Podcast Transcript

AD Nauseam Ep 42 – The Fine Print: Why Truth in Ads Matters

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Guest: Amy Mudge and Daniel Kaufman **Host:** Randall Rubenking

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For questions and comments contact:

Amy Ralph Mudge

Partner
Washington D.C.
T: +1.202.861.1519 | amudge@bakerlaw.com

Daniel Kaufman

Partner
Washington D.C.
T: +1.202.861.1523 | dkaufman@bakerlaw.com

Rubenking: 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 Randall Rubenking, 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 are back to discuss the topic of disclaimers in advertising. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: And welcome back to AD Nauseam. Daniel, how long have we been doing this podcast?

Kaufman: Amy, it has been just about two years, if you can believe that, and this is going to be episode number 41.

Mudge: Episode 41, we passed a milestone there with 40. Well, you and I passed that a while ago ourselves. But it is survivable. But get out of town, man. That is amazing. I don't, I actually don't think I've stuck with anything in my life that I wasn't legally required to do for that long.

Kaufman: Amy, I can't believe 40 was that long ago. But that is for another episode. But it has been a blast, and we never, ever run out of things to talk about here. Whether it is pop culture obsessions or the stuff of advertising law, which I guess is our focus. But there is one topic we have dodged. We have avoided it for a very long time. And I don't know…

Mudge: Oh…

Kaufman: …it might…

Mudge: …don't say it. No, no. No, no.

Kaufman: It is the question we get asked most, more than anything. We are going to tackle that issue of disclosures.

Mudge: Well, alright, Daniel. You said tackle and I'm going to divert you first. So, can we first talk about our favorite Super Bowl ads from this year? I will tell you, I will jump in, I weirdly love the facial hair ones. The Eugene Levy's eyebrows in the Little Caesars' ad, and then the flying mustaches in Pringles', I just, they gave me great joy.

Kaufman: So, how did we end up with two Super Bowl ads dealing with facial hair? I thought that was sort of fascinating, but I have a few thoughts. I will say, I was a little bit underwhelmed this year by some of them.

Mudge: Oh, faugh. By the Super Bowl? By the Super Bowl, yes. By the ads, you were underwhelmed?

Kaufman: It was under, and let me say, I will say this, the Seal one, if I never see that Seal ad again, I'll be okay with that. I'm sort of traumatized by it.

Mudge: There is a creepy ad every year, and that was the creepiest.

Kaufman: That was by far the creepiest. But I have to say, seeing Billy Crystal and Meg Ryan again teamed up, I really enjoyed that. It was retro. It was fun. It was a nice touch.

Mudge: Yeah, you know what? And did anything tug at your heartstrings? Because I have to say, I'm kind of infamous in my household for crying at commercials and then my family makes fun of me. I have to say, I teared up three times this year, literally. The Pfizer cancer ad with the little child running through the streets, the Nike You Can't Win ad, and I love the Hims weight loss ad.

Kaufman: Okay. Amy, as soon as I see it is an ad that is going to touch at my heartstrings, I instinctively look at something on my phone in order to, I got the ice cold heart. You know that. But Amy, if you're crying at ads, we need to get you some medication.

Mudge: Alright. Well, I medicate with snacks, so I'm okay. But what was, oh, and speaking of snacks, what is your favorite Super Bowl treat?

Kaufman: I am big on nachos. Nachos, wings, and wings.

Mudge: Oh, and wing, nachos slap. We could talk about what kind of wings all afternoon long. But I know mine is pigs in a blanket, and I'm going to use that as a segue. That is back to our topic of disclaimers, or how important material information, we'll call that the pig, can be adequately disclosed in the context of the ad, or the overall blanket.

Kaufman: Okay. I am a big pigs-in-blanket fan, but that felt a little bit forced, Amy, I got to tell you. But good on you for getting us back on track. So…

Mudge: There you go.

Kaufman: …the FTC did set out the standard we used for a long time with the magic language that disclosures had to be clear and conspicuous. And we referred for a while to the four Ps: placement, proximity, prominence, and presentation. And the FTC advertising enforcement orders often had definitions of what constituted clear and conspicuous placement of disclosures. And last, but not least, of course, there are the .com disclosure guides for online disclaimers. Which, as you may remember, were being reviewed a couple years ago by the FTC and we never quite got that revisions out the door. But all of these oldies, some of them, but not all goodies.

Mudge: They had a really good long run. We can say, that is, we were, those four Ps had a legacy.

Kaufman: Inevitably, Amy, I was thinking of the four Ps and it would just, I couldn't remember the fourth. And each time it was a different fourth I couldn't remember. It varied.

