Puffery in Advertising

A Practical Guidance® Practice Note by Neema Amini, Amini & Conant, LLP

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This practice note discusses puffery, its genesis, current meaning, and recent case law regarding how courts distinguish puffery and comparative advertising. This practice note also briefly addresses how the Federal Trade Commission (FTC) and National Advertising Division of the Council of Better Business Bureaus (NAD) considers non-actionable puffery.

For more information regarding puffery in advertising, see Advertising and Marketing Claims and Distinguishing Advertising Claims from Puffery Checklist.

Advertisers strive to grab their target audience's attention with bold advertising assertions made without substantiation. But there is a thin line that separates actionable advertising from permissible exaggeration—commonly referred to as "puffery." Companies can be held liable for false advertising, but puffery—that is, advertising claims that are not measurable and are therefore not normally relied upon by consumers—is not actionable. So, a diner advertising the "World's Best Cup of Coffee" cannot be successfully sued for false advertising even though the coffee tastes horrible.

Calling something puffery is easier said than done. Whether or not an advertiser intended to communicate a particular advertising claim has no bearing on liability for false advertising, which is a strict liability offense. To make things harder, the applicable legal standards are ever-evolving, with recent cases furthering a trend in which courts determine that advertising claims—which might normally be considered puffery—actually require substantiation because the court found that they are measurable as part of comparative advertising claims. This practice note seeks to shed some light on that calculus. For more information regarding claim substantiation, see Advertising and Marketing Claims — Claim Substantiation and Claim Substantiation Checklist.

What Is Puffery?

Puffery is a legal term that first came about in an 1893 English Court of Appeal case: Carlill v. Carbolic Smoke Ball Co. 1 Q.B. 256 (Court of Appeal, 1892). The case centered on the Carbolic Smoke Ball Co.'s advertising of its "smoke ball" product—a rubber ball with a tube that allowed users to inhale carbolic acid vapors, which the company claimed was a cure for influenza. Carbolic promised to give customers £100 (a large amount at the time) if they came down with the flu after properly using the smoke ball.

Eventually, Carbolic got sued by a customer who took them up on their offer and got the flu—and Carbolic refused to pay the £100. At trial, Carbolic claimed that the statements they had made were "mere puff" and not to be taken literally. They lost the case, but the English Court's decision endorsed the notion that traditional rules relating to promises might not apply to advertisements that were clearly not meant to be taken seriously. The legal defense of puffery was born.

In the United States, puffery became a more prevalent legal defense when courts began to apply a caveat emptor approach to commercial transactions. For example, in 1918, the U.S. Court of Appeals for the Second Circuit in Vulcan

Metals Co. v. Simmons Manufacturing Co., 248 F. 853 (2d Cir. 1918), allowed a company to use a "puffing" defense, holding that consumers already naturally distrust marketing slogans. The court found that customers have equal means of knowing or inspecting a product before purchasing it. In that case, American judge and judicial philosopher Learned Hand opined:

> There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth. It is quite true that they induce a compliant temper in the buyer, but it is by a much more subtle process than through the acceptance of his claims for his wares.

Over 100 years later, courts are applying this doctrine of "puffing" or "dealers' talk" to a variety of claims.

Puffery Today

Today, the legal definition of puffery differs somewhat from jurisdiction to jurisdiction. The U.S. Court of Appeals for the Third Circuit, for instance, defines puffery as marketing "that is not deceptive, for no one would rely on its exaggerated claims." The Ninth Circuit describes puffery as "exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely." Meanwhile, The Fifth Circuit defines puffery to be "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion."

Generally speaking, claims that a product is "incredible" or "best quality," to name a few, will usually be seen as "mere puff." However, when exaggerated marketing claims move closer to something that can be measured, advertisers risk that the claim will be considered actionable false advertising under the Lanham Act. More specifically, Section 43(a) of the Lanham Act establishes the standard under which false advertisement claims are reviewed. This standard consists of the following questions:

- Whether the advertiser made a false or misleading statement of fact about a product
- Whether the misrepresentation of fact deceived or had the capacity to confuse the general public
- Whether the deception is material, in that it is likely to influence the consumer's purchasing decision
- Whether the plaintiff has been or is likely to be injured as a result of the statement at issue

Additionally, the statements must be verifiable and "capable of being prove[n] false" by scientific methods. Statements that do not meet the standard above, and cannot be scientifically proven, are likely to be classified as non-actionable puffery.

