

PRACTICAL CHALLENGES IN
DEVELOPING DEFENSIBLE AD CLAIMS

And

CHALLENGING DECEPTIVE
ADVERTISEMENTS

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THE LAW IN A NUTSHELL:

The laws and regulations surrounding advertising law can be summarized in two basic rules:

1. Any and all claims you make must be truthful.
2. You must have a reasonable basis for all claims contained in your ad before the ad is seen by the public.

The various types of claims are as follows:

An **express claim**, such as “made of 24-carat gold.”

An **implied claim**, such as depicting a piece of gold-colored jewelry against a background of gold bullion, with each bullion bearing the marking, “24-carat gold.”

Comparative claims can take several forms, such as a superiority claim; “Brand X laundry detergent will get your clothes cleaner than the competition;” a parity claim such as, “No laundry detergent get clothes cleaner than Brand X;” or a preference claim such as, “The Brand X burger is America’s favorite burger.”

DEVELOPING DEFENSIBLE CLAIMS

You are counsel for Filter Tech, Inc. Filter Tech has traditionally been in the business of water filtration, but is now expanding into air filtration. Research and Development has supposedly come up with the proverbial better mousetrap, and has presented their prototype of the “Pura Monster Air Purifier” to the Marketing department. Marketing falls in love with the product, and immediately begins focus group studies to determine the best way to market the Pura Monster. At the conclusion of the focus group studies, Marketing comes to you with a list of claims they would like to make on the Pura Monster. Those claims are:

1. The Pura Monster Air Purifier removes more foreign materials from the air than any other air purification system.
2. The Pura Monster Air Purifier is the quietest air purifier on the market.

3. The Pura Monster Air Purifier reduces the incidence of illness.
4. The Pura Monster Air Purifier provides comfort for allergy sufferers.
5. The Pura Monster Air Purifier is “Doctor Recommended.”
6. The Pura Monster Air Purifier costs the least to operate among all the air purification systems.
7. The Pura Monster Air Purifier costs just \$.09 per day to operate.
8. In order to grab the attention of shoppers, Marketing wants the packaging to be emblazoned with a burst which will read “NEW!”
9. Marketing wants on packaging as well as in marketing communications the statement, “The Pura Monster Air Purifier is made in the USA.”
10. Marketing wants an animated depiction of mold spores and dust being drawn from the bedding, curtains, and furthest reaches of the room into The Pura Monster Air Purifier, where 100% of the materials depicted are trapped in the Pura Monster filter.

YOUR ANALYSIS OF THE POTENTIAL CLAIMS

1. The Pura Monster Air Purifier removes more foreign materials from the air than any other air purification system.

Issues:

A. What is the test to be used to substantiate this claim? Is it an industry standard test such as ANSI or ASTM? If you are using a test other than the industry standard test, can you support the legitimacy of that test (is it fair, repeatable, and does it measure the factor that is the subject of the claim)? Can you show performance superiority based on the test you are using (to a 95% confidence level if it is to be used for network advertising)?

B. Against whom will you test? The claim suggests that you have tested against every competitive product in existence, which is a very expensive and time-consuming process. This could instead be qualified to compare only against certain models by using a qualifier which states, “compared to leading brands,” or by specifying a particular brand against whom you are testing.

C. Do you have serialized production units for testing? Prototypes rarely have the same performance characteristics, so it is dangerous to base testing for claims substantiation on anything other than production units.

2. The Pura Monster Air Purifier is the quietest air purifier on the market.

Issues:

A. Based on what? dBa readings, or jury testing?

B. What are the conditions of the test (distance of the microphone from the sound source; equipment used; anechoic, semi-anechoic or reverberant room; at what point during the product operation cycle is the recording made)? The test situations should be as close as practicable to consumer use situations.

