

Not Another Puff Piece: The Difference Between Puffery and False Advertising



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Have you eaten “America’s Favorite Pasta”[1] or received a “record-breaking” [2] footbag with your fast-food meal? While these products may seem to have little in common, they have a shared experience – each was the target of a false advertising claim. The statements raise the always-burning question for manufacturers: what is mere puffery and what constitutes false advertising?

What Makes a Company’s Advertising Statements Actionable

False advertising claims are actionable when the advertising or statement at issue is presented as a genuine statement of fact and not “mere puffery.” In general, puffery consists of empty superlatives (like “favorite”), subjective qualitative descriptions (like “high quality,” “perfect,” and “best”), or exaggerated statements of bluster or boast (such as a pillow that makes you feel like you’re “sleeping on clouds”). Although standards vary by jurisdiction, the hallmark of “puffery” is a

statement of product performance or superiority that is subjective and non-quantifiable.

A court may determine that advertising is actionable, on the other hand, when the advertisement contains statements or claims that are objectively capable of being proven true or false. Thus, to distinguish between puffery and false advertising, courts will consider whether the statement at issue is one of measurable fact, or whether it is incapable of objective verification. Courts will also consider whether any *reasonable person* would rely on the statements in making a purchasing decision. In addition, comparative advertisements that directly compare or contrast a particular product with a competitor's can often take an advertising statement outside the realm of "puffery."

When "Mere Puffery" Transforms Into Actionable False Advertising

Whether a court finds a particular statement to be "puffery" can often be highly nuanced. In addition to the foregoing factors, courts often look at *other* text on the product packaging, advertisements or commercials, and a company's website to determine whether a "reasonable consumer" would believe that the complained-of statement is one of fact or mere "sales puff."

For example, Pizza Hut sued Papa John's based on a marketing campaign using the slogan "*Better Ingredients. Better Pizza.*"^[3] Pizza Hut argued that the Papa John's advertisements were misleading and deceptive because Papa John's couldn't show that its ingredients or pizzas were "better" than anyone else's. Papa John's argued the slogan was puffery. In addressing these arguments, the court considered the slogan in isolation, and then separately considered the slogan as it was used in the context of Papa John's larger advertising campaign.

First, the court concluded that, standing alone, the slogan "*Better Ingredients. Better Pizza.*" was puffery because it used the term "better," making it a statement of subjective opinion rather than a statement of objective fact.

Second, the court considered whether Papa John's use of the slogan in connection with other advertisements "tainted" the slogan, rendering it an actionable misrepresentation. Those other advertisements touted Papa John's use of "fresh-pack tomatoes," "filtered water," and other ingredients to make its sauce and dough, compared to competitors' use of "tomato paste concentrate" and "tap water." The court found that when the slogan was used in conjunction with advertisements identifying specific ingredients used by Papa John's compared to its competitors, the slogan took on a "quantifiable meaning" and thus was "no longer mere opinion" but "a statement of fact" - *i.e.*, Papa John's pizza was "better" than its competitors' because Papa John's used "fresh-pack tomatoes," "filtered water," etc. Thus, even though "*Better Ingredients. Better Pizza.*" was puffery, and even though the comparisons between Papa John's ingredients and its competitors' were true, the court found the advertisement was potentially misleading to consumers and therefore actionable.

Despite that finding, Papa John's still won the case - the court went on to find no

evidence that the slogan was material to consumers. But the lesson is clear: even if a slogan or tagline is puffery, statements made in other ads or on other parts of a product label may lead a court to decide that the slogan is misleading.

Staying Puft: Pointers to Combat Potential Claims

Before companies launch their next great ad campaign, they may want to keep a few pointers in mind to combat potential false advertising claims:

- **Don't forget that context matters.** Courts will often look beyond the statement or phrase at-issue and consider a company's brand-wide advertising, website, and social media to determine whether a statement is non-actionable puffery or false advertising, so it is important to be consistent and clear across all consumer-facing platforms. For example, while the phrase, "the world's favorite coffee" on its own is likely to be considered puffery, the phrase combined with a line-up of photos of competitors' coffee products may be considered comparative advertising that is actionable.
- **Remember that courts consider what a "reasonable consumer" would think when they evaluate alleged false advertising.** For that reason, terminology that may be standard in the industry may not be as clear to a consumer. For example, if a company uses the term "EPA gas mileage" – which refers to a defined rating given by the U.S. Environmental Protection Agency – that is more specific than using "mileage," may leave room for consumers to guess at whether "mileage" means "EPA gas mileage" or something else like "real world miles per gallon."
- **Check relevant agency guidelines - certain industries are highly regulated when it comes to advertising claims.** For example, the FDA has published many agency guidance statements about different types of claims that can be made on product packaging, so you'll want to be sure you fall within established guidelines if they exist. For example, a "calorie free" claim requires that a food product have fewer than five calories per reference amount customarily consumed (RACC) and labeled serving, while a "low calorie" claim requires that a food product have 40 calories or fewer per RACC (and per 50g if the RACC is small), and a "reduced calorie" claim requires that a food product have at least 25 percent fewer calories per RACC than an appropriate reference food.[4]

[1] *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004).

[2] *Martin v. Wendy's International, Inc.*, 183 F. Supp. 3d 925 (N.D. Ill. 2016).

[3] *Pizza Hut, Inc. v. Papa John's International, Inc.*, 227 F.3d 498, 497 (5th Cir. 2000).

[4] There are also additional requirements for "Light" or "lite" labeling!

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