



Podcast Transcript

AD-torneys@Law Episode 3: False Advertising or Just Puffing

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Lee: Absolute truth in advertising is something of a rarity, but not every untrue statement is false advertising. I'm Leeann Lee, and you're listening to AD-torneys@Law, our podcast series devoted to all things advertising, marketing and digital media law. Today I'm talking with Randy Shaheen, a Partner with BakerHostetler's Advertising, Marketing and Digital Media team.

So, Randy, I understand that you're going to ply us with pointers on avoiding pufferies, promotional pitfalls and potential problems. I'm sure looking forward to this discussion. Welcome to the show.

Shaheen: Thanks, Leeann. Good to talk to you again.

Lee: Let me start by asking you, what types of claims do advertising attorneys need to make sure are substantiated in their clients' advertising?

Shaheen: So generally, advertising attorneys like to talk about two kinds of claims, one being express claims. Those are usually pretty straightforward. It's just what the ad literally says. And then the other type of claims we call implied claims, or implicit claims. Those are often tougher because it's not what the ad literally says, and sometimes what the ad literally says can be true. There's an old case involving calcium in cheese, where the ad said that the cheese slices are made of, with six ounces of milk, and that was literally true, but then the government found an implied claim that the amount of calcium in that slice of cheese was the same as the amount of calcium in six ounces of milk. And unfortunately, that was not true, because when you cook the milk and process it and so forth, you lose

some of the calcium. So, implied claims are not about what you literally say, but about what you are suggesting or implying, either through pictures or words or visuals, etc.

Lee: So, with that in mind, what is puffery, exactly?

Shaheen: So, a puff, a claim or statement that's puffery is meant to be something that falls outside of those two areas. So, with an express claim or an implied claim, you're expected to have proof for those claims. You're expected to be able to show that those claims are true. But a puff falls outside of that requirement. So, if something's just puffing, it's an exception to this notion that you have to substantiate the claim or show that it's true, and so it's a free pass, it's a free hall pass, and the marketing people love puffs, because they don't have to worry about whether the claim's true, and it might be, right? It might actually be that your product tastes great, but the beauty of a puff is you don't have to worry about whether you can literally prove that to be the case.

Lee: Oh. So, if puffery isn't an actual product claim, why would advertisers want to use it?

Shaheen: I think for a number of reasons. One, obviously, is they don't have to show it's true, right? So, it takes the lawyers out of the equation in the sense of the lawyers coming, the pesky lawyers coming back and saying, okay, but how do I know that's true? But I think more importantly, sometimes we just like to boast about ourselves or about our product, right? And puffing often is just viewed as, it's kind of boasting. So, if a car company says, we have the ultimate driving machine, right? That's an expression of pride in the company, in the product, but it's not something that they literally have to show as true. And the same if you want to say you're a great place to work, right? Or your compensation plan is the best. You don't, you want to be able to make those kinds of boastful statements but not have to prove they're true. And then we'll talk in a second about the other form of puffery, but sometimes you just want to be funny and be funny in a way that's so over the top that nobody expects you to prove it or for it to be true, but everyone will talk about your commercial 'cause of how funny it was. So sometimes it's just a marketing tool.

Lee: So with that in mind, what is the first type of puffery?

Shaheen: So, puffery tends to fall into two categories and the first one is, kind of, often described as a statement of opinion that's so vague, it's so exaggerated that no reasonable person, and that word reasonable is key, that no reasonable person would take it seriously. It's kind of so over the top that nobody would believe it to be true or think that you would have something to prove it with. So just by way of some examples, you might say we're the best in the universe, right? If you say we're the best in the United States you could in theory survey people about, are you the best tasting coffee in the United States? But if you say we're the best tasting coffee in the universe then at that point probably people don't expect that you've sent ships up to Jupiter to go ask the Jupitertonians if they liked your coffee. So it's exaggerated in that sense in a way that no one thinks you've

actually proven it. Or, there was an energy drink that made a whole bunch of exaggerated claims. If you use our product you swam the English Channel, you set the hacky sack record, and you ran a marathon, etc.

