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DECEPTIVE ADVERTISING AND PUFFERY

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The goal of advertising is often to create a need, increase consumer awareness and ultimately influence consumers purchasing decisions. Many advertisements rely on puffery to get consumers’ attention. Puffery is a term used in the advertising industry to describe the hype and exaggeration that may be present in advertising to grab consumers’ attention. Advertisements need to stand out to create consumer awareness. Creating memorable attention grabbing advertisements are very effective in catching consumers’ attention and building awareness.

Puffery is generally not considered deceptive advertising because it is so exaggerated that no reasonable consumer would take the claims literally. It is not uncommon for an advertisement to exaggerate product features in order to elicit consumer attention, i.e., the world’s best hamburger. This is a subjective claim that cannot be proven true or false. As a result, it is classified as puffery. Deceptive advertising, on the other hand is used to intentionally mislead or confuse consumers, i.e., a recent study reveals that this is the world’s best hamburger, when in actuality, there was no study to substantiate this claim. The line between deception and puffery is not always clear. Advertising claims including false product descriptions, absolute product characteristics, specific and measurable claims pertaining to the product and claims of superiority based on product testing are not considered puffery and must be substantiated.

According to Roscoe B. Starek, III of the Federal Trade Commission, there is a significant difference between deceptive and false advertising and puffery. According to Mr. Starek, “The FTC does not pursue complaints involving subjective claims or puffery-- this is the best hair spray in the world. However, if there is an objective component to the claim -- such as more consumers prefer our hair spray to any other, or our hair spray lasts longer than the most popular brands -- then you need to be sure that the claim is not deceptive and that you have adequate substantiation before you make the claim. These requirements apply both to explicit/expressed or implied claims. Also, a statement that is literally true can have a deceptive
implication when considered in the context of the whole advertisement, even if that implication is not the only possible interpretation.”

The following information discusses common myths regarding “claims” in advertising and was taken from Prepared Remarks of Commissioner Roscoe B. Starek, III, Federal Trade Commission.

1. Myth #1 – A claim can be substantiated if it has several studies supporting it. Truth: A claim is only substantiated if the studies were scientifically controlled and support the claim in the view of experts in the field and the party conducting the study had no incentive to obtain particular results. A claim may be substantiated if there is an absence of relevant studies contradicting the results.

An unsubstantiated claim may arise if other studies contradict or raise questions about the study findings, the study has a design flaw(s) or was conducted by persons with an incentive to obtain particular results.

2. Myth #2 – If your product has some benefit, the advertisement will not be challenged. Truth: Even real product claims must be substantiated with scientific evidence.

3. Myth #3 – Testimonials are substantiation. Truth: Testimonials are not considered to be substantiation for a claim. Even if the testimonials are backed up with affidavits from individual users stating the product performed as promised. The FTC does not consider anecdotal evidence (i.e., testimonials) sufficient to support a claim. An endorser should be an expert in the area for which he is acting as a spokesperson and their message should be based on evaluation or tests that other experts in the field would find sufficient to support the expert endorser’s statements.

4. Myth #4 – If endorsers actually use and like the product, it is safe to use their endorsements. Truth: Given that the endorser uses and is making truthful statements about the product, the claim must consider whether the results the endorser experienced are typical. If the results are not substantiated, then the claim needs to be qualified by a clear and prominent disclosure of the generally expected results for users of the product (i.e., results may not be typical).

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5. Myth #5 – If a deceptive claim is followed with a disclosure, liability is removed. Truth: If a claim cannot be substantiated do not make it. The claim may have to be narrowed down to what can be substantiated. Disclosures that flatly contradict a deceptive claim, or purport not to make the claim does not remove liability.

6. Myth #6 – The use of a “results may vary” statement is adequate to remove liability. Truth: Even while the disclosure is very prominent and obvious, it does not keep consumers from believing that these results are typical of what they can expect from using the product. Therefore, there is liability.

7. Myth #7 - Dietary supplement advertisements are not regulated. Truth: Dietary supplement claims are regulated by both the FTC and Food and Drug Administration (FDA). The FDA is responsible for label claims while the FTC is responsible for advertising claims. The FDA is currently creating guidelines for substantiating labeling information. The FTC requires substantiation of all claims made in all dietary supplement advertising.

8. Myth #8 – Infomercial producers are not liable for deceptive claims. Truth: This is wrong! The FTC will determine whether the producer actively participated in creation of the advertisement with a deceptive claim and whether they knew the claim was misleading, false or unsubstantiated.

9. Myth #9 – Advertising rules do not apply on the Internet. Truth: This is incorrect. The FTC standards that apply to more traditional advertising media also apply to Internet advertising.

Conclusion

A rule of thumb is to not make objective claims that cannot be scientifically substantiated. Subjective claims are generally considered to be puffery and cannot be substantiated.