

This column is the best one you'll ever read!



By Bart
A. Lazar

"My product is America's favorite product."
"Only the best ingredients are put into my product."
"My product tastes better."

These are similar to the descriptions that advertisers use every day to tout the qualities of their products or services. The question is whether these statements are mere "puffery," which does not have to be substantiated, or a product superiority claim, which requires substantiation. Unfortunately, (don't shoot the lawyer) the answer is not always that clear. However, new decisions from federal courts and the National Advertising Division of the Better Business Bureau (NAD) suggest that the scope of what can be considered puffery may be expanding.

First, what's the difference between puffery and a claim anyway? The key difference is that puffery is not considered a factual statement, which can be proven true or false. On the other hand, a claim is a factual statement that can be proven true or false and must have prior substantiation in order to be contained in advertising.

Puffery can come in a variety of forms, such as the exaggerated, blustering and boasting statement upon which no reasonable buyer would be justified in relying. For example, "My product is the most popular product on Mars." No consumer could reasonably believe (or even prove) that products are sold on Mars and that my product is the best seller on Mars. Next, there are

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statements that assert an opinion or otherwise cannot be reasonably interpreted to be making a factual statement. Such examples include, "Try it, you'll like it" or "Our product uses only the finest ingredients." Finally, the category includes the general claim of superiority over comparable products, which is so vague that consumers understand it to be no more than an opinion. For example, "Our products are the best."

However, the line between what is a factual statement and what is puffery is fine indeed, particularly in the last example mentioned. For a better understanding of which is which, and how to make a determination, let's go to the videotape: Lets look at some advertising statements and how they have been viewed recently by the NAD and the courts.

In June 2004, a court looked at the phrase "America's Favorite Pasta." First, the court looked at the definition of the term "favorite" and found that it meant "popular" and that "popular" meant "well-liked" or "admired." Combining these definitions together, the court reasoned that the phrase "America's Favorite Pasta" meant that the product was well-liked and admired in America, not an objective statement that it was the "No. 1-selling pasta." I am not sure

that everyone, particularly linguists, would agree with the court's views. In fact, the court ignored a survey that found that 33% of the respondents believed that phrase to mean that the company was the No. 1 brand.

Another court, in reviewing the use of the phrase "First Choice of Doctors," found that it would be almost impossible for the term "first choice" to be misleading when used in connection with the best-selling brand of a product. This indicates that depending on the context, use of "first choice" may not be viewed as puffery.

One example of a phrase that was clearly found *not* to be puffery is, "Discover the Better Taste of Progresso," used in a freestanding insert for Progresso soups. Campbell Soup challenged the ads, and the NAD found the statement was an express, objective, superior attribute claim that required substantiation. This can be contrasted with a court's recent finding that Papa John's pizza's use of "Better Ingredients. Better Pizza" was found to be puffery, and a decision by the NAD where "Only the best tomatoes grow up to be Hunt's" was also found to be puffery.

What does all this mean? First, be careful about how a particular statement about a product is made. One slight difference in phrasing can turn puffery into a claim that must be substantiated. Second, remember that opinions, certain terms and broader superiority boasts are looked at more lenient-

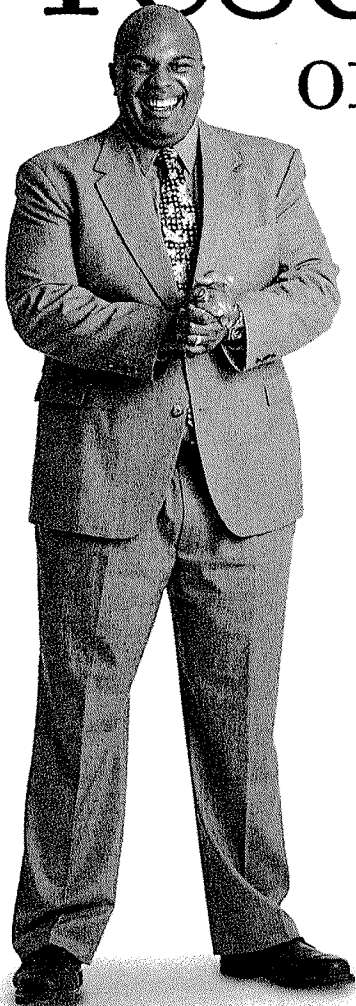


Puffed up: The courts found Papa John's claims to be puffery, but marketers should beware of making so-called product superiority claims.

ly than more specific statements. For example, "better ingredients" is more of a nebulous term than "better tasting," since the quality of some ingredients may not be subject to verification, but taste comparisons can be substantiated. Third, while market research is often used to analyze the message delivered by marketing communications, many courts have been skeptical of the use of consumer surveys to interpret the meaning of a phrase used in advertising. Finally, remember to monitor your competitors' statements to see if there are claims that ought to be dropped if not substantiated. ■

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First, there was cash. Then came checks, credit and debit cards. But today, you can pay for your purchases with the simple touch of a finger. A new system in which you place your finger on a scanning device and the bill is debited from your bank account was unveiled last month at four Piggly Wiggly stores in South Carolina.

The system will speed checkout lines, making it easier for customers to pay with no need to fumble with checks or plastic. Indeed, if you forget your wallet or purse, you can still walk into the store and make a purchase.

The scanner reads about 40 data points on a customer's finger to identify them but does not take a complete fingerprint, says Carolina McNally, chief marketing officer for Pay By Touch, the San Francisco company that provides the technology.

It takes a few minutes to register. Customers get a finger scanned and then link the scan to one or multiple accounts. If they use more than one, they can select which to debit when they check out. ■

—By Bruce Smith for The Associated Press

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