Case Study – Pizza Hut v. Papa John's

Despite the standards enumerated above, discerning puffery from false advertising is tricky work. A well-known (and oft-cited) example of this was apparent in *Pizza Hut, Inc. v. Papa John's International, Inc.* Pizza Hut, Inc. v. Papa John's Int'l., Inc., 227 F.3d 489 (5th Cir. 2000). Pizza Hut sued Papa John's because of Papa John's $300 million national marketing campaign that revolved around Papa John's slogan, "Better Ingredients. Better Pizza."

Pizza Hut challenged not only the slogan itself—which it argued was false advertising—but further claimed that Papa John's entire marketing campaign was false advertising due to its disparaging representations of the competition's (Pizza Hut's) food quality. Papa John's marketing campaign made multiple assertions comparing the quality of its product to its competition's product, such as an ad that claimed its pizza dough was made with "clear filtered water" while its competitors (including Pizza Hut) used "whatever comes out of the tap." At the conclusion of the trial, the jury decided that, although Papa John's advertisements were true, they were actively misleading to consumers. The trial court held that the misleading statements "tainted" Papa John's slogan and enjoined them from continued use.

Papa John's decided to appeal the decision to the U.S. Court of Appeals for the Fifth Circuit. In their appeal, they argued "Better Ingredients. Better Pizza." constituted non-actionable puffery. The Fifth Circuit agreed, concluding that the slogan by itself was not a claim customers could justifiably rely on because it concerned subjective taste and was not able to be objectively and scientifically verified. The court also held that the slogan "epitomizes the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer could reasonably rely."

Nevertheless, the court upheld the jury's finding that the slogan was misleading when taken in context with the entirety of Papa John's marketing campaign. The Fifth Circuit ruled that, when viewed in combination with Papa John's dough and sauce ads (such as the filtered-water claim), the slogan changed from non-actionable puffery into a quantifiable statement of fact regarding the relative quality of its ingredients.

Thus, an otherwise unverifiable slogan that on its own stood as non-actionable puffery—"Better Ingredients. Better Pizza."—became effectively tainted "as a result of its use in a series of ads comparing specific ingredients used by Papa John's with the ingredients used by its competitors." This case highlights the complexity to applying puffery to real-life situations (and advertising campaigns)—specifically demonstrating how the most obvious puffery can be transformed into a false and misleading statement under the Lanham Act, particularly when puffery is used in a marketing campaign that features comparative advertisements.

Some Examples of Non-actionable Puffery under the Lanham Act

Puffery is not actionable under the Lanham Act because it consists of, generally, "exaggerated statements of bluster or boast upon which no reasonable consumer would rely" and "vague or highly subjective claims of product superiority, including bald assertions of superiority." See Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390–91 (8th Cir. 2004). Some instances of courts determining an advertising claim was puffery, and thereby non-actionable under Section 43(a) of the Lanham Act, include the following:

- New World Pasta Co.'s claim regarding their slogan, "America's Favorite Pasta," was held to be puffery because the claim was too broad and therefore subjective to be false advertisement. See Am. Italian Pasta, 371 F.3d at 391.
- Abercrombie & Fitch's claim regarding their pants design: "Our most original pant since 1892 . . . Pure Abercrombie & Fitch design and fit," was held to be puffery as there was no way to prove otherwise. See Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F. Supp. 2d 535, 552–53 (S.D.N.Y. 2003).
- Powerade's claim that theirs was "The Most Complete Sports Drink" was held to be puffery "because consumers understand the advertiser is not contending that the particular attribute or feature can only be found in its product." See Stokely-Van Camp, Inc. v. Coca-Cola Co., 646 F. Supp. 2d 510, 526 (S.D.N.Y. 2009).

Puffery and Comparative Advertising

When advertising exaggerations are obvious and outlandish, puffery defenses are more certain. Such was the case in Martin v. Living Essentials, LLC, 653 F. App'x 482 (7th Cir. 2016), in which the Seventh Circuit affirmed the district court's holding dismissing false advertising claims brought by the individual world-record holder for consecutive kicks of a Hacky Sack. The case involved a commercial advertisement by 5-hour ENERGY that depicted a person who had disproved the theory of relativity, "mastered origami while beating the record for Hacky Sack," swam the English Channel, and found Bigfoot all within the span of five hours from consumption. The court held that there was "no danger of consumer deception and hence, no basis for a false advertising claim." The court further found that the challenged statement was "an obvious joke that employ[ed] hyperbole and exaggeration for comedic effect," and therefore constituted puffery.

