

Insights: Alerts

Five Takeaways from Key Panel Discussion at Advertising Self-Regulatory Council's 2016 NAD Conference - "It's All About the 'Fit': Advertising Claims Must Track the Test"

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Written by **Barry M. Benjamin**

Barry M. Benjamin, partner in Kilpatrick Townsend's New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to moderate a panel discussion at the **Advertising Self-Regulatory Council's 2016 NAD Conference**. The panel, titled "**It's All About the 'Fit': Advertising Claims Must Track the Test**," discussed how to ensure that substantiation testing appropriately substantiates the advertising claims. Each topic utilized at least one NAD decision from the previous year. Takeaways from the panel include:

1. **How to Distinguish Between Sensory And Objective Claims.** Sensory claims are how individuals personally react to, perceive, or sense the product, using the human senses. Testing involves asking for opinions about use of a product, typically after the fact. Objective claims involve tangible results that consumers can expect the product to provide, not influenced by personal feeling or interpretation. Testing objective claims involve objective measurement, based on tangible facts that are unbiased.
2. **Old Testing Can Still Be Valid Testing.** Claims about new products can still be supported by old testing, provided that old testing remains valid. Issues to determine whether an old test is still valid include whether the same product formulation is used, whether the old testing was performed in a reliable manner, and whether the landscape of the industry is still relevant.
3. **Bridge Studies May Validate Old Testing.** When a new product formulation comes onto the market, an advertiser may have tested the now outdated formulation. However, a bridge study could potentially maintain the validity of the old test. A bridge study compares the product's old and new formulations to determine what attributes, if any, materially changed. If the bridge study concludes that no material changes were made, the old testing may yet remain valid.
4. **Testing May Support Specific Claims, But Not Very Broad Claims.** It is an old standby of advertising law that an advertiser is responsible for ALL claims their advertising makes about their products or services –

both express and implied claims. Testing may support a specific, express claim, but take care not to create advertising that implies a much broader performance claim than the testing supports.

5. **If Consumers Do Not Follow The Use Instructions, Should The Test Be Conducted In Accordance With How Consumers Do Use The Product?** Competitive comparison/superiority claims where testing deviated from use instructions will be subject to extensive scrutiny, from a skeptical perspective. Unless an advertiser has rock solid, definitive proof that consumers do not follow directions and use instructions, conduct claims testing in accordance with them.

Related People



Barry M. Benjamin

Partner

New York, NY

t 212.775.8783

bbenjamin@kilpatricktownsend.com