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A Circuit-By-Circuit Review Of The False Ad Puffery Defense

By **Andrew Pruitt and Roy Abernathy** (October 6, 2022, 5:17 PM EDT)

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While all federal courts recognize puffery as a defense to false advertising claims, there is no uniform definition for what actually constitutes puffery — a broad term used by marketers to describe representations that are vague, subjective or incapable of objective measurement, including exaggerations and hyperbole.

Absent a universal definition, "each circuit and the various states ... have their own slightly nuanced definition of puffery,"[1] according to the U.S. District Court for the Southern District of Florida's Tershakovec v. Ford Motor Co. decision last year.

The result is that advertisers may lack clear guidance for which representations in marketing materials are protected as nonactionable puffery and which may be considered false or misleading to consumers.

This article reviews recent false advertising decisions and provides a circuit-by-circuit guide to the state of play of the puffery defense in federal courts.

Context Is King

Although no bright-line definition exists, all federal courts determine whether a challenged statement is false or misleading by looking at its context — including how a statement is being used and what other information is available to the consumer.[2]

Likewise, all federal courts apply some version of the reasonable consumer test. This test looks to the probability a statement in context could mislead some portion of the general public acting reasonably.[3] By its nature, this is a practical and fact-intensive approach.[4]

For example, adverbs and adjectives can turn a potentially actionable statement like "nutritious" into a nonactionable statement like "unbelievably nutritious" because the modifier "unbelievably" makes consumers less likely to rely on those terms.[5]

Similarly, aspirational language such as "aims to" or disclaimers such as "the specifics vary" are likely to result in a statement being considered nonactionable puffery.[6] Most federal courts evaluate whether a representation is objective, measurable, verifiable or falsifiable to determine if the claim is puffery.[7]

Location, Location, Location

The absence of a bright-line rule regarding puffery leads to a patchwork of approaches among the circuits. Because there is no uniform rule among the circuits, the exact same language can be considered nonactionable puffery in one location and false advertising in another.

There was a striking example of this recently in a series of false marketing cases against Champion Petfoods USA Inc. involving advertising claims in its dog food packaging such as "biologically appropriate" and "fresh and regional ingredients."

Evaluating this language, the U.S. Court of Appeals for the Tenth Circuit found in Renfro v. Champion Petfoods USA Inc. in February that no reasonable consumer would have concluded that these vague generalities were anything other than boilerplate statements of opinion, and thus puffery.[8]

Champion did not make empirically measurable or falsifiable claims about the level of appropriateness or freshness in its ingredients, and thus could not mislead a reasonable consumer.

Likewise, the U.S. Court of Appeals for the Seventh Circuit affirmed the U.S. District Court for the Eastern District of Wisconsin's finding last year in Weaver v. Champion that the plaintiff failed to produce actual evidence suggesting that the statements "biologically appropriate" or "fresh and regional ingredients" would materially mislead a consumer.[9]

But, the Seventh Circuit did not consider either advertising claim to be puffery.[10] Whether a court analyzes claims as puffery or forgoes a puffery analysis, the reasonable consumer test is the paramount factor when considering an advertising claim.

Earlier this year, the U.S. District Court for the Northern District of Illinois rejected Champion's argument in Zarinebaf v. Champion that "biologically appropriate" is nonactionable puffery because a reasonable consumer could be misled into thinking there is no risk or actual presence of dangerous contaminants in the dog food.[11]

No longer a meaningless superlative, "biologically appropriate" could be considered a testable and verifiable nutrition claim.[12] The court also found that the plaintiff had provided sufficient evidence to show that "fresh and regional Ingredients" could mislead a reasonable consumer.[13]

Similarly, the U.S. District Court for the Northern District of New York found in March that the claim "biologically appropriate" could in theory be true or false, which would not qualify as puffery, in Colangelo v. Champion.[14]

However, the court determined "biologically appropriate" was not misleading, and similarly found Champion's "fresh" and "regional" claims, while not discussed as puffery, were neither misleading or false in context.[15]

Finally, in 2020, the U.S. District Court for the District of Minnesota found the language "nourish as nature intended" to be nonactionable puffery in Song v. Champion because "nature's" intentions are vague and nondiscoverable, while "delivering nutrients naturally" was not puffery because "natural" is reasonably susceptible to proof.[16]

However, the court found that the plaintiffs had not plausibly alleged the phrase "delivering nutrients

naturally" was deceptive. The court reached similar conclusions — without analyzing the claims as puffery — regarding "biologically appropriate" and "fresh and regional ingredients."[17]

As these cases show, the exact same language may be false or misleading in one circuit, while nonactionable puffery in another. Indeed, even within the same circuit, courts have simultaneously found the same advertising claims to be both actionable and nonactionable.[18]

Circuit-by-Circuit Summary

While all circuits have an identifiable definition for puffery, the rules regarding what constitutes puffery are often vague and not well-defined. Below we summarize the best and most current understanding of what constitutes puffery in each of the federal circuits.