You did all these incredible things and the idea there at least was that it was so over the top that no one thought it was literally true. And then a hotel chain that was making these claims, if you stay, if you spend a night in our hotel the next morning you can do heart surgery or you can fly a helicopter, you can do amazing things. And again hopefully, right, nobody thought that was literally true, that a hotel was claiming that simply by spending the night in their hotel you would be so refreshed and have had such a great night's sleep that when you wake up the next morning you're literally a different person.

Lee: But is that really safe anymore in today's world where it seems like some people believe almost anything?

Shaheen: Well, that yeah, that can be a problem, you know, what is the reasonable person these days? And often when you do consumer surveys I kind of scratch my head sometimes and think well, how did anybody possibly believe that? But it does happen. It is a risk. Sometimes companies will add a disclaimer. The energy drink commercial for example, they added a disclaimer that said you can't actually expect to be more, have more endurance or be more, have more dexterity if you use this product. But a disclaimer's kind of a two-edged sword because maybe by putting the disclaimer in you're conceding that it's not puffing in the first place, and if you do have a disclaimer then people can argue about whether it's prominent enough. But I do think by and large these days you're seeing more and more companies add disclaimers. They show something that looks incredible and they put a disclaimer in it that says this isn't real just as a way of kind of hedging their bets a little bit against this concern that these days people might believe, you know, virtually anything.

Lee: Okay, so that's the over-the-top type of puffery. Is there a second type?

Shaheen: Yeah, so the second type is something that's so subjective that it's not actually capable of being objectively proven. And that's, those are more the boastful-type claims that I was talking about earlier. So things like we're the best or we're the favorite or we're the greatest are really so subjective all by themselves, and like everything in advertising law, context matters, but when you're saying something that's both vague and subjective there's a much better chance that it's going to be considered puffery.

Another great example, there's an insurance company that boasts that you're in great hands with them. And they got sued. Someone had an accident and said well gee, I didn't feel like I was in such great hands with how you took care of me when I had a claim, and the court dismissed it and said look, it's just boasting. No one really should expect that to be an actual claim about the type of service or experience you're gonna have, or a promise, right, that you won't have a bad experience. So those are the kind of claims that fall into that second kind of category.

Lee: Now I've heard that sometimes those kinds of claims can still get you in trouble. So wasn't there some kind of pizza case about this?

Shaheen: Yeah there is a pretty famous case and you know, if advertising lawyers could get into fisticuffs, this might be the occasion. I think there's people who would argue both sides in terms of whether this case came out the right way. But the company in this case was making kind of a series of tiered claims. So at the lowest kind of level they said their pizza was better, better pizza. And then they added on to that, better ingredients. So you had better pizza, better ingredients. And then the final piece of the claim was showing the difference between their tomato sauce which looked all like fresh and wonderful versus how the competitor started their tomato sauce, which was like this gopy, kind of gross-looking paste. And so that got challenged, the competitor with the paste wasn't so happy, and they brought a lawsuit and the court kind of very carefully dissected each of those layers to decide if it was a puff. And so with the better pizza claim I think probably almost everybody would agree, maybe everybody, that better pizza all by itself is a puff. It's this subjective opinion incapable of being objectively proven, and so that was fine. And then the court added the second piece, alright now you're saying you have better pizza because your ingredients are better.

And I think that's where some people would say, well you've now made that statement, clearly you've made the statement less vague now. You've told people why your pizza's better. But in the court's mind that still didn't go far enough, that still was vague enough. They didn't say why their ingredients were better or which ones were better. In the court's mind that was still vague enough that it was still a puff. And again, that's where, you know, reasonable people might disagree. But then the last piece of the claim was sort of the straw that broke the camel's back. So, then the court looked at the images of the tomato sauce and said okay, now you've done it. Now you've crossed the line into an actual claim because you were saying your ingredients are better, your pizza is better because you use one kind of tomato sauce versus another, or you start one way versus another and you haven't been able to prove that there's any real difference in the end product, that it really tastes any different to the consumers or there's any real difference. Once you reconstitute the gopy-looking paste, does it really taste or seem any different than the fresher sauce. And so then finally the court was like, okay now you've said enough, you've been specific enough that you've made a claim.

