



Podcast Transcript

AD Nauseam: The Best Podcast (Fact or Puffery?)

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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 BakerHostetler'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 age-old issue of when is an advertising claim puffery? With that, welcome to AD Nauseam. And let's turn it over to Amy and Daniel.

Kaufman: And welcome back to AD Nauseam, and we are going old school today. No more of that AI stuff. No more of this century. We're going to hearken back to those things ad lawyers have been talking about for decades and decades. The age-old issue of is it an actionable claim or is it puffery?

Mudge: Feels good to be kicking it back old school with my buddy D. And this could be the world's shortest podcast. When you look at those FTC and those NAD decisions, companies always argue, it is a puff, it is a puff. But that is a hard argument to win on.

Kaufman: But I am confident, nevertheless, Amy, we can milk at least 20 minutes out of this. Not a problem.

Mudge: On any topic. Any topic.

Kaufman: But I got to tell you, when I think about puffery, I think the 1960s. I think Mad Men era. And we're often obsessed with the 80s, talking about the 80s. But let's turn it back just a few decades and talk the 1960s. We never talk about the 60s, but what iconic 60s TV show or movie is near and dear to your heart?

Mudge: Alright. We never talk about the 60s because I was not born for most of them.

Kaufman: For most of them.

Mudge: I'm younger than you, Daniel, and I will not let you forget it.

Kaufman: Just in under the wire.

Mudge: But all right, 60s. I mean, we all came home from school, right? And watched reruns on TV, because that is what we had. So, Gilligan's Island, no questions asked. And actually, we were out to dinner the other night, and we were telling my daughter about Gilligan's Island. She was absolutely appalled. I was so impressed. My husband sang the entire theme song start to finish, every verse totally from memory. That is how often we all watched Gilligan's Island. And I also love Sound of Music. It is just, who doesn't love Sound of Music?

Kaufman: I miss old theme songs. I mean, you just don't get enough of those these days, and they're just wonderful.

Mudge: So, what about you? You got some weird stuff, I bet. You got some sci-fi in there?

Kaufman: So, not sci-fi, but the 1960s Batman TV series was just so much fun, so campy, so enjoyable. I'm not a big superhero person, but give me 1960s Batman with Adam West and I'm totally there.

Mudge: I know we don't fat-shame. I know we're body positive on AD Nauseam, but Adam West had a muffin top, man.

Kaufman: But no. Movies, though. All-time favorite, Manchurian Candidate.

Mudge: Yep.

Kaufman: And Angela Lansbury was so amazing in that role. She was one of my all-time favorites. I loved the movie. I loved her performance, so just something amazingly, came out of the 60s certainly. As well as you and I, both, two amazing things that came out of the 60s.

Mudge: The very, very tail end, the last whisper of the 60s. Alright. So, what was your favorite Mad Men episode? You can't pick the series finale. I loved the ketchup one where Peggy and Don competed for the Heinz account.

Kaufman: Okay, again it is going to be confession time for Daniel. I have not watched Mad Men. It has been on my list a long time. Need to watch it and I have no idea what you're talking about by the ketchup one. So, I look forward to knowing that eventually.

Mudge: I have no words. I could spend the next 20 minutes Mad Men-shaming you. Alright. So.

Kaufman: Well, let's level set. Let's focus. The task at hand, puffery. Amy, how do you define puffery?

Mudge: Well, it is never 100% set. Things do change, but generally when I think of a puff, I think of it as a statement that is exaggerated. It is bravado. Nobody is going to take it seriously. Sometimes, it's been defined as a statement about a product that can't be quantified or objectively proven, but I think it is more chest thumping.

Kaufman: Give us some examples. What are some tag lines that you consider to be puffs?

Mudge: Okay, well, one of the other greatest movies of the world, from the 90s, Elf. World's greatest cup of coffee. That is the one we all point to. Oh, Frosted Flakes. What are they? They're great. Okay? Very puffy. There's a couple that were actually litigated that I think are really interesting. BMW, world's greatest driving machine. Or Allstate. You're in good hands with Allstate. Both found to be puffs.

Kaufman: I always view puffs as being more of an NAD thing.

Mudge: Mm-hmm.

Kaufman: Less of an FTC thing. Though to be clear, puffs have their place in FTC lore. And it is specifically called out in the FTC's Deception Policy Statement, which says, the Commission generally will not pursue cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously. But so, the FTC acknowledging puffs and saying, hey, we're going to steer clear of that. But because the FTC is always kind of like that, they do note that also, that some exaggerated claims, however, may be taken seriously by consumers and are actionable. And they cite to a few old examples where the

FTC rejected a puffery assertion that, for an antenna that was touted as an electronic miracle.

Mudge: A what? You have to tell people what an antenna is for, I guess.