First Circuit

The U.S. Court of Appeals for the First Circuit does not articulate specific factors to consider beyond its puffery definition,[19] but the U.S. District Court for the District of Massachusetts last year focused on whether a statement is "specific and measurable" or verifiably true or false, in a literal sense.[20]

Second Circuit

Beyond its definition of puffery,[21] courts in the U.S. Court of Appeals for the Second Circuit have identified a number of factors to be considered in a puffery analysis, including vagueness, subjectivity and ability to influence the buyers' expectations.[22]

Third Circuit

The U.S. Court of Appeals for the Third Circuit does not articulate specific factors to consider beyond its puffery definition,[23] but the U.S. District Court for the Eastern District of Pennsylvania recently considered the statement's subjectivity, quantifiable measurability and specificity in its analysis of the defense.[24]

Fourth Circuit

The U.S. Court of Appeals for the Fourth Circuit does not articulate specific factors to consider beyond its puffery definition,[25] but the U.S. District Court for the Western District of Virgina challenged advertising claims should be considered individually, but read in context of the entire advertising scheme in 2017.[26]

Fifth Circuit

The U.S. Court of Appeals for the Fifth Circuit does not articulate specific factors to consider beyond its puffery definition,[27] but the U.S. District Court for the Southern District of Texas focused on whether a representation is a generalized opinion as opposed to a specific, measurable claim in 2015.[28]

Sixth Circuit

The U.S. Court of Appeals for the Sixth Circuit does not articulate specific factors to consider beyond its puffery definition, but focuses on what a consumer would reasonably believe could be discovered,

understood or proven.[29]

Seventh Circuit

Beyond its definition of puffery,[30] courts in the Seventh Circuit specifically look to whether a commercial statement is either capable of being tested or is specific enough to induce reasonable consumer reliance.[31] Although the factors can be considered together, if the answer to either is no, then the advertisement is puffery.

Eighth Circuit

Beyond its definition of puffery,[32] the U.S. Court of Appeals for the Eighth Circuit specifically focuses on the difference between puffery and fact — paying particular attention to whether a statement is specific, measurable or capable of verification — and appears to assume reasonable reliance from the consumer if a statement is measurable.[33]

Ninth Circuit

Beyond its definition of puffery,[34] the U.S. Court of Appeals for the Ninth Circuit identified that the principal issue is whether a reasonable consumer would rely on the challenged advertisement as a representation of fact.[35] As secondary considerations, the Ninth Circuit looks to whether a commercial representation is easily measured or capable of being tested, but only inform the reliance analysis.

Tenth Circuit

Beyond its definition of puffery, the Tenth Circuit will analyze whether the statements are measurable or falsifiable.[36] The Tenth Circuit has stated the expertise of the speaker and listener is a critical factor to determine whether a statement is puffery.[37]

Eleventh Circuit

The U.S. Court of Appeals for the Eleventh Circuit does not articulate specific factors to consider beyond its puffery definition,[38] but generally considers whether the statement is provably false, relying on the circuit's definitional understanding of puffery.[39]

D.C. Circuit

The U.S. Court of Appeals for the D.C. Circuit does not articulate specific factors to consider beyond its puffery definition.[40]

Summary

The Second, Seventh and Ninth Circuits all consider specific factors, which makes the outcome of a puffery defense more predictable in those jurisdictions.

However, this predictability may cut against defendants as the factors may make the puffery defense harder to assert. The Renfro v. Champion case provides strong precedent for the Tenth Circuit to be more amenable to the puffery defense.

Conclusion

The nuances of each circuit's analysis of puffery can be determinative in the outcome of a case — while some advertising language may be false or misleading in one context or jurisdiction, the same language may be nonactionable puffery in another.

Understanding the nuances of how each circuit addresses advertising representations is essential to understanding the risks of liability.

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[1] Tershakovec v. Ford Motor Co., 546 F. Supp. 3d 1348, 1359 (S.D. Fla. 2021), amended in part, 2021 WL 3711444 (S.D. Fla. Aug. 20, 2021).

[2] Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 477-78 (7th Cir. 2020).

[3] Ebner v. Fresh Inc., 838 F.3d 958, 965 (9th Cir. 2016).

[4] Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 478 (7th Cir. 2020).

[5] Johnson-Jack v. Health-Ade LLC, 2022 WL 562827, *6 (N.D. Cal. Feb. 24, 2022).

