AVOIDING AND LITIGATING CLAIMS IN ADVERTISING
FRANCHISED PRODUCTS AND SERVICES

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The growth of the Internet, social media, and digital marketing has dramatically expanded the methods available to franchisors and franchisees to advertise and market goods and services. These methods still include traditional television, radio, and print advertising, flyers and mailers, and point of purchase displays. But U.S. spending on digital advertising will overtake traditional advertising during 2019. Going forward the majority of advertising will be done digitally and electronically, through methods such as social media advertising (through platforms including Facebook, Twitter, and Instagram), content marketing (e.g., through blog posts), pay-per-click search engine advertising, email marketing, affiliate marketing, marketing through social media influencers and endorsers, and native advertising.

These expanded options for advertising and marketing create new opportunities to reach potential customers and target audiences, and to increase a business’s interaction with its existing customers. With these expanded opportunities comes expanded legal risks. It is easier than ever to “advertise” – by posting an ad, photograph, or social media message online or sending an email advertisement. As a result, these forms of advertising may not get the same level of business and legal review that more traditional advertising does.

This is a mistake, since the same laws and regulations apply to digital marketing as apply to traditional advertising. These include federal and state laws that prohibit false, misleading and deceptive advertising and marketing practices and regulate consumer email marketing and telemarketing. They also include regulations imposed by the Federal Trade Commission (“FTC”) and by states that prohibit false, misleading and deceptive advertising by express statements or by implication. These laws also regulate advertising in forms such as endorsements, environmental (“green”) marketing claims, health claims, and marketing directed to children.

The FTC and state attorney generals have broad powers to enforce advertising and marketing regulations, including by bringing enforcement actions. In addition, both competitors and, in some cases, consumers, can bring private causes of action to address false or misleading advertising and other forms of deceptive marketing and advertising practices. These can include consumer class action lawsuits that are expensive and time consuming to defend. Recent years have seen a dramatic increase in consumer class actions addressing advertising and marketing claims, in which a number of franchisors have been ensnared.

This paper provides an overview of federal and state laws and regulations affecting advertising and marketing of goods and services, including common bases for false and deceptive advertising claims and regulations applicable to digital marketing and endorsements. It also

1 The authors would like to thank Shaniqua Singleton (Nelson Mullins), Nicole Gougeon (Cheng Cohen), and Gar Lauerman (Cheng Cohen) for their valuable assistance with this paper.

2 According to digital marketing research company eMarketer, U.S. spending on digital advertising will overtake traditional advertising during 2019, with digital ad spending increasing 19% to $129.3 billion while traditional falls 19% to $109.5 billion. Two-thirds of this digital ad spend will go to Google, Facebook, or Amazon. https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019.
discusses best practices that advertisers can implement to help ensure that advertising and marketing comply with the law and do not pose unreasonable risks of consumer deception, frustration, or claims.

I. FALSE, MISLEADING, AND DECEPTIVE ADVERTISING CLAIMS – PRIVATE CAUSES OF ACTION

The federal Lanham Act, 15 U.S.C. § 1051 et seq., provides a private cause of action for false and misleading advertising, and also for certain other advertising practices which are likely to cause confusion or deception. State laws also provide for statutory and common law claims for false or misleading advertising and for other advertising and marketing practices which deceive or have a tendency to deceive consumers. This section summarizes the elements of these claims and available defenses and remedies, and highlights cases which illustrate the breadth and application of these laws, including in the context of class action lawsuits. This section will also describe certain non-judicial remedies available by filing a complaint with the National Advertising Division of the Advertising Self-Regulatory Council and Better Business Bureaus.

A. Federal Lanham Act Claims

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides two distinct federal causes of action: (i) for false and misleading advertising; and (ii) for use of a name, mark, symbol or other “false designation of origin” in connection with goods or services in a manner which is likely to cause confusion, mistake or deception as to source, affiliation, sponsorship or approval.

1. False and Misleading Advertising Claims

a. Elements and Proof of a False/Misleading Advertising Claim

Under the false advertising prong of Section 43(a), “[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any . . . false or misleading description of fact, or misleading representation of fact which, . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”

To establish a false or misleading advertising claim under Section 43(a) of the Lanham Act, a plaintiff must plead and prove the following elements:


i. The defendant’s use of a false or misleading description or representation of fact about its or another’s goods, services, or commercial activities, in commercial advertising: This may be satisfied “if the challenged advertisement is literally false, or if the challenged advertisement is literally true, but misleading.”6 In evaluating whether an advertising statement or claim is false or misleading, courts analyze the advertisement on its face in its entirety and in its full context.7

ii. Which deceives or has the capacity to deceive consumers: Literally false advertising statements are considered deceptive as a matter of law, so that there is no need to provide further evidence to satisfy the second element of consumer deception.8 A claim of misleading advertising which is not literally false requires proof of consumer deception or a tendency to deceive — i.e. that a substantial number of consumers were or are misled or likely to be misled.9 Proof that an advertising claim is deceptive or misleading is often introduced through a consumer survey.10

iii. Which has a material effect on purchasing decisions: The “materiality” element requires a showing that a misrepresentation is or was “material” in the sense that it is or was likely to influence consumers’ purchasing decisions.11 In most circuits, materiality of the false or misleading statement must be proven even if the advertisement is literally false.12 Materiality may be presumed if the misrepresentation relates to an inherent quality or characteristic of a product or service.13

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6 Osmose, Inc., 612 F.3d at 1308; see also Verisign, Inc., 848 F.3d at 302; Eli Lilly and Company v. Arla Foods, Inc., 893 F.3d 375, 382 (7th Cir. 2018); Wysong Corp. v. APN, Inc. (17-1975), 889 F.3d 267, 270-71 (6th Cir. 2018).

7 Osmose, Inc., 612 F.3d at 1308.

8 See Eli Lilly and Company, 893 F.3d at 382; Wysong Corp., 889 F.3d at 270-71.

9 See Eli Lilly and Company, 893 F.3d at 382; Wysong Corp., 889 F.3d at 271.


11 Cashmere & Camel Hair Mfrs. Institute v. Saks Fifth Ave., 284 F.3d 302, 311-12 (1st Cir. 2002) (“The materiality component of a false advertising claim requires a plaintiff to prove that the defendant’s deception is ‘likely to influence the purchasing decision’”); Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1250 (11th Cir. 2002) (“To succeed on a claim of false advertising, the plaintiff must first establish that ‘the defendant’s deception is likely to influence the purchasing decision.’”); Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmbH, 843 F.3d 48, 71 (2d Cir. 2016) (“[i]f consumers, face with the choice to purchase either the plaintiff’s product or the defendant’s, are likely to prefer the defendant’s product by reason of the defendant’s false advertising, the falsity of the defendant’s advertising is material to the plaintiff’s Lanham Act claim.”).

12 See Johnson & Johnson Vision Care, 299 F.3d at 1250. But see Pizza Hut, Inc. v. Papa John’s Intern., Inc., 227 F.3d 489,497 (5th Cir. 2000) ("With respect to materiality, when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statement had on consumers").

13 See Johnson & Johnson Vision Care, 299 F.3d at 1250 (“A plaintiff may establish this materiality requirement by proving that ‘the defendants misrepresented an inherent quality or characteristic of the product.’”); Apotex Inc. v. Acorda Therapeutics, Inc., 823 F.3d 51, 63 (2d Cir. 2016) (“the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product” and that “[s]uch a ‘requirement is essentially one of materiality, a term explicitly used in other circuits”); Cashmere & Camel Hair Mfrs. Institute, 284 F.3d at 312.
iv. **The advertising occurs in or affects interstate commerce;** and

v. **The plaintiff has been or is likely to be harmed.** The plaintiff must prove that it has been or is likely to be injured as a result of the deceptive advertising. The likelihood of injury may be shown by proof of either an actual or likely diversion of sales or by a lessening of good will associated with the plaintiff’s product.\(^{14}\)

A Lanham Act false advertising claim can be brought by a competitor or other commercial party who can show economic or reputational harm flowing from the defendant’s deceptive advertising.\(^{15}\)

Advertising statements relating to the performance, health, safety, or other benefits of or preferences for a product or service that one would expect to be validated by a test or study (sometimes referred to as a “tests show” advertising claim) present additional wrinkles in the proof needed for a false advertising claim. Proof that such statements are literally false require a showing that the underlying tests or studies either do not support the proposition or are not sufficiently reliable to permit one to conclude with reasonable certainty that they establish the proposition for which they are cited.\(^{16}\) A plaintiff may meet this burden by either attacking the validity of the tests or studies directly, or by showing that the tests are contradicted or unsupported by other scientific tests.\(^{17}\)

Many false advertising claims arise in the context of allegedly misleading “comparative advertising” where the defendant claims that its product is equivalent or superior to its competitor’s product or has a quality for which its competitor’s product does not.\(^{18}\) Claims involving comparative advertising are a typically analyzed under the same elements and principles applicable to other types of false advertising claims.

Courts generally permit the use of a competitor’s name, trademark, or logo as part of comparative advertising to accurately identify the competitor and its goods or services, so long as “it does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity or sponsorship of the advertiser’s product.”\(^{19}\)

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\(^{14}\) See *Verisign, Inc.*, 848 F.2d at 300; *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247 (2d Cir. 2014).

\(^{15}\) *Lexmark Int’l*, 134 S. Ct. at 1390-92. A consumer has no standing to bring a false advertising claim under the Lanham Act. *Id.*

\(^{16}\) *Osmose*, 612 F.3d at 1309; *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); C.B. *Fleet Co., Inc. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 435 (4th Cir. 1997); *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62-63 (2d Cir. 1992).

\(^{17}\) See *Southland Sod Farms*, 108 F.3d at 1139 (citing *McNeil–P.C.C., Inc. v. Bristol–Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir.1991)).

\(^{18}\) See McCarthy § 27:59.

\(^{19}\) See *SSP Agricultural Equipment, Inc. v. Orchard-Rite Ltd.*, 592 F.2d 1096, 1103 (9th Cir. 1979) (Comparison advertisement using plaintiff’s trademark for an agricultural wind machine was not trademark infringement.); see also *G.D. Searle & Co. v. Hudson Pharmaceutical Corp.*, 715 F.2d 837, 220 U.S.P.Q. 496 (3d Cir. 1983) (Defendant may properly advertise its REGACILUM laxative as “equivalent to” plaintiff’s METAMUCIL laxative so long as defendant
b. Defenses to False/Misleading Advertising Claims

A defendant to a false or misleading advertising claim may have a number of potential defenses. The first of these is that the statements made are merely opinions, not fact. Under both the Lanham Act and the Constitutional protections for freedom of speech, statements of opinion about commercial issues do not constitute false advertising.\(^\text{20}\) Another defense is that the statements amount to mere “puffery.” Puffery comes in two varieties: (1) grossly exaggerated advertising claims which no reasonable buyer would believe were true; and (2) a general claim of superiority that is so vague and indeterminate that it will be understood as a mere expression of opinion.\(^\text{21}\) Defendants may also assert a defense of laches for the plaintiff’s delay in objecting to the offending advertisement or conduct.\(^\text{22}\)

Regulatory approval of food or drug labelling by the Food and Drug Administration under the federal Food, Drug, and Cosmetics Act (“FDCA”) generally does not preclude a Lanham Act false advertising claim for false labeling. This was explained by the U.S. Supreme Court in *POM Wonderful LLC v. The Coca-Cola Co.*, in which POM Wonderful, a distributor of a pomegranate-blueberry juice blend, asserted as false advertising Coca-Cola’s labeling of its product as “pomegranate blueberry” when it contained only 0.3% of pomegranate juice and 0.2% blueberry juice.\(^\text{23}\) POM contended that Coca-Cola’s label “tricks and deceives consumers” and that the “name, label, marketing, and advertising of Coca-Cola’s juice blend mislead consumers into believing the product consists predominately of pomegranate and blueberry juice when it in fact consists predominately of less expensive apple and grape juices.”\(^\text{24}\) In response, Coca-Cola argued that the FDCA’s labeling requirements are solely enforceable by the FDA, not by individual plaintiffs.\(^\text{25}\) The Court rejected Coca-Cola’s argument and reversed the lower courts’ dismissal of POM’s false advertising claims, explaining that:

There is no statutory text or established interpretive principle to support the contention that the FDCA precludes Lanham Act suits like the one brought by POM in this case. Nothing in the text, history, or structure of the FDCA or the Lanham Act shows the congressional purpose or design to forbid these suits. Quite to the contrary, the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels. Competitors, in their own interest, includes the statement: “METAMUCIL® is made by G.D. Searle & Co. Searle does not make or license REGACILUM®.”

\(^{20}\) See McCarthy § 27:67.

\(^{21}\) McCarthy, § 27:38; see *Guidance Endodontics, LLC v. Dentsply Intern., Inc.*, 708 F. Supp. 2d 1209, 1241 (D.N.M. 2010) (advertising claims that dental equipment was “world’s best” were mere puffery); see also discussion of *Papa John’s v. Pizza Hut* case, infra at p. 6.

\(^{22}\) See McCarthy, § 31:1.


\(^{24}\) Id. at 105, 110.

