 32 F.3d 690, (2nd Cir. 1994) (noting that that failure to undertake a survey may strongly suggest that a properly done survey would not support the plaintiff's position); Johnson & Johnson* Merck Consumer Pharms. Co. v. SmithKline Beecham Corp., 960 F.2d 294 (2nd Cir. 1992) (it must be established that a "statistically significant" and "not insubstantial" number of consumers holds the false belief allegedly communicated in the ad); Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharmas., Inc., 19 F.3d 125, 134 n.14 (3rd Cir. 1994) (assuming without deciding that "[w]ith regard to what constitutes a substantial or significant number of consumers who are misled[,] . . . 20% would be sufficient" (citations omitted)); Church & Dwight Co. v. S.C. Johnson & Son, 873 F. Supp. 893, 911 (D.N.J. 1994) (acknowledging that 21% to 34% would be sufficient); McNeilab, Inc. v. Am. Home Prods. Corp., 501 F. Supp. 517, 525, 527 (S.D.N.Y. 1980) (holding that 23% was sufficient).
In order to meet the materiality requirement of Section 43(a), an advertising claim must also relate to more than a trivial or minor issue: the claim must be one that is likely to influence the purchasing decision of the listener. Express claims or deliberately-made implied claims used to induce the purchase of a product are presumed to be material.


The NAD is a non-profit organization whose role is to monitor, review, and attempt to resolve consensually false advertising claims that are national in scope. The NAD does not limit its review solely to television, radio or print advertisements. It also reviews Internet advertising and product packaging and labeling, as well as promotional materials and oral sales presentations. As experts in the field of advertising law, the NAD can offer a quick, relatively inexpensive and efficient alternative to traditional litigation.

The NAD’s authority to resolve the concerns brought to its attention (or discovered through its monitoring activities) is limited, however. The NAD only has jurisdiction over claims that are national in scope or cover a broad geographic region. Moreover, the NAD will not review claims that are the subject of a pending private lawsuit or an FTC investigation. Similarly, the NAD will not review matters in which the advertiser has both withdrawn the advertisement before the challenge is asserted and assured the NAD, in writing, that it will not include the claims at issue in future advertisements.

Likewise, there are limitations on the relief that the NAD can provide. Participation in the NAD self-regulation process is voluntary, and the NAD does not have the power to order parties to produce documents, nor can it award damages. The NAD does not permit formal discovery, and statements made by the parties to the NAD in their written submissions are generally accepted at face value. Counterclaims are not allowed and all submissions are kept confidential. The NAD does, however, have the ability to refer matters to appropriate government agencies, such as the FTC, the FCC or the FDA, in cases where an advertiser has elected not to participate in the self-regulatory process, fails to comply with the NAD’s

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22 See Golden Flakes Snack Foods, Inc. (Golden Flake Potato Chips), Report #3114, NAD Case Reports (May 1994) (advertisement that was aired in four Southern states reflected a significantly large enough segment of the population as to render the advertisement within the NAD’s purview). Access to NAD case reports is limited to members of the CBBB. The cost of membership is determined by a variety of factors. In order to determine whether your employer is a member of the CBBB, you can contact the NAD at 1-212-705-0114.

23 See NAD Policies and Procedures, Section 2.2(B) published at www.nadreview.org.

24 Id., Sections 2.2 – 2.10.
recommendations, or resumes advertising campaigns that the NAD has deemed to be misleading.25

Despite these limitations, the NAD has been very successful in resolving some high profile disputes involving franchisor-advertisers. For example, in a consumer challenge against Burger King Corporation, the NAD determined that Burger King’s “Participation May Vary” disclaimer for its 99 cent promotion was not sufficiently clear and conspicuous and recommended that Burger King modify its television commercials to convey the information more clearly.26 Even though Burger King attempted to ensure the participation of a substantial portion (70%) of its franchisees, the NAD determined that the disclaimer was a material piece of information and, as such, required more conspicuous disclosure than a one-time, difficult to read appearance at the beginning of the commercials.27

In another opinion, the NAD reviewed a challenge concerning the veracity of certain claims made by Red Roof Inns in print, television and radio ads. Red Roof Inns’ competitor, Country Inns & Suites by Carlson, Inc., questioned the basis for Red Roof Inns’ claims that “98% of Our Guests Say They’d Come Back” and “Come See Why 98% of Our Guests Come Back.”28 Based on Red Roof Inns’ two consumer surveys, the NAD concluded that Red Roof Inns had sufficient substantiating evidence to support its claim that “98% of Our Guests Say They’d Come Back,” so long as it was made clear that the advertising claim was based on the results of a survey.29 On the other hand, the NAD concluded that the survey results did not support Red Roof Inns’ “Come See Why 98% of Our Guests Come Back” claim, which required evidence that 98% of the guests were actual repeat customers.30

B. The Five Golden Rules Of Advertising Law

While there are many laws and regulations pertinent to the world of marketing and advertising, the Five Golden Rules provide a useful guide for avoiding a claim for false advertising. These Rules reflect basic common sense, but they are often forgotten when advertisers get creative or aggressive with their advertising:

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25 Id., Sections 2.1(E) and 4.1(B). See also Sanderson Farms (Advertising for Sanderson Farms Chicken), Report #4289CII, NAD Case Reports (May 2006) (referral of matter to appropriate government agency in case where advertiser continued to create noncompliant advertisements, following NAD’s decision, that implicated health and safety issues regarding enhanced chicken products); Miller Brewing Co. (Miller Lite and Miller Genuine Draft Beer), Report #4290, NAD Case Reports (Feb. 2005) (referral of matter to United States Alcohol and Tobacco Tax and Trade Bureau pursuant to Section 2.1(E) of NAD Procedures due to advertiser’s decision to decline to participate in NAD self-regulatory process).

26 Burger King Corp. (99¢ Whopper Promotion), Report #4067, NAD Case Reports (July 2003.)

27 Id.

28 Red Roof Inns, Inc. (Hotel/Lodging), Report #3837, NAD Case Reports (Oct. 2001.)

29 Id.

30 Id.
1. Claims Must Be Truthful And Non-Deceptive

The simplest and most fundamental rule governing advertising and promotional practices is that any claim material to a consumer’s decision to buy or use a product must be truthful and non-deceptive. 31

This rule applies not only to affirmative claims, but to implied claims as well. 32 This rule also applies not only to what is said, but to what is not said. In other words, omissions from an advertisement may be unlawful if they render the claim misleading. 33 "Pure omissions" (i.e., where the advertiser elects to say nothing in circumstances that do not give any particular meaning to the silence) are not deemed deceptive by the FTC, but an omission that involves material information, the disclosure of which is necessary to prevent the claim from being misleading, would be considered deceptive. 34

The FTC Deception Policy Statement is not limited solely to advertisements. It also applies to other “marketing and point-of-sales practices that are likely to mislead consumers.” 35 These practices include bait-and-switch tactics, failure to live up to a warranty, and failing to clearly disclose the purpose of an initial contact with a consumer. 36

In assessing whether a particular advertisement or other promotional practice is truthful and non-deceptive, the FTC has provided written guidelines for advertisers (the “FTC Guidelines”). 37 The FTC Guidelines generally provide that deception exists when three elements are met: a) a material representation, omission or practice; b) likely to mislead consumers acting reasonably under the circumstances; and c) detriment to the consumer. 38

31 See FTC, Policy Statement on Deception, available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm; FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994); SW Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 n.2 (9th Cir. 1986) (all FTC deception cases will apply the standards set forth in the FTC’s Deception Policy).


33 Id.

34 Cf. In re Int’l Harvester Co., 104 FTC 949, 1059 (1984) (failure to disclose information about a safety risk in the fuel systems of gasoline powered tractors was a material omission likely to mislead reasonable consumers and was therefore deceptive) with FTC Deception Policy Statement, supra, at note 31 (explaining that a material omission, one likely to affect the consumer’s conduct or decision with regard to a product or service, is likely to cause consumer injury because consumers are likely to have chosen differently but for the deception).

35 Id.


37 Id.

38 Id. See also Novartis Corp. v. FTC, 223 F.3d 783 (D.C.Cir. 2000); In re Int’l Harvester, 104 FTC at 1056. See also Pantron I Corp., 33 F.3d at 1093; Cliffdale Assocs., Inc., 103 FTC 110, 174 (1984).
Since the purpose of the FTC Act is to protect the public, intent is not a critical factor in determining whether an advertisement is likely to deceive the public.\(^{39}\) Similarly, proof of actual consumer reliance or deception is not required to prove a violation of the Act; rather, all that must be shown is that the challenged claim has the tendency or capacity to deceive.\(^{40}\)

Even claims that are literally true may be deemed misleading or deceptive under the FTC Guidelines if the overall net impression left by the advertisement is one that is deceptive.\(^{41}\) Likewise, if a claim is susceptible of two or more interpretations, one of which may be deceptive or untrue, it may be found deceptive.\(^{42}\)

For example, in *In re Thompson Medical Co.*, the FTC noted that since, more often than not, several reasonable interpretations of a given advertisement are possible, it is not necessary that the claim being challenged be the only interpretation, or even the most reasonable interpretation, of the advertisement.\(^{43}\) Consequently, the FTC determined that one reasonable interpretation of the product name “Aspercreme” was that the product contained aspirin. Hence, the advertiser’s failure to disclose the absence of aspirin in the product was found to be deceptive even though the advertisement itself was literally true. As a result, the FTC required the advertiser to cease using the brand name “Aspercreme” for any product that did not contain a significant amount of aspirin or misrepresenting by any other means that aspirin is an active ingredient of such a product.\(^{44}\)

The NAD reached a similar conclusion in *Cendant Car Rental Group*. In this dispute, the NAD noted that consumers could reasonably interpret the term “reservation” on the Budget Truck rental website to mean they were reserving a vehicle for a specific date and time and not simply reserving a “rate.”\(^{45}\) The NAD noted that Budget’s disclosure to the contrary (i.e., “vehicle is subject to availability at time of pickup”) at the bottom of a “Terms and Conditions” window that appeared three pages into a website was insufficient to eliminate deception. The NAD concluded that given how the offer to make a “reservation” appeared on the website, it would have been reasonable for consumers to presume the “reservation” was for the vehicle, not simply a rate. Therefore, the NAD recommended that Budget modify its online advertising.

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\(^{39}\) See, e.g., *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189 (2nd Cir. 1980).

\(^{40}\) See *Int'l Harvester*, 104 FTC at 1056 n.21. See also *Aspinal v. Philip Morris Cos.*, 813 N.E.2d 476, 487 (Mass. 2004); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Colgate-Palmolive Co*, 380 U.S. 374, 387 (1965); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681 (3rd Cir. 1982).

\(^{41}\) See, e.g., *Kraft, Inc.*, 970 F.2d at 319; *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2nd Cir. 1997); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996); *Castrol Inc.*, 987 F.2d at 941; *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681 (3rd Cir. 1982).

\(^{42}\) See, e.g., *Cliffdale Assocs., Inc.*, 103 FTC at 178; *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

\(^{43}\) 104 FTC 648 (1984).

\(^{44}\) See *In re Thompson Medical Co.*, Inc. v. FTC, 791 F.2d 189, 191-92 (D.C. Cir. 1986).

2. Claims Must Be Fair

All express and implied advertising claims must be fair. The FTC’s unfairness jurisdiction has been described as being (i) broader than its deception jurisdiction and (ii) designed to capture practices other than pure advertising. As the FTC makes clear in its Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (“the Unfairness Policy Statement”), this statute was intentionally framed in broad terms to allow the FTC wide latitude in identifying unfair trade practices.

The FTC’s Unfairness Policy Statement defines an unfair act or practice as one that: a) is likely to cause substantial injury; b) to consumers; c) which is not reasonably avoidable by consumers; and d) is not outweighed by countervailing benefits to consumers or competition. Acts and practices are generally deemed “unfair” when they prevent consumers from effectively deciding among competing products or services and impede the free exercise of consumer decision making. This free exercise of control can be impeded by withholding information needed to make an informed decision, using high pressure sales techniques, or applying undue influence.

In determining whether a particular claim is fair, it must be viewed in terms of the overall net impression that it conveys to the target audience. For example, the NAD in Papa John’s International noted that a claim may convey a different message to consumers depending on the context in which it appears. As a result, the phrase “Better Ingredients, Better Pizza” was found to be inappropriate when used in a television advertisement without limitation as to the specific ingredients compared and tested. However, the same phrase was held not to be misleading as it appeared on the pizza box because it was offered as a monadic, noncomparative claim.

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46 See, e.g., In re Int’l Harvester, 104 FTC at 1060; Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1367 (11th Cir. 1988); Am. Fin. Servs. Ass’n v. FTC, 767 F.2d 957, 971 (D.C.Cir. 1985).


48 See, e.g., Unfairness Policy Statement; In re Int’l Harvester Co., 104 FTC at 1070, 1093.

49 Id.

50 Id. See also Pearle, Inc. (Eyeglasses Promotion), Report #2856, NAD Case Reports (Feb. 1991) (the corporate sales strategy took advantage of the special features of the industry—complex pricing systems, confidential price lists, limited information of comparative pricing, consumers’ reliance on the professional advice of the opticians—so as to negate the benefits of the “free” promotion and proposals for a temporary halt in national advertising did not solve the accumulated problems since the proposals were not permanent commitments, they did not apply to store signs, franchisee promotions).


52 Papa John’s Int’l (Papa John’s Pizza), Report #3450, NAD Case Reports (Mar. 1998).
3. **All Claims And Reasonable Interpretations Of Claims Must Be Substantiated**

An important rule sometimes overlooked by advertisers unfamiliar with false advertising law is that all advertisers must be able to substantiate claims that a reasonable consumer may take away from an advertisement. The reasonableness requirement protects advertisers from being required to substantiate outlandish interpretations of their advertisements, particularly with respect to implied claims. If an advertisement is susceptible of two reasonable interpretations, however, and one of those interpretations is substantiated, but the other is not, the advertisement will be deemed deceptive.

It is also critical to note that proper substantiating evidence must exist at the time the claims are made. Advertisers who believe that they can develop their substantiation evidence if and when an advertisement is challenged can find themselves in a difficult situation, with very little to say when they are sued for injunctive relief, damages, or both.

The level of substantiation required depends on the circumstances of each case. Generally speaking, an advertiser must have a reasonable basis for its claims, and courts determine reasonableness by analyzing a variety of factors, including: a) the type of product; b) the type of claim; c) the consumer benefit of a truthful claim; d) the difficulty associated with developing substantiation for the claim; e) the consequences associated with a false statement and f) the amount of substantiation generally deemed acceptable by experts in the field.

For example, in *Bio Foods, Inc.*, a NAD challenge involving nutrition bars, the NAD determined that when substantiating claims regarding the purported performance capabilities of a given product – particularly in cases involving statements that allege physical and/or mental benefits – an advertiser should offer reliable and well-controlled clinical testing on that product that can be readily verified. Similarly, the FTC has instituted actions against operators of bogus business opportunity scams that marketed franchises selling herbal capsules that claimed to detoxify the effects of alcohol when inadequate substantiating evidence existed.

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54 FTC's Policy Statement on Advertising Substantiation, supra, note 53.

55 Id. at 691.


58 See Bogus Business Opportunity Sellers Settle FTC Charges, FTC News Notes, May 26, 1997, FTC File No. X950048, Civ. A. No. 95 8429 CIV.
4. **Extra Caution Should Be Employed With Claims Directed To Certain Groups Or Claims That Are Endorsed By Certain Individuals Or Entities**

Given the vulnerability of certain target audiences, specific rules govern advertisements regarding particular types of claims. For example, in October 1998, Congress passed the Child Online Privacy Protection Act (“COPPA”),\(^{59}\) which imposes civil and criminal penalties on advertisers who use the World Wide Web to communicate with a minor for commercial purposes about a matter that might be harmful to the minor. While certain defenses apply when the advertiser has made a good faith effort to restrict the access of minors to potentially harmful materials, the FTC has taken action against website operators who violated the Act.\(^{60}\) The FTC has also issued several guidelines regarding advertisements directed to children. These include guidelines regarding privacy policy, pay-per-call services as well as guidelines regarding 900-number services.\(^{61}\) Similarly, certain organizations, such as the Children’s Advertising Review Unit of the Council of Better Business Bureaus (“CARU”) have dedicated rules governing advertising to children and will closely monitor claims, particularly safety and health efficacy claims, directed to children.\(^{62}\)

Advertisements that purport to make health and/or safety claims are likewise subject to a host of rules and regulations.\(^{63}\) Advertisements directed to non-English speaking populations and the elderly are also the subject of government oversight.\(^{64}\)

Typically, the FTC will evaluate most conduct from the perspective of a reasonable consumer.\(^{65}\) However, where advertisements are specifically targeted at particular audiences, the FTC will consider the effect on reasonable members of the targeted group, with their own particular characteristics, vulnerabilities, and degree of sophistication (i.e., children, the elderly, etc.).

