Podcast Transcript

AD Nauseam – An Ad Is Not an Ad

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Corbett: 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 Connor Corbett, your new host of AD Nauseam, 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 explore the legal and regulatory challenges of deceptively formatted advertising, often referred to as native advertising, focusing on how the FTC and NAD assess whether consumers can recognize content as advertising. Through case examples and policy discussions, they emphasize the importance of clear, conspicuous disclosures to maintain transparency and consumer trust. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel for this week's episode on native advertising.

Mudge: And welcome back, everyone, to AD Nauseam. Today, we're going to turn to another one of those evergreen topics. Whether you call it native advertising, like probably marketers do, or deceptive formatting, like the regulators might choose to call it, it is really the question of whether, how do you make sure that an ad is interpreted by consumers as an ad? And as consumers are looking at their screen and they're thinking it is a news show, are they aware that it is really a news show and instead it is an ad for a new product in a news show format? It is an issue that's been around forever and ever, and it is one that though should always be front of mind.

Kaufman: Yeah, so we are talking whether we can tell the ad is an ad, and that somehow makes me think of some awesome episodes of the British Baking Show, which I think the new season is dropping, I think, this week. But anyway, there is some great episodes where our wonderful bakers would make a cake that didn't quite look like a cake. And I remember some really good ones. There was Yan's cake that looked like an amazing dish of ramen, Liam had this amazing stack of pancakes, or the absolute best one, Sophie had this amazing champagne bottle and bucket that was a cake. It was just amazing. I know I'm a huge fan. I know you appreciate the show tremendously. Any favorite baking show memories for you, Amy?

Mudge: Oh, you're trying to get our listeners to be converts. You're trying to pump up. I like that. Yeah, look, I am not quite the mega fan you are. It is not, I mean, we talked about this. I love reality television. But to me, it is not like a drag race or a Project Runway or even like a Real Housewives. It is something I so enjoy when I sit down to it, but it is not my must-see TV. But I do call the Great British Baking Show TV Valley. I watch it when I'm stressed or when I really need to relax because it is so lovely. So, I would say what I like is, most about the show and my memories of it are just so genuinely supportive everyone is. And they're actually sad when people leave. It is, you know, it is so unlike Survivor or any of our many other voting off the island American shows where it is just so cutthroat. This is like family. But if I had to pick a show, one time they made croquembouches, which are this giant Christmas tree looking thing of profiteroles, stack of, it is just really niche, bizarre dessert and everybody made them and it just made me really happy.

Kaufman: Yeah, and I think, look, the other big distinguishing thing is they're not playing for $1,000,000. They're playing for that civic cake holder at the end, sort of thing.

Mudge: Wait, what? That is all they win?

Kaufman: They don't get any money. They've gone on, the winners have gone on to make a lot of money through cooking books, _______, and all that stuff, but there is no cash prize.

Mudge: They cook in a tent. They don't even have air condition. They cook in a tent and there is no cash prize. Whoa.

Kaufman: Lack of air conditioning, that would be rough.

Mudge: This would never happen in the great old U.S. of A. I'm just telling you.

Kaufman: My two favorites, and I will always, the episode, spoiler alert, where Nadia wins and at the end, they're talking to her and she is talking about how she never thought she could accomplish something like this and did it, brings tears to my eye every time I watch it, and I've seen it multiple times. And my other second favorite is Kim Joy, who made just the most delightful, whimsical, sort of lots of little cartoon characters and stuff in her bakes. And she was just a wonderful person. I follow them both on social media, and there are just so many delightful people that are part of that show.

Mudge: Well, this is also the favorite show of one of our mutually favored people, Leslie Fair, of course, who could probably write an encyclopedia about her favorite episodes.

Kaufman: Yeah. But so, Amy, now turning to the topic at hand, I want to get this started by talking about me.

Mudge: What? Shocker. Shocker, Daniel.

Kaufman: One of my favorite topics, but no, okay, not exactly me, but one of the cases I worked on early in my FTC career. It was the early 2000s and infomercials were the rage. And there were quite a bunch of infomercials that were doing what I would call a fake news show format. You had two people talking behind, often an anchor desk with a 30-minute program talking about some amazing new discovery.

