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True Blue

Avoid "Fake News" on Product Packaging

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"What claims can I include on the packaging of my product?" This can be a difficult question to answer for manufacturers or distributors. While product claims drive consumers' interest, there can be real consequences if your claims are not accurate or supported by the appropriate research. There has been a recent increase in the amount of litigation involving product claims that carry serious consequences, such as violations of the Federal Trade Commission Act, unfair competition laws, the Lanham Act, and product liability claims. Here are some recommendations to consider before placing claims on your product, recognizing that the applicability of these recommendations will depend on the unique situation and the applicable regulations.

First, identify all claims on the product materials. When marketing submits proposed packaging or a label, ask yourself what statements are made regarding the efficacy and safety of the product. A good rule of thumb is to include only statements of fact for which you have tangible evidence—and you should maintain a file for each product documenting the evidence for all claims. While this is not always an easy determination to make, one court has found that "capacity for verification is the most important question in determining whether a statement is one of fact." *Gillette Co. v. Norelco Consumer Products Co.*, 946 F.Supp. 115, 137 (D.Mass 1996). If your statement can be proven true or false, ensure that you have the data to show it is true.

Do not forget that visual images are equally important. The pictures on your packaging are just as important as the words. In analyzing these types of claims, the court will also consider the visual images. *See e.g., Coca-Cola v. Tropicana Prods, Inc.*, 690 F.2d 312 (2nd Cir. 1982) (court examined "visual component" of ad and concluded that the visual image constitutes an explicit and false representation that defendant's packaged orange juice "is produced by squeezing oranges and pouring the freshly-squeezed juice directly into the carton.").

Ensure that all claims are true, accurate, and not misleading. Under the Lanham Act, a false advertising claim can be made if an advertising statement is proven to be false, either on its face or by necessary implication. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997). Even if the claim is not literally false, if the advertisement misleads, confuses, or deceives the public, the claim is actionable. *Id.* Claims that are mere "puffing" are not actionable, which is defined in one jurisdiction as "advertising, blustering, and boasting upon which no reasonable buyer would rely." *Id.* As one court put it, "[t]he 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific." *Castrol Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1992); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997) ("less is more" was found to be mere puffery while "50 percent less mowing" was not puffery but an actionable claim). Generally, if you are making a statement of fact, it is unlikely to be puffery; however, a good way to prevent misleading statements is to avoid absolutes and use qualifying language.

Ensure that your claims are supported by the appropriate research. The Federal Trade Commission ("FTC") requires that advertisers have a reasonable basis for the advertisements before they are disseminated to consumers. Courts will look to whether the tests establish the proposition asserted on the packaging and whether the testing is sufficiently reliable. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 930 F. Supp. 753, 779 (E.D.N.Y. 1996). Remember also to ensure that all research and testing upon which you rely is documented in writing and saved to the appropriate product file.

Failure to follow these best practices could result in costly and expensive litigation. This litigation can include, but is not limited to, proceedings before the National

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Advertising Division (a self-regulatory system administered by the Council of Better Business Bureau), charges filed by the FTC and class actions. Such litigation is not only costly, but can damage a company's reputation and subject it to general product liability claims. For example, the FTC recently announced that it settled charges against a company and its CEO related to their advertising of anti-aging products, using what the FTC believed were false or unsubstantiated claims. In *Noel Patton*, the respondents marketed, distributed, advertised, and sold to consumers TA-65 Skin. Respondents consistently marketed the product as having the ability to reverse aging, prevent DNA damage, restore aging immune systems, and increase bone density. *In the Matter of Telomerase Activation Sciences, Inc., a Corporation; and Noel Thomas Patton, Individually and as an Officer of Telomerase Activation Sciences, Inc.*, 2018 WL 1082541, at *12. The FTC found both that these claims were false at the time they were made and not substantiated by scientific or clinical evidence. Based on this, the FTC found the claims were false and misleading. *Id.* at 43-45.

Similarly, in 2009, Dannon Company, Inc. was required to pay up to $45 million to settle a class-action lawsuit filed by consumers based on false claims on its yogurt products. *Gemelas v. The Dannon Co. Inc.*, Case No. 1:08-cv-00236 (N.D. Ohio 2010). Specifically, consumers alleged that Dannon falsely advertised that its Activia- and DanActive-branded yogurt was "clinically" and "scientifically" proven to regulate digestion and boost immune systems. *Id.* at Doc. #1 (Jan. 29, 2008). Throughout the litigation, Dannon stood by its products and its advertisements; however, under the terms of the settlement, Dannon agreed to remove the words "clinically proven" and "scientifically proven" from its product labels and advertisements. Press Release, *Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink: FTC Charges that Evidence Supporting Benefits of Probiotics Falls Short,* Fed. Trade Comm'n, https://www.ftc.gov/news-events/press-releases/2010/12/dannon-agrees-drop-exaggerated-health-claims-activia-yogurt (Dec. 15, 2010). In addition, Dannon agreed to add a qualification to its claim that its product "helps support the immune system."

Then, in 2014, Red Bull GmbH settled two class-action lawsuits totaling up to $13 million dollars. *Careathers v. Red Bull North America Inc. & Wolf, et al. v. Red Bull GmbH et al.*, Case No. 1:13-cv-08008 & Case No. 1:13-cv-00369 (S.D.N.Y. 2015). In these cases, consumers filed suit against Red Bull for falsely claiming that its beverages were more effective and efficient than less expensive products like "caffeine tablets or a cup of coffee." *Id.* at Doc. #1 at ¶¶ 5, 24 (Feb. 27, 2013). Specifically, consumers note in their Complaint, that Red Bull's claims are not supported by scientific data or studies. *Id.* at ¶¶ 22-23. In an effort to end the litigation, Red Bull settled the cases; then the United States District Court for the Southern District of New York approved the settlement. *Id.* at Doc. # 81 & #82 (May 12, 2015).

In sum, what these cases and many others demonstrate is that it is critical to examine and thoroughly review all product claims. Each claim should be supported by the necessary research and should include qualifications when appropriate. Taking and adhering to these best practices are important steps to ensuring that a product maintains a strong reputation among consumers and stays out of expensive or prolonged litigation.

And if you are aware of a competitor that you believe is making false and misleading advertisement claims, an avenue to challenge the claims is through the National Advertising Division. (https://www.bbb.org/sdoc/for-businesses/advertising-review-services/national-advertising-division/contact-information/).


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