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\(^{60}\)See, e.g., United States v. Monarch Servs., (D. Md. 2001) (FTC settled with three Web site operators charged with collecting information from children under 13 without parental consent).


\(^{62}\)See, e.g., Self-Regulatory Guidelines for Children’s Advertising, http://www.caru.org/guidelines/guidelines.pdf. See also The Fountain of Youth Group, LLC (Edita’s Skinny.com/The Skinny Pill for Kids™), Report #4021, NAD Case Reports, (Feb. 2003) (NAD expressed serious reservations about safety and efficacy claims made in Internet advertising regarding the “Skinny Pill for Kids” due to the unique and vulnerable population to which the product was advertised).


\(^{64}\)See, supra, note 63. See also Friendly Ice Cream Corporation (Friendly’s Senior Meal Menu), Report #3415, NAD Case Reports (Oct. 1997); SEC v. Pittsford Capital Income Partners, L.L.C., Civil Action No. 06 Civ.6353 (MAT) (W.D.N.Y. July 14, 2006).

\(^{65}\)See, e.g., Am. Home Prods. Corp. v. FTC, 695 F.2d 681, 689 (3rd Cir. 1982).
cancer victims, low income consumers, etc.). The claims are evaluated within the totality of the advertisement, not in isolation.66

5. Be Aware of Specific Laws Governing Specialized Avenues Of Sale And/Or Advertisement

Due to the invasive nature of many forms of advertisements, such as telephone solicitations, pop up email advertisements, and blast faxes, Congress and the FTC have also enacted several specific statutes and rules directed to forms of advertising that are found to be annoying, if not downright repugnant, to many consumers. Examples of these statutes include:

- **Telemarketing Sales Rule** (effective March 31, 2003, as amended). This Rule established the National Do Not Call List that contains a list of consumers who do not wish to receive telemarketing calls. The registry is enforced against sellers and telemarketers engaged in commercial sales activities, but is not enforced against charitable organizations. The Rule requires certain oral disclosures by the solicitor and when promotions or prizes are involved, additional disclosures must be made before a customer is charged for the products or services purchased.67

- **CAN-SPAM Act** (effective January 1, 2004). The CAN-SPAM Act establishes requirements for those who send commercial emails for the primary purpose of promoting a commercial good or service, including content on a Web site. This Act prohibits false or misleading header lines or deceptive subject lines and requires that a commercial email be identified as an advertisement and contain the sender’s valid physical postal address.68

- **Deceptive Mail Prevention and Enforcement Act** (effective April 12, 2000). This Act is designed to help protect consumers from fraudulent sweepstakes promotions sent through the mail. The Act requires that sponsors of skill contests disclose certain key facts in a clear and conspicuous manner and prohibits certain claims from being made (i.e., claims that you are a winner unless you have actually won something, etc.) 69

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66Id. See also Kraft Foods (Kraft “Cheesiest Kids” Contest), Report #4404, NAD Case Reports (Oct. 2005) (Since the use of premiums, promotions and sweepstakes in advertising has the potential to enhance the appeal of a product to a child, special attention should be paid to the advertising of these marketing techniques to guard against exploiting children’s immaturity); KFC Corp., Report #4122, NAD Case Reports (Dec. 2003) (in making comparative claims to children, food advertisers need to be especially careful when highlighting certain nutritional ingredients so that children do not get the wrong impression about the overall dietary benefits of the products being compared).

67See generally Telemarketing and Consumer Fraud and Abuse Prevention, 15 U.S.C. § 6101; FTC Telemarketing Rule, 16 C.F.R. § 310 (fact of sales call must be clearly identified and no calls permitted after 9 p.m. or before 8 a.m.)


II. GENERAL GUIDELINES FOR EVALUATING ADVERTISEMENTS FOR DECEPTION

As with other types of disputes, the best defense to a claim of false advertising often is a good offense. Mounting an effective offense requires not only creating, but consistently implementing, sound procedures for reviewing potential advertisements for potential pitfalls and problems before they are disseminated to the public. The following guidelines are not meant to describe required “best practices,” nor do they contain an exhaustive list of “good practices” in this important area. Rather, they are offered as reminders of some of the issues that advertisers can easily overlook in their hurry to roll out that next big advertising campaign.

A. **Review From The Appropriate Perspective**

In reviewing an advertisement for compliance with applicable guidelines, rules and regulations, consider the advertisements from the perspective of a “reasonable consumer.” Although this “reasonable consumer” is often an average lay person, in situations where the advertisement is designed for a particular specialized audience, care should be given to making sure that a reasonable consumer within this specialized group will not consider the advertisement to be misleading or deceptive.70 For example, the FTC pays particular attention to advertisements aimed at children, which it evaluates from a child's point of view, not an adult's. Conversely, when a product is marketed and sold to a more sophisticated audience, advertisements are viewed from the perspective of that target consumer. For example, advertisements directed solely to travel agents that use lingo well-known in the travel industry might be acceptable in ads targeted to this market, but if identical claims are directed to consumers, additional disclosures may be necessary to avoid confusion.71

B. **Do Not Think Narrowly**

As noted above, since advertisements must be viewed in their entire context in order to determine the overall message they convey, advertisers should not think narrowly in reviewing their ads for potentially false, deceptive, or misleading claims. Cautious advertisers will screen not only the words and phrases used in an advertisement, but will also take into consideration pictures, graphics, and voice-overs. The size, content, and location of applicable qualifiers, disclosures, and disclaimers should always be taken into consideration in determining whether the overall message being conveyed by the advertisement is fair and non-deceptive.72

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70 See, e.g., CIMO, Inc. (Hotwire Airfare Pricing), Report #3830, NAD Case Reports (Nov. 2001) (while “opaque fares” may be a product category well understood by the travel industry, there was no evidence that the average consumer knows what opaque fares are or understands that the advertiser was comparing the prices for opaque fares with published fares).

71 Id. See also Am. Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568 (S.D.N.Y. 1987) (professional advertising claim directed to doctors regarding a product’s superior safety profile help to be within the tolerable range of commercial puffery given the sophistication of the target audience); Schering & Glatz, Inc. v. Sharp & Dohme, Inc., 146 F.2d 1019, 1022 (C.C.P.A. 1944) (“if the merchandise is purchased exclusively by a particular class of people, then that particular class of people constitutes the public . . . .”); see also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 730-31 (9th Cir. 1999). See generally http://www.ftc.gov/bcp/conline/pubs/buspubs/ad-faqs.htm.

72 See, e.g., Carlson, Inc. v. Red Roof Inns, Inc., Report #3837, NAD Case Reports (Oct. 2001). See also Cendant Car Rental Group (Budget Truck Reservations), Report #4169, NAD Case Reports (Apr. 2004) (mice-type sized disclosure stating: “[the reservation] reserves the rate you have been quoted but does not ensure the availability of the equipment requested but, if the equipment requested is not available, we will attempt to find a substitute” was not clear and conspicuous disclosure); U-Haul Int’l, Inc. (Vehicle Rental), Report #3117 NAD Case Reports (June 1994);
C. Beware Of Implied Claims

Advertisements should always be reviewed for implied claims, whether intentional or unintentional. It is often the case that the context and setting in which express claims are made end up determining whether implied claims can be reasonably inferred.\textsuperscript{73}

For example, in one NAD monitoring case, the NAD found that a television advertisement directed to children that used the term “triple thick” to describe McDonald’s thick shake beverages might imply that a McDonald’s shake was three times thicker than a “typical” shake and, therefore, concluded that the advertiser should have appropriate documentation to support this implied claim.\textsuperscript{74} Similarly, in another NAD monitoring case, the NAD concluded that two television commercials aired by KFC in 2003, each of which compared the fat in two Original Recipe® chicken breasts to the fat in a Burger King Whopper and included certain disclaimers about the basis of the comparison, nevertheless conveyed a false implied message about the healthiness of KFC’s fried chicken even though the commercials did not contain any express statements of health benefits.\textsuperscript{75} In support of this conclusion, the NAD reiterated the rule that an advertiser has an obligation to support any reasonable interpretation of its claims and, despite KFC’s use of superscripts and disclaimers, concluded that these devices were insufficient to provide material nutritional information or otherwise qualify the commercials’ health-related claims, especially with respect to the amount of sodium and cholesterol in KFC’s chicken.\textsuperscript{76}

Another area where care should be exercised is in offering opinions that may be interpreted as statements of fact. For example, in North Coastal Cable, L.P., a defendant made comments in advertising materials that minority investors had agreed in advance to sell their interests after the franchise was established.\textsuperscript{77} In reviewing this claim for possible deception, a district court determined that this comment implied a party’s treatment of minorities and was pertinent to evaluating the legitimacy of the minority investments.\textsuperscript{78} The court therefore concluded that defendant’s statement was a false claim because it could reasonably be interpreted as stating an actual fact and it could be argued that the statement contained provably false facts.\textsuperscript{79}

Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994) See also subsection II.D below.

\textsuperscript{73}Alamo Rent-A-Car, Inc., Report #3124, NAD Case Reports (July 1994) (humorous commercial regarding the lives of a couple, from the present to the year 2028, as they attempt to drive “all the miles in Alamo territory” did not imply a claim that Alamo was currently a worldwide car rental service due to the nature and context of the overall advertisement).

\textsuperscript{74}McDonald’s Corp. (McDonald Restaurants), Report #1530, NAD Case Reports (Apr. 1979).

\textsuperscript{75}KFC Corp. (Fried Chicken), Report # 4143, NAD Case Reports (Jan. 2004).

\textsuperscript{76}Id.

\textsuperscript{77}N. Coast Cable Ltd. P’ship v. Hanneman, 648 N.E.2d 875, 877 (Ohio Ct. App. 1994).

\textsuperscript{78}Id. at 878.

\textsuperscript{79}Id. at 880.
D. Sometimes More Is Better

Sometimes less is more, but when “less” results in a failure to include in an advertisement certain material limiting conditions or product efficacy parameters, this could result in a false advertising claim. 80 Thus, as a general rule, advertisers should at least consider whether a qualification, disclaimer, or disclosure is necessary to avoid having a claim be considered deceptive or misleading. Moreover, if this additional language is needed, advertisers should also be sure that the additional information is clearly and conspicuously disclosed (i.e., no “mice type”). 81

In determining whether a particular disclosure is clear and conspicuous, the NAD has considered a variety of factors, including: a) the size of the font; b) the duration that the super appears on a screen in an internet or television advertisement or the location of the disclosure in a print advertisement; c) the extent to which a disclosure contrasts with the background; and d) surrounding visuals and/or sounds that might distract a viewer’s attention away from the super. 82

E. Know The Applicable Rules And Regulations

As noted above, there are special statutory and regulatory schemes that apply to advertising particular types of products and those that apply to advertising directed to particular audiences. Know which rules apply to your business or your client’s business.

Special rules also apply to certain modes of communication. For example, with respect to television advertisements, the three major networks have clearance procedures that should be reviewed early and often. For example, advertising agencies preparing commercial messages for national broadcast on NBC must consult the Advertising Standards Department at NBC in advance of production. 83 For commercials intended for local broadcast, advertising agencies should consult the local Broadcast Standards representative before production.


81 See, e.g., Carlson, Inc. v. Red Roof Inns, Inc., Report #3837, NAD Case Reports (Oct. 2001); Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994) (use of type face larger than that usually found in supers and located in lower third of screen was sufficiently prominent to withstand competitor’s challenge that the comparative advertisement did not adequately disclose the target of the comparison in connection with one advertisement, but in another ad where the disclosure was made at a time when it conflicted with other on-screen reading material, the disclosure was found not to be sufficient); QVC (Shopping Spree Sweepstakes), Report #4189, NAD Case Reports (May 2004) (“mice type” disclosure of one year limit term at the bottom of advertisement, buried in other text and difficult to read, was not sufficient to disclose material information to participants).

82 See, e.g., Priceline.com Inc., Report #4073CIII, NAD Case Reports (May 2006) (size of font of disclosure was acceptable, but visual distracters and use of white disclosure on white background led NAD to believe that disclosure needed to be modified).

There are also very specific rules and statutes that apply to telemarketing, marketing by facsimile, and mail promotions. Failure to abide by these results can result in substantial fines and penalties.

F. The Devil Is In the Details

While there is no guarantee that any advertisement or promotional piece is “bullet proof,” there are at least some general guidelines that many advertisers follow in order to avoid, or successfully defend against, false advertising claims. These include, but are not limited to, the following:

- Carefully review the entire advertisement – and consider the context of its presentation to the consumer – to identify all explicit claims and implied claims.
- For any claim relating to a product’s performance, effectiveness, safety, price or features, be sure that you have well-documented substantiation evidence before the advertisement is run.
- Be sure that you are relying on reliable, competent evidence that directly supports the claims being made.
- Scientific tests, studies, or research should be performed by individuals with expertise in their field and conducted in an objective manner.
- Procedures followed should be according to industry standards or, if not applicable, according to logical methodologies with adequate controls in place to reduce/eliminate errors and skewed results.
- Results upon which the advertisement is based should be capable of replication by others, rather than a one-time, best-case scenario.
- Visuals used in television commercials must track the results of the substantiation testing.

84 See generally notes 67-69, supra.


86 See, e.g., Alamo Rent-A-Car, Inc., Report #3030, NAD Case Reports (July 1993) (when viewed in overall context, substantiated claim in 60-second version of commercial became unsubstantiated in 30-second version because of the absence of appropriate qualifying language contained in the longer commercial); Procter & Gamble Company (Pringles Potato Crisps), Report #2977, NAD Case Reports (Aug. 1992) (depiction of Pringles chip breakage in television advertisement did not accurately reflect the actual breakage rate); Hertz Corp. (Automobile Rental), Report #2759, NAD Case Reports (Jan. 1990) (commercial claiming that “[i]n every survey, Hertz came out on top” based on an independent opinion survey of users with rental experience of at least one leading car rental company represented a well-established technique in market research and was free from bias); Pom Wonderful, LLC (POM Wonderful® Pomegranate Juice), Report #4468, NAD Case Reports (Apr. 2006) (claims made by an advertiser regarding an association between the consumption of pomegranate juice and a reduced risk of certain cardiovascular-related illnesses, stroke, cancer and other ailments should mirror the precision and specificity of the data used to substantiate the claim and NAD was concerned regarding the sufficiency of the research proffered by the advertiser to substantiate these claims).
Surveys should be carefully crafted to include control questions and should avoid biases that might impact the reliability of the survey results.

Avoid using anecdotal evidence, sales or promotional materials from manufacturers, or newspapers or other general circulation articles, especially dated ones, to substantiate your claims.

Substantiation evidence generally should be kept for at least three years after the last date on which the advertisement was run.

Conspicuously display any disclaimers or limitations.

G. Stay Current And Be Vigilant

Stay current, as to both substance and procedure. Product performance claims, particularly comparative claims involving technological issues, are short-lived due to rapid changes in certain industries. As a result, ads need to be based on current, reliable evidence or appropriate qualifiers must be added to avoid deception. This rule applies with particular force to comparative claims made in the technology field. In this area, advertisers must be vigilant, making sure that they monitor changes in the industry and modify and/or discontinue claims that become obsolete. The same applies to comparative price claims in a market known for rapid price changes.

In addition, the law in certain areas, particularly advertisements to children and advertising involving distilled spirits, are the subject of close scrutiny by the FTC and certain state agencies and industry organizations. Be aware of these special rules and guidelines, stay attuned to changes in the law and potential changes in the law, and be ahead of the curve.

H. Know Your Partners And Your Boundaries

Advertising agencies can be held liable under the Lanham Act for formulating and implementing advertising campaigns that are found to be false. Most relationships with advertising agencies are governed by written contracts, and most of these agreements address false advertising-related issues, such as allocation of responsibility for claim substantiation and the resolution of disputes regarding the allocation of responsibility. Be sure to read and understand all applicable agreements before embarking on a substantial advertising campaign.