\(^{25}\) Id. at 112-16.
may bring Lanham Act claims like POM’s that challenge food and beverage labels that are regulated by the FDCA.26

The FDCA still could preclude Lanham Act false advertising claims in limited situations in which the claims at issue fall within the exclusive regulatory authority of the FDA, such as determinations about the safety, legality, and classification of new drugs, and whether such drugs can be lawfully marketed under the FDCA.27 And, a FDCA preemption claim has been successful in barring state law claims for unfair competition arising from allegedly falsely labelling “well water” as “spring water,” although plaintiff’s analogous Lanham Act false advertising claim was allowed to proceed.28

c. Representative Examples of False/Misleading Advertising Claims

False advertising claims arise in a wide variety of contexts. For example, false advertising claims have been asserted against product manufacturers for claiming a product has certain qualities, benefits or attributes that it simply does not have — in other words, that the claim was “literally false” under the Lanham Act tests described above. In *Abbott Laboratories v. Mead Johnson & Co.*, the manufacturer of an oral electrolyte product used to prevent dehydration in infants claimed that the carbohydrate components of its product were “rice-based,” as opposed to the plaintiff’s “glucose-based” competing product.29 The court concluded that the defendant-manufacturer’s claims were literally false in violation of Section 43 of the Lanham Act because its oral electrolyte product was not made from rice grain powder or other grain based components.30 Similarly, in *Moltan Co. v. Eagle-Picher Industries, Inc.*, the Sixth Circuit upheld a preliminary injunction entered against a manufacturer of earth oil absorbent products for falsely advertising and labeling them as not containing carcinogens.31

In other instances, the cases evaluated advertising claims that were not literally false but were rather “misleading.” For example, in *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, Papa John’s appealed from a jury verdict which found that Papa John’s advertising use of its “Better Ingredients. Better Pizza” slogan — standing alone and when used in the context of advertising comparing Papa John’s ingredients to those used by its competitors including Pizza Hut — was “misleading” in violation of section 43(a) of the Act.32 The Fifth Circuit concluded that the slogan

26 Id. at 106. The Court further explained that “[b]ecause the FDA acknowledges that it does not necessarily pursue enforcement measures regarding all objectionable labels, if Lanham Act claims were to be precluded then commercial interests—and indirectly the public at large—could be left with less effective protection in the food and beverage labeling realm than in many other, less regulated industries,” and that “’[i]t is unlikely that Congress intended the FDCA’s protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other products.” Id. at 116.


29 971 F.2d 6 (7th Cir. 1992).

30 Id.

31 55 F.3d 1171 (6th Cir. 1995).

32 227 F.3d 489 (5th Cir. 2000). Prior to the challenged Papa John’s advertising campaign, Papa John ran television ads in which a Pizza Hut founder who was a then-current Papa John’s franchisee declared the superiority of Papa
“Better Ingredients. Better Pizza,” standing alone, amounted to non-actionable puffery, holding that “Better Pizza.” is “a general statement of opinion regarding the superiority of the product over all others,” and amounts to the kind of “exaggerated advertising, blustering, or boasting by a manufacturer” that constitutes puffery; while “Better Ingredients.” is likewise mere puffery because the word “better,” when used in this context, is unquantifiable; what makes one ingredient “better” than another is a matter of individual taste and perception.33

The Fifth Circuit next considered whether the slogan became actionable when used in various advertisements comparing the ingredients Papa John’s uses to those used by its competitors, including Pizza Hut. Like the district court, the Fifth Circuit concluded that the context of Papa John’s comparative advertising made the use of “Better Ingredients. Better Pizza” “no longer mere opinion, but rather took on the characteristics of a statement of fact,” which was misleading.34 But even though the slogan became misleading when used in this context, the Fifth Circuit concluded that Pizza Hut failed to present sufficient evidence showing that the misleading statements materially affected consumer purchasing decisions.35 Thus, the court held that the district court erred in denying Papa John’s motion for judgment as a matter of law.36

Similarly, in Doctor’s Associates, Inc. v. QIP Holder Inc., Quiznos faced a Lanham Act claim for its “Quiznos vs. Subway TV Ad Challenge,” an advertising campaign asking consumers to submit Youtube videos explaining why Quiznos sandwiches were better than Subway sandwiches.37 The court held that Quiznos could be liable for the false or misleading claims made in the consumer videos if a jury determined that Quiznos had played a role in developing the content (though the parties settled this case before the jury weighed in on the facts in dispute). And in Happy Tax Franchising, LLC v. H&R Block, Inc., Happy Tax asserted H&R Block’s advertising campaign promoting the company as the only online and in-person tax preparation service offering “Upfront” and “Transparent” pricing was false, misleading, and in violation of the Lanham Act.38 Happy Tax argued that H&R Block’s television and internet-hosted commercials, including a commercial uploaded to YouTube, was literally false because Happy Tax also “offers and advertises ‘Upfront’ and ‘Transparent’ pricing, and had done so since at least 2015.”39 The parties ultimately settled the dispute for an undisclosed amount.

2. Trademark Infringement/False Designation of Origin Claims Arising From Keyword Search Engine Advertising

John’s pizza over Pizza Hut’s, and another series of ads touting the results of taste tests in which consumers preferred Papa John’s pizza over Pizza Hut’s. Id. at 491-92.

33 Id. at 498-99.
34 Id. at 501-02.
35 Id. at 502-504.
36 Id. at 504.
39 Id. at Compl. ¶ 30.
Keyword Internet search engine advertising (also known as “pay per click” advertising, exemplified by Google’s AdWords program) is a common form of Internet advertising. It involves an advertiser bidding with Google, Yahoo, or another Internet search engine to have its ads displayed in Internet search results (labelled as an “Ad”) when certain designated “keywords” are searched by consumers. The goal is to have consumers click on the resulting ad in the search results, which will connect the consumer to the advertiser’s website or phone number. The advertiser bids for how much it will pay the search engine operator each time its ad is clicked by a consumer, with the bid amount influencing how frequently the ad is displayed in response to consumer searches for particular keywords.

It is not unusual for an advertiser to include its competitors’ trademarks among the keywords that it bids on and purchases to generate search engine ad results. For example, a Volkswagen dealer may wish to have its ad displayed in the results page when a consumer searches Google for Toyota, and thus may include Toyota among the keywords it purchases. This advertising practice has led to lawsuits by trademark owners alleging trademark infringement and/or false designation of origin under the Lanham Act.

A claim of trademark infringement requires proof that: (1) the plaintiff owns a protectable trademark; and (2) defendant’s use of the same or similar mark in commerce is likely to cause confusion or deception of the public concerning the origin or affiliation of goods or services. Bidding on and purchasing another’s trademark as a keyword to generate search engine ads amounts to “use in commerce” of the mark. Courts have concluded that a defendant’s mere purchase of a plaintiff’s mark as a keyword term, on its own, is insufficient to establish the further element of a likelihood of consumer confusion. However, likelihood of confusion might be found if the content and appearance of the ad (or of the website to which the ad links) suggests that it could be advertising for, sponsored by, or affiliated with the plaintiff trademark owner, or if other facts suggest that the practice could cause confusion as to the source of the goods or services advertised or as to the affiliation, sponsorship or approval of those goods or services.

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40 See 15 U.S.C. § 1114 (1)(a) (establishing liability for “[a]ny person who shall, without the consent of the registrant use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive”); see also 15 U.S.C. § 1125(a) (establishing liability for “any person” who “uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin” that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. . . .”).

41 See Virgin Enters. V. Nawab, 335 F.3d 141, 146 (2d Cir. 2003); Tana v. Dantanna’s, 611 F.3d 767, 773 (11th Cir. 2010). This standard applies both to a claim for infringement of a federally registered trademark under 15 U.S.C. § 1114, and a claim for false designation of origin based on trademark infringement under 15 U.S.C. § 1125(a)(1)(A).

42 See, e.g., Rescuecom Corp. v. Google, Inc., 562 F.3d 123, 127 (2d Cir. 2009).

For example, in *Edible Arrangements LLC v. Provide Commerce, Inc.*, plaintiff Edible Arrangements (a franchisor and leading seller of fresh fruits sculpted in the shapes of flowers and arranged to resemble floral arrangements), sued for trademark infringement and false designation of origin based on its competitor’s purchase of plaintiff’s “Edible Arrangements” mark as a keyword to generate defendant’s ads for competing products when consumers searched the mark in an Internet search engine. Defendant’s resulting ads at issue included a prominent, underlined reference to the term “Edible Fruit Arrangements,” followed by smaller text that sometimes but not always displayed one of defendant’s own brand names and that included one of defendant’s domain names (such as www.proflowers.com).

In ruling on defendant’s motion for summary judgment, the District Court explained that:

The court [in the Second Circuit case of *Rescuecom v. Google*] held that the sale of a mark as a keyword . . . could create a likelihood of confusion if searchers were “misleadingly directed to the ads and websites of its competitors in a manner which leads them to believe mistakenly that these ads or websites are sponsored by, or affiliated with the plaintiff.” *Id.* Similarly, the Ninth Circuit has held that “[t]he potential for infringement in this context arises from the risk that while using [Plaintiff’s] mark to search for information about [Plaintiff’s] product, a consumer might be confused by a results page that shows a competitor’s advertisement on the same screen, when that advertisement does not clearly identify the source or its product. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1149 (9th Cir. 2011). Thus, the crux of the issue is whether a defendant’s keyword purchases, combined with the look and placement of that defendant’s advertisement, create a search results page which misleads, confuses or misdirects a consumer searching for a trademarked brand to the website of a competitor in a manner in which the source of the products offered for sale by the competitor is unclear.

Applying this standard, the Court denied defendant’s motion for summary judgment, holding that a reasonable trier of fact could conclude that defendant’s purchase of plaintiff’s Edible Arrangements mark as a keyword, and use of it to generate ads which advertised “edible fruit arrangements” and which identified the seller only in the small print of a URL, could result in a likelihood of confusion, and could suggest that defendant’s intent “was to mislead consumers as to sponsorship or affiliation with [plaintiff] and to misdirect the web traffic of users searching for [plaintiff’s] mark.”

Another District Court explained that Lanham Act claims based on search engine keyword advertising rely on proof of “initial interest confusion” that is likely to “divert users to the defendant’s website,” even if the customer realizes the true source of the goods before a sale is

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45 *Id.* at *5-8.

46 *Id.* at *30-31.

47 *Id.* at *36-37; see also *Hearts on Fire Co. v. Blue Nile, Inc.*, 603 F. Supp.2d 274, 289 (D. Mass. 2009) (noting importance of whether “the consumer clicked on the sponsored link thinking that he would find products” affiliated with the mark, but upon landing at the competitor’s website “nothing there would immediately alert him to his mistake.”)
consummated. That Court noted that the Ninth Circuit had identified the following factors as relevant to analyze whether there is a likelihood of "initial interest confusion" in this context:

(1) the strength of the mark, (2) the evidence of actual confusion, (3) the type of goods and degree of care likely to be exercised by the purchaser, and (4) the labeling and appearance of the advertisements and the surrounding context of the screen displaying the results page. The Ninth and Tenth Circuits have further held that the last factor—the labeling and appearance of the advertisements and the surrounding context of the screen displaying the search results—is the most critical in determining whether a likelihood of confusion exists in cases where the defendant has used a competitor's mark as a keyword search term.48


Although not expressly called out in the Lanham Act’s prohibition on false designations of origin, the statutory language in Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) has been found to be broad enough to provide a vehicle for “false endorsement” claims; i.e., claims of falsely implying the endorsement of a product or service by a celebrity or other person.49

An advertisers’ unauthorized use of a celebrity’s (and in some cases, a non-celebrity’s) name, image, or likeness in commercial advertising (including social media) can give rise to being sued for “false endorsement”. False endorsement claims are similar to state law claims for misappropriating a person’s right of publicity (discussed infra, at pp. 15-17), in that they both involve unauthorized use of a person’s name, image, likeness, or other aspect of identity for commercial purposes. However, false endorsement claims require proof of the added element of falsity – i.e., that the unauthorized use of the person’s identity is likely to falsely deceive or mislead consumers into believing that the person approves, sponsors, or endorses the goods or services of the business at issue.

The Sixth Circuit, in a case in which Tiger Woods’ licensing agent sued for false endorsement over a painting which included images of Woods during his victory at the 1997 Masters golf tournament, explained that:

Courts have recognized false endorsement claims under § 43(a) of the Lanham Act where a celebrity’s image or persona is used in association with a product so as to imply that the celebrity endorses the product. False endorsement occurs when a celebrity’s identity is connected with a product or service in such a way that consumers are likely to be misled about the celebrity’s sponsorship or endorsement of the product or service.50

48 EarthCam, Inc. v. OxBlue Corp., 49 F. Supp. 3d 1210, 1241 (N.D. Ga. 2014) (citing Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1154 (9th Cir. 2011) and 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1245 (10th Cir. 2013)) (granting summary judgment to defendant because plaintiff failed to present evidence on these factors relevant to likelihood of confusion).

49 See McCarthy § 28:14.

50 ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 925-26 (6th Cir. 2003) (court balanced the First Amendment right of creative expression against a proprietary right of publicity and to be free from false endorsements and found that Wood's image had artistic relevance to the creative work of art and that it did not mislead as to the source of the work).
In Allen v. Nat'l Video, Inc., the Southern District of New York similarly held that “the unauthorized use of a person's name or photograph in a manner that creates the false impression that the party has endorsed a product or service in interstate commerce violates the Lanham Act.” In that case, National Video was a franchised video rental chain that ran an advertisement featuring Woody Allen look-alike Phil Boroff. In the ad, Boroff was depicted as a customer at the counter in a National Video store, holding his National Video V.I.P. card with videotape cassettes of “Annie Hall” and “Bananas” (two of Woody Allen's movies) on the counter waiting to be rented. The headline on the ad read “Become a V.I.P. at National Video. We'll Make You Feel Like a Star.” The ad ran in the Video Review magazine, and on counter-cards distributed to National's franchisees to be used inside National Video stores.

