

NAD Considers “Up To” Qualifiers in Superiority Claims

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Coterie Baby advertises that its diapers provide “up to 4x more absorbency” and “up to 3x drier skin” compared to “leading brands.” P&G, the maker of Pampers – one of the two leading brands of diapers – challenged this claim (among others) before NAD. One of the key questions in the case is what evidence is necessary to support an “up to” superiority claim involving multiple competitors.

Coterie submitted tests to demonstrate that its diapers were four times faster at absorbing and three times drier when compared to Huggies – the second of the two leading brands – and certain others. Coterie’s tests generally did not, however, demonstrate those levels of superiority when compared to Pampers. Coterie argued that its claims were nevertheless supported because the “up to” qualifier communicates that its diapers won’t always meet those metrics.

NAD disagreed. It determined that consumers would likely understand the “up to” qualifier to mean that there will be some variability based on the usage conditions, including size, age, and activity level of the babies. However, NAD opined that “consumers would not expect an ‘up to’ superiority claim over the leading diaper brands to mean that the claim was true for only one of the two leading diaper brands.”

NAD determined that “when a superiority claim over ‘leading brands’ is supported for only half of the claimed brands, the addition of the phrase ‘up to’ is not sufficient to prevent consumers from being misled.” A contrary decision “would open the door to advertisers being able to expand their superiority claims to any and all competing products even if they only have substantiation for a single competing product.”

There’s more to this case that may be of interest if you market diapers, but the guidance on “up to” claims involving multiple competitors is relevant across industries. As we’ve noted before, though, the standards for “up to” claims aren’t always clear. For example, last year, FTC Chairman Andrew Ferguson [commented](#) that the Commission “appears to have articulated at least three inconsistent standards” for these claims. And [some courts](#) have differing views, so it pays to be cautious when making these types of claims.