

NAD Holds that a Trademark Can be a Claim

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In a decision issued last week, the NAD held that even trademarked phrases are subject to advertising laws. A company that makes dishwasher products was asked to substantiate the phrase “Outshines the Competition.” The company argued that because the phrase was a trademark, it didn’t require support. It also argued the phrase constituted puffery. The NAD disagreed, holding that when “a trademark appears as an advertising claim, an advertiser must provide a reasonable basis for that claim.”

The NAD also determined that although the phrase might constitute puffery when it stands on its own, the claim appeared in conjunction with other performance claims, such as a statement that the product “removes the toughest spots and film while keeping your dishwasher sparkling clean.” In that context, the trademark constituted “an objectively provable superior performance claim.”

This isn’t the first case to address this issue. Indeed, [the FTC recently alleged that the name of a product conveyed a claim that required substantiation](#). But the case serves as a reminder of two key points. First, just because a something is a trademark doesn’t mean it’s outside the scope of advertising laws. Objective claims require substantiation. Second, context is important to determining whether something is puffery. A statement that may be puffery on its own will take on a different meaning if it appears near other performance claims.