88 See, e.g., CSC Holdings, Inc. (Optimum Online Internet Serv.), Report #4476, NAD Case Reports (Apr. 2006).


If advertisements involve joint sponsorships or other relationships, be certain that duties and responsibilities are delegated clearly and in writing in order to avoid litigation and help ensure success when court involvement cannot be avoided. For example, in Scotch Whiskey Association v. Barton Distilling Co.,91 the defendant supplied labels to a distributor that later misapplied them to certain beverages. Although the defendant took steps to sever relations with the distributor when it learned of these facts, the court still issued an injunction, finding that the defendant had not exercised its right to inspect and control the distributor’s product even when events were brought to its attention that should have triggered a duty of inquiry. Similarly, a booking agent for musical groups was held to be a proper party in a Section 43(a) case when the agent caused the booking of a band called “Herman’s Hermits” knowing that the lead singer, Herman, was no longer with the band.92

I. Withstand The Temptation To Exercise Too Much Creative License

Problems often arise when advertisers and/or their outside consultants get overly creative in the production process and lose sight of what the substantiation evidence can support. Common sources of headaches include: dramatizations; modifications of scripts; undisclosed mock-ups; use of inappropriate props; editing; failure to include appropriate disclosures of information regarding alternative options; and failure to qualify scope of certain claims.

For example, the NAD once investigated an Arby’s television commercial that depicted a roast beef sandwich in a manner that might create the impression that the sandwich contained more meat than would ordinarily be served in an Arby’s restaurant. Although the advertiser assured the NAD that only Arby’s specification roast beef was used and the portions depicted in the commercials were always on the lower end of the weights commonly used in Arby’s restaurants, the NAD found it significant that the sandwiches shown in the advertisement, in order to avoid crushing, were not, as was Arby’s customary practice, wrapped before filming, and therefore looked bigger than what customers typically received. Since the NAD felt that the filming techniques used might lead to some consumer confusion or disappointment about the quantity of meat used in the sandwiches, the NAD requested that the advertiser take steps to reflect more accurately the appearance of the sandwich as it was served to customers.93

Likewise, in one of the most memorable cases involving this issue, Volvo North America Corporation and its New York advertising agency were charged with false advertising by the FTC and the State of Texas in connection with a “Bear Foot” ad campaign for Volvo cars.94 The

91489 F.2d 809, 813 (7th Cir. 1973).


93Arby’s Int’l (Arby’s Roast Beef Sandwich Restaurants), Report #1469, NAD Case Reports (Dec. 1978). Cf. Burger King Corp. (Chicken Club Sandwich), Report #3686, NAD Case Reports (Sept. 2000) (advertiser took proper precautions to make certain that its food photography did not create “over promise” or misrepresent the product by ensuring that same size and quality of product was used in demonstration and product was prepared in accordance with actual preparation procedures used by the company).

ads in question depicted a monster truck riding over a row of cars and crushing all but a Volvo 240 station wagon. As it turned out, some of the Volvos used in the demonstration had been structurally reinforced, while the supports in some of the other cars were cut. The FTC and State of Texas both asserted that the ads falsely depicted the comparative performance of the cars. Volvo promptly settled both sets of claims.

J. Encourage Clients To Seek The Advice Of Counsel Early And Often

Costly mistakes can be avoided by involving counsel early in an advertising campaign, preferably at the conception stage. Sometimes, only minor changes are necessary to comply with applicable rules. Changes to an advertising campaign usually become more expensive as the process progresses, however, and advertisers who wait until the final stage to consult their counsel will pay the highest price. Lawyers who get involved early on in the creative process can help with:

• issue spotting with respect to potential legal or regulatory requirements;
• creation of internal review procedures and checklists;
• educating key personnel regarding the need to make sure that the left hand is coordinating with the right hand; and
• offering a reality check on certain claims and whether they may draw a legal response from a competitor or consumer.

To assist counsel in providing appropriate advice regarding certain rules and regulations, the FTC has issued guidelines in certain areas that contain detailed information regarding steps that can and should be taken to comply with applicable laws. For example, one guideline is entitled “Drafting a COPPA-Compliant Privacy Policy” and provides detailed information about both content and placement of information required by the Children’s Online Privacy Protection Act. Similarly, the FTC has issued guidelines regarding print disclosures and online disclosures.

Reliance upon the advice of counsel or other advisers does not, however, ensure that an advertisement will be free from challenge. Indeed, the NAD has expressly stated that reliance upon the advice of counsel does not relieve an advertiser of the responsibility to disclose material information or substantiate its advertising claims.


III. PUFFERY

Puffery is generally defined as subjective statements and statements of opinion that are not easily quantifiable or subject to verification or that a reasonable consumer would not believe to be supported by tests or surveys.98 Claims that qualify as puffery do not require substantiation, and courts will not grant relief in connection with these claims since it is unlikely that they will mislead the public or damage a plaintiff.99

Determining whether a particular claim is puffery, however, is not always an easy task.100 Subjective claims about products, which cannot be proven either true or false, are not actionable; they are mere "puffing."101 "Puffing is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a)."102 Often, decisions about whether a claim is puffery or a misrepresentation of a verifiable fact depends upon its impact on the target audience.103

For example, in one print advertisement for the Arby's Adventure Meal® that appeared in an issue of National Geographic Kids® magazine, the advertisement contained a promotional heading that stated: “Trusted by moms and loved by kids!” Although Arby’s claimed that this heading was nothing but puffery, the NAD disagreed, finding that in the context of this particular advertisement, the “trusted by moms” claim was a specific representation that was “certainly capable of being measured and substantiated by an appropriate survey.”104 In reaching this conclusion, the NAD emphasized that since the advertisement was aimed at children, many of whom viewed their mothers as the “ultimate authority figures,” particularly when it comes to determining what foods to eat, the statement “trusted by moms” was, in essence, conveying the


100Cf. Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513 (E.D. Tex. 2004) claim that the plaintiff had made no investment into the parties' shared network and that the plaintiff gave nothing back found to be puffery) with Potamkin Cadillac Corp. v. Towne Cadillac Corp., 592 F. Supp. 801, 802-03 (S.D.N.Y. 1984) (claim by car dealer that it was the “number one seller of Cadillacs” found not to be puffery since it suggested that the dealer was the largest volume seller of Cadillacs); Valeo Intellectual Prop., Inc. v. Data Depth Corp., 368 F. Supp. 2d 1121, 1130 (W.D. Wash. 2005).


102See e.g. CollegeNet, Inc. v. Embark.Com, Inc., 230 F. Supp. 2d 1167 (D.Or. 2001) (citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997)); Conagra Foods, Inc. (Hunt’s Ketchup), Report #4194, NAD Case Reports (June 2004) (“Generally speaking, [puffery involves] claims for which reasonable consumers will not expect substantiation. Conversely, where an objective representation is made (i.e., termed in fact rather than opinion) regarding the performance or other tangible attributes of a product that is sufficiently specific and material enough to create expectations in consumers, then substantiation for the claim is required.”)

103See Conagra Foods, Inc. (Hunt’s Ketchup), Report #4194, NAD Case Reports (June 2004) (“Whether a specific claim falls within puffery’s protective reach is largely dependent on what is communicated, i.e., what, if any, consumer expectations are created.”) Accord RealTIME Media (Online Promotion), Report #3755, NAD Case Reports (May 2001).

104Arby’s, LLC (Arby’s® Adventure Meal®), Report #4268, NAD Case Reports (Dec. 2004).
endorsement by mothers of the Adventure Meals® and should be supported by appropriate substantiation.  

While there is no bright line test for determining whether a claim is puffery or one that requires substantiation, several factors are often considered. These include: a) whether the representations concern general matters that cannot be proven or disproven; b) whether the statements are distinguishable from representations of specific characteristics that are measurable by research or test; and c) whether the wording uses expressions of opinion that will be discounted by the buyer. No one factor is determinative.

Drawing the line can be difficult, especially when claims that would otherwise be deemed puffery are tied to a particular product’s performance or qualities. For example, the terms “better” or “best” are not always deemed puffing, even if it intended as just a general superiority claim. Context must also be considered. For example, a claim of “Better Ingredients, Better Pizza,” standing alone, has been held to be non-actionable puffery. However, when the same slogan was used in the context of comparative advertisements that compared attributes of the advertiser’s sauce and dough to that of its competitor, the same claim was held to be misleading because the slogan was expanded and gave consumers fact-specific reasons why the advertiser’s ingredients were allegedly “better.” Similarly, a claim that Maxwell House’s coffee is “America’s most loved coffee” could, in some circumstances, be deemed an objectively verifiable statement requiring substantiation. However, when this claim was made in the context of nostalgic advertisements and not in the context of the current market position of the coffee, it was deemed to be puffery.

Given the vacillating nature of decisions in this area, a good, simple rule of thumb is: If you are uncertain whether a claim may be deemed puffery, substantiate it.

105 Id. at p. 8.
106 Conagra, supra, note 102; RealTIME Media, supra, note 103.
107 See, e.g., Pizza Hut, Inc. v. Papa John’s Int’l, Inc., 227 F.3d 489 (5th Cir. 2000) (concluding that the slogan “Better Ingredients. Better Pizza”, standing alone, was not misleading, but when viewed in the context of the overall comparative advertisements, did convey a comparative message that Papa John’s could not substantiate); Saint-Gobian Abrasives, Inc. (Sandpaper, Sanding Sponge Blocks & Pads), Report #4113, NAD Case Reports (Oct. 2003) (“Best” claims, appearing without specific factual assertions of superiority were puffery); iOwn, Inc. (Online Mortgage Servs.), Report #3604, NAD Case Reports (Dec. 1999) (claim regarding “the best loans Online” deemed to be puffery); Conagra Foods, Inc. (Hunt’s Ketchup), Report #4194, NAD Case Reports (June 2004) (claim that “better tomatoes make better ketchup,” made in monadic advertisement without reference to any competitors or specific product attributes, found to constitute puffery). But see Gen. Mills, Inc. (Progresso Soup), Report #4165, NAD Case Reports (Mar. 2004) (“Discover the better taste of Progresso Soups” in a monadic advertisement found to be an express objective superior attribute claim that required substantiation because it expressly referred to taste).
108 Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994) (a “best tasting” claim can be a provable or disprovable substantive claim or subjective hyperbole relating to a sensory stimulus incapable of verification depending upon the overall context of the advertisement).
110 Id.
111 Kraft Foods, Inc. (Maxwell House® Coffee), Report #3201, NAD Case Reports (June 1995).
IV. ESTABLISHMENT AND REASONABLE BASIS CLAIMS

Some of the most common claims made by advertisers are establishment claims, purportedly supported by tests or surveys – someone or something has “established” the claim to be true. For example: “98% of our Guests Say They’d Come Back” and “Come See Why 98% of Our Guests Come Back.”

Reasonable basis claims are a variation of establishment claims. These claims do not purport to have a specified level of objective support, but are nevertheless claims that a reasonable consumer would understand to be supported by tests or surveys. “The crispiest chip in the South” is an example of a reasonable basis claim.

Under the FTC’s Policy Statement on Advertising Substantiation, the level of substantiation generally required for establishment claims (express or implied) is at least the level of substantiation advertised. For example, if an advertiser claims that its product is preferred over other brands by a particular percentage or margin, this claim must be substantiated with reliable and well-controlled surveys or tests on the product or service. In the absence of a representation that an advertiser possesses a certain objectively verifiable level of proof to support a claim, advertisers must still possess a reasonable basis for all objective product or service claims. An advertiser should have reasonable support for these claims and the quantifiable claims should closely reflect the test results upon which they are based.

Once again, there are no hard and fast rules about what type of substantiation is required to support a reasonable basis claim, but the factors generally taken into consideration are the type of product involved; the type of claim at issue; the benefits of a truthful claim; the consequences of a false claim; ease of developing substantiation for the claim; and the amount of substantiation that experts in the field agree is reasonable.

It is sometimes difficult for advertisers to determine when they have “enough” substantiation evidence to support a reasonable basis claim, or whether their evidence is the

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113Golden Flake Snack Foods, Inc. (Golden Flake Potato Chips), Report #3114, NAD Case Reports (May 1994) (claim that potato chip was “the crispiest chip in the South” was an objective claim regarding a tangible characteristic of its product that was capable of being verified and required supporting evidence to substantiate the claim).


115Id. See also In re Bristol-Myers Co., 102 FTC 21 (1983) (although absolute precision is not required, an advertiser must possess a reasonable basis for its claims).


right type of evidence to support that claim. As a general rule of thumb, advertisers should not overstate the benefit of the product or service in the ad, especially if the claim being made is not fully supported by product testing or survey results. Moreover, advertisers cannot depend upon anecdotal evidence, newspaper articles, improperly conducted industry association surveys or findings, a few letters from satisfied customers, the absence of consumer complaints or the existence of a money back guaranty as the basis for claiming that a claim is properly substantiated.\textsuperscript{119}

V. COMPARATIVE CLAIMS

A comparative claim is any claim where an advertiser compares its products or services to those of its competitors.\textsuperscript{120} Comparative claims may relate to a competitor’s individual product or service or may relate to the broader category of the advertiser’s competitors as a whole.\textsuperscript{121} A claim does not have to expressly compare product A to product B by name to be a comparative claim. For example, claims by an advertiser to have the “lowest price” or “fastest service” or “better” product can be a comparative claim in the appropriate circumstances.\textsuperscript{122}

An advertiser is entitled to select the target of its comparison provided that the target is clearly identified and, if appropriate, differences between the products that may affect a consumer’s purchasing decision are disclosed.\textsuperscript{123} This is particularly true when the advertiser has elected to compare product A to product B, but there is a more closely resembling product in the competitor’s line (product C), and the closer item is not only a prominent part of the competitor’s line of products, but is preferred or better than the advertiser’s product.\textsuperscript{124} The

\textsuperscript{119}See Castrol, Inc. v. Quaker State Corp., 977 F.2d 57 (2d Cir. 1992); Procter & Gamble Co. v. Chesebrough-Pond's Inc., 747 F.2d 114 (2d Cir. 1984). See also Pom Wonderful, LLC (POM Wonderful® Pomegranate Juice), Report #4468, NAD Case Reports (Apr. 2006) (studies and articles submitted to support claims regarding health benefits of pomegranate juice were based on small sample sizes, specific populations, and emerging scientific research on antioxidants and disease in health-related claims in food advertising were not sufficient to substantiate several specific health benefit claims); Winn-Dixie Stores, Inc., Report #3324, NAD Case Reports (Aug. 1996) (anecdotal evidence offered to support claim that suggested retail price was a representative price for comparison was not sufficient to provide reasonable basis for price comparison made by advertiser).


\textsuperscript{121}Kraft General Foods, Inc. (Kool-Aid Bursts), Report #3045, NAD Case Reports (Aug. 1993) (claim that “[n]one of these other bottles will do” imparted a comparative superiority claim vis-à-vis the children’s crink category as a whole).

\textsuperscript{122}See, e.g., Pizza Hut, Inc. v. Papa John’s Int'l, Inc., 227 F.3d 489 (5th Cir. 2000); U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-41 (9th Cir. 1986); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997) (Court reviewed the differences between Bonsai, Marathon IIe, and Shortstop in the turfgrass characteristics emphasized by defendants, including growth, density, and maintenance costs in comparative advertisement claims); Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1334-35 (8th Cir. 1997) (applying rule only in context of comparative advertising where plaintiff's product was specifically targeted).

\textsuperscript{123}See, e.g., Priceline.com Inc., Report #4073, NAD Case Reports (Aug. 2003) (comparison between different types of hotel services offered by Internet booking agencies challenged); Hardee’s Food Sys., Inc. (Hardee’s Thickburgers), Report # 4090, NAD Case Reports (Aug. 2003) (comparative burger advertisement stating that “[a] guy shouldn’t have to eat a pound of bread to get a half pound of meat” and depicting a customer stacking four competing burgers in order to get a half-pound of meat challenged by Burger King since commercial did not specify the competing burgers being compared).