Woody Allen was not amused by this and brought claims against National Video and Boroff for violations of his right of publicity and false endorsement. The district court determined that this conduct amounted to false endorsement in violation of the Lanham Act, concluding that it only had to determine whether the Allen look-alike was "sufficiently similar to plaintiff" to create a likelihood of confusion as to Allen's endorsement of National Video. After analyzing the evidence, the court was led "to the inescapable conclusion that defendant's use of Boroff's photograph in their advertisement creates a likelihood of consumer confusion over plaintiff's endorsement or involvement." As a result, the court granted summary judgment to Allen on his Lanham Act claim and entered an injunction prohibiting potentially confusing use of the photograph.

The age of social media has led to false endorsement claims arising from unauthorized use of one's photograph or likeness being posted on advertisements to Facebook, Instagram, or Twitter. For example, in April 2014 drug store chain Duane Reade posted a picture on Twitter and Facebook of actress Kathrine Heigl carrying a Duane Reade shopping bag, with a tweet that read: “Love a quick #DuaneReade run? Even @KatieHeigl can’t resist shopping #NYC’s favorite drugstore [...]”. Heigl promptly filed a $6 million dollar lawsuit in federal court for false endorsement under the Lanham Act and for violating her right of publicity. She reportedly settled after Duane Reade removed the posts and made a contribution to benefit a Heigl endorsed charity.

Similarly, the Middle District of Florida denied motions to dismiss false endorsement claims in multiple cases in which images of plaintiffs with modeling careers and significant

52 Id. at 625-28.
53 Id. at 632. The court further held that a disclaimer in small print in the magazine ad reading "Celebrity double provided by Ron Smith's Celebrity Look-Alike's, Los Angeles, Calif." was so small that it was unlikely to be noticed by most readers; and that "to be effective, a disclaimer would have to be bolder and make clear that plaintiff in no way endorses National, its products, or its services. [cite omitted] Having gone to great lengths to evoke plaintiff's image, defendants must do more than pay lip service to avoiding confusion." Id. at 629.
social media followings were used without permission to advertise a defendant’s business on its social media accounts.\textsuperscript{55}

The First Amendment and associated rights of freedom of speech and expression can serve as valid defenses to a false endorsement claim in certain circumstances. Lanham Act Section 43(a) “protects the public’s interest in being free from consumer confusion about affiliations and endorsements, but this protection is limited by the First Amendment, particularly if the product involved is an expressive work.”\textsuperscript{56} In the Tiger Woods painting case mentioned above, the Sixth Circuit concluded that Wood’s image had artistic relevance to the creative work of art and that it did not mislead as to the source of the work, so as to preclude application of the Lanham Act.\textsuperscript{57}

There is a difference between an advertisement that is likely to confuse as to endorsement and one that only calls a person to mind. In \textit{Roberts v. Bliss}, the Southern District of New York dismissed an actress’s false endorsement claim after T.G.I. Friday’s used a viral video of her for an appetizer commercial, masking her identity with images of life-sized appetizers covering her for the entire advertisement.\textsuperscript{58} Despite the actress still being recognizable in the video, the court held that the advertisement did not suggest that the actress endorsed the product, and that only “call[ing her] to mind” did not satisfy the confusion required for a false endorsement claim under the Lanham Act.

4. Lanham Act Remedies

A plaintiff who successfully brings a claim for false advertising, trademark infringement/false designation of origin, or false endorsement has a number of potential remedies available to it under the Lanham Act:

1. An injunction to prohibit defendant from continuing the offending conduct;\textsuperscript{59}

2. Recovery of damages proved by plaintiff (which can include profits from sales lost by plaintiff as a result of the false advertising, damage to goodwill, and costs of corrective


\textsuperscript{56} \textit{Brown v. Electronic Arts, Inc.}, 724 F.3d 1235, 1239 (9th Cir. 2013) (because of free speech policies, the use of former NFL football player Jim Brown’s identity in an expressive video football game did not trigger a false endorsement claim). Most courts use the \textit{Rogers} test, derived from the Second Circuit’s opinion in \textit{Rogers v. Grimaldi}, to balance free speech policies with false endorsement claims that relate to use of a person’s name, image or likeness in expressive works. Under that test, an accused use of an identity in an expressive work will be immune from liability as creative free speech, unless: (1) it has “no artistic relevance” to the underlying work or, if there is artistic relevance; (2) the use “explicitly misleads as to the source or the content of the work.” 875 F.2d 994 (2d Cir. 1989).

\textsuperscript{57} \textit{ETW Corp.}, 332 F.3d at 924-37.

\textsuperscript{58} 229 F. Supp. 3d 240, 252 (S.D.N.Y. 2017).

\textsuperscript{59} 15 U.S.C. § 1116. This could include a preliminary injunction, if plaintiff proves the requisite factors entitling it to such relief.
advertising), and/or a disgorgement of defendant’s profits obtained from the offending conduct, which the court has discretion to enhance up to a trebling according to the circumstances of the case;\(^{60}\) and

3. A recovery of attorneys’ fees, in an exceptional case.\(^ {61}\)

Needless to say, these remedies can prove costly for businesses found to have engaged in false, misleading, or deceptive advertising claims. An injunction can prevent a business from running an advertising campaign in which it may have invested substantial amounts. And damages and disgorgement of profit awards in false advertising and false endorsement cases can be substantial. For example, in *PBM Prods., LLC v. Mead Johnson & Co.*, a jury awarded $13.5 million in damages for false advertising of infant formula.\(^ {62}\) In *EFCO Corp. v. Symons Corp.*, the Eight Circuit affirmed a $13 million damages award for false comparative advertising.\(^ {63}\)

In 2015, a jury awarded Michael Jordan a $8.9 million verdict in a false endorsement and right of publicity claim against Chicago grocery chain Dominick’s, after Dominick’s failed to obtain Jordan’s approval before running a tribute ad in a Sports Illustrated commemorative issue.\(^ {64}\)

**B. State Law/Common Law Claims**

State statutory and common law claims also can be used by plaintiffs to pursue claims relating to false, misleading or deceptive advertising or unauthorized use of another’s name, image or likeness. These include claims brought under statutory unfair and deceptive trade practice acts or other consumer protection acts, which also can provide a basis for consumer class actions. These also include state right of publicity claims.


All states and the District of Columbia have enacted statutes governing unfair or deceptive trade practices.\(^ {65}\) These statutes are largely based on three model laws: the Uniform Deceptive

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\(^{60}\) 15 U.S.C. § 1117(a); see *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105 (9th Cir. 2012) (affirming award of $3.5 million in plaintiff’s actual damages for defendant’s false advertising and trademark infringement (which included corrective advertising as a component), and of $2.5 million for disgorgement of defendant’s profits).

\(^{61}\) 15 U.S.C. § 1117(a). A case is exceptional, for purpose of an award of fees under the Lanham Act, if there is an unusual discrepancy in the merits of the positions taken by the parties, or if the losing party has litigated the case in an unreasonable manner. *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 314-15 (3d Cir. 2014).

\(^{62}\) 639 F.3d 111, 118 (4th Cir. 2011). The District Court also enjoined several advertising statements made by the Defendant. *Id.*

\(^{63}\) 219 F.3d 734, 740, 742 (8th Cir. 2000); see also *Skydive Arizona*, 673 F.3d 1105, *infra* at n. 55.


Trade Practice Act\textsuperscript{66}, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in the 1960's; the Uniform Consumer Sales Practices Act\textsuperscript{67}, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1971; and the FTC's Unfair Trade Practices and Consumer Protection Law. The unfair and deceptive activities prohibited by these state statutes and the remedies available to consumers and businesses under the same vary. Each of these statutes generally include prohibitions against false or misleading advertising of goods and services, and provide for potential civil remedies including injunctive relief and recovery of attorneys' fees, with some statutes, but not all, permitting recovery of damages.\textsuperscript{68}

We highlight California and New York deceptive trade practices and consumer protection statutes, because courts in those states have been a hotbed for consumer-led false advertising litigation.

In California, consumers may assert false advertising claims under several consumer protection statutes, including: (1) California Business & Professions Code § 17200, which broadly prohibits “unfair competition,” defined to include “unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising;”\textsuperscript{69} (2) California’s Consumer Legal Remedies Act,\textsuperscript{70} which prohibits a number of deceptive practices, including “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have;”\textsuperscript{71} and (3) California’s False Advertising Law, which prohibits making any statement in connection with advertising of goods or services “which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”\textsuperscript{72} To assert a false advertising claim under these statutes, a plaintiff must demonstrate that members of the public are likely to be deceived by the false or misleading


\textsuperscript{68} Many of the state statutes modeled under the Uniform Deceptive Trade Practices Act provide civil remedies for injunctive relief and recovery of attorneys’ fees and costs, but not damages (without prohibiting awards of damages under common law or other statutes). \textit{See, e.g.,} Georgia’s Uniform Deceptive Trade Practices Act, at O.C.G.A. § 10-1-373. But other statutes, including many of them specifically oriented to protecting consumers, also permit recovery of damages. \textit{See generally} National Consumer Law Center, Consumer Protection in the States, a 50 State Evaluation of Unfair and Deceptive Practices Law, which includes as Exhibit C a state by state summary of certain state deceptive practices statutes providing protections to consumers, available at http://www.nclc.org/images/pdf/udap/udap-report.pdf.

\textsuperscript{69} California Bus. & Prof. Code § 17200.

\textsuperscript{70} California Civ. Code, § 1750 \textit{et seq.}

\textsuperscript{71} California Civ. Code § 1770(a)(5). Section 1770(a) contains a list of prohibited unfair and deceptive practices that also includes representing that goods or services are of a particular standard, quality or grade if they are another; disparaging the goods, services, or business of another by false or misleading representations of fact; and advertising; advertising goods or services with intent not to sell them as advertised; and making false or misleading statements regarding price reductions.

\textsuperscript{72} California Bus. & Prof. Code § 17500.
advertising. Each of these statutes provides for injunctive relief and restitution to recover money or property acquired by means of the false advertising. In addition, the Consumer Legal Remedies Act allows an award of money damages. Cal. Civ. Code § 1780(a); Cal. Bus. & Prof. Code, § 17203; Cal. Bus. & Prof. Code, § 17535; See Colgan v. Leatherman Tool Group, Inc. 135 Cal. App. 4th 663, 694-96 (2006) (containing a discussion and comparison of damages awardable under the Consumer Legal Remedies Act and restitution available under all of the statutes, and holding that they serve different purposes and can both be awarded in an appropriate case); Kwikset Corp. v. Superior Court (2011) 51 Cal. 4th 310, 337 (Injunctions are “the primary form of relief” and restitution is “ancillary relief.”)

The statute makes it unlawful for “any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied.” Violations of the Law are a misdemeanor punishable by imprisonment and/or a fine. New York’s General Business Law Sections 349 and 350 prohibit “[d]eceptive acts or practices in the conduct of any business, trade or commerce” and “[f]alse advertising in the conduct of any business, trade or commerce,” respectively. These laws protect both consumers and business competitors, who both have standing to assert violations of New York’s false advertising statutes and to seek an injunction, damages, potential trebling of damages, and attorneys’ fees. State statutes providing causes of action for deceptive trade practices and false and misleading advertising are frequently relied upon to support consumer class action claims, as discussed below in Section I.B.1.C.

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73 See Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008) (noting that California’s false advertising jurisprudence uses a “reasonable consumer” standard).

74 Each of these statutes provides for injunctive relief, damages, restitution, and recovery of attorneys’ fees.

75 California Bus. & Prof. Code § 17580(a).

76 Id. § 17580.5(a).

77 Id. § 17581.


2. Right of Publicity Claims

The right of publicity is the right of a person to control the commercial exploitation of his or her identity (e.g., name, image, likeness, and voice) and prevent its commercial appropriation by others without permission. At least 38 states recognize the right of publicity either by statute or common law, and additional states recognize the common law tort of invasion of privacy by appropriation of likeness which is a similar claim.

Most states hold that all natural living persons possess a right of publicity, although some states limit the right to celebrities and other personas that have demonstrable commercial value. The specific aspects of identity protected by the right to publicity can vary by state, but most states protect at least an individual’s name, photographic image, likeness, and voice. Other statutes and cases have extended protection to include other aspects of identity, such as distinct gestures and mannerisms as well as a combination of hair style and manner of dress.

The specific requirements for proving a right of publicity claim vary somewhat by state, but a violation generally consists of proving elements such as the following: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.

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80 For a more detailed discussion regarding right of publicity (and false endorsement) law and claims, see Right of Publicity Claims in a Digital Age, ABA 39th Annual Forum on Franchising, by Jason Adler and Mark VanderBroek.


82 See KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 367, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000). (finding that “[a]lthough the unauthorized appropriation of an obscure plaintiff's name, voice, signature, photograph, or likeness would not inflict as great an economic injury as would be suffered by a celebrity plaintiff, California's appropriation statute is not limited to celebrity plaintiffs.); See generally McCarthy on Right of Publicity.

83 See, e.g., Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 626 (6th Cir. 2000); OHIO REV. CODE § 2741.03 (West 2015-16)

84 For examples of protection of likenesses and voices of celebrities, see White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1408 (9th Cir. 1992) (robot likeness of Wheel of Fortune letter-turner Vanna White violated her right of publicity); Midler v. Ford Motor Co, 849 F.2d 460, 463-64 (9th Cir. 1988) (Bette Midler sound alike singing in Ford commercial).