Kaufman: I know. I love old antenna cases. We certainly had those on our TV growing up. But the FTC thought that given the exaggerated claims that were being made next to the calling it of an electronic miracle, that gave it more credence to the exaggerated claim. So, context is going to matter. They emphasized context. But how do we draw that line with any certainty? You've got proof of puff in isolation, but it sounds like context really matters from the FTC's perspective.

Mudge: Oh, absolutely. Context is king. Context is everything. The four corners of the ad. And that is not just advertising lawyers not wanting to actually give advice. Here, that is the be-all end-all.

Kaufman: So, it is interesting. When we were getting ready for this awesome episode, I went to the FTC's website. I really wanted to see, what have they said about puffery? Did some searches and the thing that pops up frequently are the fabulous business blogs by Leslie Fair. A lot of the discussion of puffery on the FTC website happens in her blogs, and she is often pointing out what is and isn't puffery.

So, some examples, statements about shipping, she makes it clear aren't puffery. And she writes, like price and product features, they're among the objective claims consumers rely on in deciding whether to do business with you or your competitor. Talks about puffery in a skin care case. She says, ads that focus on user's dewy visage or angelic glow are probably just puffery, which are fabulous Leslie lines. But once companies make objective product representations, long-standing substantiation principles apply. And she also talks about it in the Made in USA context, saying, Made in the USA isn't just flag-waving puffery. It is an objective claim that companies must substantiate with solid proof.

Mudge: Yeah. So, there's certain things that just, they can't be a puff. Those probably are the easy ones, but we should all be following Leslie's advice and reading her blog, and ours of course.

Kaufman: Absolutely.

Mudge: ADventures in Law. But Leslie's is a classic, and truly, no puff, one of the best blogs in our area. But look, when it comes to the FTC, mostly companies make that feeble argument. I sometimes call puffery the last refuge of scoundrels. If you got nothing to say to support your claim, say, well, it is a puff. It is a puff.

But there have been some cases, and you don't have to go back to find a TV antenna, which you needed to watch your 1960s shows. More recently, there was one from, I think it was about 2017, *Natural Urologic*. It was a contempt action. The defendants tried to argue puffery as a defense, but the judge said,

look, puffery includes general opinion, representations that the product is the best or it is superb. But in that case the puffery defense didn't fly because there were, in that context, which we're going to keep coming back to, express claims about fat burning and weight loss.

And so, if you have things like best or superb claim standing alone, those might have been puffs. But when you couple them up with things about weight loss and fat loss, absolutely not. That is when you make an adjective into an actual claim.

Kaufman: So, and you know, Amy, I don't do my FTC war stories too often. But actually puffery was also raised in a case...

Mudge: _____ every time you do your war stories? Alright.

Kaufman: Here is my FTC war story. No, it came up in a case I worked on many years ago at the FTC. It was a case against Direct Marketing Concepts, which eventually made it all the way up to the First Circuit, though unfortunately I was no longer working on the case at that point. This was a case that involved really strong health claims for a green product. And it's raised all sorts of issues, including puffery claims, and claiming that the infomercials were puffery, and they were mollified by disclaimers. The court did not buy it, knowing these were specific and measurable claims that may be literally true or false, like cancer cure claims and pain treatment claims. Certainly not a close call at all there. But let's switch it over to NAD, because that is where we do see the much closer calls and real challenges involving puffery claims.

Mudge: One hundred percent. And actually, the NAD's had a couple recently. Actually, a bunch of cases about puffery. One of them had me a little bit befuddled. But speaking of our blog, I did just write a couple of blogs on both of these cases on ADventures in Law. Puffery seems to be having a renaissance, if you will, at the NAD.

Kaufman: So, what is the lesson we take on this NAD decision you wrote about regarding best claims?

Mudge: Alright, so this is a case about beef jerky. Very meaty case you can sink your teeth into.

Kaufman: I would say no pun intended, but it was clearly intended.

Mudge: That was clearly intended. Alright. So, best, just by itself, maybe even coupled with some other adjectives, almost certainly going to be a puff with nothing more. Best with reference to ingredients in food cases, let's put a pin in that for a minute. Best with product attributes, best company by showing or referring to competitive product, almost certainly to be a claim. It is not always black and white.

As I said this with food cases, when there's ingredients, it harkens back to an old classic Lanham Act case involving pizza, where it was found that better ingredients, better pizza was a puff. Except when you took the better pizza,

better ingredients and showed pictures of that pizza, and you showed pictures of those ingredients, that is when it crossed over into being a claim. The ingredient piece is one that people tend to get a little bit befuddled about in this area because of that case.