\textsuperscript{124}Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report # 3087, NAD Case Reports (Jan. 1994).
obligation to point out material differences in products that affect purchasing decisions also applies in comparative price advertising.125

Since competitors heavily scrutinize comparative advertising, the FTC encourages truthful references to competitors and competing products. Clarity is critical and, where appropriate, disclosures may be needed to avoid deception.126 Moreover, if the information that forms the reasonable basis for a comparative superiority claim is based on identified product attributes that are subject to change from market to market, advertisers must monitor this information regularly to ensure that it remains current, relevant, and continues to reflect the inherent variations.127

A comparative claim may be express or implied. For example, an express comparative claim would be a claim that product X is “faster,” “better” or “quicker” than product Y.128 An implied comparative claim, in contrast, is more subtle and may often require a review of the overall net impression created by the advertisement as a whole.129 Where comparative advertising contains implied claims that are not clear enough to permit a determination whether the claim may be false or misleading, the FTC and courts may require extrinsic evidence of consumer confusion.130

All comparative claims, including intended and unintended claims that a reasonable consumer might take away for the ad, must be substantiated. The general rule is that if 20% or more of consumers who view the ad take away a claim from the ad, it must be substantiated.131

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125 See Priceline.com, supra, note 123 (advertisements that compared fundamentally different types of travel related services offered by Priceline and Expedia required disclosure of the material differences between the services offered by each in order to make claim of 40% savings not misleading).

126 See, e.g., Statement of Policy Regarding Comparative Advertising, 16 C.F.R. § 14.15; Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994) (ad comparing Hardee’s fried chicken to KFC’s fried chicken required clear and prominent disclosure of the actual products being compared).


128 See generally U-Haul Int’l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-41 (9th Cir. 1986); Res. Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134 (2d Cir. 1991). See also Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994) (claim that advertiser’s chicken is “tastier” than the competition’s chicken).

129 See, e.g., In re Stouffer Foods Corp., 118 FTC 746, 799 (1994); Serta, Inc. (FireBlocker Mattress), Report #4392, NAD Case Reports (Sept. 2005) (claim that “Your current mattress will go up in flames” found to be a misleading comparative claim since it did not clearly specify, as a basis for the comparison, that this was true only with respect to a mattress with no open-flame resistance protection); GlaxoSmithKline Consumer Healthcare (Poligrip® Comfort Seal™ Strips Denture Adhesive), Report #4409, NAD Case Reports (Nov. 2005) (claim in advertisement that “someone finally got it right, a denture adhesive with no messy ooze….” implied that advertiser was the first to offer a product with no messy ooze when in fact the challenger had been offering a safe denture adhesive that did not ooze since 1978).

130 See, e.g., Scotts Co. v. United Indus. Corp., 315 F.3d 264 (4th Cir. 2002) (maker of a crabgrass repellent that depicted a mature crabgrass plant on the package of a product that was effective in treating crabgrass pre-germination or up to four weeks post-germination found to convey a literally false message, but since the challenger failed to produce extrinsic evidence that the ad caused consumer confusion, court reversed a grant of an injunction); Stouffer Foods Corp., 118 FTC at 798-99.

Courts typically rely on surveys to determine what message consumers take away from advertisements in order to determine whether an advertisement contains claims that must be substantiated. See discussion in Section VIII below.

A prime example of a comparative claim that drew strong objections from a competitor is the now famous Papa John’s pizza campaign involving the slogan “Better Ingredients. Better Pizza.” This slogan became the focus of a series of television commercials that not only used the slogan, but graphically depicted what Papa John’s conveyed to the public as material differences between the ingredients used in the two sets of pizza products. After several rounds of court and NAD battles, a Texas federal judge determined that the slogan, standing alone, was not misleading, but when viewed in the context of the overall comparative advertisements, did convey a comparative message that Papa John’s could not substantiate. Ironically, however, the court denied judgment as a matter of law, because even though the slogan was misleading in context, there was no evidence that the misleading statement was material to consumers.

Other examples of comparative food claims that have drawn criticism from competitors include Kentucky Fried Chicken’s claims regarding the relative nutritional value and healthiness of its fried chicken as compared to a Burger King Whopper; Hardee’s claims that its fried chicken was “tastier” than KFC’s Original Recipe® chicken; and Pringles’ claim that chips in a bag “don’t stay fresh” and “get your hands full of grease.”

Adhering to a few “good practices” may assist advertisers in avoiding challenges that their comparative advertisements are misleading and/or deceptive. These include, but are not limited to:

and 31 percent of consumers took away the message that Listerine can replace dental floss, a substantial percentage of consumers took away that message).

132 Johnson & Johnson Merck Consumer Pharms. Co. v. SmithKline Beecham Corp., 960 F.2d 294, 298 (2d Cir. 1992); GlaxoSmithKline Consumer Healthcare (Poligrip® Comfort Seal™ Strips Denture Adhesive), Report #4409, NAD Case Reports (Nov. 2005) (consumer perception survey used to attempt to prove what relevant consumers understood the key takeaway message was from a commercial, but NAD found that survey failed to focus on the key message challenged (i.e., what a consumer understood the word “finally” meant in relation to a claim that the advertiser’s product “finally got it right” with respect to eliminating ooze)).

133 See Pizza Hut, Inc. v. Papa John’s Int’l, Inc., 227 F.3d 489 (5th Cir. 2000).

134 See KFC Corp., C-4118 (Sept. 17, 2004) (consent order entered in connection with these comparative claims); In re Kraft, Inc., 114 FTC 40 (1991), aff’d, 970 F.2d 311 (7th Cir. 1992) (holding that ads for Kraft Singles cheese slices were deceptive because the ads implied that the product contained more calcium than imitation cheese slices when this claim could not be substantiated).

135 Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994).

• Substantiation should match the claim being made so that the ad does not, intentionally or unintentionally, convey a broader message than the evidentiary support for it.\textsuperscript{137}

• Comparative claims should generally compare like products and make "apples to apples" comparisons to avoid claims that the ads are misleading. Although comparisons between dissimilar products are not prohibited, they should only be made if the basis for the comparison is clearly and conspicuously disclosed.\textsuperscript{138}

• The sophistication of the target audience should always be considered in determining whether comparative claims are or could be misleading.\textsuperscript{139}

• Since comparative claims are particularly offensive to competitors, they should be extremely well-documented and substantiated with current data.\textsuperscript{140}

• Demonstrations regarding the everyday performance of competitive products should fairly and accurately reflect real use conditions.\textsuperscript{141}

• In areas where technology changes rapidly, comparative claims should not be run for extensive periods of time unless the advertiser is carefully watching the competition to avoid claims that the data is not accurate.\textsuperscript{142}

\textsuperscript{137}Id. See also Unilever United States, Inc. (Suave In-Shower Body Lotion), Report #4466, NAD Case Reports (Mar. 2006); United Online, Inc. (NetZero “HiSpeed 3G” Accelerated Dial-Up Internet Service), Report #4413, NAD Case Reports (Nov. 2005).

\textsuperscript{138}See, e.g., Coca-Cola Co. (Powerade Option Low Calorie Sports Drink), Report #4438, NAD Case Reports, (Jan. 2006) (ad campaign making comparative claims about the calories and energy benefits of the two sports drinks found to be misleading because the advertiser did not compare “apples to apples” products and failed to clearly disclose the material differences between the two types of drinks (i.e., a low calorie sports drink without added carbohydrates for energy and a higher calorie sports drink that had the added carbohydrates for extra energy) and the limitations of the comparison); Hardee’s Food Sys. Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case Reports (Jan. 1994) (advertiser was entitled to select the fried chicken product that was the target of its comparison so long as the target was clearly identified in the advertisement); Applebee’s Neighborhood Grill & Bar (Applebee’s House Sirloin), Report #3621, NAD Case Reports (Feb. 2000).

\textsuperscript{139}Applebee’s Neighborhood Grill & Bar (Applebee’s House Sirloin), Report #3621, NAD Case Reports (Feb. 2000) (although disclaimer clearly identified a well-established category for those in the restaurant business to determine the basis for the comparison, the advertising at issue was targeted to the general public that was not likely to be familiar with sales tracking data, market categories or different restaurant niches and was therefore insufficient to clearly disclose the object of the comparison (i.e., excluding steakhouses)).

\textsuperscript{140}Id. ("Number 1" selling claims must be supported by current sales data and this information must be updated regularly to ensure that the claim continues to accurately reflect market sales figures). Accord, Thorn Apple Valley (Thorn Apple Valley Bun-Sized Skinless Smoked Sausage), Report #3425, NAD Case Reports (Nov. 1997) (although sales data provided a reasonable basis for America’s #1 selling smoke sausage claims in 1995, market conditions may have significantly changed by 1997, thereby rendering the substantiation for the claim questionable).

\textsuperscript{141}See, e.g., Procter & Gamble Co. (Bounty Paper Towels), Report #4361, NAD Case Reports (Jan. 2006) (comparative demonstration of side-by-side performance of two paper towels found to be misleading since conditions under which results were achieved were more reflective of laboratory conditions that normal home use conditions).

\textsuperscript{142}See CSC Holdings, Inc. (Optimum Online Internet Service), Report #4476, NAD Case Reports, (Apr. 2006) (ad claiming that Cabelevision Optimum Online service was faster and cheaper than Verizon’s DSL found to be partially
• To avoid claims that comparative advertisements are misleading, it is often a good idea to include data somewhere in an ad that indicates the date on which the claim was substantiated.  

• Do not rely on a competitor’s published data when making comparative claims. Always do your own testing to confirm how the competition performs under your testing methodology.

VI. SUPERIORITY AND PARITY CLAIMS

Superiority claims are those suggesting that one product is better than others or “the best” in some way -- i.e., our company has “the best chicken sandwich in America” or “American’s number one sirloin steak.” Parity claims, in contrast, are those suggesting that the advertiser’s products are a member of a particular class or category of recognized products. For example, a parity claim would include a claim such as “taste the best -- at a sensible price.”

Unqualified superiority claims (both overall superiority and superiority with respect to specific attributes or features) must generally be supported by testing as against a significant portion of the market. Qualified superiority claims should generally be supported by well-documented and controlled head-to-head testing or surveys that support the claimed benefit. With parity claims, testing should generally support at least equal performance with competitors under well-documented and controlled testing or survey conditions.

misleading since claims about fees accompanying DSL service falsely implied all DSL packages included such fees when, in fact, some did not).

143For example, in Millennium Import Co. v. Sidney Frank Importing Co., No. CIV. 03-5141 JRT/FLN, 2004 WL 1447915 (D.Minn. June 11, 2004), the Court denied preliminary injunctive relief against Millennium Import for claiming that Grey Goose was “Rated The # 1 Vodka In The World” based on a 1998 Beverage Testing Institute of Chicago blind taste test.

144KFC Corp. (Original Recipe® Chicken Sandwich), Report #3715, NAD Case Reports (Dec. 2000); Applebee's Neighborhood Grill & Bar (Applebee’s House Sirloin), Report # 3621, NAD Case Reports (Feb. 2000).

145Brigham’s, Inc. (Brigham’s Ice Cream), Report #3007, NAD Case Reports (Mar. 1993) (viewed in the overall context of the advertisement, a statement “taste the best – at a sensible price” was found to be an attempt by the advertiser to present its product as a member of a category of “best” or “premium” ice creams).

146See Univ. Med. Prods., Inc. (AcneFree Clear Skin Treatments), Report #4432, NAD Case Reports (Jan. 2006); Dental Whitening Corp. of Am. (Forever White™ Plus 15-Minute Home Whitening Kit), Report #4023, NAD Case Reports (Mar. 2003); Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 63 (2d Cir. 1992).


148See Andrew Jergens Co. (Bioré Blemish Fighting Cleanser), Report #4114, NAD Case Reports (Nov. 2003). (when performance parity claims are implicated, the NAD requires advertisers to conduct direct head-to-head testing
As with other types of claims, a few general guidelines should be followed in making superiority and parity claims:

- Substantiation should match the claim being made so that the ad does not, intentionally or unintentionally, convey a broader message than the evidentiary support for it.

- In making a broad superiority claim believed to be puffery, assume that a competitor may view the claim differently and be prepared to substantiate the claim, if challenged.

- When making broad parity or superiority claims, be sure that you have tested against the entire market or a substantial portion of the market (i.e., 85% of the products with a greater than 2% market share), or clearly disclose the basis for your claim.

VII. TESTING AND SCIENTIFIC EVIDENCE

If an advertisement expressly or impliedly claims to be supported by a specific level of proof, an advertiser must possess the level of substantiation claimed. Even without such a claim, advertisers must still possess a reasonable basis for all objective product claims. As a general rule, unqualified superiority claims require testing against 85% of product category/brand of a greater than 2% market share. Moreover, the number of sales at the maximum of all or a significant portion of competitive products on the market); Discus Dental, Inc. (Zoom! Chairside Tooth Whitening Sys.), Report #4009, NAD Case Reports (Jan. 2003) (in the absence of head-to-head testing, the advertiser may utilize existing studies on competitors’ testing on their own products and compare the results against the advertiser’s own testing of its product, as support for its claims); Id. See also Britesmile, Inc. (BriteSmile Tooth Whitening System), Report #4032, NAD Case Reports (Apr. 2003).

149 See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997) (holding that specific and measurable claims of product superiority are more than non-actionable puffery). But see BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1091 (7th Cir. 1994) (advertiser’s claim that its product “met specifications” was literally false when not all appropriate tests were run, since “[s]tatements in the form ‘tests show x’ are literally false if tests do not establish ‘x.’”). See also Niles Audio Corp. (Niles’ Surge Suppression Products), Report #3650, NAD Case Reports (May 2000) (holding that “[a]n advertiser has an obligation to substantiate all reasonable interpretations of its claims”); Lucy Peters Int’l, Ltd. (Electrolysis Servs., Integrated System® of Electrolysis), Report #3649, NAD Case Reports (May 2000) (“Comparative performance claims should be supported by reliable testing demonstrating the claim superior effectiveness.”).

150 See FTC Substantiation Policy Statement, supra, note 53. See ALPO Petfoods, Inc. v. Ralston Purina Co., 720 F.Supp. 194, 213 (D.D.C. 1989) (“A product claim is false under the Lanham Act if the representation cites tests or other authority that does not substantiate the claim made . . . .”). For example, in Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190, 1194 (S.D.N.Y. 1987), the court held that the defendant’s claim that “positive results [of its pregnancy tests] are generally, though not always, obtainable in 10 minutes” was not supported by the study conducted which showed that only about 52% of the women tested received such results. Therefore, the advertisement was held to be false on its face. On the other hand, in United Industries Corp. v. Clorox Co., 140 F.3d 1175, 1181 (11th Cir. 1998), the court held an advertisement to be literally true where the claim that the insect-killer “Maxattrax” would kill roaches in 24 hours was supported by scientific evidence showing that roaches coming into contact with the product would die within that time period.

151 It should also be noted that there is a relaxed burden of proof for plaintiffs when challenging ads that claim to be backed by scientific evidence. When normally challenging claims of general superiority, plaintiffs must show that
savings should comprise a “significant percentage” of all items in the offering. In addition, any
evidence used in support of a claim must not only be clearly directed to the subject of the claim,
but must also reflect any change due to the nature of evolving technology.

Since the substantiation for superiority, parity and comparative claims is often
challenged by competitors, the following practice pointers should generally be followed
whenever possible:

- Hire professionals in the relevant area to do the testing. This will avoid
arguments that bias or subjectivity marred the tests.

- Tests should always be conducted on the most recent version of the product or
service at issue.

these claims are patently false. When attacking a claim supposedly substantiated by scientific evidence, plaintiffs
must prove only that the evidence does not establish the claim. United Indus. Corp., 140 F.3d at 1182 (citing Castrol,
Inc. v. Quaker State Corp., 977 F.2d at 63 (2nd Cir. 1992)).

152See Cimo, Inc. (Hotwire Airline, Hotel and Car Rental Discount Pricing), Report #3496, NAD Case Reports (Aug.
#3689, NAD Case Reports (Sept. 2000); Priceline.com (Savings on Airlines Tickets), Report #3742, NAD Case
Reports (Mar. 2001).