Lee: Okay. I know that humor plays into all of this. Aren't humorous claims considered to be puffery?

Shaheen: Yeah. So I mentioned I guess earlier that humor, sometimes it's a reason you want to do a puff is you want to just create an ad that's memorable 'cause it's funny but sometimes do it in a way that you're not actually making a claim. And it can get tricky, and I think one thing to keep in mind here is when we're talking about what a reasonable person would take away from your funny ad. The way the courts look at this is, it's not, you don't have to show that a majority of people think your funny ad is making a claim. If even like 20 or 25 percent of the people

think, yeah that's really funny but by the way I'm taking it seriously, that can be a problem. It only requires 20 percent or so of the people to be confused or misled for there to be a false advertising concern. And you know, going back to our earlier conversation, these days there might be 20 percent of the people who would believe virtually anything.

So, you do have to be careful with humor but there are, I think, examples where it works. The energy drink example, they did get sued. Ironically the guy who owns the hacky sack record, the Guinness Book of Records for hacky sack, sued and said the commercial implied that he used this energy drink to achieve that record, and that wasn't true and maligned his skill and so forth. The court found in favor of the energy drink company, threw the case out for other reasons but also said by the way, like, can't you take a joke? This was just meant to be funny and that's how we look at it. But it did trigger a lawsuit which obviously you want to, it's nice to win but you'd rather not have the lawsuit in the first place. The hotel commercial I think where they say you spend the night in the hotel and the next morning you do great things. I think that's safer humor because the humor has nothing to do with the product. I think the problem with the energy drink claim is what do energy drinks do? They give you more energy. And so this was just exaggerated depictions of what that might look like, and so the humor hits closer to home in terms of the claim and that's always a little more risky.

Just another quick example of that, there was a drink that claimed to help with your memory, help support brain health, and they ran a funny, a very funny commercial where this guy's at a mall on the escalator and this woman comes up to him and says, hey, I think you're the father of one of my girls. And he looks at her and goes oh, Cancun summer of, you know, 2005, thinking that this is a woman he'd had a fling with in Cancun and she'd gotten pregnant and had a child. And the commercial says well it's 'cause you didn't take your drink, and then they replay the scene with him having taken the drink, and he's like, oh yeah, you're Sister Mary Catherine, my daughter's in your third-grade class. So he pulls it out correctly. So a very funny ad but the problem was NAD said there's a kernel of truth there. You're making a claim about memory in a funny way, but it's still a claim. So humor you've got to be really just careful with.

Lee: Well we have covered a lot of ground today. And I'm wondering if you have any final thoughts as we wrap up.

Shaheen: I'm tempted to say this is the best podcast ever, since now I think I've clearly established that would be a puff and I don't have to prove it. But I would say just in general, be skeptical, right? The marketing people are gonna like to tell you that it's a puff 'cause then they get you off their back but be skeptical about that. Road test it pretty well and debate, I think, ask yourself, is it worth the risk of potentially having to defend the claim? Is it worth taking the risk or should we, 'cause often times you can slightly modify the claim so that it's still funny or it's still effective but you've now said it in a way that you can at least offer some substantiation for it or some proof for it. And that may be a better direction to go if you don't want to take the risk about whether a court or a regulator is gonna

conclude the same way you have that it's a puff, 'cause it is, at the end of the day, a somewhat subjective determination.

Lee: Well, great. Thanks again, this was a action-packed conversation and as always, I really appreciate your time. Thanks for joining us.

Shaheen: Yep, thank you, Leeann.

Lee: If you have any questions for Randy, you'll find his contact information in the show notes. And if you haven't already signed up, be sure to subscribe to BakerHostetler's AD-torneys@Law newsletter and blog at bakerlaw.com. I'm Leeann Lee. Thanks for listening.

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