

The Sweet Smell of Puffery

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With summer in full swing, many people are thinking about sunscreen. As they compare typical selling points—including SPF levels, formulations, and water repellency—one company is focusing on a different selling point. Vacation claims that it makes the “World’s Best-Smelling Sunscreen.” The company slathers that claim everywhere, including product labels, retail displays, social media posts, and its website.

Beiersdorf, makers of competing sunscreen products, didn’t think that claim smelled right. It filed a challenge before the NAD arguing that the claim required substantiation. Beiersdorf argued that there are ASTM standards for measuring smell and hedonic scales for preference that are used for claim support. Vacation countered that the claim was puffery and didn’t require substantiation.

NAD acknowledged that smell can be measured. “But the fact that a test methodology exists to measure smell does not necessarily mean that consumers would expect a claim of ‘World’s Best-Smelling Sunscreen’ to be substantiated.” Thus, the key question in the eyes of the NAD is whether consumers would expect Vacation to have substantiation based on the context of the claim.

In most contexts in which the claim appeared—such as the product labels, retail displays, and social media posts—NAD determined that consumers would not expect substantiation. “Given the inherent subjective nature of the claim and the grossly exaggerated characterization of the product’s smell, NAD found that reasonable consumers are unlikely to take the claim, when presented by itself, seriously.”

The analysis was different on Vacation’s website, though. There, the claim appeared in quotation marks directly above a star rating, a 4.8/5.0 score, and more than 13,000 reviews. That changed the context. NAD wrote that a quote that appears above ratings may suggest that the quote is taken from the reviews or is a summary of the reviews.

“By tying the claim to the reviews in this manner, consumers may take away the message that the claim is more than puffery and relies on the reviews as substantiation for a claim of preference.” NAD therefore recommended that Vacation modify the claim in this context to avoid conveying the message that the “World’s Best-Smelling Sunscreen” is substantiated by the reviews.

Many marketers will rejoice when reading about this decision. They will likely tell their in-house legal teams that the world’s best-written legal blog has a post suggesting they can say that they are the world’s best at something without having to prove it. That’s half true, but the other half is the more important part.

It’s important to remember that the difference between a claim that is puffery and one that requires substantiation can sometimes be as subtle as a hint of coconut on the breeze on a summer afternoon.