153Testing, including taste testing, must be kept reasonably up-to-date in order to avoid rendering the advertisements
using these tests from being declared false by implication. See Millennium Imp. Co. v. Sidney Frank Importing Co.,
No. 03-5141 (JRT/FLN), 2004 U.S. Dist. LEXIS 11871, at *19 (D. Minn. June 11, 2004) (noting that “at some point,
reliance on an outdated test could well render an ad ‘false by necessary implication,’ especially where the ad appears
to report the most recent taste test results”). See also CSC Holdings, Inc. (Optimum Online Internet Serv.), Report
#4476, NAD Case Reports (Apr. 2006) (holding “because of the rapidly changing nature of the technology field,
advertisers making comparative claims in this area must be vigilant to ensure the continued accuracy of their
claims.”).

154See, e.g., Hunt-Wesson, Inc. (Peter Pan Peanut Butter), Report #3164, NAD Case Reports (Dec. 1994) (tests
used to substantiate a comparative claim must be performed on currently marketed products); Alamo Rent-A-Car,
Inc., Report #3124, NAD Case Reports (July 1994) (where bona fide questions regarding appropriate communication
research methodology and interpretation existed, these results could not override a common sense appraisal of the
challenged advertisement); Hardee’s Food Sys., Inc. (Hardee’s Fried Chicken), Report #3087, NAD Case
Reports (Jan. 1994) (challenger’s communication study that was conducted in only one shopping mall and involved small
sample size was not sufficient to support challenge of competitor’s advertisement); Ferrero U.S.A., Inc. (Tic Tac
Breath Mints), Report #3036, NAD Case Reports (Aug. 1993) (challenger’s study deemed to be flawed due to
intrinsic differences between the products compared and the most recent information regarding real-world usage that
contradicted the methodology employed in the study); Alamo Rent-A-Car, Inc., Report #3030, NAD Case Reports
(July 1993) (consumer perception study submitted by challenger was of limited value due to the small sample size);
Kraft Gen. Foods, Inc. (Tombstone Special Order Pizza), Report #2920, NAD Case Reports (Dec. 1991) (challenger’s
study was limited to 80 consumers in four test cities, three of which were allegedly outside Tombstone’s selling area
and the form of the two questions asked may have led to an inflated estimate of the number of panelist identifying
“50% more toppings” as applying to the whole line of products and not just the pepperoni pizzas being compared);
Kraft Foods (Capri Sun Sport), Report #43879, NAD Case Reports (Sept. 2005) (claim that Capri Sun Sport
“hydrates better than water” was properly supported by a detailed study of 29 children who completed two 80-minute
interruption exercise sessions on separate days in a hot and humid environment and then had their fluid intake, urine
volume, body weight, core temperature, heart rate, perceived exertion, thirst, taste, and gastrointestinal discomfort measured at selected times during each of the sessions).
• Care should be taken to ensure the accuracy of the results, including, wherever possible, the use of randomized, double-blind and/or placebo-controlled results that are peer reviewed, published or both.

• Although extrapolations are generally permitted, there must be a reasoned basis for doing so.

• Don’t rely on partial results.

• Use industry approved tests or protocols, if they exist (i.e., ASTM tests). If an industry standard exists, but is not followed, be prepared to provide good reasons why the “norm” was not followed.

• If no industry standard exists, be sure that the testing is performed under consumer relevant conditions.

• Testing should follow the advertiser’s standard use and care instructions.

• Research used to contradict a common sense interpretation of an advertisement must be free from material flaws in order to be persuasive.

Although there are several highly informative NAD decisions regarding the adequacy of testing used to substantiate claims, one of the more detailed and thorough decisions issued in December 2004 and related to the testing that Frito-Lay and its competitor, Pringles, performed to support and challenge taste preferences. In Frito-Lay, Inc.,155 the NAD determined that the advertiser’s independent, double-blind taste test provided a reasonable basis for its claim that “America prefers the taste of Lay’s Stax® Original Potato Crisps over Pringles® Original Potato Crisps* *Among respondents with a preference.” Furthermore, the NAD concluded, in a highly detailed opinion, that the challenger’s design differences in its tests, and its enhancements to the advertiser’s tests, did not make the challenger’s taste test sufficiently reliable to rebut the advertiser’s taste test. In particular, the NAD noted that the challenger’s test was not superior because it attempted to include race and ethnicity as part of the demographic criteria in its test design. Moreover, the NAD concluded that the challenger’s methodology was contrary to ASTM guidelines recommending that for national claims, a minimum of two markets in each of the four census regions should be included.156

VIII. THE IMPORTANCE OF SURVEYS

Survey evidence is often used in supporting consumer preference claims, and courts rely on consumer survey evidence to determine the overall message that an advertisement


156Id.
conveys to consumers. Accordingly, surveys should not be used to determine the meaning of words used in an ad or to set the standard by which a claim should be measured.

When attempting to prove that a defendant is making a claim that is misleading on any basis other than its literal falsity (i.e., because it is ambiguous or literally true, but nevertheless misleading), a plaintiff must show evidence of actual consumer reaction to the advertisement in question through direct testimony or surveys showing that "a substantial number of consumers" were misled by the ad. The federal circuits have no single standard for determining whether a given survey proves the existence of consumer confusion. There is, however, general agreement that a competent survey showing that the number of deceived consumers is "not insignificant" will be sufficient proof of confusion. To minimize attacks on the credibility and reliability of the survey, advertisers should aim to have a 25-50% confidence level to support a claim of likelihood of confusion

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158 See, e.g., Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 393 (8th Cir. 2004); Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883, 886 (7th Cir. 2000).

159 Pizza Hut, Inc. v. Papa John's Int'l Inc., 227 F.3d 489, 497 (5th Cir. 2000). See also Hilton Int'l Co. v. Hilton Hotels Corp., 888 F. Supp. 520, 538 (S.D.N.Y. 1995) (holding that, in order to show false advertising, plaintiff can either show that the advertisement is literally false or "show through a consumer survey that, although the challenged statement is ambiguous or literally true, the advertising is nonetheless misleading, confusing or deceiving in that the message understood by a significant number of consumers is false"); Thomas W. Edman, Note, Lies, Damn Lies, and Misleading Advertising: The Role of Consumer Surveys in the Wake of Mead Johnson v. Abbott Labs, 43 Wm. & Mary L. Rev. 417, 419-20 (2001) (article asserting that consumer survey has become the most important tool for determining what makes up a falsity in an advertisement, since most courts believe that the target audience should determine which claims are misleading).

160 SmithKline, 960 F.2d at 298 (courts require that a "not insubstantial number of consumers" take away the false belief communicated in order for an advertisement to be deemed false or misleading). Accord, Edman, supra, note 159, at 430-31. See generally Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms., Co., 290 F.3d 578, 594 (3rd Cir. 2002) (survey evidence demonstrating that 15% of respondents were misled held to be sufficient to establish deception); Johnson & Johnson-Merck Consumer Pharms., Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125, 134 (3rd Cir. 1994) (20% would be sufficient to constitute a substantial or significant number of consumers who are misled); Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 317 (2nd Cir. 1982) (7.5% consumer confusion might be substantial confusion under appropriate circumstances). But see G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 873 F.2d 985, 1000 (7th Cir. 1989) (4.5% consumer confusion not sufficient to show substantial confusion).

161 See generally Vol. V, J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§ 32:187-32:190 (4th ed. 1996) (percentages over 50% are usually viewed as persuasive evidence of likely confusion, while figures in the range of 25-50% have been viewed as “solid support” for a finding of likelihood of confusion). See, also, Seven-Up Co. v. Green Mill Beverage Co., 191 F. Supp. 32, 36 (N.D. Ill. 1961) (25% deemed credible); J & J Snack Foods Corp. v. McDonald’s Corp., 932 F.2d 1460, 1463-64 (Fed. Cir. 1991) (30% supported finding of likely confusion); Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 935 (7th Cir. 1984) (45% was deemed “high” and weighed “strongly”); Kraft Foods, Inc. (Maxwell House® Coffee), Report #3201, NAD Case Reports (June 1995) (20% typically regarded as “noise”). But see Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883, 885-86 (7th Cir. 2000) (noting that “[s]urveys are accepted ways to probe for things such as confusion about the source of goods, for confusion depends on the effect of a phrase or trade dress on the consumer” but can be flawed when used to interpret the meaning of words because of the different meanings placed on them); Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 393 (8th Cir. 2004) (same).
Survey evidence is expensive and time consuming to gather, but is often necessary in order to support or defend claims in federal court. According to one expert, the typical cost of a consumer products mall survey involving four to five venues and 250 participants can range from $31,000 to $46,000, depending primarily on the hourly rate of the survey expert. A consumer products telephone survey of 250 participants, in contrast, could cost in the range of $15,000 to $21,000, again depending on the hourly rate of the expert.162

While the scope of a particular survey will be governed, in large part, by the type of product or service involved, the message that the advertiser wishes to convey, and the composition of the target market, courts have often considered certain key factors in determining whether a survey is trustworthy. These include whether: (1) the "universe" was properly defined; (2) a representative sample of that universe was selected; (3) the questions asked of interviewees were framed in a clear, precise and non-leading manner; (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; (5) the data gathered was accurately reported; (6) the data was analyzed in accordance with accepted statistical principles and (7) objectivity of the entire process was assured.163 In addition to these factors, the NAD and certain experts in the field have also recommended:164

- Every survey needs to be conducted using well-considered boundaries (i.e., sample size, demographics, market, etc.)
- Questions need to be clear and directed to the subject of the advertisement (i.e., they must focus on the takeaway message of the ad).

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164 See generally Berger article referenced supra, note 162; McCarthy, supra, note 161, at §§ 32-159, 161, 170, 172, 173, 187. See also Kraft Foods, Inc. (Maxwell House® Coffee), Report #3201, NAD Case Reports (June 1995) (studies with open-ended questions are preferable and generally carry more weight, but if properly posed, more guided questions could also be of value so long as the questions are not leading and do not draw into question the reliability and credibility of the survey); Kraft Gen. Foods, Inc. (Tombstone Special Order Pizza), Report #2920, NAD Case Reports (Dec. 1991) (neither advertiser’s tracking study that did not properly ask whether main idea (i.e., “more toppings than Domino’s”) applied to all Special Order pizza or a specific one, nor challenger’s study that was limited to narrow group of consumer (i.e., 80 in four cities, three of which were not in Tombstone’s selling area) provided definitive guidance for the NAD); Alamo Rent-A-Car, Inc., Report #3030, NAD Case Reports (July 1993) (consumer perception study submitted by challenger was of limited value because of small sample size); Hertz Corp., Report #2759, NAD Case Reports (Jan. 1990) (independent opinion survey involving two questionnaires (one for users who had rented a car for business purposes in the previous six months and one for those who had rented for personal or vacation purposes in the past three months) asking open ended and more specific questions during eight years of testing found to be unbiased and reliable support for claim that “Hertz came out on top” in every survey); Conagra Foods, Inc. (Hunt’s Ketchup), Report #4194 (June 2004) (consumer survey found to be inconclusive at best due to leading nature of attribute question relied upon and open-ended questions failed to show that consumers were taking away superiority messages about the particular attributes, such as taste).
• Great attention must be paid to avoiding bias in the questions. There should always be a “no preference” option offered early on in the questionnaire.

• Leading questions should be avoided.

• Control or filter questions need to be used.

• For national ads, at least 200 individuals evenly divided between at least 4 geographic markets should be tested.

IX. MONITORING THE ACCURACY OF CLAIMS

Advertisers should exercise reasonable care in monitoring the accuracy of claims to insure that market conditions or substantiation evidence does not change. For example, if a claim is based upon the results of an annual survey and the survey results change during the course of the ad campaign, the claims may need to be modified or the campaign cancelled. Similarly, the frequency with which an advertisement should be monitored is dependent on the type of good or service advertised and the market conditions involved. As a general rule of thumb, long term ads should be monitored every two-three months to ensure their continued accuracy. If an advertiser learns that a claim is no longer accurate, for any reason, it should take prompt action. This action may involve pulling the ad entirely, modifying the ad, or replacing it with a more accurate ad.

X. HOT TOPICS WITH A POTENTIAL IMPACT ON THE FRANCHISE INDUSTRY

Although there are numerous advertising issues of interest in franchising, five topics received significant attention from the FTC, NAD and other state and local authorities in recent years.

1. Advertisements to Children
2. Food Advertising
3. Sweepstakes, Promotional Games, Contests, and Prizes
4. Coupons, Rebates, and “Free” Offers
5. Endorsements

1. Advertisements To Children

Advertisements directed to children have received the greatest attention by regulators during the past several years. Areas of concern range from childhood obesity and food advertisements directed toward children, to mechanisms to insure the Internet privacy of children, to product placements in programming directed to children. Since these concerns are so widespread and varied, only a few of the most prominent areas of concern will be addressed here.

The Children’s Advertising Review Unit (“CARU”) of the Council of Better Business Bureaus (“CBBB”) has perhaps been the most active organization regarding the promotion of responsible children’s advertising campaigns. CARU was established in 1974 by the National Advertising Review Council (“NARC”), a strategic alliance of the advertising industry and the CBBB. CARU’s basic activities include the review and evaluation of child-directed advertising in all media (i.e., print, broadcast, and cable television, radio, video, online and Internet
advertising) and online privacy practices as they influence children. CARU provides general advisory services for advertisers and agencies, encourages advertisers to develop and promote the dissemination of educational messages to children consistent with the Children’s Television Act of 1990, and maintains a clearinghouse for research on children’s advertising.

CARU reviews advertising directed to children under the age of 12 and seeks changes to advertisements that are considered to be misleading, inaccurate, or inconsistent with its published Guidelines. These Guidelines set forth seven basic principles for advertising directed to children under 12. 165

CARU’s Guidelines also set forth specific guidelines regarding a variety of topics, including product presentations and claims, sales pressure, disclosures and disclaimers, comparative claims, endorsements and promotion by program or editorial characters, premiums, promotions and sweepstakes, safety, interactive electronic media, sales targeting, and data collection.

With respect to online privacy, in particular, the Guidelines apply to Internet and online advertising directed to children under the age of 13 and are specifically designed to harmonize with the FTC’s final rule implementing the Children’s Online Privacy Protection Act of 1998 (“COPPA”).166 The Guidelines require that advertisers make “reasonable efforts” to provide

165 The seven basic CARU principles are as follows:

1. Advertisers should always take into account the level of knowledge, sophistication and maturity of the audience to which their message is primarily directed. Younger children have a limited capacity for evaluating the credibility of information they receive. They also may lack the ability to understand the nature of the personal information they disclose on the Internet. Advertisers, therefore, have a special responsibility to protect children from their own susceptibilities.
2. Realizing that children are imaginative and that make-believe play constitutes an important part of the growing up process, advertisers should exercise care not to exploit unfairly the imaginative quality of children. Unreasonable expectations of product quality or performance should not be stimulated either directly or indirectly by advertising.
3. Products and content which are inappropriate for children should not be advertised or promoted directly to children.
4. Recognizing that advertising may play an important part in educating the child, advertisers should communicate information in a truthful and accurate manner and in language understandable to young children with full recognition that the child may learn practices from advertising which can affect his or her health and well-being.
5. Advertisers are urged to capitalize on the potential of advertising to influence behavior by developing advertising that, wherever possible, addresses itself to positive and beneficial social behavior, such as friendship, kindness, honesty, justice, generosity and respect for others.
6. Care should be taken to incorporate minority and other groups in advertisements in order to present positive and pro-social roles and role models wherever possible. Social stereotyping and appeals to prejudice should be avoided.
7. Although many influences affect a child’s personal and social development, it remains the prime responsibility of the parents to provide guidance for children. Advertisers should contribute to this parent-child relationship in a constructive manner.


166 15 U.S.C. § 6501. COPPA requires that websites obtain verifiable parental consent before collecting, using, or disclosing personal information from children. In April 2000, the FTC issued final rules that provided guidelines that would serve as safe harbors to advertisers. See 16 C.F.R. pt. 312. These rules apply only to operators of commercial websites, online services directed to children under 13, and general audience cites that know that they
notice and choice to parents when information is collected from children online, including the collection of information through “passive tracking.” In all cases, the notice must clearly specify the means by which a parent may correct or remove the information collected from a company’s database. The Guidelines also require prior parental opt-in to the collection of personal identifying information from children under these circumstances: a) when the information would enable the recipient to contact the child offline, regardless of the intended use; b) when the information would be publicly posted so as to permit others to communicate directly with the child online; and c) when the information would be shared with third parties. Under other circumstances (i.e., the collection of internal use only of an e-mail address, first name or hometown), the site must provide notice to the parent and an opportunity to opt-out. If advertisers comply with CARU’s guidelines, they are deemed to have complied with the Act under COPPA’s safe harbor provisions.

