Podcast Transcript

AD Nauseam: Cabbage Soup v. Keto Diet: The Evolving FTC and NAD Approach to Post-Holiday Weight Loss Claims

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from Baker Hostetler's Advertising, Marketing and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel talk about the issue of post-holiday weight loss claims and how these claims have been addressed by the FTC and the NAD. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back to AD Nauseam. Thank you for joining. We have a great topic today. Well, when do we not have a great topic, right, Daniel?

Kaufman: Totally true.

Mudge: Yeah, but today the holidays are approaching, and Daniel and I are getting into that holiday spirit. The holidays always make us think of wonderful things. Families, parties, seeing old friends and family, reindeer, lights, shopping, and of course, my personal favorite, food and drink. Lots and lots of food and drink. The eggnog, the cookies, and with that, many of us encountered that post-holiday extra pound, or two, or three.

Kaufman: Look, for decades, FTC and NAD, you've seen a steady diet of actions involving weight loss issues. And in fact, when you look back historically, so many of the principles in advertising law have been premised on cases involving issues of weight loss over the years.

Mudge: Absolutely.

Kaufman: So, we thought, good topic today, post-holiday recovery. Holidays are approaching. But, Amy, a couple of questions for you at the outset. What are your go-to holiday song and holiday movie?

Mudge: Oh, totally easy. The old 80s compilation, Do They Know It's Christmas Time. Every time, the first time I hear that on the radio station at Christmas, I bawl. No idea why, it is a terrible song. What is that? Here's to you, and thank God, it is them, not us. I mean, the words are terrible, but…

Kaufman: Bono and Boy George are all enough.

Mudge: They got it all. They got it all. So, Do They Know It's Christmas Time? Not even close. Another not even close. Elf.

Kaufman: Okay, well, look, I'm not going to be stereotypical and go for the dreidel song. Not really one of my favorites.

Mudge: The Adam Sandler version or?

Kaufman: Oh, no. Hipster. I love the Waitresses' Christmas Wrapping song. That has always been one of my favorites. I don't hear it often enough, but it is just delightful. And favorite movie? Not really a movie, but I got to go with the cartoons. I love the Charlie Brown Christmas and The Grinch movie. I mean, those just…

Mudge: Oh.

Kaufman: I love the Grinch show. I just watched them so many times as a kid.

Mudge: Okay. Can I trade? No? You get those. But yes, those are, although when we were kids, right, we had to wait till they came on TV.

Kaufman: Totally.

Mudge: Yeah, that was the big night. Now you can stream them, I guess. Whatever streaming network they're on tells you can. But look, you can't…

Kaufman: Those gosh darn kids don't know how difficult we had it, right?

Mudge: Walking up hill to school both ways.

All right, but we can't. I'm sorry, Daniel. Movies, we do that all the time. In celebration of this topic, what is your favorite fad diet you have ever tried? And I will tell you, for me it is the good old fashioned Cabbage Soup Diet.

Kaufman: Okay, I got nothing. I have nothing on this one. Eat less, exercise more. That has been my go-to.

Mudge: Oh, you're so virtuous, Daniel. Oh, blah, blah, blah, all right.

Kaufman: Well, I can't restrict things. I have tried low carb. I just can't do it. It is physically impossible to not eat carbs.

Mudge: Okay. All right. So, let's get to it.

Kaufman: Okay. So, Amy, let's talk big picture at the outset. You are someone who I know has counseled a lot of clients in this area. What, let's start at the beginning with your key sage thoughts that people should think about when it comes to weight loss claims.

Mudge: Well, I mean that is definitely changing. So, let me go with the old standbys that have been tried and true, and things that are always well worth repeating. So, you got to get that science. You got to get the science in order, all right? That is the first and foremost. The science standards might involve, you got to look at what is expected at any given time. Is it what experts in the field focus on? Is it two clinical trials which we had a while ago? Is it one clinical trial? What is it? But, so stack up your science, but remember that testimonials are never science. Testimonials, no matter how many you have of them, are anecdotes. They're not evidence. When we talk science, we're talking clinical science.

If your study that you have, your clinical, says, hey, you got to include diet and exercise, that has got to be clearly disclosed in the advertising. That is a material part of the study, that's got to be a material part of your ads. And of course, extraordinary claims are going to get a lot of scrutiny. If it is too good to be true, it probably is. And even if the claims aren't outrageous, even if the testimonials are better than what most people are going to expect, that typicality has to be known, and it has to be disclosed.