C. Is the testing based on production units?

3. The Pura Monster Air Purifier reduces the incidence of illness.

Issues:

BEWARE!!! This is clearly a health claim; health claims receive the highest level of scrutiny by the Federal Trade Commission (FTC), and may trigger the regulatory authority of the Food and Drug Administration (FDA). It is unlikely that this product could satisfy the requirements of either of these regulatory bodies in order to make this health claim.

4. The Pura Monster Air Purifier provides comfort for allergy sufferers.

Issues:

Once again, this is a health claim, and contains the caveats of #3.

5. The Pura Monster Air Purifier is “Doctor Recommended.”

Issues:

This is an endorsement. Without a specific endorsement by some legitimate body of physicians, this claim is inappropriate. Despite the assertion from your marketing person that he can dig up a couple of doctors who will endorse the product, this would not support the far broader statement, “Doctor Recommended.”

In addition, please remain aware that even if a respected entity such as the American Medical Association recommended that allergy sufferers use some form of air filtration, that does not constitute an endorsement of this particular product, and would have to be worded in such a way as not to imply such endorsement (i.e., “Nine out of ten dentists surveyed recommend sugarless gum to their patients who chew gum”).

Finally, even if you could obtain an endorsement of your specific product by a respected medical group, that could constitute a health claim, and subject your product to the enhanced regulatory authority of the FDA and FTC.

6. The Pura Monster Air Purifier costs the least to operate among all the air purification systems.

Issues:

- A. Against whom are you comparing?
- B. Are you comparing apples to apples? For example, are you considering the initial cost of the unit into the cost to operate in order to skew the figure against much higher-priced units?
- C. Is this based on serialized production units?

7. The Pura Monster Air Purifier costs just \$.09 per day to operate.

Issues:

- A. Is that figure based on electrical usage of production units?
- B. Is that figure based on average electrical rates? Is it based on the average retail price of the replacement filters? Assuming the \$.09 figure is at the lower end of the spectrum rather than the average, consider softening the claim to read, “Costs as little as \$.09 per day to operate.”

8. In order to grab the attention of shoppers, Marketing wants the packaging to be emblazoned with a burst which will read “NEW!”

Issues:

The FTC has issued guidelines that suggest that a “New” claim is valid for six months from the date of entering the marketplace. While there is no question that this product can appropriately display the “New” burst now, Marketing needs to consider whether they are willing to incur the additional cost to change the packaging to remove the burst in six months’ time.

9. Marketing wants on packaging as well as in marketing communications the statement, “The Pura Monster Air Purifier is made in the USA.”

Issues:

According to the FTC “Made in USA” Guidelines, a product can only have *de minimis* foreign content and still be allowed to make the “Made in USA” claim. If any substantial component is produced outside the USA, the claim cannot, in all likelihood, be made. If, for example, the motor or switches were from China, but the steel used to build the chassis is from the USA, it is stamped into the chassis in your factory in the USA, the casing is injection molded in your factory from resins produced in the USA, and all wiring was made in the USA, that product could not bear the tagline, “Made in the USA.” However, it could bear the tagline, “Assembled in the USA from US and foreign materials.”

10. Marketing wants an animated depiction of mold spores and dust being drawn from the bedding, curtains, and furthest reaches of the room into The Pura Monster Air Purifier, where 100% of the materials depicted are trapped in the Pura Monster filter.

Issues:

After conferring with Research and Development, you learn that the Pura Monster Air Purifier actually pulls and filters air from within a five to seven foot radius of the unit. Therefore, it would be deceptive to depict via animation the unit pulling particles from bedding, curtains, and the farthest reaches of the room. Even an animated depiction is a sort of demonstration, and the effectiveness of the unit cannot be exaggerated.

CHALLENGING THE DECEPTIVE CLAIMS OF COMPETITORS

You have worked with your Marketing group, softened the claims where necessary, and have arrived at claims which you believe are defensible. Now, your competitor, Slippery Industries, has come out with their new product, also an air purifier, called "Super Air." In national network TV ads, Slippery claims that the Super Air "cleans your air for less cost than any other room air purifier." In national magazine ads, they go on to say, "Removes the most foreign material from the air," and "Proudly made in the USA." The magazine also depicts a man in a white coat with a stethoscope around his neck handing a Super Air to a woman who is wiping her nose with a tissue.

