KEY TAKEAWAYS

Puffery Versus Objective Claims in Advertising: Five Takeaways from the 2024 National Advertising Division Annual Conference

Barry M. Benjamin, managing partner of the New York office and chair of Kilpatrick's Advertising and Marketing group, was honored to participate recently on a panel at the **BBB National Program's National Advertising Division's 2024 Annual Conference**, discussing puffery in advertising. The panel discussed the historical background of puffery and its place in our current legal system, how to distinguish an objective claim from puffery, and how the FTC, courts, and the NAD define and review puffery claims.

Takeaways from the program include:

1

Puffery as a Legal Defense is Hundreds of Years Old. The year 1603 saw a decision in the English courts rejecting a claim brought by a man who purchased a bezoar stone that supposedly had magic healing properties. When the magic stone failed to heal the man, he sued the seller. Upon rejecting the man's claim, the court held that no actual deceit in the transaction took place, and the buyer had no right to his money back, because the seller's chatter during the sale was mere puffery. Along with announcing the doctrine of *caveat emptor,* or "buyer beware", the case also ushered in the concept of puffery. This legal concept posits that buyers should approach commercial transactions with skepticism and possess the means and ability to assess or examine a product before making a purchase.

2

The "Ultimate" Product. As a superlative descriptor, among the definitions of the word "ultimate" are "greatest," "unsurpassed," and "not to be improved upon." These seem objectively provable. Thus, advertising a cough syrup as "the ultimate immune system support;" or a spray paint as providing the "ultimate coverage;" or an energy bar as "the ultimate energy bar" could all be viewed as objectively provable superiority claims. However, in different NAD decisions, the claims at issue for the cough syrup and spray paint were found to be puffery, while the ultimate energy bar was found to be an objective claim. Not surprisingly, the outcome was context-dependent, based on what the reasonable consumer would think upon viewing the actual advertisements as a whole.

3

The "Best" Product. Another recurring theme in NAD cases over the years involves the word "Best." In a different energy bar case, a challenger sought discontinuance of a competitor's claim that its own product was the "best tasting" energy bar. Other similar NAD challenges include claims such "World's Best Glass Cleaner" and "World's Best Fruit and Vegetable Juice." Again, NAD gave split decisions – the "best tasting" energy bar was an objective claim, while the others – "World's Best Glass Cleaner" and "World's Best Fruit and Vegetable Juice" – were held to be mere puffery. As usual, the outcomes were entirely context-dependent.

4

Are Consumers Influenced by Puffery? Puffery is a viable legal defense because, as courts and NAD have held, it is unreasonable for consumers to be influenced by certain kinds of marketing. Indeed, Prosser and Keeton have called puffery a "seller's privilege to lie his head off" on the theory that no reasonable person "would be influenced by such talk." But that's the entire point of puffery! To influence potential buyers to become actual buyers! How this dichotomy is dealt with gets to the heart of puffery, and how courts define puffery becomes extremely important.

5

The Many Definitions of Puffery. At the NAD, puffery is generally analyzed through the lens of whether a claim can be proved or disproved, whether the claim mentions specific characteristics that are measurable by testing or research, or whether the words in the claim are merely opinions that consumers will ignore. (French's Food Co., Report #6119, NAD Case Reports (Sept. 2017). Lack of reliance is also key to many court decisions, and the Third Circuit and Ninth Circuit have issued decisions finding claims to be puffery because no reasonable consumer would rely upon the verbiage at issue. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914 (3d Cir. 1990); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997)*. The Fifth Circuit has an even stricter view, defining puffery as a general claim of superiority over comparable products that is so vague that it could only be understood as a mere expression of opinion. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489 (5th Cir. 2000). In addition, the Federal Trade Commission has established its own definition of puffery, limiting the defense to marketing claims "that ordinary consumers do not take seriously." *Cliffdale Assocs.,* 103 F.T.C. 110, 174 (1984); *see also FTC Policy Statement on Deception* (Oct. 14, 1983).

All advertising is intended to persuade, to induce a sale, to prompt someone to buy. The nonsensical chatter of the stereotypical salesperson should be viewed skeptically, as we do live in a society where monetary transactions are premised on *caveat emptor,* or let the buyer beware. Puffery has many legal definitions, and while discerning the dividing line between puffery and an objective claim may not be too far from "I know it when I see it," there are lenses through which to view and weigh potentially cognizable legal claims – based on the context of the claim, was it reasonable to rely, were there measurable attributes mentioned, did the statements go beyond any standard of vagueness, or are the statements truly mere opinions. These are the kinds of questions to ask when evaluating the context of an ad to determine whether a buyer was overly credulous or a seller made actionable promises – that is, whether a claim is puffery or not. It's often not an easy call.

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