Mudge: I do recall seeing many of those a while back, and there was a period of time where the FTC was really hot and heavy going after all sorts of infomercials. There was also the, in addition to the news format, there was the talk show format, of course, where there are lots of different flavors, but there were lots of consumers that were buying stuff from these late night shows, and the FTC was quite active.

Kaufman: Yeah. And one of the cases I worked on involved an infomercial for a product called Supreme Greens. And like a lot of products back then, the infomercial featured a lot of pretty strong health claims, but the core presentation was two people in a newsroom-type setting presenting the product and discussing all the great results. And one of the FTC counts in the case alleged that through the presentation of the infomercial, the defendants represented that the program was an independent television program and was not paid commercial advertising. There were some modest disclosures that weren't particularly conspicuous.

Mudge: I do love a trip back to the 30-something Daniel working up a case. But this one, of course, is one of those rare FTC advertising cases that was litigated. And I think this one eventually got to the First Circuit. Now, the litigation focus wasn't really on that deceptive format issue, because there were a wealth of other issues. I think it is fair to say the greens were neither supreme nor maybe even green.

Kaufman: They were green.

Mudge: Oh, they were green. Okay, alright. Supreme was a question. But it is an important reminder to the industry that disclosures are really important. And if you're presenting something in a way that can be reasonably construed as independent programming, or what we now sort of refer to as editorial content, you've got to take some real steps, meaningful steps, to undo that impression.

Kaufman: Now, I should disclose, I worked on the case for quite a while but did not get to go to trial because I'd moved on to a different role in the agency by then. But I will say, one of the issues I know I wrestled with in that case was, well, how many news shows also present a 1-800 number where you can call in and buy something? That issue never really got teed up in the litigation, but Amy, why don't you get us some better grounding and let's talk policy statement.

Mudge: Oh, I love policy statements. We focused so much on rules in the last year. Talking about policy statements is one of my favorites. And this was an important one. It was from 2015. It was the enforcement policy statement on deceptively formatted. And it came out the same time that the FTC dropped the native advertising guidance. But this was this overarching document. And it provided details regarding really the general principles that the FTC considers when determining whether an ad format is deceptive, and hence a violation of the FTC Act. And look, and the starting point, though, is that advertising that is not identifiable as advertising is misleading. If it misleads consumers into believing they're independent, impartial, or not, I'm harkening from the sponsoring advertiser itself. And look, the source of a promotional message can certainly affect the weight or the credibility that consumers give to that. And that, according to the FTC, is quite material to consumers.

Kaufman: Yeah, there have been cases in all sorts of areas, and the statement has a really good recitation of some of the stuff or things that the agency has seen. They've seen advertorials that appeared as news stories or feature articles, direct mail ads disguised as book reviews, infomercials presented as regular TV programming, in-person sales practices that misled consumers as to the true nature and purpose. We've got mortgage relief ads designed to look like solicitations from a government agency, emails with deceptive headers, and paid endorsements that are offered as the independent opinions of impartial consumers or experts.

Mudge: Well, that is a lot. That is a whole laundry list. But what is the agency focused on? Well, the core, of course, is the overall net impression, not just statements in isolation. The Commission is going to look at the ad as a whole. I mean, this time, sometimes it is a very long ad, like in the case of an infomercial or a commercial-length ad. But they're going to look at the total overall appearance, the similarity of its written and visual style to non-advertising content, and really the degree to which it is distinguishable from other content. How do reasonable consumers interpret the ad in a particular situation? And this would, of course, include any qualifying information that is actually contained within the ad. So adequate disclosures will help. And are there really any audio or visual clues that will help consumers understand the nature of what they're seeing?

Kaufman: The other thing I really like about this policy statement, and this is also great for our listeners who want to delve into FTC history a little bit more, but it is the extensive focus on FTC history in this space. And there is a discussion of so many cases and considerations over decades of jurisprudence to make sure that at its core, no matter how creative advertisers want to be, and we want them to be creative, you still need to make sure that your thing is identifiable as an ad. It is a real compelling read.