In this case NAD found that clearly the best beef jerky statement was a puff. Not surprised by that. NAD also found that saying the best ingredients make the best beef jerky. Okay, makes sense. NAD found that saying, because we use the best ingredients, we have the best beef jerky. That was a claim. Again, that made sense. But there was some grey in there too. There was another claim, clearly the best beef jerky, clearly fresh, clearly more. NAD came out that this was a puff. This one had me pausing, because to my mind, fresh is an objective measurable attribute. Clearly, more sounds like quantity. Does it have more beef jerky in your product versus another? That I was surprised, that NAD found out that those statements were puffs.

So I think, what I took away from this is even amongst people that think about this a lot, works like me and NAD attorneys, it's not always easy to figure out what is and is not truly puffery.

Kaufman: You are indeed an NAD wonk, Amy. But I always do think it's really fascinating to focus on areas where puffs actually exist. And we're going to hammer home context until the cows come home. But is there another best case you can talk about us that came out recently?

Mudge: Absolutely. There are more better and best cases at NAD than you can shake a stick at. And they're all fascinating reads.

There was one recently involving charcoal. And one maker of charcoal touted their charcoal as bringing the best grilling experience. Now, in isolation, pretty clear that is a puff. But these claims are rarely made in isolation. And NAD noted that best claims can be substantive superiority claims requiring substantiation or a puff depending on, you guessed it, the all-important context.

Now, in this case, puffery failed. Here, the best grilling claims appeared in ads where they also said the charcoal bricks were 50 percent larger, and that they light fast with high heat and a long burning time. So, again, those are things that you can measure. Those are things you need support for. And in that context, the best claim just wasn't substantiated.

Kaufman: Well, Amy, all this talk about pizza, barbeque, grilling is making me very sad about the salad I need to go pick up for my lunch today.

Mudge: Oh, is it making you thirsty? Because actually, I wanted to tell you about one more case because you asked about best. And best and better a lot of times the context where we see suggestions that something is puffery but not exclusively.

The most recent case that NAD looked at where puffery was an issue involved sports drinks, and it was one of the classic, the BODYARMOR versus Gatorade

kind of advertising wars. In this one, BODYARMOR claimed that the rehydration champ is here. And that is one that BODYARMOR said, come on, it is a puff. Gatorade said no, it is not. This is one where NAD said no, you know what? Saying you're the champ is probably a puff, but when you said you're the rehydration champ, that meant you needed substantiation to show that your drink rehydrated better than competing drinks. So, the key here is it is not just always best and better. You can find this issue of is it a puff, is it a claim, in other contexts as well.

Kaufman: So, it is interesting, a lot of this really flows from that statement in the FTC's deception policy statement that you can have a puff in one instance, but the same statement can become actionable in another context. So, wrapping up here, Amy, what are some takeaways that you think folks should be mindful of?

Mudge: I, again, we said this, we'll say it again. Don't assume it is going to be a puff. That context does matter, and a puff can easily become actionable. You've always got to have a plan B. I'm, get really, really nervous if you go in and the only defense you have to something is, it is a puff. Even if you think a statement is puffery and even if you intend for it to be puffery, think through how you would substantiate it if you were challenged, and the puffery defense failed. Just always got to have something in your back pocket.

If you clear a claim as a puff with your clients, you've got to use more words with them. Make it very, very clear you're only clearing the statement when it is used in isolation. And remind them anytime there is additional context, you got to come back and get another opinion as to whether in the context of the whole ad, the statement becomes a claim. Is there clear separation between the puffery statement and any objectionable claims? That is going to be another key. And that is hard to do in a 30-second spot, let alone a 15-second spot.

There has been some suggestion that small brands get more leeway here. If you're a new entrant and you say you're the world's greatest, that maybe some are more likely to say, oh, of course, that is just boasting. And if a market leader made such a statement, maybe that means something, is meant to be a claim. I don't think that makes a whole lot of sense. But we, we've seen it in practice, and we've seen it in a few NAD cases so at least just something to watch.

And finally, if the statement has an E-R at the end, better, fancier, more wonderfule, it occasionally can be a puff. We have seen some better claims where they've been found to be a puff, but anything with an E-R is more likely to be comparative. And if it is comparative, it is probably not a puff. So, make sure your marketing people understand the limited applicability of the puffery defense. There is often a knee-jerk reaction to say, oh, it is a puff, you can just ignore it. But that is not the right mindset. And again, keep close track of those puffs and make sure they are on an island all by themselves.

Kaufman: On Gilligan's Island.

Mudge: Like with Gilligan's Island. Yes. If they're coupled up with other stuff, they might well be a claim.

Kaufman: That is amazing, and we brought it full circle. So, thank you so much everyone for joining us here on AD Nauseam.

Brave: Thank you, Amy and Daniel. If you have questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law blog at www.adventures-in-law.com, and check out AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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