Your Marketing and R&D departments have come to you screaming. Your company's testing show that, when tested pursuant to the industry standard, the Super Air removes less foreign matter than 75% of all the other competitive products on the market. In fact, the only models which the Super Air outperforms are other older models from Slippery Industries. R&D speculates that they are basing their "costs less to operate" claim on the fact that this unit uses technology whereby a reusable, washable filter is used rather than a disposable filter. R&D also speculates that this technology is what causes their less-than-stellar particle removal ratings. Lastly, the Super Air which your company acquired for testing was disassembled, and the motor, switches and controls were all stamped, "Made in China."

Following are various means available to address Slippery's deceptive ads:

1. Informal Challenge

You draft a letter to the chief executive and/or general counsel of the advertiser outlining what you believe is deceptive about the ad, asking for the advertiser to provide either their substantiation for the disputed claims, or their assurance that the offending ads will be discontinued. Finally, the letter should underscore your willingness to take the matter to the next level if the response is unsatisfactory or not forthcoming.

Advantages: This is clearly the least cost alternative, and very often is successful in making the matter go away.

Disadvantages: If the advertiser sandbags, time is lost while the deceptive ad remains in circulation.

2. Lawsuit

You may file a lawsuit under Section 43(a) of the Lanham Act.

Advantages: This is the most serious action, and will certainly grab the attention of even the most recalcitrant of competitors; damages are available to you as the challenger; the court has authority to order the offending ads to be removed from circulation.

Disadvantages: This is the highest cost alternative; this can be the slowest means of removing an offending ad; all allegations must be proven, such as, in the event of your allegation of an unsupported implied claim, you must incur the time and expense of having a consumer perception study prepared; proving damages can be very difficult; and, perhaps most importantly, if there is any glass in your advertising house, this action will most certainly result in counterclaims against your company.

3. Challenge before the National Advertising Division of the Better Business Bureaus (NAD)

The NAD has set rules by which they will review a challenge by one entity against an advertiser (they can also investigate a matter on their own accord)

which is an alternative dispute resolution method incorporating informal briefing and responses by the parties.

Advantages: This is, comparatively speaking, a very fast approach (2-4 months); most reputable companies consider this a useful and viable means of resolving advertising disputes, and will abide by the resulting decision; the NAD staff has a great deal of experience and expertise on advertising issues, and will use that expertise and judgment in dealing with a dispute (for example, absent a consumer perception survey to prove the existence of a misleading implied claim, the NAD staffers will determine based on their experience whether such a claim is, in fact, a misleading implied claim); if you are dissatisfied with the resulting NAD decision, you may appeal the decision to the National Advertising Review Board (NARB).

Disadvantages: The NAD and NARB have no independent enforcement authority. If an advertiser ignores the NAD/NARB or refuses to abide by the decision, their only recourse is to refer the matter to the FTC.

4. Challenge before the Networks

Networks have independent responsibility to ensure that the advertising they run is truthful and fully supported. They have exposure as well as the advertiser for misleading and deceptive advertising. Consequently, they are extremely conservative in what they allow to be aired.

Advantages: This alternative is fast (roughly the same as an NAD challenge); Networks are very conservative due to their own potential liability (this favors the challenger); sometimes the Network will suspend airing of the ad in question while the matter is investigated; this alternative can be done simultaneously with a lawsuit or NAD challenge.

Disadvantages: A network challenge only affects that particular network; a similar course of action must be taken at each of the “big three” networks on which the offending ad appears; this only works at the “big three,” and no similar mechanism exists for Fox or cable networks (or for print, billboards, etc.); damages are not available; rather, the only remedy available is that the ad will be pulled from circulation.