I mean, I'm going to say in all seriousness, I'm a lifelong dieter, and I've been plagued with this yo-yo cycle. So, an easy pass or a magic cure is really something that a very vulnerable audience is looking for. So, you also have to recognize that your audience can be desperate for a magic cure, and that heightens your responsibility in terms of how you speak to them.

Kaufman: Important words there. But look, you can't talk about the FTC and weight loss without talking about two decades ago. The FTC, under former chairman, Muris, issued what they called their red flags weight loss claims and…

Mudge: That was two decades? That was two decades ago?

Kaufman: Two decades ago. I think it was early 2000s, yeah.

Mudge: Oh whoa, those are oldies but goodies, but.

Kaufman: Yeah, they really are. The goal here was to make it clear to publishers, there are seven key weight loss claims that are never true, so, don't post ads that make these claims. It was actually intended to be a way for publishers to really do a better job of screening ads. And I'm not going to go through all seven of them, but some of them are a little bit more consistent with what was going on at the time.

So, if you're claiming that your product blocks the absorption of fat or calories and that enables people to lose substantial weight, that was one of them. If your product causes weight loss of two pounds or more a week for a month or more without diet or exercise and claims that products cause permanent weight loss even after consumers stop using the product. These were all among the red flag claims that the FTC wanted publishers to stop publishing.

Mudge: All right. Like I said, oldies but goodies, and I think these have stood the test of time. I think they're still good for use for platforms and publishers that are accepting digital ads. I have to say, the one thing that's always had me scratching my head is that permanent weight loss. And I guess you do see claims like that. I don't think reasonable consumers would think that is possible.

When I hear a permanent weight loss claim what I think of that is, is that is more of a, this program will help you keep it off. So, it is not really, you do this and somehow you can then eat whatever you want and never get off the couch, and you'll stay slim. It is more of a separate claim to me that this program or regimen can work for maintenance. But I get it, we still see cases that are brought over these expressed or implied claims of permanent weight loss.

Kaufman: So, I think you hit the nail on the head, though, on the looking at the consumer population. And I'm going to give you a quote from *Porter & Dietsch*. It is an old FTC quote and involving a weight loss issue. And I don't think this is the language the FTC would use today, but they talk about this issue, and I'm reading it verbatim. Again, current FTC, kind of guessing the language would be different. But they say, to these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance if not abstinence simply does not pass muster. And it is a slightly insensitive way of making the point.

Mudge: That sounds judgy, Daniel. That sounds very judgy. I do not like that.

Kaufman: I know, but it is in a FTC opinion from 1980, so…

Mudge: That sounds like the FTC would write that today. That is smug and self-satisfied. Written by skinny people, I am sure, but okay.

Kaufman: I know. Well, let's turn around a little. Let's talk a little bit about the NAD. What are we generally hearing from the NAD on issues involving weight loss?

Mudge: Well, the NAD has not really gone over new ground here. They brought, just like the FTC, more than their share or certainly their share of weight loss cases over the year. They've largely been very complementary of the decisions that we've seen out of the FTC. One of the things that is interesting though is we've had a number of competitor challenges in the weight loss area. So, there have been monitoring cases. I think my favorite was a case that they brought against the Lemonade Weight Loss Diet. Doesn't that sound refreshing?

Kauffman: Love lemonade.

Mudge: And then, well, and I should say, there was also for a time, CRN ran a program through NAD where they brought a number of, so they were a challenger. But really it was an organization, a dietary supplement industry watchdog that brought a bunch of cases against Sensa, Mega-T Green Fat Burner, Mega Cleanse, things like that. But lots of these cases are competitor challenges. Weight Watchers has gone after a, or, I guess WW now, has gone after a bunch of folks. Denise Austin Weight Loss Program. They've gone after Nutrisystem. Nutrisystem came back and went against The Body Gym. We had more recently an *Atkins Products v. Slim Fast*, *Pharmavite v. Goli* apple cider vitamins. So, this is definitely an area where more companies go after each other head-to-head. But they really, all the cases have followed the, whatever the FTC car standard is at the time.