Mudge: Oh I, it was always presentation for me. I never, I was like, what even is that mean? What? But I don't. Four Ps, clear and conspicuous, .com disclosures. And we also had the network guidelines, right, for disclosures. And those were really the minimum requirements for disclosures to get your ad on network television, with some specifics on font size and length of time on the screen. The FTC and the NAD have been very clear that these are minimum performance standards and not necessarily legally sufficient, depending on the type of disclosure. Right? Not, all disclosures aren't created equally. But when you've got really material information that's got to be imparted, those network standards might not have cut it for the FTC or the NAD. But we do also, we have the, well, we have the CARU Guidelines, if you're talking about disclosures in ads to a child audience. But we

really do have tons and tons of NAD cases that go into lots of detail on what constitutes clear and conspicuous disclosures in all sorts of ads. Labeling, video, prints, door signs, social media, billboards, etc. But it does feel like the standard we knew for a long time took a sharp turn in the last couple of years.

Kaufman: Yeah. The FTC definitely changed up its lingo and now we have references to disclosures being difficult to miss or likely to be seen and appreciated, to probably what is the strictest articulation, I think, a disclosure must be unavoidable. But what we want to explore today is whether these are just sort of new labels for what we already know or if the standard is really changing. And never one, of course, to bury the lede, I think we are in a new age of what is and is not acceptable for disclaimers.

Mudge: Yep. Daniel, I agree with you there. But let's start out with the basics because some things haven't changed. We know that a disclaimer is appropriate to use to provide additional clarifying information that is needed to put a claim into proper context. Right? What a disclaimer can't be used for is to contradict the main claim. I often sometimes say you can't promise it all on the headline and then whisper in the fine print, I didn't really mean that.

Kaufman: I like the way you frame that, Amy. And that the trends at the FTC and the NAD is to frown on the use of disclaimers altogether, and to really push advertisers to consider if the claim itself can be framed in an appropriately narrow way to get rid of that need for disclaimer text. And really, it is not just an enforcement or a regulatory trend. A lot of advertisers want clean copy and don't really like the muddying visuals with the fine print. And some studies have suggested consumers don't necessarily trust ads when they have a lot of that disclaimer text in it.

Mudge: All really fair points, Daniel. And yes, advertisers these days should start from the premise of, can I write my claim, can I write my copy that eliminates the need for disclosure? But you can't always avoid a disclaimer. Sometimes you just, you can't get it all up in the headline. But it is a really good place to start seeing if and how a claim can be framed to be self-contained.

But let's discuss some of the specifics for when you are using disclaimers or disclosures. I'd like to first start talking about labeling claims. Daniel, can you walk us through, I think a very, very interesting case, the *Aromaflage* case?

Kaufman: Yeah. This was a really interesting one and it does date me back to my time as a deputy director over at the FTC. So, this was a case about the adequacy of substantiation for claims that a bug spray during the Zika outbreak would protect wearers. And the case got a lot of attention over its use of Olympic athletes who were heading to the games in Brazil. And it addressed issues of native advertising, influencer disclosures, and consumer reviews made by relatives, allegedly, of the company owners. But the order interestingly required any disclosures on product labels had to be made on the principal display panel or the front of the package.

Mudge: And this was the first time I remember seeing the FTC requiring specific geographic placement for a label. But in this labeling context, there actually, there have been some class actions out of the Ninth Circuit that provide some guidance in this direction as well. And another super classic case, a class action case from 2008 involved Gerber Fruit Snacks, where the Ninth Circuit said that at least on a motion to dismiss, the back label will not be considered if the front of pack contains false or deceptive information. But I think this is one where some of the private cases tend to be suggesting there is a shift.

Kaufman: And Amy, I think we have those fruit snacks in our pantry here. And I have eaten a few too many of them over the past 40 episodes.

Mudge: Oh, I love a fruit snack. They are not just for kids and school lunches. They are a delicious, tasty treat.

Kaufman: But then we have, so, in 2023, *McGinity v. P&G* and the Ninth Circuit said, unless the front of pack information is unambiguously deceptive, you can look at the back of pack at the motion to dismiss stage. And then just last year, the *Whiteside* case, the Ninth Circuit said, the question is whether consumers would need more information. And they endorse the use of a sort of asterisk or a star on the front of the pack to direct consumers to the backside of the package. Didn't expect to see that sort of asterisk given an affirmative nod by a California Appeal court, but it is good news for advertisers and does suggest that road map is an important first step.

Mudge: You know I'm a glass-is-half-full person. So, we do like to start with where things on the disclosure front are loosening up a bit, and this labeling one might be one of them. But these labeling cases also have been in the context of products where consumers really need to look on the back of the label to understand how to use a product. Like what is in a serving of a dietary supplement? Or how much detergent do you need for a load? To that extent, it really is still a best practice to get critical information about a claim on the label right next to the claim it modifies.

Again, even though some of these cases suggest a little bit of loosening up, it is too early to set aside what we know, putting disclaimers in close proximity to the claim they modify is going to be important. And even outside of labeling cases, the NAD's been recommending that some disclaimers appear directly contiguous with the claim. I've heard some marketers call this, I love this term, a juicy super. Okay? So, the disclaimer, the text might be slightly smaller in font, might not be as bold of a font as the main claim, but it is directly below or beside a claim it modifies. I mean, this is just another best practice. Small font, bottom of the screen or page is becoming increasingly disfavored.