Mudge: Yeah, I agree. I just want to go back to a lot. Couldn't agree more, Daniel. It is certainly in my top three, I would say, in policy statements, if I was giving Amy's rankings. But there is a long history of these cases, as you said before, that involve things that look like newscasts or news reporting. And I think that there have been FTC cases, though, maybe not your one that litigated, but that do focus exclusively on the format issue. I think if it wasn't the first case, it was one of the first cases, the *Blue Blockers Glasses* case, and that didn't actually go into whether Blue Blockers blocked blue light, it was exclusively focused on that news formatting and whether people understood what they were looking at was an ad.

But yeah, before that policy statement issue, the FTC really had a sweep of those cases in the early 2010s. And in that era, they really focused on weight loss claims and lots on that acai berry supplements. And in those cases, we also saw a wide variety of websites, right, many that were part of affiliate marketing networks. And those were really dressed up to look like legitimate news gathering organizations. There were things called News 6: News Alerts and Health 5 Beat: Health News. And as the one and only David Vladek noted, almost everything about these sites is fake. The weight loss results, the so-called investigations, the reporters, the consumer testimonials, and the attempt to portray an objective journalistic endeavor.

Kaufman: But it is not all news, of course. There are countless other contexts where there could be, and often is, confusion about whether I'm looking at something that is indeed an ad. And Lord & Taylor, the renowned department store, had a bit of a tussle with the FTC about 10 years ago in connection with some native advertising that featured a very fetching, asymmetrical paisley dress.

Mudge: Yes, and I'm glad we're moving on to the more legitimate uses of native ads. Because not all of these ads that don't necessarily look like ads are inherently wrapped up in deception. Quite the contrary. Good marketers want to be involved in the conversations of the day and not just be an ad break, interruption in the conversation. They want their products and services discussed in the mainstream.

So, Lord and Taylor looked at a dress it featured and how it could be styled. Now, to be clear, the case did not focus in any way, shape, or form on the fashionability of the Paisley dress. Daniel, I'm sure you would argue that there could be some unfairness issues there, but the concern was the marketing behind the dress, and that included a social media plan and a team of fashion influencers that were recruited based on their extensive base of followers. The dress was gifted to these influencers, who were also paid to post a shot of themselves wearing the dress. And the influencers were also given some specific details about the posts, including tags. But notably missing was Lord & Taylor telling them to disclose that they had been compensated for the posts. And these posts were also allegedly pre-approved by the company.

Kaufman: And according to the complaint, the campaign was a real success, reaching more than 11 million Instagram users. and over 3,000 brand engagements with Lord & Taylor's own Instagram handle. The campaign also featured some paid appearances at some online fashion magazines, but again, no disclosures.

Mudge: And the company settled with the FTC. Our dear friend David Mallon represented the company in that case. The complaint alleged that it was deceptive for the post to imply they were independent statements of the influencers, and the failure to disclose the material connection was a deceptive practice. As part of the settlement, the company agreed to, among other things, clearly and conspicuously disclose any material connection that might exist.

Kaufman: So, Amy, this is of course an area where the NAD and the FTC have both been really active, and I don't want to give short shrift to the NAD's work in this space. One thing I was wondering at the outset, are the NAD cases here mostly monitoring cases, or do we sometimes see competitor challenges on the issue of native advertising?

Mudge: They are almost all monitoring cases, but not all. We do on occasion see competitor challenges. And there have been an evolution at the NAD. A lot of the cases there focused on review sites and whether they are objective review sites or whether there is an advertising component. But you know, before the FTC issued the native advertising guides, the NAD issued a bunch of decisions to try to provide advertisers with guidance in what then was an emerging area. The FTC had announced a workshop on native advertising, and it was busy gathering information, and it was learning about what then was a new concept rather than rushing to enforcement. You know I call that good government. But the NAD saw marketers struggling and so wanted to lay out some early principles. A lot of these initial work came from former director Laura Brett when she was new to the NAD as a staff lawyer. I mean, these cases have actually really stood the test of time, including a case involving articles placed in online publications about Qualcomm processors.