They have brought some, a few fun cases, I think, that clarify things. They brought a case, a monitoring case, the NAD did against a company called Fit Tea. In that case the idea was the company had reposted a bunch of consumer testimonials. They weren't incentivized testimonials. They said no, no, these are real posts that we mined the web for and we found them, and we posted them on our own website. Set aside if they're right of publicity or other types of issues, what the NAD focused on, they said look. Even if these aren't incentivized, once you, the marketer, has grabbed them and put them on your digital properties, that becomes your advertising that you're responsible for, to substantiate. And maybe we say duh to this today, but that was a pretty early statement out of the NAD providing some good guidance. And my favorite thing they did, is the NAD filed a case against the Kardashians, and that was a simple case about influencers being responsible when they are paid. In this case, the Kardashians were paid to post about Fit Tea that they have to have disclosures.

Kaufman: Yeah. No, it is interesting. At the FTC it's been probably a couple of years since we've seen a sort of significant weight loss case, but the topic just comes up quite frequently. When you look at the revised endorsement guides that came out, there is a good deal of examples that talk about endorsement issues through the lens of weight loss claims. And I think in many respects it is just, it is easy to understand when you sort of cite examples about weight loss. But there is one really interesting point they raise. So, the example they have in the new endorsement guide, the claim is, I lost 50 pounds in 6 months with a certain weight loss program.

Mudge: Which program?

Kaufman: And you know, there is a disclosure that says the typical weight loss for people who stick with the program for 6 months is 35 pounds. We've seen those disclaimers a lot, and that is generally what we think about, disclosure to explain what the typical result, but…

Mudge: Sounds like typicality disclosure.

Kaufman: Yeah. They say users who stick with the program, and the FTC is concerned in this example, is that in this example only one-fifth of the users actually stuck with the program, and that is not indicated in the disclosure. So, they want the disclosure to not just cherry-pick the people who stuck with the program, but to also make it clear that very few people actually stuck with the program. So that is an interesting wrinkle that the FTC has certainly put out there and in one of their examples in the guides.

Mudge: That is very disappointing to me. I understand this notion of you, and the FTC is always focused on this I think for clinicals, that you have to at least take into account the dropouts and take a look at them. Here, if the disclaimer makes it clear we're looking at people who stick with the program, it really seems like that is a fair, assuming it is right, that I think is getting too greedy and I really think, because I think dieters know. They know you got to stick with the program. I think that is way too rigid. But we'll see if they sue anybody over it. We'll see what happens, but…

Kaufman: Yeah, no, exactly. Like I get the principle, because if you take it to an extreme and only one percent of the people are actually sticking with the program and no one is succeeding, I can see that. But I totally agree. We'll see how this plays out and if there'll be some cases down the road on that sort of narrow but interesting proposition.

Mudge: I got to say I would still green light this disclosure for a client, wrecking, highlighting the risks, but I just don't think, I mean, we've seen a huge evolution in the typicality thing, and in the old days everybody had results not typical, results not typical. And when the last update to the T&E guides, and that is when the FTC did some research and they said, look, look, look, no, but everybody blows through that. Nobody reads that. Everybody is an eternal optimist and assumes they're going to hit the high results. So, you can't say results not typical. You have to disclose typicality. But I think what we saw then and what we've seen for the last decade since that came out, is almost every weight loss disclosure is asterisks, average weight loss of one to two pounds a week. And I've always wondered if some of those companies have actually looked at the average or if they just have simply said, you know what, this fits into the red flags rule. This sounds pretty good. I think we're going to use it. But I guess if anything, what the FTC has said is we're upping the game here, and we're going to look more closely at this.

Kaufman: And this may not put you on the radar if you're putting that in your disclosure perhaps.

Mudge: Although have I been too glib here, Daniel? Do you think this is the way the FTC has always looked at the typicality area?

Kaufman: I don't think so. I think this is a novel issue, and I think they're putting it out there. I don't think it is necessarily evidence based, but they're sending a signal. They're going to look pretty close at your marketing problem with lots and lots of dropouts in your clinicals that may have an effect on how you frame your claim. It is an interesting point.

Mudge: Now, one of my favorite things to talk about in this area is when companies try to get very clever. And some of my favorite older FTC cases, there is one, we show this all the time when we're training, about what is a claim, and there was an ab belt case. Remember, one of those jiggly things you put around your middle and you could just jiggle off the fat and jiggle your way and rock-hard abs. Well, the ad showed the use of this product with around some very oiled up, very fit people, and the claim in the ad was you've seen those other ad belts. We work just as well at a fraction of the cost. And the FTC came knocking and the company tried to defend saying, we didn't make a claim. We just said we work as well as those other ab belts. We, and…

Kaufman: It was a brilliant defense. I was a big fan of that defense. I thought it was a good try.