85 IND. CODE. § 32-36-1-1 (West 2019).

86 See, e.g., Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir.1974) (use of famous race car driver's well-known race car in televised cigarette ad was sufficient to constitute an appropriation of driver's identity).

87 Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98, 111 (2010); see also White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992); Prima v. Darden Restaurants, Inc., 78 F. Supp. 2d 337, 339 (D.N.J. 2000) (“[T]he plaintiff must be able to prove that she owns an enforceable right in the identity or persona of [Louis Prima],” and that the defendants 'without permission, ... used some aspect of identity or persona in such a way that [Louis Prima] is identifiable from defendant[s'] use, and that the 'defendant [s'] use is likely to cause damage to the commercial value of that persona.”).
The breadth of right of publicity claims is illustrated by the case of *Jordan v. Jewel Food Stores, Inc.*\(^{88}\) Jewel Food Stores ran a tribute ad in a Sports Illustrated commemorative issue to congratulate Michael Jordan’s entry into the NBA Hall of Fame, without getting Jordan’s approval. The ad did not mention any of Jewel’s products, but that did not stop the Seventh Circuit from holding that the ad served the commercial function of enhancing Jewel’s image and brand and could amount to a violation of Jordan’s right of publicity and a false endorsement.\(^9^9\) Jewel eventually reached a confidential settlement with Jordan, after Jordan won an **$8.9 million** verdict in a trial of the same claims alleged against another Chicago grocery chain (Dominick’s) that had run a different Jordan tribute ad in the same Sports Illustrated commemorative issue.\(^9^0\)

Awareness of right of publicity issues is particularly important given the rise in social media and the ubiquity of cell phones. The act of a business or brand posting, re-posting, tweeting, or “liking” the photographic image, likeness and/or name of a celebrity or other person generally will implicate a right of publicity issue.

For example, in 2016 actress Sofia Vergara filed a $15 million lawsuit against Venus Concept for misappropriation of her right of publicity, based on authorized promotional use of a selfie that Vergara had posted to her social media site while using a Venus skin-tightening product during a massage. Venus re-posted the photo to several social media pages with captions such as “Loved by bombshell actress Sofia Vergara,” and also included it in an informational/promotional video clip shown on television. Vergara alleged that this misappropriation of her image created the false impression that she endorsed the brand and its products. The case was settled in 2017 for an undisclosed amount.\(^9^1\)

Actress Katherine Heigl filed a similar lawsuit against Duane Reade after the drug store chain posted on its Twitter and Facebook sites a paparazzi-style photo of her carrying a Duane Reade shopping bag.\(^9^2\) In 2017, a non-celebrity customer of Chipotle’s sued the chain for **$2.2 billion**, after a photograph of her taken in a Chipotle restaurant was used in images placed in Chipotle restaurants for commercial purposes. The lawsuit alleged that the photographer asked her to sign a release for the photographs, but she declined. This case eventually was settled on confidential terms.\(^9^3\)

The rise of social media “influencers” – users who generate thousands of followers and “likes” online – also has led to claims arising from the use of the influencer’s persona in advertisements. For example, in *O’Brien v. PopSugar Inc.*, the defendant website allegedly

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\(^{88}\) 743 F.3d 509 (7th Cir. 2014).

\(^{89}\) Id. at 518.


\(^{92}\) See *supra*, at 11.

“misappropriated influencers’ personas by copying likenesses, logos, and content from the real influencer profiles and posts and creating fake influencer profiles on the PopSugar website,” and used those names and likenesses to advertise or sell products and services; resulting in plaintiffs’ assertion of right of publicity and unfair competition claims.94

As these cases indicate, it is crucially important for advertisers to obtain express or implied permission to use images of or references to recognizable people (celebrities or not) in their advertisements or social media posts. Express written permission is the best way to avoid disputes. This can be done through a written release of the person’s rights in a particular image or photo, or a writing that provides permission to use the image or likeness for certain or any promotional purposes.95

C. Consumer Class Action Lawsuits

With increasing frequency, consumer claims for false, misleading, or deceptive advertising or marketing practices under state statutes and common law are being brought as class actions on behalf of a number of plaintiffs. This most often happens when claims are brought on behalf of consumers under state consumer protection, deceptive trade practice, or false advertising statutes which provide consumers with a cause of action.

Though the standards for class certification are high, the threat of a class action can be particularly disruptive and damaging to franchisors and other businesses against which they are brought. And, the number of consumer class action lawsuits brought as a result of product advertising and marketing practices has skyrocketed in recent years.

For example, the U.S. Chamber Institute for Legal Reform, in its February 2017 report on Trends in Food and Beverage Class Action Litigation, reports a huge surge in class action lawsuits challenging food and beverage marketing, with active food marketing class actions pending in federal court increasing from about 20 in 2008 to over 425 in 2015 and 2016.96 The substance of these food marketing class action claims vary, but include: (1) assertions that a product marketed as “natural” or “no preservatives” does not qualify for reasons such as the presence of genetically modified organisms (GMOs) or synthetic ingredients, or the product’s processing; (2) “slack fill” claims that a product’s packaging includes extra space that might lead a consumer to believe he or she is getting more product than the package contains; (3) representations of where a product is made, such as by stating the product is “Made in the USA” when some ingredients come from elsewhere; (4) representations that a product’s health benefits are overstated, or that a product labelled as “healthy” includes ingredients that aren’t sufficiently nutritious; and (5)


95 As an example of implied consent to use of an image, think of a classic Italian restaurant where the wall is covered with photos of famous guests with the owner. When a celebrity poses for a photo with the owner in this situation, he or she is doing so with the almost certain knowledge that the photo will end up on the “wall of fame” – which would be considered implied consent. However, the scope of the implied consent likely would be limited to the expected use, and probably would not allow the owner to include the photo on the front of the restaurant’s menu or on billboards.

advertising that suggests a product is handmade or made in small batches or by a small business when it is mass produced.  

Food and restaurant franchisors have been subject to these food marketing class actions. For example, a putative class action was filed in 2018 against Jamba Juice, alleging that it falsely marketed its smoothies as “healthy” and made from whole fruits and vegetables, when in fact the beverages have a high caloric and sugar content and are made from concentrated fruit juices. The plaintiffs’ claims were asserted under various California and New York consumer protection statutes, but were filed in federal court under the Class Action Fairness Act of 2005. The case was eventually dismissed based on a confidential settlement with the named plaintiffs.

In another recent case, a consumer brought a class action against Krispy Kreme under the California Consumer Legal Remedies Act, Unfair Competition Act, False Advertising Law, and the common law, for false advertising of its donuts as being “raspberry filled,” “maple” iced or “maple bars,” and “blueberry cakes” when the fillings or donuts did not contain any actual raspberries, maple syrup or sugar, or blueberries. The court denied Krispy Kreme’s motion to dismiss, holding that whether a reasonable consumer would be deceived by a particular advertising or marketing statement is generally a factual question except in “rare situation[s]” where it is clear from the complaint that no reasonable consumer would be misled. The case was subsequently dismissed (presumably based on a settlement) without affecting the rights of other putative class members.

Dunkin’ Brands fared better than Krispy Kreme in a subsequent putative class action filed in California alleging essentially the same claims of false advertising of donuts as containing blueberries and maple syrup or sugar. In that case, the court granted Dunkin Brand’s motion to dismiss, holding that: (1) plaintiff lacked standing to pursue injunctive relief due to lack of imminent threat of future harm, given that he now was aware that Dunkin’s products did not contain real blueberry or maple ingredients; and (2) plaintiff had not pled sufficient economic harm to recover money damages.

Another recent example involves a putative class action brought against McDonald’s and its franchisee under the Illinois Consumer Fraud and Deceptive Trade Practices Act for allegedly misrepresenting the value of its “value meals.” In Killeen v. McDonald’s Corporation, the named

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97 Id.


101 Id., February 27, 2017 Order re Motion to Dismiss.

102 Babaian v. Dunkin’ Brands Grp. Inc., 2018 U.S. Dist. LEXIS 98673, *9-20 (C.D. Calif., June 12, 2018). The court further explained that to plead economic injury in a false advertising case “a consumer must allege that she was exposed to false information about the product purchased, which caused the product to be sold at a higher price, and that she ‘would not have purchased the goods in question absent the misrepresentation.’” Id. at *15.

103 Killeen v. McDonald’s Corporation, No. 1:17-cv-00874 (N.D. Ill. 2018)
plaintiff sought certification of a consumer class action under Illinois and federal law, arguing that the defendants’ deceived consumers by misrepresenting that purchasing a “value meal” would be less expensive than purchasing each menu item individually. Judge Elaine Bucklo, of the Northern District of Illinois disagreed, denying class certification and finding that defendants did not deceive its customers because it prominently displayed the price of each menu item, so that the plaintiff and members of the putative class could have compared the price of the “value meal” and individual items themselves.

Subway was subject to multiple consumer class actions contending that the bread baked and used to make its “foot long” submarine sandwiches was less than a foot long. Early discovery established that Subway’s unbaked bread sticks are uniform, and the baked rolls rarely fall short of 12 inches (with limited numbers about ¼ inch shorter due to natural variability in the baking process that can’t be prevented). The district court still approved a class settlement that provided injunctive relief mandating Subway to use a tool to measure sandwiches and ensure its foot-long sandwiches would be at least 12 inches long (with minor variations permitted), $520,000 in class counsel fees, $500 to each class representative, and no damages to class members. However, an objector appealed the settlement to the U.S. Court of Appeals for the Seventh Circuit, arguing that the settlement did not benefit the class members. The Seventh Circuit agreed and reversed the settlement’s approval and the class certification, holding that the class actions “seek[] only worthless benefits for the class” and thus should have been “dismissed out of hand.”

False advertising class actions against restaurant chains has continued into 2019, and include as examples the following suits: (1) against Panera under California’s Unfair Competition and False Advertising statutes for supposedly falsely marketing bread sold in its establishments as “clean,” (2) against the BareBurger Group under New York General Business law for falsely advertising food items sold at its BareBurger franchises as “organic,” and (3) against Smashburger under California consumer protection laws for allegedly stating that its Triple Double, Bacon Triple Double, and Pub Triple Double burgers with two beef patties contain “Double the Beef” when, according to plaintiffs, the Triple Double burgers have the same amount of beef as the Classic Smashburgers with one beef patty.

Food and restaurant companies are not the only businesses subject to class actions for false, misleading or deceptive advertising. Class action lawsuits also frequently arise in the “green advertising” space. In Hill v. Roll Int’l Corporation, the owners of the FIJI water brand were named as defendants in a class action lawsuit under California’s Consumer Protection Act, which alleged that FIJI’s green water drop logo and slogan EVERY DROP IS GREEN® was false and misleading because it suggested that FIJI branded water was environmentally superior to other

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104 In re Subway Footlong Sandwich Marketing and Sales Practices Litigation, 869 F.3d 551 (7th Cir. 2017).

105 Id. at 557.


waters. The court disagreed, finding that FIJI’s logo and slogan would not mislead a reasonable consumer into believing the product was environmentally superior to its competition. Similarly, in Koh v. S.C. Johnson & Son, Inc., a consumer filed a class action lawsuit against S.C. Johnson, allegedly the defendant’s GREENLIST® trademark was deceptive because it appeared as though it was a certification awarded by a third-party entity when it was not. The court certified the class, finding the mark was deceptively designed to suggest it was awarded by an independent third party.

D. NAD/BBB Procedures for Resolving False Advertising Claims

As an alternative to asserting and resolving false advertising claims in federal or state court, litigants may seek an administrative determination from the Better Business Bureau’s National Advertising Division of the Advertising Self-Regulatory Council (“NAD”). The NAD reviews national advertising to set standards for advertising claims and substantiation. Companies may voluntarily submit their proposed advertisements for review or may bring challenges about a competitor’s advertisement. Parties may file a complaint directly with the NAD for disputes about advertising the party believes to be false or misleading. Claims filed with the NAD must be “national in character,” and “[c]omplaints regarding specific language in an advertisements, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation; political and issue advertising, and questions of taste and morality. . are not within NAD/CARU’s mandate.” Finally, the issue complained of must have arisen within the twelve months prior to filing a complaint, and must not be the subject of pending or previous litigation, arbitration, or settlement between the parties.

Upon receiving a complaint or voluntary submission, the Division gives the parties an opportunity to explain their position and submit supporting evidence. Within 20 business days,

110 Id.
112 Id.

113 NAD Procedure 2.2(A) (“Any person or legal entity may submit to NAD/CARU any complaint regarding national advertising, regardless of whether it is address to consumers, to professional or to business entities. Likewise, NAD/CARU may initiate a proceeding as part of their monitoring responsibility pursuant to Section 2.1(B) of these Procedures.”)
114 NAD Procedure at 2.2(B).
115 Id.
116 Id.
117 NAD Procedure at 2.5-2.6.
the NAD will render its decision on the truth and accuracy of the claims at issue. At the close of a matter, the NAD publishes a Case Report that includes the final case decisions of the NAD and identifies that advertiser, challenger, advertising agency, product or service, and subject matter reviewed. Though the opinions of the NAD are not binding, they provide cost-effective ways of reviewing advertisements.