Kaufman: And the NAD gave us guidance where there were review sites that were hosted by and written by brands selling those products, including a website about trampoline safety hosted by a trampoline company. Or more recent, similar cases about mattress review sites hosted by a mattress company. NAD didn't say such sites were inherently deceptive. A manufacturer or a product may be a great source for information about the safety of products in the market, but disclosure is key. Readers understanding before they engage with the content, who is behind the content.

Mudge: The trampoline case was a competitor challenge. I had no idea that the trampoline business was so heated. But you know, that is this idea again behind the testimony endorsement guides that just consumers need to understand when there is that material connection to a marketer in any content that they're consuming, not because it is inherently deceptive, but because at least some of these consumers want to know about that connection. And the word, I think we said this before, is some people want to decide how much weight or credibility to give the source.

Kaufman: Absolutely. And this concept is a really big part of the sweep of monitoring cases that the NAD brought, looking at listsicles or articles with a listing of top cosmetic products, for example, and reminding marketers to make affiliate relationships clear.

Mudge: Yeah, and a really important thing to remember is that while lots of stuff that harken from a brand is advertising, not all of it is. I mean, if a brand publishes or pays to publish content about its products, services, or about its product or service category, no question, that is advertising. But if a brand is publishing other content, that might not require a disclosure that it is advertising. And Daniel, I know you have had many star-making moments at the FTC. I had exactly one, and I was invited to speak at the Native Advertising Workshop. I know there is a video or audio recording of this somewhere that I hope will stay buried, but nothing stays buried on the internet forever. But one of the things I really liked about the workshop is this was something that was discussed, and the FTC recognized this when the guidelines came out. And an example is that they gave is, if a tennis shoe company markets an article about shoes, okay, that is an ad. But if a tennis shoe company sponsors an article about the best vacation destination for tennis players, that is not necessarily advertising. Now, the tennis shoe brand probably wants to make sure you know it was behind such content, similar to when a brand sponsors a sporting event or a concert, but that sponsorship itself doesn't mean that the content is advertising.

Kaufman: Yeah, it is a real interesting point. But we're talking today, of course, about the stuff that is advertising, that needs to be disclosed as advertising. And the FTC tells us such disclosures need to be clear, conspicuous, and unavoidable. And we know that means above the fold in a social post, not buried in a string of hashtags. And we know in articles, this needs to be at the top of an article before a reader engages. And for infomercials, that disclosure needs to be repeated for people who tune in midstream.

Mudge: Absolutely. And there's a great recent case from the NAD that gives even more prescriptive guidance. And this is a monitoring case involving a trusted company reviews site. Now, one thing that NAD is starting to do, and it is awesome, is to include some of the ad copy at issue in its decision rather than just describing.

And that is far more helpful for marketers who look to NAD cases for guidance. And for review sites that include reviews for companies where it receives affiliate commissions, the NAD said this needs to be identified, and the companies from whom you receive the commissions need to be identified. Further, that the call out that there is a material connection needs to be, they said, both at the top and the bottom of a listing in prominent type, and this is not via pop-ups or any kind of links.

Kaufman: So, Amy, what are some of the key things or issues we should think about from the FTC and NAD perspective?

Mudge: Alright, so, when marketers want to create engaging content, and when do they not? Thought needs to be given as to whether the content needs to be identified as advertising. The default probably is that there should be disclosure. But assuming so, how this should be accomplished is also something that lots of thought needs to be given to. Calling something an advertorial or advertising may be a best practice, but it is not the only way. You need to avoid ambiguous terms, but making clear the content is written by or produced by a brand is likely a clear message. And that sponsorship element needs to be disclosed right away at the top that something is sponsored content and who the sponsor is. And that brand connection needs to stick with the content when it is shared. Hiding the ball about who is behind advertising is absolutely likely to be a problem with not only the FTC and the NAD, but probably also a problem with keeping consumer trust as well.

Kaufman: Amy, wise words. And with that, thank you everyone for joining us for another episode of AD Nauseam.

Corbett: 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.