In the past few years, CARU has actively monitored children’s websites for compliance with its Guidelines and the COPPA. These monitoring activities have resulted in several recent NAD decisions in which advertisers were provided with clear notice of their violations of the Guidelines and cautioned to correct these violations immediately.167 Two well known food franchisors, KFC and CEC Entertainment Inc., the owner of the Chuck E. Cheese restaurant chain, were the targets of two such monitoring actions.168 Both companies worked with CARU to bring their websites into compliance.

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are collecting personal information from a child. Pursuant to the rules, which are mirrored in CARU’s guidelines, sites that meet these criteria must:

- Provide parents with notice of their information practices
- Obtain verifiable parental consent before collecting a child’s personal information
- Give parents a choice as to whether their children’s information will be disclosed to third parties
- Allow parents the opportunity to review their children’s personal information and have it deleted
- Give parents the opportunity to prevent further use of collection of information
- Not require a child to provide more information than is reasonably necessary to participate in an activity
- Maintain the confidentiality, security and integrity of information collected from children

167 See, e.g., Walt Disney Internet Group, a Division of the Walt Disney Co. (Go.com/Club Blast), Report #3696, NAD Case Reports (Sept. 2000) (“It is the ‘Best Practice’ for general interest Websites that include areas designed for children under 13 to elicit age in a manner that is neutral and does not encourage children to lie about their ages by characterizing themselves as teenagers.”); Pepsi-Cola Co. (Pepsi.com), Report #3852, NAD Case Reports (Dec. 2001) (registration form for “Rewards Registration” collected more information from children under 13 than was reasonably necessary to participate in a particular activity, age screening mechanism did not have a “session cookie” that would prevent a child from scrolling back to re-register with false birth date information, and privacy policy did not contain complete offline contact information).

168 KFC Corp. (KFC.com), Report #4088, NAD Case Reports (Sept. 2003) (NAD was concerned that site was collecting personally identifiable information from children under the age of 13 without first obtaining parental consent, was not effectively screening children for age in a neutral fashion, and was not employing a tracking mechanism to prevent underage children from circumventing the age screening device used by the advertiser. The NAD was also concerned that the posted privacy policy was not consistent with the site’s practices.); CEC Entm’t Inc. (chuckcheese.com), Report #3985, NAD Case Reports (Nov. 2002) (NAD had several concerns over the screening devices used, particularly the “tip off” language that had the potential of inviting children to falsify their age, the absence of a tracking mechanism, and requests for offline contact information. NAD also noted several deficiencies in the website’s privacy policy.).
The FTC has also been vigilant in monitoring websites directed to child audiences to ensure their compliance with COPPA. Some of these monitoring activities have resulted in lawsuits and the imposition of substantial fines.\textsuperscript{169}

For example, a well-known cookie franchising company, Mrs. Fields, became the target of an FTC investigation in 2003 when it failed to get verifiable parental consent before obtaining personally identifiable information from children interested in “birthday clubs” offered on the Mrs. Field’s website.\textsuperscript{170} To become a member of the club and receive coupons for free cookies and pretzels, children were required to provide not only their names, but their home addresses, e-mail addresses and dates of birth, all without first requiring parental consent. The FTC concluded that this violated COPPA and fined Mrs. Fields $100,000.\textsuperscript{171} Similarly, Hershey Foods became the subject of an FTC investigation when it purported to obtain parental consent by merely directing children to have their parents fill out the online parental consent form. The FTC found that this instruction was not reasonably calculated to ensure that the person providing the consent was, in fact, the child’s parent and therefore imposed civil penalties of $85,000.\textsuperscript{172} In addition to these civil penalties, both companies were required to delete any information gathered in violation of COPPA and submit to FTC monitoring to ensure that they comply in the future with COPPA’s Guidelines.

Other advertising areas directed to children that have drawn the attention of state and federal regulators include food advertisements and product placements. Food advertisements will be discussed in more detail in the next section, but advertisers should be aware that the FTC had made the issue of childhood obesity a top priority and is closely monitoring advertisements directed to children, especially advertisements that suggest that fast food is “healthy.”\textsuperscript{173} Moreover, the NAD has been aggressive in its efforts to monitor food advertisements directed at children, with the fast food chains being high on its priority list. Arby’s, Burger King, and McDonald’s have all been the subject of recent NAD investigations regarding advertisements directed to children.\textsuperscript{174} In addition, the NAD carefully scrutinizes

\textsuperscript{169}See, e.g., United States v. UMG Recordings, Inc., No. 2:04-CV-1050 (C.D. Cal. Feb. 25, 2004) (consent decree in which music company agreed to pay $400,000 civil penalty for knowingly collecting personal information from children without first obtaining parental consent and for engaging in the same activities on a website directed to children); United States v. Mrs. Fields Famous Brands, Inc., No. 2:03-CV-205 (D. Utah Apr. 4, 2003) (consent decree in which food franchisor paid $100,000 in civil penalties for collection of personal information from more than 84,000 children without first obtaining parental consent).


\textsuperscript{171}Id.


\textsuperscript{174}Arby’s, LLC (Arby’s® Adventure Meals®), Report #4268, NAD Case Reports (Dec. 2004) (advertisement claiming “trusted by moms” was not puffery but was an objective claim that required adequate substantiation); Burger King Corp. (Burger King® “Kids Meal”), Report #4298, NAD Case Reports (Mar. 2005) (when food advertisers offer lower calorie options in child-target meal advertisements, it is misleading to only show higher calorie, higher fat options in advertisements and these lower fat options should be included in advertisements whenever possible to make children aware that such options exist); McDonald’s Corp. (Mighty Kids Meals), Report #4332, NAD Case Reports (May 2005) (representations of food products should encourage sound use of the product with a view toward healthy development of the child and development of good nutritional practices and advertisements regarding Mighty Kids.
advertisements that depict children in unsafe situations or in acts harmful to themselves or others.  

Consumer protection groups are also concerned about the increasing use of product placements in movies, television programs, books, and Internet websites directed to children that may convey subtle but potentially misleading messages to children. This form of advertising (i.e., prominent display of Coke products on American Idol or a challenge on The Apprentice to design an ad campaign for a particular M&M candy bar product) has been around for years, but has been on a dramatic rise during the past two years. With more consumers turning to ad-skipping devices like TiVo, advertisers have begun to use product placements in lieu of traditional advertisements. According to Nielsen Media Research, paid product placements in television shows increased by 46.4% in 2004, with product placement media in the range of $1.88M. The total value of the product placement market (television, film and other media) grew to $3.5 billion in 2004 and was expected to rise to $4.2 billion in 2005.

While much of this product placement is still directed to adult audiences, the wild success of Reese’s Pieces after the 1980’s hit children’s movie E.T. (i.e., an increase in candy sales of 65% after the movie release) has led some advertisers to start employing this advertising technique in connection with marketing goods, and services to children even if the cost for doing so is high. This is because, with paid product placements, advertisers have more control over how their products are featured and what the actors are communicating to the audience about their products.

In 2003, one consumer protection group, Commercial Alert, decided to challenge the overall practice of product placements with the FTC. Commercial Alert requested that the FTC require that a new disclosure mechanism be employed in which a pop-up with the word “advertisement” would appear any time a television show contained a paid product placement, as opposed to the current mechanism that makes such disclosures at the end of a program. In February 2005, the FTC rejected this request, stating that it was not necessary to disclose payment for product placements in this fashion. The FTC did, however, agree to monitor product placement on a case-by-case basis to determine whether a particular product placement is deceptive or unfair. In contrast, the FCC, which also received a complaint from

Meals should therefore reveal various combinations of available food options with differing calorie and fat compositions).

\(^{175}\) See, e.g., Dairy Mgmt. Inc. (“Got Milk” Campaign, “Too Good to Waste”), Report #4042, NAD Case Reports (Apr. 2003) (television advertisement that was shown on Nickelodeon and Cartoon Network and depicted younger brother covering face with tape, over nose and eyes, to frighten older brother into tripping backwards over skateboard and falling down stairs while managing to hold his glass of milk with a voiceover “too good to waste” was found to violate CARU’s Guidelines since the actions of the little brother were easily duplicable by children and presented safety concerns); Dr. Pepper/Seven Up, Inc. (7 Up), Report #4059, NAD Case Reports (June 2003) (commercial in which man who is holding video gaming system walks into middle of a city street, oblivious to traffic, and gets hit by a 7 Up delivery truck while stating “[b]ecause I invented this tracking device. It beams whenever 7 Up is near” was found, due to its content and humor, not to be appropriate for younger children because it raised safety concerns and depicted an activity that could easily be mimicked by children).

Commercial Alert, may elect to take a different approach. Most notably, in May 2005, FCC Commissioner Jonathan Adelstein voiced concerns over product placements, claiming that they turn news and entertainment shows into “undisclosed commercials,” and he encouraged consumers to record examples of product placements and file complaints with the FCC if they did not believe that the placements contain adequate disclosures.  

2. Food Advertising

The FTC, FDA, and USDA share jurisdiction over claims made by manufacturers of food products. The FTC is primarily responsible for regulating food advertising, while the FDA is primarily responsible for food labeling. The USDA, in turn, is responsible for nutrition labeling related to meat and poultry products.

In May 1994, the FTC issued an Enforcement Policy Statement on Food Advertising (“the Enforcement Policy”) to provide guidance regarding its enforcement policy with respect to the use of nutrient content and health claims in food advertising. With respect to nutrient content claims, this Policy Statement defines certain absolute and comparative terms that can be used to characterize the level of nutrients in a food. For example, absolute terms such as “low” or “high” must describe the amount of nutrient in a single serving of food. Relative or comparative terms, such as “less,” “more,” or “reduced” must compare the amount of a nutrient in one food with the amount of the same nutrient in another food. With only limited exceptions, these specific terms, and certain approved synonyms, may be used on food labels to characterize the level of a nutrient. Where the FDA has not established any standard metric, such as “low” or “high,” for a specific nutrient, the FTC will closely review food claims that characterize the level of that nutrient claimed by an advertiser and will, where applicable, defer to the FDA’s scientific and public health determinations and/or recommendations when determining the significance of a particular nutrient claim.

With comparative nutrient claims, the FDA also has established definitions for comparative terms that characterize the nutrient content of a labeled food relative to that of a comparison or reference food. For example, the regulations permit the use of terms such as “less” and “reduced” only where there is a minimum 25% difference in the relevant nutrient.

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180 See 21 C.F.R. § 101.69(b).

181 See 21 C.F.R. §§ 101.60(c)(5), 101.13(j)(1)(i). See also Tropicana Prods., Inc. (Tropicana® Light ’n Healthy), Report #4192, NAD Case Reports (June 2004) (claim that Tropicana Light ’n Healthy has 1/3 less sugar and calories complied with FDA requirements and was properly substantiated, but NAD suggested that low carbohydrate claim, a claim not expressly covered by the FDA’s regulations, should be qualified to state the number of grams of carbohydrates in a single serving to protect against an improper takeaway message that the beverage was consistent with low carbohydrate diets that typically severely restrict carbohydrate intake).
Comparative claims must also disclose the reference food, the percentage difference in the nutrient between the labeled and reference food (i.e., 50% less fat than company X’s burger), and quantitative information regarding the absolute amount of the nutrient in the labeled and reference food (i.e., fat reduced from 8 g. to 4 g. per serving). Some advertisers, however, do not always follow these rules, sometimes intentionally, but more often, unintentionally. Thus, if an advertisement represents that a food has “less fat than Brand X,” without indicating the percentage or the absolute difference in fat, the FTC will generally rely on the FDA’s 25% minimum difference in determining whether a claim is deceptive. Moreover, in advertisements directed to certain classes of consumers, particularly children, additional disclosures may also be necessary to ensure that the audience does not get the wrong impression about the overall dietary benefits of the products being compared.  

The Enforcement Policy also makes it clear that comparative claims should not overstate the significance of a nutrient difference and should, where necessary, be qualified in a manner sufficient to ensure that consumers are not misled. For example, a simple statement that “our fried chicken has one-third less fat than Brand X’s fried chicken,” could, without further information, suggest that the nutrient difference is greater in an absolute sense than it is in actuality. Thus, the Enforcement Policy makes clear that this kind of claim may need further clarification to prevent the claim from creating a misleading impression, especially in areas where consumers may not be aware that the item is generally high in fat. An example would be “Our fried chicken contains one third less fat that Brand X’s fried chicken – theirs has X grams and ours has Y grams.”

The Enforcement Policy also summarizes the FDA’s standards for use of claims that characterize the relationship of a substance in a food to a disease or health-related condition. These standards: a) limit the authorization of health claims only to those categories for which there is significant scientific agreement that the relevant diet-disease relationship is supported by the scientific evidence; b) establish levels for total fat, saturated fat, cholesterol, and sodium above which foods are disqualified from bearing any health claims; c) require a statement of the specific substance that is the subject of a health claim, setting a threshold level for the amount of that substance in the food that is sufficiently high or low, as the case may be, to support the health claim; d) require that foods making health claims have some minimal nutritional value; and e) require that health claims identify the factors, other than the dietary intake of the substance, that affect the diet-disease relationship.

The FTC’s requirements for substantiation of health claims in food advertising are much like its requirements for claims on labels. The FTC imposes rigorous substantiation requirements on all such claims and requires that they be supported by competent and reliable scientific evidence, as judged by a significant scientific agreement standard. In other words, a food advertiser does not have to establish that there is a full scientific consensus in order to support a health claim. Rather, the appropriate standard is whether

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182 See, e.g., KFC Corp. (KFC Commercials), Report #4122, NAD Case Reports (Dec. 2003) (advertisement that compared the fat in two FKc chicken breasts to the fat in a Burger King Whopper® but did not state that the KFC chicken breast had far greater amounts of sodium and cholesterol failed to provide sufficient information for children to properly evaluate and compare the overall nutritional benefits of the two food products being compared).

183 See Enforcement Policy, supra, note 179.

184 Id.
Based on the totality of the publicly available scientific evidence (including evidence from well-designed studies conducted in a manner which is consistent with generally recognized scientific procedures and principles) . . . there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence.  

The FDA’s health claim regulations also identify four nutrients – total fat, saturated fat, cholesterol, and sodium – the consumption of which has been associated with increased risk of certain diseases and health-related conditions, such as cancer, cardiovascular disease, and hypertension. The regulations therefore set forth established levels of these nutrients above which foods containing these nutrients cannot make health claims. In addition, the regulations make it clear that certain unqualified health claims must contain certain disclosures in order to avoid deception when a risk-increasing nutrient is closely related to a health claim or when consumers could infer from the health message that the food does not present any health-related risks. For example, an unqualified claim that a food is low in saturated fat and cholesterol and therefore compatible with a diet designed to reduce the risk of heart disease would be deceptive if the food also contained high levels of sodium that might increase the risk of hypertension.

In addition to the Enforcement Policy, the FTC and Department of Health and Human Resources have also recently issued a report addressing the issue of childhood obesity. This report urged advertisers to take voluntary measures to encourage healthier eating habits among children or face the potential of governmental regulation. In particular, the report recommended that food advertisers consider: a) adopting minimum nutritional standards for foods marketed to children or, alternatively, shift the emphasis to lower-calorie, more nutritious foods; b) adopting labeling initiatives that identify lower-calorie, higher nutrition foods; c) implementing more aggressive research and development efforts to create new products or reformulate old products in a manner that will make them more nutritious, lower in calories, and more convenient and appealing to children to eat; d) assisting children in controlling portion


187 See, e.g., Campbell Soup Co., 115 FTC 788 (1992) (consent order requiring disclosure of sodium content and recommended maximum daily sodium intake in advertisement regarding heart disease for soups with more than 500 mg of sodium per 8-oz. serving).

sizes by offering smaller portions, single-serving packages and other ways to reduce the intake of food quantities; and e) developing promotional campaigns designed to educate children about nutrition and fitness.¹⁸⁹

In addition to these guidelines, the Institute of Medicine, of the National Academy of Sciences, a non-profit organization created to provide science-based advice on matters relating to the nation’s health, medicine, and science, is in the process of developing nutritional standards for foods sold in schools and has recommended that food companies review and revise their policies. Some companies, such as Coca-Cola, PepsiCo, Inc. and Cadbury Schweppes (owner of the Snapple brand) – perhaps acting in response to legislation in California, Connecticut and New York City banning the sale of soft drinks in schools and proposed Federal legislation introduced that would give the US Department of Agriculture the authority to ban from schools any foods that do not meet USDA nutritional standards¹⁹⁰ – have already adopted new guidelines that will be phased in as school contracts are renegotiated.