II. FTC REGULATION OF ADVERTISING CLAIMS

A. The FTC Act and its Requirements

Although private causes of action are often the most attention-grabbing means for enforcing false advertising claims, with demands for sky-high monetary damages and the potential to certify a class of hundreds or thousands of plaintiffs, they are by no means the only avenue for enforcement. At both the federal and state level, regulatory agencies have been imbued with the authority to bring enforcement actions against companies that violate laws against false and deceptive advertising. At the federal level, the FTC is the primary governmental body that is responsible for regulating consumer protection.

The FTC issues advertising regulations under Section 5 of the Federal Trade Commission Act (the “FTC Act”), which regulate a company’s ability to make lawful advertising claims. The FTC Act applies to both express and implied advertising claims. Express claims include statements that directly describe the benefits or attributes of a product, such as “ABC Mouthwash prevents colds”. An implied claim is one made indirectly or by inference, such as “ABC Mouthwash kills the germs that cause colds” which implies that the product will prevent colds. In evaluating implied claims, the FTC will look beyond the language of the claim itself to evaluate the likelihood that a reasonable consumer would take away a certain impression.

When making an express or implied advertising claim, the FTC Act will require advertisers to observe three principal requirements:

118 NAD Procedure at 2.9(A).

119 NAD Procedure at 2.1(C). In some jurisdictions, opinions issued by the NAD are considered hearsay and inadmissible evidence at trial. See e.g. Rexall Sundown, Inc. v. Perrigo Co., 651 F. Supp. 2d 9 (E.D.N.Y. 2009) (“Simply substituting the findings of the NAD and NARB decision-makers for that of the district judge would not be consistent with the Second Circuit's guidance. Moreover, the NAD and NARB decisions make no finding of consumer deception, nor do they make a finding of a likelihood of consumer deception. In fact, to the extent Perrigo is attempting to rely upon such findings for the truth of the matter asserted, Perrigo has failed to explain how the NAD and NARB decisions could even be admitted under the Rules of Evidence. These findings, like judicial findings, are generally characterized as inadmissible hearsay that cannot be used to prove the truth of the matter asserted.”); Cytosport, Inc. v. Vital Pharmaceuticals, Inc., 894 F. Supp. 2d 1285, 1292 (E.D. Cal. 2012) (taking judicial notice of the existence of an NAD referral to the FTC after one litigant refused to participate, but refusing to “attribute any weight to [its] contents so long as [it is] disputed by either party”). Other courts have permitted use of NAD decisions in judicial proceedings when offered as support for other extrinsic evidence. See e.g. Bellsouth Telecommunications, Inc. v. Hawk Communications, LLC, No. 1:04-cv-280-MHS, 2004 WL 1085324 (N.D. Ga. Apr. 12, 2004).

120 If an advertiser does not comply with the NAD’s decision requesting that the offending advertisement be “modified or discontinued,” the matter may be referred to a government agency, like the FTC, release information regarding the referral to the press and public and report the referral in its Case Reports. See NAD Procedure at 4.1(A)(3)(b).

121 15 U.S.C. §45

Advertisements must not be deceptive. The FTC considers an advertisement to be “deceptive” if any representation, omission or practice is likely to mislead a consumer. Deception is evaluated from the perspective of a “reasonable” consumer, or if the advertisement targets a specific group of consumers, a “reasonable” member of that particular group. Additionally, the representation, omission or practice must be “material”, meaning that it is likely to affect a consumer’s behavior or decisions, and is likely to cause that consumer injury or otherwise be to the consumer’s detriment. The FTC considers some claims presumptively material – such as an express claim, in particular if the claim is made regarding a fundamental characteristic of a product (i.e. safety, efficacy, purpose or cost). However, the FTC has specifically stated that it will always consider relevant and competent evidence offered to rebut presumptions of materiality.

Advertising practices must not be unfair. If any advertising practice causes consumer injury, the FTC considers that act or practice as “unfair” if the injury it causes or is likely to cause is substantial (not trivial or speculative), not outweighed by the benefits, and is not reasonably avoidable. In most cases, substantial injury involves monetary harm, such as when a consumer is coerced into purchasing unwanted goods or services, or defective goods or services. However, the FTC has found substantial harm arising from unwarranted health and safety risks as well. On the other hand, the FTC has indicated that emotional harm (for example, being offended by an advertisement) is generally not sufficient to demonstrate unfairness, other than in extreme cases (such as late-night harassing phone calls). The FTC may also consider public policy considerations in evaluating whether a practice caused a substantial injury.

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123 In re: Fedders Corporation, 85 F.T.C. 38 61 (529 F.2d 1398) (1975) (Fedders’ advertised that “only Fedders” brand of air conditioners offered a reserve cooling feature, when in fact such feature is not unique to Fedders’ air conditioners); In re: The Firestone Tire and Rubber Company, 81 F.T.C. 398, 456 (aff’d, 481 F.2d 246) (1972) (Firestone advertised its Safety Champion tires were “safe tires”, when in fact the tires had no unique safety features rendering them safer than other tires); In re: Peacock Buick, Inc. et al. 86 F.T.C. 1532 (aff’d 553 F.2d 97) (1975) (Peacock advertised “new” cars for sale, when in fact such cars had been used by local drivers education schools and had significant mileage).


126 Id. Citing, Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961) (servicemen dismantled home furnaces and then refused to reassemble them until the consumers had agreed to buy services or replacement parts)

127 Id. Citing, Philip Morris, Inc., 82 F.T.C. 16 (1973) (respondent had distributed free-sample razor blades in such a way that they could come into the hands of small children)

128 Id.

129 Id.
iii. **Advertisers must have substantiation to support any claims.** Advertisers must have a reasonable basis for all express or implied claims made.\footnote{Fed. Trade Comm’n, Policy Statement on Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984)} To satisfy this reasonable basis requirement, all advertising claims regarding performance, health, safety or other benefits of a product or service must be substantiated. The FTC does not outline specific requirements for the type or breadth of this substantiation, other than it must at a minimum be the amount of substantiation described in the advertisement (i.e. if the advertisement claims that 2 out of 3 consumers chose a product, the advertiser must have substantiation of consumer testing with such results)\footnote{In re: Honeywell, Inc., 126 F.T.C. 202 (1998) (requiring claims that imply a certain level of performance under specific conditions, such as household use, be substantiated by evidence of performance under those conditions).}. But the FTC has indicated that it may look at factors such as the type of product, the type of claim, the consumer benefit from the truthfulness of the claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation that experts in the field believe is reasonable.\footnote{In re: Pfizer Inc., 81 F.T.C. 23, 1972 WL 127465 (1972) (reliance on recognized medical literature drafted based on controlled tests was sufficient to substantiate claims of efficacy for sunburn relief cream, because the advertisement did not imply that additional well-controlled scientific tests had been conducted).} The type of substantiation expected by the FTC may also be heightened for certain specific types of claims, such as relating to health or environmental benefits (see further below for specific types of claims).

The only exception to the requirement that claims be truthful and substantiated pertains to statements that are subjective “puffery”. Puffery generally refers to statements that are both highly exaggerated and also so general or vague that that they cannot be proved or disproved, and would therefore be understood by a reasonable consumer to be a subjective opinion and not an objective claim regarding the characteristics of a particular product. Example of puffery would be “world’s best pizza” or “world-class customer service”. As with the other tests described above, advertisers should evaluate puffery based on the overall impression of the advertisement to a reasonable consumer rather than only looking at any particular claim in isolation. (See above re: Pizza Hut v. Papa John’s for another example of puffery evaluated as false advertising).

**B. Use of Disclaimers to Qualify Advertising Claims**

If an advertiser believes that a reasonable customer may be confused or misunderstand a particular advertisement without certain qualifying information, the FTC Act requires the advertiser to provide additional disclaimers containing all additional qualifying information necessary to inform the consumer.\footnote{Fed. Trade Comm’n, Com Disclosures: How to Make Effective Disclosures in Digital Advertising (March 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf. (last visited Jul. 12, 2019).} These disclaimers must be clear and conspicuous, such that the consumers are able to notice, read or hear, and understand the information in all such disclaimers easily. For example, these disclaimers must be close to the claim being qualified and not include any small type or distracting elements. If the advertisement is lengthy, the disclaimer may need to be repeated in more than one location. The key to evaluating any disclaimer is the
overall impression of the advertisement to a reasonable consumer, including by assuming that
the consumer will not read every word on the page. Therefore, any relevant disclaimers must be
prominent and noticeable on the advertisement. 134

The FTC has also issued guidelines about the use of disclaimers in specific types of online
advertising.135 These guidelines require advertisers to ensure that disclaimers will be visible on
all platforms as close as possible to the claim made, without excessive scrolling, hyperlinks, pop-
ups or other methods of separating these disclaimers from the advertisement itself. The
disclaimer should be as “unavoidable” as possible, for example being displayed before consumers
can make any purchasing decisions (such as before the “add to cart” button). Disclaimers via
hyperlinks are also generally discouraged, though the guidelines recognize it may in some cases
be appropriate if the advertisement is of limited space and the hyperlink is labelled to appropriately
carry the relevance and importance of the information to which it leads, the hyperlink is as close
as possible to the claim made, it takes consumer directly to the disclaimers, and the advertiser
has evaluated the click-through rate and other factors to determine that consumers are in fact
accessing the disclaimer as intended.

Although disclaimers may be used to reduce the risk of deceptive advertising claims, it is
important to remember the existence of a disclaimer alone is not usually enough to remedy a false
or deceptive advertising claim. For example, a disclaimer cannot contradict the claim itself. This
theory was recently tested in 2016 by California Naturel, a company that made sunscreen
products that were advertised as “all natural” and “only… [made from] ingredients found in nature”
– with a disclaimer that one of the ingredients in its products was in fact synthetic. 136 The FTC
found that the disclaimer was inadequate to render its “all natural” claim truthful and non-
misleading. The California Naturel order also cited the recent digital advertising guidelines –
finding that the disclaimer was also inadequate due to its placement below the “add to cart” button.

C. Enforcement of the FTC Act

Only the FTC can initiate an enforcement action under the FTC Act for deceptive
advertising. That being said, the public may submit complaints to the FTC, and those complaints
will often be the basis of an FTC enforcement action. The FTC will also review other sources of
consumer complaints, including local Better Business Bureau complaints, online forums, news
reports and articles, as well as their own direct observation. NAD or other advocacy groups may
also refer certain cases to the FTC for further investigation.

The FTC will investigate potential violations, and if it believes a violation has occurred,
it may initiate an enforcement proceeding. The first step in such an enforcement proceeding is
typically a request for information submitted to the advertiser, whether informally (i.e. a letter) or
formally (i.e a subpoena). However, if the FTC feels that there is a risk of immediate consumer
harm, the FTC also has the right to seek immediate relief in court, such as permanent injunctive

134 See e.g. See FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1 (1st Cir. 2010) (inconspicuous disclaimer that
infomercial was paid advertising and that statements were opinion was insufficient to correct “bold and straightforward”
claims that supplements could cure or prevent disease); FTC v. Cyberspace.Com LLC, 453 F.3d 1196 (9th Cir. 2006)
(fine print notices on the back of solicitations insufficient to overcome deceptive nature of front-side communications).

https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road (last visited Jul. 12,
2019).

relief, a temporary restraining order, or other equitable remedies. These measures are typically reserved for advertisements targeting consumers in financial distress or that are intentionally and materially defrauding or scamming consumers.

If the FTC elects not to seek immediate relief, it would submit a request for information, typically requesting all evidence that the advertiser relied on in substantiating the disputed advertising claims. The advertiser may reach out to the FTC to negotiate the scope of the request or the timing of production, but it is not common for an advertiser to entirely refuse to respond to the FTC, in part because the FTC has the right to issue a subpoena or motion to compel a response. During this information gathering phase, the advertiser has the opportunity to explain why its advertising was truthful, not misleading and substantiated, and otherwise advocate for its position with the FTC staff. The information provided to the FTC is typically not made public, but advertisers should discuss the confidentiality of certain files with the FTC, and properly mark files as confidential in accordance with FOIA requirements to avoid public disclosure.

Based on the outcome of the discussions between the advertiser and the FTC, there are three likely outcomes: (1) the FTC closes the investigation without further action; (2) the FTC voluntarily settles the claims by entering into a consent order with the advertiser; or (3) the FTC elects to pursue a formal enforcement action. Typically, unless the FTC elects not to pursue the investigation, the parties will attempt to settle the claims. As part of the consent order for such a settlement, the advertiser is generally not required to admit to a violation, but rather will simply agree to stop the disputed practice or take other negotiated remedial actions. However, if no settlement can be reached, the FTC may bring a claim against that party in an administrative action or in federal court, seeking a variety of remedies, including: (i) cease and desist orders to prevent further use of the deceptive advertisements; (ii) monetary fines paid to the FTC up to $41,484 to $42,530 per violation; (iii) monetary payments to affected consumers (such as issuing refunds to consumers that purchase the advertised product or services); (iv) corrective advertising or notices to consumers to correct prior claims or provide further information. These federal suits can be appealed to the US Court of Appeals and ultimately the Supreme Court.

D. FTC Guidelines for Specific Claims

In addition to the regulations under the FTC Act, the FTC has issued a number of other guidelines and summaries regarding particular types of advertising claims that are particularly likely to mislead consumers. The FTC often looks to these guidelines when determining whether to investigate specific advertisements for unfairness or deceptive practices. Below is a summary of the most common types of advertising claims made by franchise companies, but other guidelines exist that may impact franchise businesses – such as pertaining to jewelry, wood or textile products, manufacturing, product warranties, credit and financial products, and energy. The FTC’s guidelines should be carefully reviewed for anything pertinent to a particular business.