Mudge: If the FTC give, yes. If you gave clever points, that would be. But no, not in that case. They said it is clear what you're doing here. You're training off of the existing confusion and there were visual claims that, visual images of very toned people that can themselves be a claim.

Kaufman: Amy, the other clever point on that case, it was also a lot cheaper than the other ab belts that were on the market so they were arguably saving people money.

Mudge: Saving people money? Although yes, if you're buying something that doesn't work at all, does it matter?

Kaufman: You lose a little less money.

Mudge: All right. And the other one I loved. There was another ab, what is it with these ab devices? It was another ab toning device, and they had a celebrity spokesperson who was in the infomercial. And she claimed that she'd lost 80 pounds. Well, this woman, she had, but she'd lost 80 pounds 20 years before, doing something else. She didn't lose the 20 pounds using the ab circle device. So again, you can't, I think the lesson here is, you, we can laugh at these, but don't be cheeky. Don't play fast and loose in this area. But, Daniel, you had hit on, I want to talk about, I mentioned the NAD's Kardashian case. Let's talk about celebrities or what we now call influencers, and what obligation do endorsers have to police claims before repeating them? Do you have to ask the dietary supplement or the workout companies of the world, show me your studies? Let me read them before you sign on and be an endorser? And this is your Christmas gift to you or your Hanukkah gift, or both. You get to talk about Steve Garvey now.

Kaufman: Well, okay. So, we got the Steve Garvey 9th Circuit case and the Court established a pretty low standard for a celebrity endorser talking about a product. I don't think the FTC would necessarily agree with the standard there, but it was a pretty minimal requirement that the endorser had checked out the product, looked at a handbook. That was going to be sufficient. Look, the reality is if a celebrity endorser is endorsing a weight loss product, they have to have used it. They have to have used it and had results from them. They have to accurately talk about the results. And I think something we see often is they use the product but you know what, they also were getting a trainer that was helping them for two hours a day. And again, are they using the product in the way that it is being advertised? And if they're using a dietary supplement, weight loss product but they also have two hours with the trainer every day, that is not going to be substantiation for the product alone. So really important issues of actual use, how it was used and what the endorser experience was.

Mudge: But they probably don't have to pour through the raw data of the clinicals. A quick look, a good faith look, but really to focus on is how they're describing their own experience truthful.

Kaufman: Yeah. And I, look, I would certainly, if a company was making a red flag weight loss claim, I would steer clear of that still.

Mudge: Yeah, that should, yep. Love those old red flags. All right. Well, speaking of red flags and thinking about the holidays, the FTC has often kicked off New Year's with weight loss reminders or announcements. I bet you worked on some of those in your many years there.

Kaufman: So, it is funny, I remember I was working for former Chairman Majoras and it was like late 2006. And we all of a sudden realized there were like three or four weight loss cases that were sort of coming through the system at the FTC and sort of approaching conclusions. And we're like, oh, it is late December. We have four weight loss cases. So, we did this big January, very beginning of January, sort of New Year's Resolution press conference on weight loss issues. It was actually a huge success. And I know every year the FTC has done a lot of other sort of New Year's announcement of varying varieties on this issue because look, the reality is, you know gyms are packed on January 2, and people are having their New Year's resolutions. And again, it relates to the holiday weight, but it just also goes to the New Year's resolution, the sort of the final holiday in the series where people are making that commitment and spending money in order to try to lose weight. So, it has always been a focus.

Mudge: Well, and it is worth noting, if the FTC today does issue a CID in a new weight loss case, chances are very good that they will provide a copy of that notice letter to the target, to put that company on specific notice, and maybe allow the FTC to see penalties in those cases.

Kaufman: Yeah, absolutely. They do have those notice letters for weight loss that are out there, and we know it is a habit the FTC has now when they issue a CID, is there a notice letter that can accompany the CID with to start more companies on notice of that issue. And we can have another episode someday about these notice letters, Amy, and what we think about them, but that is not…

Mudge: Well, I know what you think about them, Daniel. That'll be a cool podcast.

Kaufman: Yeah.

Mudge: Well, and with that charming thought, I think we have come to the end of another episode of AD Nauseam. We wish you the very best for you and yours for the holidays.

Kaufman: Thank you, everybody.

Brave: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes.

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