Kaufman: So, Amy, I know you and I both love our TV advertising, but let's jump online a little bit. There was almost panic in the streets last year when the FTC sent out some warning letters and made statements in the Testimonial and Endorsement Guides that disclosures in video social media posts should be in both audio and writing in the video itself.

Mudge: Indeed. NAD has actually issued very recent cases, including this dual audio and video requirement. These cases were focused on the material connection disclosure, not so much a modification of a product performance promise. But still, another aspect where we look at disclosures a lot. And a case involving an NAD claims for tooth whitening, of Hismile, the NAD looked at, well, they looked actually at both product demo videos and influencer videos. And they specifically recommended that any material connection disclosure be in both audio and in writing in the videos.

I was recently at the ACI Advertising Claim Substantiation Conference in New York and there was a great influencer presentation. And Penelope Barnett, in-house counsel at Colgate, showed an influencer video where the influencer talked about her partnership with Colgate leading up to her wedding, and then the video also had a hashtag disclosure. It was super clear, definitely unavoidable. But it was also really organic and really natural. So, I think in other words, good marketers really can present multiple disclaimers, even in ways that don't detract from the ad itself.

Kaufman: I love when you see that done so well in advertising. Really, it is wonderful.

Mudge: And Penelope said she didn't even have to beat up the marketers or ask them to do better. This is what they, this was their first attempt and it just, it nailed it out of the park. So, it is possible.

Kaufman: Yes. But to be clear, we still operate in a world where both the FTC and the NAD do not think that the ad disclosures provided by the platforms are sufficient. Now, I have personal views on that. But we know that is what we're hearing and have been hearing from, certainly, the FTC and the NAD. But yet advertisers have to use them, of course, in order to comport with platform rules. And we all wonder if a platform will, at some point, offer something that enforcers are happy with. But in the meantime, it remains very clear, until you hear otherwise, that use of the platform disclosures for material connections are, by themselves, not going to be sufficient.

Mudge: Absolutely. But while we're talking about material connection disclosures, let's talk a bit about how to make them clearly. Daniel, what has the FTC told us?

Kaufman: The FTC wants their disclosures to be unambiguous. So, it is ad, it is advertising, it is sponsored. Now there are some terms like ambassador or partner. They've said it is okay to use those, but only in connection with the brand name. So, it is going to be Acme partner. If you've got shorthands, like spon or part, that is not going to fly. Those are disfavored. And running together disclosures with all lowercase letters is also disfavored. You got to look at it and see, is it going to be readable?

Mudge: Unavoidable, likely to be noticed, seen, and appreciated, that newer FTC language.

Kaufman: Twenty letters of small lowercase might not be that readable.

Mudge: And the NAD issued a rash of recent monitoring cases where they took these guidelines from the Testimonial and Endorsement Guides and put them into practice. They affirmatively recommended that advertisers make changes. There was a case involving Drunk Elephant cosmetics where NAD found the disclosure, drunkelephantpartner, in all lowercase was not sufficient and recommended using capital D Drunk, capital E Elephant, Capital P Partner. In another very recent case involving REVOLVE clothing, the hashtag, giftedbyrevolve, was found to be ambiguous when influencers were given free product to write about. I mean, frankly, I think I found that one a bit extreme. Sarah Lavoie wrote a good blog on that basically coming to the same conclusion.

But I think the point is NAD is out there affirmatively looking at how brands are making disclosures in the influencer context, and they're opening cases if they see brands that are not following FTC guidance. Even though we haven't seen FTC enforcement actions that go into sort of this level of detail, the NAD is forcing what the FTC has recommended.

But Daniel, we did it. We survived it. It wasn't as painful as I thought it was going to be. But why don't you bring us home with some takeaways?

Kaufman: I am so happy to bring us home, Amy. So, okay, first, try to put out ads that maybe don't need disclaimers or disclosures by making the claims narrow and self-contained. Number two, alternatively, because of course disclaimers are going to have to exist sometimes, if you are using a disclaimer for really key material information, consider using less of a traditional disclaimer and more subtext. The key language that is connected to the claim. Third, if you're using a disclaimer in a video ad, don't use the network guidelines and just call it a day. Pump up the size, contrast, and length of time on the screen for your key disclosures. Fourth, for online influencer videos, if the influencer is talking about the product and showing it, really try to get a disclosure of the partnership spoken and in a text overlay. And finally, really incorporate the specifics of the FTC guidance regarding influencer disclosures if you want to stay away, and think we all do, from an NAD action.

Mudge: And that is a wrap on our first, probably not our last, disclosure episode. And it was good to talk about it. We should talk about these things.

Kaufman: Little bit of pain. A little bit of pain, but not too much.

Mudge: No, they're a fact of life. Just got to make sure that we're doing them the best that we can.

Kaufman: We're learning about the facts of life, right, Amy?

Mudge: Yes. But thank you all for joining us, as we hope you do every other week, with us on AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any 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 all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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