1. Nutritional and Health Claims

The Food and Drug Administration is the agency principally tasked with regulating food and menu labelling; however, the FDA only has indirect authority over advertising food products, whereas the FTC Act expressly states that it is unlawful to disseminate any false or deceptive
advertisement to induce the purchase of food, drugs, devices and cosmetics. The FTC has also issued guidelines regarding nutritional and health claims. These guidelines state that competent and reliable scientific evidence is required to substantiate any claims relating to health or nutrition in advertising, such as research conducted by professionals in the area. In fact, the FTC typically requires at least one controlled human clinical trial (in some cases, two) to support any claims relating to specific health benefits. Moreover, before relying on any such testing conducted by a third-party, the FTC will consider whether the advertiser should conduct its own clinical trial, and whether the advertiser may interpret the results of such trials itself or if an expert should be engaged.

In particular, many nutritional and health claims are related to weight loss. As a consequence, the FTC has issued a reference guide prohibiting certain specific weight loss claims. To start, advertisers may not use unrepresentative results from customers to advertise a product or service (see below regarding the use of customer endorsements). Additionally, the FTC has identified 7 claims that experts have said simply cannot be achievable, and are therefore presumed by FTC to be deceptive: (i) weight loss of 2 lbs or more per week for a month or more without dieting or exercise; (ii) substantial weight loss no matter what or how much the consumer eats; (iii) permanent weight loss even after the consumer stops using product; (iv) blocking the absorption of fat or calories to enable consumers to lose substantial weight; (v) enabling consumers to lose more than three pounds per week for more than four weeks; (vi) substantial weight loss for all users; or (vii) substantial weight loss by wearing a product on the body or rubbing it into the skin. These express claims do not need to be used word-for-word, and implied claims of the same variety will also be prohibited.

The FTC has also made it clear that advertisers should not market their products as healthy on the basis of a single nutritional claim, without being able to substantiate the implied impact of the product in its totality. For example, in 2014 the FTC settled an action against KFC based on multiple KFC’s advertisements in which specific truthful and substantiated health claims were used to create a broader picture of healthy eating, which the FTC ultimately found to be deceptive. For example, in one advertisement a couple discussed their interest in “eating better” which was followed by the claim that 2 fried chicken breasts from KFC contained less fat that a Burger King Whopper. This claim was ultimately true in that the friend chicken contained


139 In re: POM Wonderful LLC, 155 F.T.C. 56, 193 (2013), aff’d in part, 777 F.3d 478, 504-05 (D.C. Cir. 2015) (health claims regarding the reduced risk of heart disease and positive impact on prostate cancer and erectile disfunction require at least 2 clinical trials)


less total fat than a Whopper, but it contained three times the trans fat and cholesterol, twice the sodium, and more calories, which made the claim of “eating better” deceptive. Similarly, KFC created an ad that targeted proponents of a low-carb weight loss diets by claiming that fried chicken was low in carbs and high in protein, notwithstanding the fact that virtually all low-carb weight loss diets specifically advised against eating breaded and fried foods. This settlement makes it clear that the FTC will require advertisers to substantiate more than just the individual nutritional health claims made in any advertisement, but also any broader implied claims regarding overall health or weight-loss of consumers eating the advertised products.

2. Environmental and Green Claims

The FTC has also issued guidelines regarding environmentally and “green” marketing claims. Under these guidelines, the FTC has cracked down strictly on generic claims such as “green” “eco-friendly” or “environmentally safe” in advertising, finding these generic claims to be inherently too broad to be substantiated. Instead, advertisers must limit environmental advertising to claims of specific objective and substantiated environmental benefits. Those specific benefits must also directly support the claims made – for example, a claim that a product is made from recycled materials is not sufficient on its own to support the claim that the product is “green” unless the advertiser has substantiation that the environmental benefits of using recycled materials outweigh the environmental costs.

The FTC guidelines also create certain limitations on the use of specific environmental claims. For example, advertisers may only make claims using the following words if:

- **Degradable**: The entire product or package will completely break down and return to nature within a reasonably short period of time after disposal (1 year for solid products) and is not disposed of in landfills, incinerators or recycling facilities.

- **Free Of**: The product does not have more than trace amounts of the substance such that it would not cause consumers the type of harm typically associated with the substance, the substance was not intentionally added to the product, and no other substance in the product poses a similar risk.

- **Non-Toxic**: The product is safe both for people and the environment.

- **Recyclable**: The product is capable of being collected, separated or recovered from the regular waste stream, and reused in whole or used again in the manufacture or assembly of another product. Recycling facilities for the product are available to a substantial majority (over 60%) of the consumers or communities where the product is sold.

- **Recycled**: The product has been recovered or diverted from the waste stream. And it must be clearly qualified if the product or packages or only made from partially recycled materials (i.e. made from 30% recycled materials).

- **Refillable**: The advertiser provides a way to refill the package.

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142 16 C.F.R. § 260.
Although not directly addressed in its guidelines, the Federal Trade Commission (FTC) has also recently begun to crack down on claims of “all natural” and “organic” and other express and implied claims relating to the limited use of artificial or synthetic ingredients or chemicals. In 2016, the FTC brought a series of high-profile enforcement actions against several cosmetic companies for using “all natural” or “100% natural” to advertise products that contained some synthetic ingredients. Additionally, in late 2017 the FTC brought its first enforcement action on the basis of a claim of “organic” against a retailer advertising organic baby mattresses when, in fact, the substantial majority of the content of these mattresses was non-organic.

3. Made in the USA Claims

The FTC has also issued guidelines relating to “Made in the USA” claims. As with any other advertising claims, a “Made in the USA” claim can be express or implied. Express claims include language such as “Our products are American-made”, “Made in the USA” or “USA”. Implied claims include statements that give the overall impression of US origin, such as a product being described as “true American quality” or the use of the American flag or similar images. Ordinarily, however, the FTC will not consider the use of an American brand name or trademark on its own to be a Made in the USA claim, provided that it is not intentionally deceptive (i.e., Made in the USA, Inc.). Similarly, the FTC will generally not consider the use of a US business address to be a Made in the USA claim, provided that it is a valid address at which the company conducts its business.

Under relevant FTC guidelines, all or virtually all of the components of a product must be made in the United States (including 50 states, DC, and the US territories) to use an unqualified “Made in USA” or similar claim. The product’s final assembly or processing must also take place in the U.S. In determining whether the “all or virtually all” test has been satisfied, the FTC will consider factors, such as how much of the product’s total manufacturing costs can be assigned to U.S. parts and processing (i.e. the cost of goods sold or inventory costs of finished goods, including manufacturing materials, direct manufacturing labor, and manufacturing overhead), and how far removed any foreign content is from the finished product (i.e. if the only foreign content is from an initial input that is transformed early in the manufacturing process, such as the use of foreign raw materials to manufacture supplies such as the plastic used to build component parts of an otherwise U.S. manufactured product).

A qualified “Made in the USA” claim reflects that only a portion of the product’s components are made in the United States (i.e. “60% U.S. content” or “Made in the US with Imported Parts”). Similar to the unqualified claims, advertisers are only allowed to make qualified

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146 Id.

147 Id.
claims to the extent that they are truthful, and a significant portion of the product is made with US components or US processing. One exception to this rule is with respect to unqualified claims of “Assembled in the US”. So long as the last “substantial transformation” occurred in the U.S., even if made with foreign components, the advertiser may use an unqualified “Assembled in the US” statement.

In both cases, when making a qualified or unqualified Made in the USA claim, the advertiser must have a reasonable substantiation for the claim at the time made, which may require some diligence by the advertiser. For example, if the product contains component parts obtained from another supplier, the advertiser should ask the supplier for specific information about the percentage of U.S. content before they make a U.S. origin claim. The FTC guidelines permit advertisers to rely on information given by such secondary suppliers in good faith.

In most cases, the FTC brings actions relating to Made in the USA claims for unambiguous non-compliance. For example, the FTC recently barred Sandpiper from making unqualified Made in the USA claims for products (in this case, backpacks, travel bags, wallets and similar accessories) when up to 95% of the products were imported as finished goods, and approximately 80% of the products contained significant imported components.\(^\text{148}\) In another recent action, the FTC barred Patriot Pucks and certain of its affiliates from making unqualified Made in the USA claims for products (in this case, hockey pucks) when the products were in fact wholly imported from China.\(^\text{149}\) In both cases, the FTC determined that the use of unqualified claims in these instances was misleading, requiring the companies to cease using unqualified Made in USA claims until the standards described above could be met for all such products.

4. Endorsements

Endorsements are a form of advertising in which the advertiser uses an individual in its advertisements in a manner that would cause a reasonable consumer to believe that the individual is promoting a particular product or service. Endorsements can come from multiple sources, including celebrities, experts in a field, or customers themselves. Endorsements can also be published by the endorser (i.e. a social media post by a celebrity) or by the advertiser (i.e. an advertisement describing the opinion of an expert in the field).

The FTC has issued guidelines for the use of endorsements in advertising,\(^\text{150}\) with specific practices that advertisers should observe:

1. **Disclose the relationship.** Any material connection between the endorser and the advertiser must be clearly and conspicuously disclosed. These disclosures should be prominently displayed near the claim itself (for example, the FTC has issued specific guidance for Instagram posts that the disclosure must be before the “more” button, may not be buried within multiple hashtags, and may not rely on confusing abbreviations such as “#sp” to mean “sponsored”).\(^\text{151}\) This rule applies to all relationships that would not be


\(^{150}\) 16 C.F.R. Part 255

\(^{151}\) Press Release, Federal Trade Commission, “FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship” (April 19, 2017)
readily apparent to a customer, for example: (1) a financial relationship in which the endorser received payment, free products, a chance for prizes, other benefits of value; (2) the endorser is a company employee or a family member; or (3) the endorser is part of a focus group that was informed they would be reviewing the product before they tried it.

2. **Bona fide user and opinion.** If the advertisement suggests that the endorser has used the product, the endorser must be a bona fide user at the time it gives the endorsement, and the endorsement must reflect the honest opinions of the endorser at the time the advertisement is being distributed. If the advertiser is publishing the advertisement for a longer period of time, the advertiser will be responsible for checking-in with the endorser from time to time to ensure their opinion is unchanged. The FTC announced its first case challenging a marketer’s use of fake online paid reviews (paying a third-party to make positive online reviews on Amazon) in February 2019, recognizing that consumers increasingly rely on online reviews when shopping online. The advertiser need not use the exact words of the endorser (unless it claims that it is doing so) but it cannot take any endorser’s comments out of context or reword them in a manner that would distort the endorser’s opinion. If an endorser is described as an expert in any field, the endorser’s qualifications must be disclosed with the endorsement. The expert must also evaluate the product on the basis of its expertise (not simply the expert’s personal taste), including the examination or testing of the product.

3. **Unrepresentative results.** The advertiser cannot use unrepresentative endorsements without disclosing what a typical consumer could expect from the product. This is particularly common when using customer endorsements, where an advertiser will want to provide the opinion of the person who used their product most successfully (for example, a customer of a gym who experienced a transformative weight loss).

In a recent example, the FTC settled an enforcement action against Creaxion Corporation, a public relations company, and Inside Publishing LLC, a magazine publisher, for paying multiple well-known gymnasts to endorse a particular brand of bug repellant during the 2016 Zika outbreak at the Rio Olympics Game, without disclosing that the advertisers received consideration from the retailer. The FTC alleged that Creaxion and Inside Publishing violated the FTC Act by: (1) falsely representing that endorsements reflected the independent opinions and experience of impartial users; and (2) failing to disclose material connections between the endorsers and the marketer of the product, specifically that certain endorsers were paid or reimbursed by Creaxion and Inside Publishing for promoting the product. The settlement required Creaxion and Inside Publishing not only to cease the disputed practice and clearly and conspicuously disclose any material

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153 [*FTC v. Emerson Direct, Inc.*](https://www.law.cornell.edu/courtdecisions/federal/d80/2-05-cv-377-am-33) (M.D. Fla. Aug. 23, 2005) (enjoining defendants from representing that they are an expert, unless they actually possess that level of education, training and experience at the time the representation is made – i.e. one of defendant’s was a chiropractor with no medical experience, but represented to consumers that he was qualified as an expert in nicotine addiction and smoking cessation.)

154 [*In re: Cliffdale Assocs., Inc.*](https://www.law.cornell.edu/courtdecisions/federal/d80/103-f-t-c-110) (1984) (finding that consumer endorsements must be representative of the typical or ordinary experience of the people who use the product or service, as opposed to the optimal (or in this case, unobtainable) result or experience).

connection with endorsers in the future, but to also take actions to ensure that the endorsers comply, such as monitoring the endorsements and terminating endorsers that fail to comply.\footnote{156}

It is also important to understand that the content of the endorsement is also subject to the same rules about deceptive and unfair advertisements as if made by the advertiser, including the requirement that any claims made by an endorser be substantiated.

**E. Comparison and Promotional Pricing Claims**

The FTC has published guidelines regarding certain comparative pricing claims, addressing a number of specific types of pricing claims.\footnote{157} These FTC guidelines prohibit advertisers from making such pricing claims based on comparisons to higher prices that are in fact fictitious, or otherwise distorting the value of certain promotional price offerings.

1. **Comparisons to non-sale prices.** If a company wants to advertise a sale price by comparing it to a “regular” or “former” non-sale price, the company must have offered that product at the listed regular or former price for substantial period of time in good faith and in the regular course of business. The key word in this context is offered. In other words, a former price is not necessarily deceptive merely because no sales at the advertised price were made, so long as the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business.