However, in less obvious cases in which comparative advertising is present, puffery defenses are harder to maintain. In XYZ Two Way Radio Service, Inc. v. Uber Technologies, Inc., 214 F. Supp. 3d 179 (E.D.N.Y. 2016), while the court ultimately accepted Uber's puffery defense, Uber's advertisements demonstrably came dangerously close to the line between puffery and unsubstantiated comparative advertising (and the associated legal consequences). In *XYZ Two Way Radio*, two livery companies that provided black-car services sued Uber for allegedly false statements advertising the "safety" of Uber's services. The court held that Uber's safety-related statements fell into the "boastful and self-congratulatory" definition of puffery because many of the statements were replete with terms such as "committed to," "aim to," or "we believe deeply." The court also held that other challenged statements could not reasonably be understood by consumers as facts that could be scientifically verified—for instance, "Uber is committed to connecting you to the safest ride on the road. This means setting the strictest safety standards possible, then working hard to improve them every day." The court reasoned that if Uber literally set the "strictest safety standards possible," it could not "improve them every day."

The court also rejected the plaintiff's attack on Uber's guarantee that its drivers "must go through a rigorous

background check" that is "often more rigorous than what is required to become a taxi driver." Although Uber's background check did not require fingerprints, a medical clearance, or a drug test—all of which New York City requires for licensed cab drivers—the court explained that Uber's background check statements are also "boastful and self-congratulatory." The statement also included the qualifier "often," so the court found that Uber was actually stating that its background checks are often more rigorous than what is required to become a taxi driver. Uber's website also included the disclaimer that "specifics [on the background checks] vary depending on what local governments allow." Ultimately, the court concluded that Uber's statements were meant simply to convey that it takes the safety of its passengers very seriously.

Before your client releases advertisements and related marketing materials, always review them to ensure that all puffing statements actually do fall under the puffery umbrella and that all other claims are accurate and properly substantiated. Make sure all assertions are objectively true, and properly fact check (with supporting documentation as proof) and verify them to the extent necessary before distribution. (Or double check your client's fact checking and verification.) Be sure to inform your client that their omission of material information can be just as damaging as their inclusion of incorrect or misleading information. For example, failing to include a clear and conspicuous warning that a hair product could cause a serious rash if the consumer does not stay out of the sun for 24 hours after applying the product is a material omission, if true.

If your business client believes its competitor is disseminating false or misleading comparative advertising, then you should promptly challenge the relevant advertisement by doing one or more of the following: sending a cease and desist letter; issuing a takedown request; or filing a legal complaint. For more information on challenging comparative advertising, see Challenging a Comparative Advertisement Checklist. For more information on challenging a false advertising claim, see Competitor False Advertising Claim Challenges.

The Stakes – When the "Puff" Turns Out to Be Just False Advertising

When an advertiser decides to make a claim that may fall on the wrong side of puffery, the stakes are high and the advertiser's intent is hardly a shield. This is because many statutes, including the Lanham Act, impose strict liability for false advertising. Although intent is relevant on the issue of damages, intent to deceive or bad faith is not a necessary element of a Lanham Act claim. See Procter & Gamble Co. v. Cheesebrough-Pond's, Inc., 747 F.2d 114, 119 (2d Cir. 1984) ("[P]roof of good faith does not immunize a defendant" from Lanham Act false advertising charge); Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 189 (2d Cir. 1980) (holding that intent to deceive is not an element of false representation); Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 648 (3d Cir. 1958); Grupke v. Linda Lori Sportswear, Inc., 921 F. Supp. 987, 994 (E.D.N.Y. 1996) (citing Johnson & Johnson for same); Brandt Consolidated, Inc. v. Agrimar Corp., 801 F. Supp. 164, 174 (C.D. Ill. 1992) (holding that a Lanham Act claim based on false representations of patent infringement does not require an allegation of bad faith); McNeilab, Inc. v. American Home Products Corp., 501 F. Supp. 517, 529–30 (S.D.N.Y.1980) (holding that a false advertising claim under the Lanham Act requires no intent to deceive). The Lanham Act has created a regime of strict liability in regards to false advertising claims.