[6] Greater Houston Transportation Co. v. Uber Techs., Inc., 155 F. Supp. 3d 670, 683-84 (S.D. Tex. 2015).

[7] Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390-91 (8th Cir. 2004).

[8] Renfro v. Champion Petfoods USA, Inc., 25 F.4th 1293, 1303-06 (10th Cir. 2022).

[9] Weaver v. Champion Petfoods USA Inc., 3 F.4th 927, 935-37 (7th Cir. 2021).

[10] Id. at 937-38, n.1.

[11] Zarinebaf v. Champion Petfoods USA, Inc., 2022 WL 980832, *5 (N.D. Ill. Mar. 31, 2022).

[12] Id. at *5-6.

[13] Id. at *8-9.

[14] Colangelo v. Champion Petfoods USA, Inc., 2022 WL 991518, *19 (N.D.N.Y. Mar. 31, 2022).

[15] Id. at *20-24.

[16] Song v. Champion Petfoods USA, Inc., 2020 WL 7624861, *9-10 (D. Minn. Dec. 22, 2020), aff'd, 27 F.4th 1339 (8th Cir. 2022).

[17] Id. at *5-9.

[18] For example, courts in the Eleventh Circuit have found the terms "safe" and "reliable" to be both actionable misrepresentation and non-actionable puffery. Compare Sanlu Zhang v. Royal Caribbean Cruises, Ltd., 2019 WL 8895223, *6 (S.D. Fla. Nov. 15, 2019) (finding language such as "safe" and "reliable," among others, to be mere puffery and non-actionable) with In re Takata Airbag Prod. Liab. Litig., 464 F. Supp. 3d 1291, 1304 (S.D. Fla. 2020) (finding the promotion of vehicle safety, using terms like "safe" and "reliable," went beyond puffery to active misrepresentation).

[19] F.T.C. v. Direct Mktg. Concepts, Inc., 624 F.3d 1, *11 (1st Cir. 2010).

[20] Costa v. FCA US LLC, 542 F. Supp. 3d 83, 101 (D. Mass. 2021).

[21] George v. Starbucks Corp., 857 F. App'x 705, 706 (2d Cir. 2021).

[22] MacNaughten v. Young Living Essential Oils, LC, 2021 WL 5965195, *6-7 (N.D.N.Y. Dec. 16, 2021).

[23] Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, n. 17 (3d Cir. 2011).

[24] Painaway Australia Pty Ltd. ACN 151 146 977 v. MaxRelief USA, Inc., 2022 WL 1028024, *4-5 (E.D. Pa. Apr. 6, 2022).

[25] Verisign, Inc. v. XYZ.COM LLC, 848 F.3d 292, 302-03 (4th Cir. 2017).

[26] Trex Co., Inc. v. CPG Int'l LLC, 2017 WL 3272013, *5-9 (W.D. Va. Aug. 1, 2017).

[27] Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 496-97 (5th Cir. 2000).

[28] Greater Houston Transportation Co. v. Uber Techs., Inc., 155 F. Supp. 3d 670, 683-87 (S.D. Tex. 2015).

[29] Louisiana-Pac. Corp. v. James Hardie Bldg. Prod., Inc., 928 F.3d 514, 519 (6th Cir. 2019).

[30] F.T.C. v. Trudeau, 579 F.3d 754, 765 (7th Cir. 2009).

[31] Evolve Biosystems, Inc. v. Abbott Lab'ys, 2022 WL 846900, *5 (N.D. Ill. Mar. 22, 2022).

[32] Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390-92 (8th Cir. 2004).

[33] In re Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Pracs., & Prod. Liab. Litig., 2022 WL 710192, *18-19 (W.D. Mo. Mar. 9, 2022).

[34] Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1053 (9th Cir. 2008).

[35] Johnson-Jack v. Health-Ade LLC, 2022 WL 562827, *6 (N.D. Cal. Feb. 24, 2022).

[36] Renfro v. Champion Petfoods USA, Inc, 25 F.4th 1293, 1302-04 (10th Cir. 2022).

[37] Alpine Bank v. Hubbell, 555 F.3d 1097, 1106-07 (10th Cir. 2009).

[38] Tershakovec v. Ford Motor Co., 546 F. Supp. 3d 1348, 1359-60 (S.D. Fla. 2021), amended in part, 2021 WL 3711444 (S.D. Fla. Aug. 20, 2021)

[39] POWERbahn, LLC v. Found. Fitness LLC, 2021 WL 2689852, *8 (N.D. Ga. Mar. 26, 2021).

[40] Jacobson v. Hofgard, 168 F. Supp. 3d 187, 196 (D.D.C. 2016).