2. **Comparison to prices of a competitor.** If a company wants to advertise a price as lower than competitors in the market, that company must be reasonably certain that the higher price listed in the advertisement is in fact offered for a substantial amount of the product sold in that market area. The products being compared must also be essentially similar in quality and both obtainable in the same geographic market area.

3. **“Buy-one get-one” and similar offers.** Where a company is advertising a material price reduction on a product, after the purchase of another product, that company cannot increase its regular prices of the product that is first required to be purchased. The company may also not decrease the quantity or quality of the products being purchased or otherwise attach strings to the offer that would deceive a consumer. Additionally, all the terms and conditions that will apply to the offer must be made clear at the outset.

Some states also have regulations regarding comparison pricing, which typically prohibit an advertiser from comparing its prices to any other prices, unless a substantial number of sales of that product were made at the higher price recently in the ordinary course of business. In some cases, these state statutes are broad, requiring only a substantial number of sales have been conducted “recently” in the “ordinary course of business”.\footnote{158} However, in other cases, the states regulate the specific time periods in which the higher price must have been offered. For example, Illinois, Virginia and North Dakota have adopted a rule that requires the product to have been...
offered at the higher price for at least 28 days out of the immediately preceding 90 days.\textsuperscript{159} Other states may have different rules for comparative advertising.\textsuperscript{160}

Many of these state statutes provide not just for state regulatory enforcement but also private causes of action. For example, in 2013 a shopper at Kohl’s department store brought claims alleging that he had bought items advertised as a certain percentage off the “original” price, but that Kohl’s routinely sold these items at the “sale” price rather than the “original” price.\textsuperscript{161} The plaintiff brought these claims under California’s Unfair Competition Law on the basis that the advertised regular prices did not reflect the prevailing market rate during the immediately preceding 3 months as required under the California statute.\textsuperscript{162} The District Court dismissed the case, on the basis that the plaintiff was unable to show that he was injured, because he had successfully acquired the merchandise he wanted at the price advertised, and had therefore received the “benefit of the bargain”. But the Ninth Circuit reversed this decision, finding that “[m]isinformation about a product’s ‘normal’ price is… significant to many consumers in the same way as a false product label would be.”\textsuperscript{163} The Ninth Circuit was not persuaded by the fact that the plaintiff did not assert a specific lower price that he would have paid absent the false advertising, finding instead it was sufficient to show injury that the plaintiff was induced by the misrepresentation to buy products he would not otherwise have purchased.

III. CONSIDERATION FOR OTHER SPECIFIC TYPES OF ADVERTISING

A. Telemarketing/Do not call

In addition to the legal and regulatory considerations relating to the substance of advertising, franchise businesses should be aware of various issues that affect the manner and frequency of consumer advertising. The first of these involves the National Do Not Call Registry and telemarketing. The Federal Trade Commission operates a Do Not Call Registry that, since 2003, has permitted consumers to opt out of receiving telemarketing calls. Violations of a consumer’s wish to opt out of telemarketing calls can carry a heavy penalty in the form of an enforcement action undertaken by the Federal Trade Commission that may result in a temporary or permanent injunction, civil penalties and fines, and disgorgement of profits.\textsuperscript{164} Exceptions to the advertising limitations imposed by the Do Not Call Registry apply if a consumer has done or


\textsuperscript{160} Alaska: Al. Codified Code. §9.05.020-.050 (9ACC05.020-.050) (more than 6 months out of 12 months); California: Ca. Bus. and Prof'l. Code § 17501 (Ca. Bus. Prof. Code (BPC) Div2, Part 3, Chp. 1§17501) (immediately preceding 3 months); Missouri: MO. Rev. Stat. § 301.567 (40% of the time from 30 days to 12 months); Oregon: Or. Rev. Stat. §137.020.0010 (within the preceding 30 days or otherwise specified in the ad); South Dakota: SD. Codified Laws. §37-24-6 (7 consecutive days during preceding 60 days); Utah: Ut. Code Ann. §13-11a-3 (15 days immediately preceding)

\textsuperscript{161} Hinojos v. Kohl’s Corp., 718 F.3d 1098, 1101 (9th Cir. 2013).

\textsuperscript{162} Ca. Bus. and Prof'l. Code § 17501

\textsuperscript{163} See Hinojos §1106

sought to do business with an entity or if 18 months have expired since a consumer last transacted business with an entity.\textsuperscript{165}

\textbf{B. Email Advertising/CAN-SPAM}

Franchise businesses also must be conscious of specific federal law and regulations that apply to direct consumer advertising in the form of e-mails. The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or “CAN-SPAM” Act, regulates requirements for the content of e-mail communications to consumers and requires consumers to be provided with a method to opt-out of additional e-mail communications.\textsuperscript{166}

The CAN-SPAM Act prohibits “any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading.”\textsuperscript{167} The Act also prohibits the use of deceptive e-mail subject headings\textsuperscript{168} and continued transmission of e-mails from a business entity after an individual opts-out.\textsuperscript{169} Violations of the CAN-SPAM Act may be prosecuted by the Federal Trade Commission, state government, or another regulatory body depending on the severity of the violation.\textsuperscript{170} The Act does, however, provide a certain level of flexibility to senders of electronic messages to obtain the consent of recipients prior to sending them an electronic message of a commercial nature.\textsuperscript{171} This imposes upon a recipient the duty to take active steps to “opt out” of receiving further electronic correspondence.\textsuperscript{172}

Messages that contain only transactional or relationship content are exempt from most provisions of the CAN-SPAM Act, as long as they do not contain false or misleading routing information.\textsuperscript{173} Messages that facilitate or confirm an existing transaction, provide updates about an ongoing transaction, deliver goods or services, or provide warranty, product recall or safety information about an item purchased fall into this exemption.\textsuperscript{174} It is important to note, however, that where a message’s transactional or relationship content does not appear at the beginning of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{165} Id.
\item \textsuperscript{166} 15 U.S.C. § 7701, \textit{et seq.}
\item \textsuperscript{167} 15 U.S.C. § 7704(a)(1).
\item \textsuperscript{168} Id. at § 7704(2).
\item \textsuperscript{169} Id. at § 7704(4).
\item \textsuperscript{170} 15 U.S.C. § 7706.
\item \textsuperscript{171} Floriani, Bruno, et al., \textit{Your Ad Here: The Perils and Rewards of Advertising in Social Media} (Oct. 14, 2015) 19.
\item \textsuperscript{172} 15 U.S.C. § 7706(a)(3)(B).
\item \textsuperscript{173} See 15 U.S.C.A. § 7702(2)(B) (defining “transactional or relationship messages” as the types of electronic communications that are not included in the definition of “commercial electronic mail message”)
\item \textsuperscript{174} See 15 U.S.C.A. § 7702(17)(A).
\end{itemize}
\end{footnotesize}
the message, the primary purpose of the message may be considered commercial and subject
the sender to liability under the Act.175

C. Marketing Directed to Children

Numerous behavioral studies have determined that children are particularly
susceptible to advertising. One such study found that, prior to the age of 8, most children
understand advertisements to be unbiased entertainment – in other words, they do not
understand that the advertisements are intended to persuade people to purchase products.176 In
response to these findings, many consumer and children protection groups have advocated for
regulations limiting the amount of advertising that may be directed at children. After significant
lobbying battles between the late ‘70s through the early ‘90s, children’s advocacy groups were
able to persuade Congress to pass the Children’s Television Act, which limited the amount of
commercial time during children’s programming to 10.5 minutes per hour on weekends and 12
minutes per hour on weekdays, which time limits are still in effect today. 177

The next frontier for regulating advertising for children is of course the Internet. To
date, the principal focus of regulating children’s advertising on the Internet has been data
collection. The Children’s Online Privacy and Protection Act (COPPA) directs the FTC to develop
rules restricting data collection and use for children under the age of 13.178 Generally speaking
COPPA requires all website and online service operators to: (i) include certain specific privacy
policies and notices about data collection on their website; (ii) obtain parental consent before
collecting, using, or disclosing any children’s data (with limited exceptions, such as for one-time
contact in direct response to a child’s specific request); (iii) provide parents with the ability to
review, change, and delete their child’s data; (iv) not condition any children’s participation in any
online activity on the child disclosing any personal information that is not strictly necessary for the
ability to participate; and (v) maintain all children’s data in a reasonably secure manner.179

In addition to the specific regulations applicable to television screening time and
Internet data collection described above, the same general rules applicable to deceptive and

175 Bruno, et al. at 19.

176 John, Deborah Roedder, Consumer Socialization of Children: A Retrospective Look at Twenty-five Years of

177 47 U.S.C. § 303a

178 15 U.S.C. § 6502(b)(1); see 16 C.F.R. § 312.2 See also 16 C.F.R. § 312.2 (“In determining whether a Web site or
online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual
content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of
models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web
site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed
to children. The Commission will also consider competent and reliable empirical evidence regarding audience
composition, and evidence regarding the intended audience.”).

179 Id.; see e.g. United States v. UMG Recordings, Inc., Civ. Action No. CV-04-1050 JFW (Feb. 18, 2004) (finding that
a media company violated COPPA after it collected information about children under 13, despite sending email
requesting click-through parental consent, because: (i) the company did not disclose its informational practices,
including the information it had already collected and what information it proposed to collect; (ii) the company had taken
no steps to verify that the person clicking-through the consent as the child’s parent; (iii) the company did not provide
any mechanism for parents to review the collected information or delete it).
unfair advertising practices will of course apply to advertisements directed at children. As discussed above in this paper, the FTC will evaluate the deceptiveness of any particular advertisement from the perspective of the specific group of consumers that the advertisement targets. Where that group of consumers is children, the deceptiveness of the advertisement must be reviewed not through the eye of the advertisers or even the FTC regulators, but the eye of the children that are viewing it. This nuance can result in a particularly heightened scrutiny for advertisements directed at children. For example, the FTC brought an enforcement action against Hasbro on the basis of advertisements for its zipcord-activated Battle Copter toy.\footnote{181} The Hasbro ads depicted the Battle Copters flying towards the viewer, colliding mid-air, and a fantasy segment showing two actors in life-size helicopters in battle. Although none of these ads specifically made claims that the toy would perform to a certain specification, the FTC held that the visual images of the toy in these ads implied the toys would hover and fly in a sustained and directed manner, which in fact it could not.\footnote{182} Similarly, in Ideal Toy Corporation, the FTC found that another toy company engaged in a deceptive practice when its TV commercials showed the “Robot Commando” moving and responding to voice commands, when in fact additional actions and components were necessary to make these feature work (i.e. batteries that were not included were needed for the toy to turn on, and the user would have to blow into the microphone of the toy before the voice commands would function).\footnote{183} These cases demonstrate that the agency is sensitive to marketing that “unfairly exploit a consumer group unable by age or experience to anticipate or appreciate the possibility that the representations may be exaggerated or untrue.”\footnote{184}

\section*{D. Native Advertising}

Both digital and print media provide advertisers an opportunity to create advertisements that either integrate in or have the appearance of editorial content or otherwise match the media in which it is displayed, such that consumers may not realize that the content is in fact an advertisement. This type of advertising is typically referred to as “native advertising”. In evaluating native advertising, the FTC has issued guidelines which focus on the likelihood that the consumer will believe that the advertisement is anything other than an advertisement.\footnote{185} The more a native ad is similar in format and topic to content on the publisher’s site, the more likely that additional disclosure will be necessary to prevent deception.

The FTC’s first enforcement action under its native advertising guidelines was brought against the department store Lord & Taylor, which had engaged an online magazine to publish an article picturing and highlighting a new dress, as well as over 50 fashion influencers to post

\begin{itemize}
  \item \footnote{180} See Fed. Trade Comm’n, Policy Statement on Deception, appended to Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984); see also Heinz W. Kirchner Trading as Universe Co., 63 F.T.C. 1282, 1290 (1963), aff’d sub nom. Kirchner v. FTC, 337 F.2d 751 (9th Cir. 1964) (“If . . . advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.”).
  \item \footnote{181} In re: Hasbro, Inc., 116 F.T.C. 657 (1993)
  \item \footnote{182} Id.
  \item \footnote{183} Ideal Toy Corp., 64 F.T.C. 297 (1964), available at.
  \item \footnote{184} Id. at 299.
\end{itemize}
Instagram pictures featuring the dress along with Lord & Taylor’s Instagram handle and a specified hashtag.186 The FTC alleged that the advertisements were represented as the “independent statements and opinions” of the online magazine and fashion influencers, though in fact neither the article nor posts were independent, and were therefore deemed misleading to consumers.187 The FTC approved a settlement in which Lord & Taylor agreed to disclose any and all paid advertising as not originating form an independent or objective source, and to disclose any “material connection” that any influencer or endorser may have with the company. The FTC reiterated that “consumers have the right to know when they’re looking at paid advertising”.188

These rules also apply to product integration in programming such as streaming video and/or video games, which may require a disclosure to avoid consumer deception. The FTC does not prohibit product integration where the advertisement is either clearly an advertisement in the programming (i.e. billboards with visible advertisements in the background of a streaming program) or where the fact that the product was placed due to an advertising arrangement rather than creative judgment is likely immaterial to a customer (i.e. a character wears a particular brand of sunglasses). However, if certain advertisements are created to match the appearance of the native programming and integrated within that programming such that it is difficult to distinguish the programming from the advertisements (i.e. video advertisements that mirror an episode of a streaming series), then disclosures will likely be required to prevent consumer confusion.