Several U.S. food manufacturers have also taken these recommendations to heart and begun the process of attempting to meet the guidelines. According to the Association of National Advertisers, more than 4500 new and reformulated products with lower fat and calories have been introduced in the past three years in response to increasing concern over childhood obesity. In fact, one major manufacturer of children’s food products, Kraft Foods, has promoted a new line of children’s food products under the Sensible Solution labeling program in the United States, featuring a prominent on-pack “flag” for food and beverage products that meet specific, “better-for-you” nutrition criteria that Kraft has established for each category of products.¹⁹¹ In addition, several companies, including Nestle, McDonald’s and Arby’s, have started offering healthier food options to children.

In addition to the self-regulatory scheme currently still employed by the FTC and FDA, some states have begun taking more aggressive action to curb the advertisement of foods with low nutritional content. For example, California SB 1118, currently under consideration by California lawmakers, would impose an excise tax of an unspecified percentage on the purchase of television advertising for certain foods of “poor nutritional quality” between the hours of 7 a.m. and 10 p.m. and during child-oriented programming.¹⁹²

Several organizations, including the Association of National Advertisers, have opposed the bill, claiming that it violates the First Amendment.¹⁹³ Although a hearing about the Bill has

¹⁸⁹ Id.


¹⁹³ See www.aaf.org/government/legislative_20060426.html.
been postponed by the Revenue and Taxation Committee, the Bill remains listed as an urgent matter by the California legislators.

Outside the United States, more aggressive action is also being taken to regulate food advertising. Most notably, the European Parliament and Council of the European Union recently approved comprehensive regulations addressing nutrition and health claims in the labeling and advertising of food in the European Union. The Regulations will become effective six months after being formally published in early 2007 and will create a two-track system for companies wishing to make health claims. Under the new European Regulations, all pre-packaged food products sold within the European Union will be covered. As a result, companies manufacturing and marketing such products will need to become familiar with these rules and comply with them if they intend to sell their products in the European Union.194

Under the new two-track system, companies must either: a) ensure that their food products will fit into one of the prescribed “nutrient profiles” that will be established by the Commission and may only market such products with pre-approved health claims; or b) propose to use health claims that are not pre-approved, but any such claims must be reviewed by the European Food Safety Authority to determine whether the proposed claims are adequately substantiated through competent scientific evidence. The Commission will keep a public register of all health claims that have been assessed and approved. In addition, nutritional claims not authorized by the new rules will be grandfathered in for 12 months.

All approved health claims will also have to be qualified with information regarding the importance of a balanced diet and healthy lifestyle, the quantity of the food and pattern of consumption required to achieve the claimed beneficial effect, the individuals, if any, that should avoid the food, and the health risks associated with excessive consumption. Marketers will be forbidden from making claims that suggest that health could be affected by not consuming a particular food product, make reference to the rate or amount of weight loss, or cite individual recommendations of doctors or other health care professionals. The Rules will also address issues such as appropriate parameters for making comparative claims.

Despite these regulations and positive steps taken by regulators and companies making certain health claims associated with food items, the path for advertisers is anything but clear. For example, on January 16, 2006, the Center for Science in the Public Interest (“CSPI”) issued a demand letter to Kellogg Company and Viacom, Inc, over the marketing of junk food to children in connection with certain Saturday morning television programs. CSPI asserted that 88% of food advertisements on Nickelodeon television were for foods of poor nutritional value and claimed that the cable channel had not set appropriate minimum nutritional thresholds for foods advertised on its programs or endorsed by its characters, such as SpongeBob, a very popular figure on morning programming.195 Although the parties began near immediate settlement discussions and no lawsuit has been filed, CSPI has asserted that it will sue seeking relief under a Massachusetts state law that would impose penalties in excess of $1 billion and


potential injunctive relief preventing the marketing of junk food to audiences with a composition of at least 15% of children under the age of 8 and to prohibit the marketing of junk foods through web sites, toy giveaways, contests, and other techniques aimed at that age group. 196

CSPI also joined in a more direct attack against a major food franchisor, Yum! Brands, the owner of Kentucky Fried Chicken, in June 2006, by assisting in the filing of a lawsuit in which the plaintiff, a retired physician, claimed that he had purchased and consumed KFC products without knowing that they were fried in a partially hydrogenated oil high in trans fats. 197 According to a CSPI press release, “[t]he lawsuit asks the court to require KFC to switch to a less harmful frying oil. If the court declines to do that, it could require signs in restaurants that say ‘KFC’s fried chicken and certain other foods contain trans fat, which promotes heart disease.'” 198

KFC is not the only fast food chain being challenged this year. In July 2006, a multidistrict panel was asked to determine whether McDonald’s could consolidate more than ten lawsuits charging that McDonald’s company website had misled consumers into believing that its french fries did not contain wheat ingredients by asserting that the fries were gluten-free. 199 McDonald’s also faced claims in New York alleging that McDonald’s, through marketing techniques like toy giveaways, was inducing children to purchase and eat its products and was falsely representing that its food was part of a healthy daily diet when, in fact, it actually leads, according to the plaintiffs, to childhood obesity, heart disease, and high blood pressure. 200 The plaintiffs, two teenage girls, also claimed that McDonald’s failed to live up to promises that it had made to prominently display nutritional information in its restaurants. 201 Although the United States District Court for the Southern District of New York dismissed the case, the Second Circuit vacated that order, finding allegations sufficient to support claims of deceptive marketing practices under New York law. 202

In response to these and other previous attempts by individuals and organizations to impose the responsibility for childhood obesity and other health problems on food

196 Id.


198 Id.


201 Id.

202 Pelman v. McDonald’s Corp., 396 F.3d 508 (2nd Cir. 2005). See also Pelman ex rel. Pelman v. McDonald’s Corp., 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005) (on remand from the Second Circuit, the Southern District of New York ordered plaintiffs to provide a more definite statement of their claims, including (1) identification of the advertisements about which they were complaining, (2) a brief explanation of why the ads were materially deceptive to an objective consumer, (3) a brief explanation of how the plaintiffs were aware of the acts alleged to be misleading, and (4) a brief description of the injuries suffered by each plaintiff).
manufacturers and marketers, Representative Ric Keller introduced the Personal Responsibility in Food Consumption Act (also known as the “Cheeseburger Bill”) in 2004. The Act would, if passed, insulate food manufacturers, marketers, distributors, advertisers, sellers and trade associations from claims of injury relating to a person’s weight gain, obesity, or other associated health conditions. Although this Act passed the House, the Senate never voted on it. In October 2005, the bill passed the House again by a substantial margin (306-120) and is, once again, awaiting Senate disposition.\footnote{Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (noting that the bill has been placed on the Senate Legislative Calendar, but the last major action of record is October 21, 2005).}

If passed, the Cheeseburger Bill would provide federal protection similar to the protection already provided by several state statutes, many of which were modeled upon the original bill submitted to the House for consideration in 2004. As of June 2006, twenty-three states\footnote{States with existing legislation include: Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.} have legislation limiting civil liability for providers in the food industry, while an additional ten states\footnote{These states include: Alabama, Minnesota, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, and South Carolina.} are considering or have considered such legislation.

3. **Sweepstakes, Promotional Games, Contests, And Prizes**

Each year, the National Consumer League releases a list of the Top Ten Scams employed by telemarketers. In 2005, prizes and sweepstakes topped the list, with 31% of all complaints reported relating to requests for payment to claim prizes that never materialized. The average loss was $4990 per complaint. 51% of the complaints in this area came from consumers over the age of 60.\footnote{See National Consumers League, Telemarketing Scams: January-December 2005, http://www.fraud.org/2005_fraud_trend_report.pdf.} Prizes and sweepstakes also made the FTC’s Top 10 Consumer Fraud Complaint list for 2005, with 7% of the total 686,683 complaints filed with the FTC being in this area.\footnote{See News Release, Federal Trade Commission, FTC Releases Top 10 Consumer Fraud Compliant Categories (Jan. 25, 2006), available at www.ftc.gov/opa/2006/01/topten.htm.} Several states have also posted top telemarketing scams on various websites. For example, in Georgia, prizes/sweepstakes have consistently remained at the top of the list.\footnote{See University of Georgia, Cooperative Extension, Publ’n No. HACE-E-19-03, Sweepstakes Scams (Sept. 1, 2001), available at http://www.fcs.uga.edu/pubs/PDF/HACE-E-19-03a.pdf; Press Release, Georgia Governor’s Office of Consumer Affairs, Sweepstakes: Don’t Play to Pay (Dec. 21, 2005), available at http://www.georgia.gov/00/article/0,2086,5426814_38709348_48101771,00.html.}

Whether companies offering sweepstakes, promotional games, contests and prizes are intentionally deceiving the public or simply ignorant of the complicated rules governing such matters is an open issue. Legitimate franchising companies interested in offering these items to their customers, however, should keep a few general rules in mind.
First and foremost, unlike many other areas discussed in this paper, sweepstakes and other promotional games of chance are governed almost exclusively by state laws. There are no federal statutes specifically governing lotteries, so there is not, unfortunately, a uniform framework under which national organizations may feel free to operate. There are, however, several federal statutes that provide the FTC, Justice Department and FCC with the authority to regulate certain activities. The FTC has also attempted to provide consumers with some practical advice regarding prize offers that involve areas regulated by the FTC, such as telephone solicitations, written solicitations, and skill contests.

Moreover, under the laws of most jurisdictions, lotteries that are not state-sponsored and state run are considered illegal. Thus, any advertiser wishing to offer a promotion that may arguably contain the three essential elements of a lottery -- prize, chance, and consideration -- should be aware of the state lottery rules in the jurisdictions in which these promotions are offered in order to avoid the possibility of fines, penalties and potential criminal charges.

In order to avoid liability under most state lottery laws, consideration must be eliminated from sweepstakes, promotional games, or contests or, alternatively, must not be deemed mandatory. Practitioners familiar with lottery laws know that the appropriate buzz words in this context are “alternative means of entry.” In other words, most states will permit a chance promotion where some participants may be asked to or elect to play so long as there is a free method of entry that permits an equal opportunity to win and this alternative method of entry places both groups of participants on truly equal footing. While there are certain exceptions to this general rule, such as credit card promotions where the payment to play precedes the actual games, sponsors should always obtain expert advice before relying upon such an exception.

The three most common types of promotional games used by advertisers are sweepstakes, seeded games, and contests. A sweepstake is generally defined as a promotion in which the winners are selected in a random drawing from the total entries received. A

\[^{208}\text{See, e.g., 15 U.S.C. §§ 45, 52, 54-55 (provisions relating to deceptive and misleading advertising); 47 C.F.R. § 73.1211; 47 C.F.R. § 76.213 (provision permitting the FCC to regulate lotteries offered by its licensees); see generally Andrea E. Friedman, & Kathryn Misna, You May Be a Winner! Legal Issues Affecting Sweepstakes and Contests, ABA Forum on Franchising (Oct. 10-12, 2001).}\]

\[^{210}\text{See notes 67 and 69, supra. See also Federal Trade Commission, Prize Offers: You Don’t Have to Pay to Play!, available at http://www.ftc.gov/bcp/conline/pubs/tmarkg/prizes.htm (July 2000).}\]

\[^{211}\text{A lottery is defined under most state statutes as a promotion in which a person pays “consideration” for a “chance” to win a “prize.” A “prize” is generally defined as anything of value that is awarded to the winner. Prizes can come in all shapes and sizes. A prize does not have to be of any significant financial value in order to be subject to regulation, but it does have to be something of tangible value. In other words, mere special recognition is likely not enough to be considered a prize under most lottery statutes. The term “chance” is generally defined as a process by which a winner is selected randomly. The key is that the entrant has no control over the selection of the winner. “Consideration” generally consists of either the expenditure of money or something else of value in return for the right to participate, or the agreement by the entrant to expend meaningful time or effort that will benefit the sponsor in some material way. Some examples of non-monetary consideration might include responding to a survey or questionnaire, sitting through a product demonstration, or agreeing to participate in some other activity of importance to the sponsor.}\]

\[^{212}\text{The article by Friedman and Misna referenced in note 209, supra, contains a helpful Appendix referencing the applicable state statutes.}\]
seeded game is one in which the winning game piece is “seeded” in the available universe of all
available game pieces. The most common examples of seeded games are scratch off cards,
bottle caps, etc. Contests are generally considered competitions in which the winner is
determined by a demonstration of skill, and not by chance. An example may include creating
and submitting an essay or video about why a child loves a particular product. If properly
structured, contests are generally not subject to lottery laws because this element of skill is
included.

The official rules for a promotional sweepstake, game, or contest serve as the contract
between the entrant and the advertiser. These official rules establish the structure for the game
and serve as the vehicle for compliance with any notice, eligibility, or other requirements that
may be imposed by applicable laws. Alternative methods of entry must be clearly disclosed and
any limitations on the number of entries, types of entries, or other material limiting conditions
need to be set forth in the rules. For example, a one year limit on the ability to spend the
winning amount is a material fact which must be clear and conspicuous and placed in close
proximity to the claim it modifies.

If a sweepstakes, game or contest is offered over the Internet, additional issues must
also be taken into consideration. These include issues of privacy and worldwide access that
may trigger the laws of other countries. The FTC has adopted specific guidelines for Internet
disclosures. These guidelines provide helpful information regarding the display of
disclaimers, the incorporation of legal terms via hyperlink, and other valuable information that
will assist advertisers in making costly mistakes.

In recent years, both the FTC and the NAD have carefully monitored sweepstakes,
promotional games, and contests for compliance with these general rules and guidelines,
particularly sweepstakes that involve children. For example, the NAD questioned General Mills’
“Re-Do Your Room” sweepstakes because it contained material disclosures (i.e., that children
must purchase a specially marked box of Fruit Gushers in order to enter the sweepstakes) that
were not prominent. Similarly, the NAD questioned General Mills’ “Trix Halloween
Sweepstakes” because the “no purchase necessary” disclaimer and the mailing address for the
free alternative method of entry were neither clear nor prominently displayed. The NAD also
expressed concern over Kraft’s “Cheesiest Kids in America” contest in which twelve winners
could have their faces appear on boxes of Kraft Macaroni and Cheese because the print
disclosures and audio voice overs did not clearly disclose to children who may or may not go to
the company’s website to find out the full contest details and that three proofs of purchase of
Kraft Macaroni and Cheese were required for entry into the contest.

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214 QVC (Shopping Spree Sweepstakes), Report #4189, NAD Case Reports (May 2004).

215 See, e.g., Federal Trade Commission, Advertising and Marketing on the Internet at


218 Kraft Foods (Kraft’s “Cheesiest Kids” Contest), Report #4404, NAD Case Reports (Oct. 2005).
4. **Coupons, Rebates And “Free” Offers**

Advertisers often promote their products or services with offers that suggest consumers will get a bargain if they purchase item A over item B. Typical advertisements of this nature include the following offers: “Buy 1- Get 1 Free,” “2-for-1 Sale,” “50% off with the Purchase of Two,” “Half Price Sale.” Since consumers are often searching for the best possible deal, all such offers must be made with care to avoid the possibility that consumers will be deceived.

Representations regarding coupons, rebates, and “free” offers are subject to the same general standards of truthfulness and accuracy as other product claims. However, certain specific rules, such as the FTC’s Mail or Telephone Order Merchandise Rule and the Telemarketing Sales Rule, may also apply.  

The FTC has developed a specific Guide concerning the use of the word “free” and similar representations in marketing and promoting goods and services. This Guide makes it clear that when the word “free” is used to promote a good or service, the word “free” must indicate that the consumer is paying nothing for that article and no more than the regular price for the other. In other words, an advertiser may not directly or indirectly attempt to recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article that must be purchased, by the substitution of inferior merchandise, or otherwise. The “regular price” that may be used for comparison purposes, in turn, must refer to the price of the same quality and quantity of good or service that the advertiser has openly and actively sold in the geographic market or trade area in which the “free” offer is being made in the most recent and regular course of business for a reasonably substantial period of time (i.e., usually a 30-day period). If the “regular” price fluctuates, then the referenced price must be the lowest price at which any substantial sales were made during the 30-day period.