Surprisingly for many advertisers, this can be true even if the advertisement was once true and accurate, but later becomes false due to new developments and innovations. This was the case in *SharkNinja v. Dyson*, in which Dyson was sued over its claim that its vacuums had "twice the suction of any other vacuum." When Dyson originally made the claim, it was truthful. But when SharkNinja released a new vacuum with better performance—after Dyson had already launched its advertising campaign—the claim no longer held true. Moreover, once Dyson learned of the new SharkNinja vacuum, they moved to remove that slogan from their advertising.

Despite all of this, the court found for SharkNinja, ruling:

> The language of the statute is compulsory, and it includes no exceptions for cases in which a manufacturer undertakes good faith, commercially reasonable efforts to remove a false claim from the marketplace upon learning of its falsity. Good faith is simply not a defense to a false advertising claim under the Lanham Act.
>
> Thus, the caselaw and the statute seem to appropriately establish that an advertiser that puts a claim into the marketplace bears all of the risk of the claim being false or becoming stale. An approach that allowed such an advertiser to continue to benefit from false or stale claims, so long as reasonably commercial efforts were undertaken to remove the advertising, would not adequately disincentive the behavior prohibited by the

> Lanham Act or foster vigilance about the accuracy of advertising claims. Further, it would unfairly shift the cost of stale or inaccurate claims from the sponsor of such claims to its competitors, as long as the sponsor made reasonable efforts to remove those claims.

See SharkNinja Operating LLC v. Dyson Inc., 200 F. Supp. 3d 287–88 (D. Mass. 2016).

Dyson did not claim that its slogan was puffery, but rather that it was true at the time they made it, and that they had made commercially reasonable efforts to stop the slogan once they learned it was no longer true. Nevertheless, the case demonstrates exactly how **strict** the strict liability standard for false advertising under the Lanham Act really is. Accordingly, the legally prudent advertiser is well-advised to keep this in mind when making claims in their marketing campaigns.

Puffery in the FTC and NAD

Outside of the courts, non-actionable puffery is a primary consideration within both the domains of the FTC and the NAD. For the latter, the following factors are considered in the determination of non-actionable puffery vs. false advertisement:

- Can the representations be proven or disproven?
- Are the representations distinguishable from representations that can be verified scientifically?
- Is the language employed by the advertisement expressions of opinion that can be discounted by the buyer?

These factors were in play when, for instance, NAD certified Vital Pharmaceutical's slogan, "The World's Most Effective Energy Drink." Similarly, NAD determined that Wrigley's use of, "For White Teeth, No Matter What," was an obvious exaggeration that consumers would not take seriously. Hunt's Ketchup's slogan, "Only the Best Tomatoes Grow Up to be Hunt's," was also considered by NAD to be an obvious exaggeration made without any reference to objective, quantifiable aspects of Hunt's Ketchup. This distinction between quantifiable claims and boastfulness came into play when NAD found Metabolife International's slogan, "#1 in Weight Loss," to be misleading. In so determining, NAD pointed to the fact that the *#1* portion of the claim indicated to consumers that its effectiveness was scientifically tested and proven relative to the performance of competitor products. For more information about the NAD, see the NAD website.

Ultimately, when NAD and FTC scrutinize advertising campaigns, they will look to the degree of boastfulness in a claim, and whether any of the claims made are quantifiable in some way, or potentially subject to objective analysis. This analysis is performed in the context of the rest of the marketing campaign. Those claims that a reasonable consumer would not take seriously are considered puffery, while those that are verifiable (one way or another) are not considered puffery.

Conclusion

Puffery can be a powerful marketing tool that, if used correctly, can capture the attention of consumers and garner sales. But puffery is not without its dangers. Advertisers and marketers must ensure that their claims do not need substantiation. The more the claim resembles a measurable fact or comparative advertisement, the more likely the claim will require substantiation and, if not supported, the advertiser will be held strictly liable for false advertising. For more information regarding claim substantiation and competitor challenges, see Advertising and Marketing Claims — Claim Substantiation, Claim Substantiation Checklist, and Competitor False Advertising Claim Challenges.

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- Online Advertising Regulation and Compliance
- Federal Regulation of Advertising
- Advertising Regulation Fundamentals
- Unfair Business Practices Claims
- Competitor False Advertising Claim Challenges

Checklists

- Challenging a Comparative Advertisement Checklist
- Distinguishing Advertising Claims from Puffery Checklist
- Claim Substantiation Checklist

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