To avoid confusion, advertisers should ensure that advertisements are clearly and prominently disclosed as ads. In particular, for online advertisements, the FTC makes advertisers responsible for clearly identifying all native content as an advertisement before consumers click on any link or redirect to any other advertising page.189 Advertisers must ensure that the commercial nature of these materials are clear to consumers in all circumstances, no matter how the content is reached, including for example if the native add appears in online search results.

E. Online Behavioral Advertising

Online behavioral advertising is the practice of tracking consumer’s online activities, such as searches, page visits, preferences and content to deliver advertising targeted to a specific consumer’s interests. Currently, online behavioral advertising remains self-regulated. In February 2009,190 the FTC issued a list of four principles that are designed to guide industry self-regulation for online behavioral advertising: (1) transparency and control – companies should provide consumers meaningful disclosures about the practices and choices relating to data collection and use; (2) security and limited data retention - companies should provide reasonable security measures and retain data only as long as necessary for legitimate business and law


187 Id.

188 Id.


enforcement purposes; (3) consent to change to privacy policies – companies should obtain affirmative consent from customers before using data in a manner materially different from promises made when the data was collected; and (4) consent before use of sensitive data – companies should obtain affirmative consent from customers before collecting information about children, health, or financial information. These guidelines apply to a broad category of information, including information that is not traditionally associated with “personally identifiable information” such as clickstream data, IP addresses, and search history, which may not on its own be sufficient to identify a specific individual, but which can with reasonable efforts be used to identify an individual, and/or the disclosure of which may make consumers uncomfortable.

The FTC brought enforcement actions against two companies in 2011 relating to online behavioral advertising, highlighting the importance of both transparency and user control over data collection. The first action was against Chiitka Inc., a search-targeted advertising company. Chiitka informed users that it collected data on search activity for the purpose of sending targeted advertisements and gave users information on how to opt out of such practice by adjusting their browser settings to disable cookies; however, what Chiitka did not disclose was that this opt-out preference expired after 10 days. In a similar case, the FTC brought action against ScanScout Inc., another online targeted advertising company. ScanScout also used cookies to collect user online data for targeted ads, and informed users that they could opt out of such practice by changing their browser settings. What ScanScout failed to tell users, however, was that ScanScout collected data through Flash cookies, as opposed to HTTP cookies. Flash cookies operate very similarly to HTTP cookies, but unlike HTTP cookies, Flash cookies cannot be blocked by disabling cookies in a user’s web browser. In the decision for both Chiitka and ScanScout, the FTC required substantially similar remedies, namely that the advertiser: (1) provide additional or corrected online disclosures about the availability and terms of the opt-out mechanism, (2) provide an opt-out mechanism that was unique to the advertiser and distinct from the user’s general web browser settings, which mechanism must require no more than 1 additional click for users to exercise their choice and must remain in effect for a minimum of 5 years, and (3) include a link to the opt-out mechanism in all published targeted advertisements.

Certain exceptions do however exist for online behavioral data collection, for example, using customer browsing history on a specific site to advertise other products on that same site (called “first person” behavioral advertising because the data is not shared with a third-party), and targeted ads based on information obtained from a single search query that involves no retention of data beyond what is necessary for the immediate delivery of an ad based on the search results (called “contextual advertising” when the search will show ads targeted to the keywords searched without retaining any data from the consumer).

F. Sweepstakes and Contests

Many advertisers offer sweepstakes and contests to consumers, in particular via social media, to encourage consumers to interact with their brand. A sweepstakes is a promotion in which the prize is based on luck, whereas a contest is a promotion in which the prize is awarded based on skill. One of the most immediate regulatory hurdles for sweepstakes and contests are

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192 In re: ScanScout, Inc., No. 102-3185 (2011)

193 Id.
the state level lottery and gambling laws. Typically, these lottery laws will apply if: (i) there is a prize; (ii) winning depends on chance rather than skill; and (iii) the entrant must pay money or make a purchase to be entered. To avoid these lottery laws, advertisers running sweepstakes will often allow participants to enter without paying any fee or requiring any purchase (i.e. “no purchase necessary”). The advertiser should ensure that the free entrants are not disadvantaged in the sweepstakes, for example by offering separate prizes, shorter timeframes to enter, limitations on the number of times to enter, or unduly burdensome methods of entry. Advertisers can also avoid the lottery laws by introducing a skill component to their promotion (i.e. posting the best photo on social media) to avoid the contest being based strictly on chance. In running a contest, the advertiser should ensure that there are objective judging criteria and methods to break ties. If a contest will have both a skill and a luck component, the advertiser should ensure that skill be the predominant criteria for determining the winner.

General advertising laws will still apply to advertisements of sweepstakes and contests, which means that the promotion cannot be deceptive or unfair.194 To avoid such claims, advertisers should disclose all material terms of the sweepstakes and contest prominently (i.e. eligibility based on geography or age, exclusions such as for company employees, the start and end times of the promotion, the date the winner will be selected or announced, the method of entry, the description of the prize and approximate value, the right to use any user submitted content, for contests the judging criteria, and for sweepstakes the odds of winning). Additionally, if the advertisement will include less than a full set of the game rules, there should be clear and conspicuous directions for how to obtain the full rules.

Advertisers running a sweepstakes or contest should also be sure to consider what if any terms and conditions may apply if the advertisement is run on a third-party social media platform (for example, Facebook® has a specific set of rules for such promotions).

Additionally, when designing a contest in which users will submit content advertisers must consider rules that appropriately address not only the ownership and use of that content by the advertiser, but also prohibits the use of any intellectual property owned by a third party.

**G. User Generated Content**

It is increasingly common for companies to engage with consumers online and on social media by asking users to submit content. This practice is very effective for user engagement, but can be challenging from a compliance standpoint, because the advertiser may face liability for user generated content that it cannot necessarily control. For example, user generated content could include false or deceptive claims or infringe on another person’s intellectual property. Fortunately, there are two key federal laws that protect advertisers from liability associated with user generated content: the Online Copyright Infringement Liability Limitation Act (“OCILLA”)195; and The Communications Decency Act of 1996 (the “CDA”).196

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194 See e.g. *Fed. Trade Comm’n, Letter to Cole Haan*, No. 142-3041 (Mar. 2014) (the FTC applied the standard analysis applicable to false or misleading endorsements to a contest run by Cole Haan on the Pinterest website)

195 17 U.S.C. § 512

196 47 U.S.C. § 230

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OCILLA provides certain safe harbors for online service providers against copyright infringement claims based on their users’ actions (both protection against monetary liability and limitations on equitable remedies). The scope of these safe harbors and the criteria to qualify for them vary depending on the type of service provided and the nature of the user generated content. The most relevant to advertisers is the safe harbor for information stored at the direction of the user, which captures many forms of user-submitted content. To qualify for this safe harbor, the online service provider must: (i) not have actual knowledge that the use is infringing, (ii) not receive a direct financial benefit, if the provider has the right and ability to control the infringing action, and (iii) designate an agent to receive notices of infringement and respond expeditiously to remove or disable infringing activity upon receiving notice. Additionally, the online service provider must have a policy for terminating repeat infringers’ use of its services.

The CDA prohibits the transmission of defamatory, offensive or false messages but provides limited immunity for providers and users of online services from liability for third-party content. This immunity is available, even if the online provider received notice of the offensive content, provided that the content does not violate federal law, intellectual property laws, state decency laws, or other similar state laws.

The key purpose of the protections available under both OCILLA and CDA is to insulate online forums and website owners from claims based on unauthorized content posted by users. In order to protect this avenue of defense, most website platforms that permit the submission of user generated content will expressly state in their terms and conditions that users may not post false, defamatory, offensive or infringing materials. Similarly, advertisers should be clear in all contest rules or other messaging soliciting user-generated content that such content must be free from false, defamatory, offensive or infringing materials.

On the other hand, if the advertiser actively solicits a particular type of user-generated content, it will be more difficult for the advertiser to avail itself of these statutory protections. For example, as described above, when Quiznos ran an advertising campaign asking users to submit videos of why Quiznos sandwiches were better than Subway sandwiches, Subway sued Quiznos under Section 43(a) of the Lanham Act and the state Little FTC Act, claiming that the user submitted content contained false claims. Quiznos defended these claims by asserting immunity under the CDA, but Subway claimed that the immunity under the CDA was not available to Quiznos because it had not merely published the user-submitted content but had actively participated in its creation. The court held that Quiznos could be liable for the user content if a jury determined that Quiznos had played a role in developing the content (though the parties settled this case before the jury weighed in on the facts in dispute).

IV. CONCLUSION – BEST PRACTICES FOR COMPLYING WITH ADVERTISING LAWS

Developing a legally compliant advertising campaign can be challenging in any medium. The rise of social media and digital marketing has increased the frequency and ease of marketing communications with consumers, but also has increased the risks that a franchisor or franchisee will post, tweet, email, or blog something to promote the franchise system’s goods or services in a manner that violates some law or regulation.

To minimize legal risks and help ensure compliance with advertising laws and regulations, it is important that any advertiser, whether a franchisor or a franchisee, set up a process for review

and clearance of advertising and marketing materials, and a policy and clearance procedure for social media posting and digital marketing content. Attached as Exhibit A is a sample checklist that will outline some of the best practices covered in this paper.

Some franchisors, in addition to relying on such checklists in their own marketing, may also want to issue similar guidelines, or other social media policies or brand standards to franchisees for use with all local advertising. A recent publication by the ABA Forum sets out some guidance on preparing such a social media policy.198

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EXHIBIT A

Advertising Review Checklist

It is essential that a franchisor (and franchisee, as applicable) review all proposed advertising and marketing materials for accuracy of content, fairness to consumers, obtaining of necessary approvals, and compliance with other advertising laws and regulations. Below is a checklist of items to review and consider to help ensure that advertising materials are legally compliant:

- Are all factual statements in the ad accurate?
- Does the advertiser have a reasonable basis for all advertising claims made, including substantiation to support all such claims?
- Are any express or implied advertising claims potentially misleading?
- Are any disclaimers needed to ensure that the statements are not misleading – and if so, are those disclaimers:
  - Close in proximity to the claims being made
  - Free from distracting elements
  - Prominent and noticeable in appearance
  - Unavoidable to consumers (using text or visual cues to draw attention to the location of disclaimers if necessary)
  - Avoids unnecessary scrolling, pop-ups or hyperlinks for online advertisements
- If endorsements are being used, is the relationship with the endorser being accurately described (such as through “#ad” on endorser tweets or posts)? Is the endorser a bona fide user and is the endorser’s opinion being accurately described?
- Has approval been obtained from persons whose photographs, image or likeness appear in an ad or post (whether they are celebrities or not)?
- Has clearance and approval been obtained for all third-party generated content in an ad or post (which may be subject to copyright or other rights)?
- Are any particular claims being made about health, nutrition, environmental benefits, or origin in the USA, and if so are such claims substantiated, truthful, and compliant with applicable FTC and state regulations?
- Are any comparative or “sale” pricing claims being made, and if so are the comparison prices fictitious or have they recently been offered in the ordinary course of business?
- For native advertising, is the advertisement recognizable as an ad, or are additional disclaimers necessary to distinguish the ad from native programing or content?
- Is the advertiser being transparent and safe with any consumer data it collects? Does the advertiser have affirmative consent from consumers before using any personal data for targeted ads?
• For email advertising, are consumers being provided the opportunity to opt out from further email advertising?

• Are the terms and conditions of any sweepstakes and contests being accurately and prominently disclosed?
ANTONIA SCHOLZ

Antonia Scholz is a partner at Cheng Cohen LLC in Chicago, Illinois. Antonia counsels a diverse spectrum of clients on corporate and transactional matters, in particular within the franchise and distribution industry. Her practice principally focuses on complex business transactions, ranging in size from public company mergers and acquisitions to the sale of a single-unit franchise. Antonia’s services extend to complex contract negotiations, equity investments and joint ventures, cross-border transactions, corporate restructuring, financing and lending transactions, and the acquisition or divestiture of assets. Antonia also supports franchise brands in all stages of growth, including preparing franchise disclosure documents and agreements, negotiating and documenting franchise sales, transfers and terminations, and handling the wide array of other issues arising in the evolution of a franchise system.

Antonia has been a member of the Forum since 2012, previously serving as the Young Lawyer’s Division Liaison to the Forum’s Governing Committee from 2015 to 2017, and currently serving as a member of the Forum’s Membership Committee. Antonia is also a member of the International Franchise Association, including by serving as a member of the IFA’s Women’s Franchise Committee, 2020 IFA Convention Planning Committee, and a Co-Chair of the IFA’s Women’s Franchise Network (Chicago Chapter). Antonia earned both her J.D. and B.A. from the University of Chicago.

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Mr. VanderBroek has been recognized in the International Who's Who of Franchise Lawyers for multiple years. He has written articles for the ABA Franchise Law Journal on franchise trade secrets, copyright law, and covenants not to compete, and was a presenter at the 2009 ABA Forum on Franchising on the topic of protecting and enforcing trade dress rights, and at the 2016 ABA Forum on Franchising on the topic of right of publicity claims. He also is a regular presenter on franchise and professionalism topics for the Georgia Bar Franchise and Distribution Law Section. Mr. VanderBroek received his Bachelor of Business Administration degree in 1981 from the University of Michigan, and his J.D. degree in 1984 from the University of Chicago Law School, where he was a member of the law review. He served as a law clerk to Judge James C. Hill of the United States Court of Appeals for the Eleventh Circuit.