If there are any conditions and/or obligations associated with making a “free” offer, these conditions and/or obligations must be clearly and conspicuously disclosed at the outset of the offer to avoid confusion. Some advertisers believe, incorrectly, that placing an asterisk or symbol next to the offer with reference to a footnote that describes the limiting condition or obligation is sufficient to meet this requirement. The Guide indicates that it is not. However, the mere notice of the existence of a “free” offer on the main display panel of label or on a package is allowed if: a) the notice does not constitute an offer or identify the item being offered as “free,” b) the notice informs the consumer of the location elsewhere on the package or label where the disclosure may be found, c) no purchase or other material affirmative act is required in order to discover the terms and conditions of the offer, and d) the notice and offer are not otherwise deceptive.

Both the FTC and the NAD have addressed claims in which advertisers have made offers of “free” goods and services. In two cases, the NAD found that advertisers failed to meet

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219 See generally references in notes 67-69, supra.

220 See 16 C.F.R. § 251.1.

their obligations to disclose clearly and conspicuously, in close proximity to their offers, a material restriction on offers for “free” travel services. In one case, the offer for “free” airline tickets did not disclose that the “free” tickets were available only on the lowest priced flights that were often scheduled during the least convenient travel times. In the other, the advertiser claimed that a travel program was “free” with “no restrictions” when, in fact, this claim only applied to its travel discount program (i.e., a program where tickets obtained with travel awards required 14 days advance notice and were limited to coach seats) and this qualification was not disclosed on the same page and in close proximity to the claims it modified or in sufficiently large print.222

Failure to abide by the Guide and similar state and local guidelines can also result in action by state and local regulators as well. In 2005, for example, the New York City Department of Consumer Affairs filed a false advertising suit in New York Supreme Court alleging that Nextel, Sprint and T-Mobile violated applicable New York laws by claiming, among other things, to offer “free roaming” and stating that “[a]ll incoming calls are free.” The focus of the complaint was that all three companies had promised consumers great deals in the headlines of their advertisements, but buried additional costs and other obligations in fine print insufficient to place consumers on notice of the overall costs involved.223

With respect to “free” offers in connection with introductory offers of products, specific guidelines also exist. Specifically, no “free” offer can be made in connection with the introduction of a new product or service offered for sale at a specified price unless the advertiser expects, in good faith, to discontinue the offer after a limited time and to commence selling the good or service at the same price at which it was promoted with the “free” offer. In addition, so that a “free” offer will be meaningful, a single size of a product or a single kind of service should not be advertised with a “free” offer in a trade area for more than six months in any twelve month period. Likewise, 30 days should elapse before another such offer is promoted in the same trade area and no more than three such offers should be made in the same year in any twelve month period. Failure to comply with this guideline has resulted in several adverse rulings and FTC consent judgments.224

Rebates are also the subject of FTC scrutiny. By law, companies are required to send rebates within the time promised by the advertiser. If no time is specified, then rebates must be

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222 Travelers Bank (TravelersMiles Frequent Flyer Reward Program), Report #3462, NAD Case Reports (May 1998); WebMiles.com Corp. (WebMiles Free Travel Program), Report #3751, NAD Case Reports (Apr. 2001).


224 See, e.g., FTC v. Consumerinfo.com, Inc., No. 8:05-cv-00801 (C.D. Cal. Aug. 29, 2005) (stipulated final judgment in which defendant agreed to pay $950,000 in refunds to consumers for false advertising of “free” credit reports without disclosing to consumers that they would be enrolled in a credit report monitoring service and charged $79.95 per year); FTC v. Conversion Mktg., Inc., No. 8:04-cv-01264 (C.D. Cal. filed Oct. 29, 2004) (complaint alleging that advertiser offered “free” samples of weight loss and tooth whitening products and then debited consumers’ accounts and enrolled them in an automatic shipment program without their knowledge or consent); United States v. Creative Publ’g Int’l, Inc., No. 0:01-cv-00945 (D. Minn. May 31, 2001) (consent decree ordering payment of $200,000 civil penalty for publisher’s failure to disclose that acceptance of “free” trial offer would result in consumer being enrolled in book club); Sears, Roebuck & Co. (“Free Delivery” Rebate Offer), Report #3789, NAD Case Reports (July 2001).
issued within a “reasonable” time. “Reasonable,” in turn, is generally interpreted as being within 30 days.\textsuperscript{225}

In one recent case, the FTC even went so far as to allege that, under circumstances where a retailer was aware of a third-party vendor’s serious financial problems and nevertheless continued to advertise the vendor’s rebates until shortly before the company filed for bankruptcy, despite receiving numerous customer complaints, the retailer should be held liable for deceptive and unfair practices. This case against CompUSA was ultimately settled in March 2005 with CompUSA agreeing to pay consumers who had purchased certain covered products at CompUSA their due or past-due rebate amounts.\textsuperscript{226}

In the area of coupons, advertisers should also be aware that the FTC and state regulators have very little sympathy for advertisers who use third party vendors to print coupons and fail to oversee their work. Most notably, Harrah’s felt the sting of such a printing error late last year when the Illinois Gaming Board ordered it to honor coupons worth a total of $5.8 million after a printing error that led to the distribution of 11,000 coupons valued at $525 each when Harrah’s only intended for 15 of the coupons to be sent to loyalty cardholders of Harrah’s Joliet Casino.\textsuperscript{227} Although Harrah’s attempted to shift the blame to its third-party vendor, the Illinois Gaming Board was not persuaded and ordered Harrah’s to honor all of the coupons mistakenly issued. Other companies, such as Kraft Foods, Anheuser-Busch and Hunt-Wesson, have also been required to make substantial payments due to similar printing errors.\textsuperscript{228}

In light of these rulings, advertisers that wish to be involved with promotions that employ the services of third party vendors should take certain precautions to protect themselves against liability of this nature. Some reasonable steps that can and should be taken include, but are not limited to, the following: a) hire a competent and experienced company to design and implement the promotion; b) be sure to involve knowledgeable counsel to review the promotion and ensure its compliance with applicable laws and regulations; c) carefully proof all elements of the promotion for errors; d) include an indemnification clause in the contract with the vendor and confirm that the vendor has sufficient assets to comply with its indemnification obligations, if necessary; and e) act promptly and responsibly to consumer complaints.

5. Endorsements And Testimonials

An endorsement or testimonial is generally defined as any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or


\textsuperscript{228}See \textit{generally} Douglas J. Wood, Harrah’s Ordered to Pay Out In $5.8 Million Coupon Printing Error, \textit{available at} http://www.adlawbyrequest.com/in_the_courts.cfm?cit_id=2504&FAArea2=customWidgets.content_view_1&useCache=false&ocl_id=ARTICLE.
other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser. An endorser may be an individual, a group, or an institution.

The FTC has specific written guidelines regarding the use of endorsements and testimonials. Generally speaking, the FTC requires that endorsements and testimonials must reflect the honest opinions, findings, beliefs or experiences of the endorser and may not contain any representations that would be deceptive. This rule is a simple one, premised upon the basic principle that consumers often rely upon the opinions of people that they know, like or trust in making product decisions and endorsements must therefore be non-deceptive.

Some advertisers believe, incorrectly, that endorsements themselves, especially endorsements from consumers who have used an advertised product, may provide adequate substantiation for a claim. This is not the case. Rather, the Endorsement Guide clearly provides that endorsements “may not contain any representations which would be deceptive or could not be substantiated if made directly by the advertiser.” Thus, before an advertiser can use an endorsement, the advertiser must possess competent and reliable evidence to support any product efficacy claims conveyed to consumers. In addition, any material connection between the endorser and the advertiser that is not reasonably expected by a consumer that could materially affect the weight or credibility of the endorsement must be disclosed.

Advertisers often use three types of endorsers: experts, celebrities, and consumers. Each category has its own rules regarding the scope of representations that can be made and the liability for overstepping the bounds.

Expert endorsers, on the one hand, are individuals, groups or institutions that possess knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. Expert endorsers must have qualifications sufficient to give them all of the expertise that is represented to the public. An expert endorsement must also be supported by testing or an examination of the product that is at least as rigorous and extensive as experts in the field generally agree is needed to support the conclusions presented in the endorsement.

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229 See FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (the “Endorsement Guide”).

230 Id. at 255.1(a).

231 See, e.g., In re Numex Corp., 116 FTC 1078 (1993) (endorser’s status as a corporate officer must be disclosed); In re TrendMark, Inc., 126 FTC 375 (1998) (consumer endorsers’ status as distributors of weight loss product or spouses of distributors required to be disclosed).

232 16 C.F.R. § 255.0(d).

233 Id. at 255.3(a).

234 Id. at 255.3(b). See also In re The Eskimo Pie Corp., 120 FTC 312 (1995) (consent order relating to challenge that food advertiser deceptively claimed that its line of frozen desserts were approved or endorsed by the American Diabetes Association); In re Black & Decker (U.S.) Inc., 113 FTC 63 (1990) (consent order relating to challenge that household iron received the endorsement of the National Fire Safety Counsel when this group was held not to have the expertise to evaluate appliance safety).
Celebrity endorsers, like other endorsers, may only endorse a product or service based on their honest opinions, findings, beliefs or experience. This means, quite simply, that the celebrity who is represented as using the product or service must, in fact, be a bona fide user and must, in fact, hold the views presented in the advertisement at the time it is made. In areas of rapid technological change, advertisers must also be careful to apprise the celebrity endorser of any new information on the performance or effectiveness of the product or, if applicable, a competitor's product, any material alterations of the product, and any changes in the advertiser's contract commitments to determine if the celebrity is still comfortable endorsing the product.

Consumer endorsers are typically individuals who have used the product or service and have been asked by the advertiser to convey their experiences. The Endorsement Guide requires that consumer endorsements and/or testimonials must be representative of what consumers as a whole will typically achieve with the product or service in actual use. If this is not the case, then the advertiser must either clearly disclose the limited applicability of the endorser's experience to what can typically be expected or must clearly disclose what the generally expected performance would be in the depicted circumstances.

Many advertisers believe that a disclaimer with words to the effect that "not all consumers will achieve this result" is sufficient to disclaim an implied claim that the endorser's experience is indicative of what a consumer will typically experience. The Endorsement Guide, however, clearly provides that this is not enough.

A relatively new variation of a traditional consumer endorsement that is drawing criticism from some consumer protection groups is "buzz marketing," a term used to describe word of mouth marketing which companies undertake to generate favorable word of mouth publicity about a product or service. It is generally perceived to be a low-cost, highly effective way to promote a positive "buzz" about a product. According to one organization that opposes the practice, word of mouth marketing is now a $100-$150 million business that ranks among the marketing industry's highest growth areas. According to this same organization, more than 85% of the nation's top 1000 marketers now use some form of buzz marketing.

In fact, one well known company, Procter & Gamble, apparently has been using this form of marketing to promote household products such as Clairol Herbal Essences Shampoo, Dawn Direct Foam, and Febreze Air Effects, since approximately 2001. Proctor & Gamble's Tremor program has reportedly enlisted over 250,000 teens aged 13 to 19 to talk to friends

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235 See, e.g., FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004) (holding that celebrity endorser possessed necessary level of substantiation).

236 16 C.F.R. § 255.2 (a).

237 Id. See also Priceline.com Incorporated (Hotel Pricing), Report #4073, NAD Case Reports (Aug. 2003).

238 See 16 C.F.R. § 255.2, ex. 1.

239 See www.commercialalert.org/issues/culture/buzz-marketing/pg-buzz-marketing-unit-hit-with-complaint.

240 Id.
about new products and concepts that P&G sends to them. Since most of P&G’s products are sold to adults, over 80% of Tremor’s work to date has been for outside companies, such as music and movie companies. Similarly, P&G’s Vocalpoint program has apparently enlisted over 600,000 mothers with children ages 19 or under to talk about three P&G products. In each instance, the volunteers are not paid, are not told what to say about the products, and are not directed by P&G to disclose to their friends that they are part of the Tremor and/or Vocalpoint organization. They are, however, given free samples, discount coupons and other perks by P&G, thereby raising concerns by some groups that this type of marketing might be deceptive since the decision to disclose the affiliation with the two P&G groups is left solely to the volunteer.

In October 2005, Commercial Alert filed a complaint against Tremor with the FTC, claiming that P&G’s policy of not requiring its volunteers to disclose their affiliation with the company was deceptive and threatened the “commercialization of human relations.”241 In apparent response to this complaint, certain buzz marketing entities, such as the Viral + Buzz marketing Association (VBMA) and Word of Mouth Marketing Association (WOMMA) began publishing ethical guidelines for their members.242 Proponents of this form of marketing suggest that these ethical guidelines, when coupled with the existing Guidelines referenced above, are sufficient to maintain honesty and integrity in this form of marketing, thereby eliminating the need for additional governmental guidelines or regulations. The FTC has not taken any formal action on this complaint.

In addition to this activity on the federal level, a Massachusetts State Representative introduced a bill in 2005 that would, if passed, require that children under the age of 16 recruited to engage in buzz marketing obtain parental consent before participating in any such activities. The legislation specifically targets programs that invite consumers to receive free merchandise in exchange for sharing product information with friends.243

XI. CONCLUSION

Not confined to a particular statute or jurisdiction, the law of advertising may seem unwieldy and intimidating to even the experienced practitioner. But a basic understanding of the legal framework and the underlying principles associated with commercial advertising is important in order to avoid the pitfalls that can be associated with aggressive marketing campaigns for goods or services that compete for attention among numerous providers anxious to reach the same audience. It is far better to clear the advertisement before it is launched than to attempt to justify it once it has been aired to consumers (and your client’s competitors). Checking for truthfulness, accuracy and substantiation is essential to ensure a smooth and successful marketing strategy.


Jennifer Moore is a business litigator who focuses on franchise, distribution, and contract disputes, intellectual property litigation, and business tort litigation. She has represented franchisors and manufacturers in litigation, arbitration and mediations involving a host of franchising and distribution issues. She also has an active intellectual property practice, focusing on cases involving claims of trademark infringement, copyright infringement, false advertising, misappropriation of trade secrets, and related business torts.

Jennifer is a member of the editorial board for *The Franchise Lawyer* and currently serves on the Programming Committee for programs other than the annual meeting. Jennifer organized and participated in the June 2006 Fundamentals of Franchising Program presented in Atlanta, Georgia presented to a group of 65 lawyers and business representatives from across the Southeast. Jennifer also participated in a program sponsored by the ABA Forum on Franchising at the American Bar Association Annual Meeting in Atlanta in August 2004.

Jennifer is a member of the ABA Forum on Franchising, the Intellectual Property Sections of the ABA and the State Bar of Georgia, and the Atlanta Bar Association. Education: J.D., the University of Georgia School of Law; B.A., University of North Carolina at Chapel Hill.
**Linda K. Stevens** is a Schiff Hardin partner who resolves intellectual property and other commercial disputes – both inside and outside of the courtroom – including those regarding trade secrets, confidentiality agreements, employee raiding, and covenants not to compete. Her courtroom experience extends from trial courts at the state and federal levels to the appellate arena as well. In addition to her courtroom work, Linda acts as general outside counsel to several intellectual property-focused clients, assisting them with all aspects of their business.

Linda is a frequent speaker regarding trade secrets and non-competes, and she has written articles on those issues as well, including for the *ABA Franchise Law Journal*. She wrote the chapter regarding “Trade Secrets Remedies” and the “Inevitable Disclosure Doctrine” for the 2005 edition of the *Intellectual Property Law Handbook* (Illinois Institute for Continuing Legal Education, Spring 2005).


Linda also has written several columns regarding trade secrets and non-compete agreements, and has been interviewed by numerous legal and general news publications, including the *Chicago Tribune* and the *ABA Journal*, on those topics.

Linda is active in the ABA Franchise Forum, and her other ABA activities include chairing the Trade Secrets subcommittee of the ABA Litigation Section’s Intellectual Property Committee. She has served as an adjunct faculty member of Northwestern University School of Law and the National Institute of Trial Advocacy. Linda has been recognized as a “Super Lawyer” – Intellectual Property – Litigation, by *Illinois Super Lawyers* and a Leading Lawyer – Litigation, by the *Illinois Leading Lawyers Network*.