



Podcast Transcript

AD Nauseam: Beauty Claims – You’ve Got the Look

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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 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 substantiation for cosmetic advertising claims, outlining how companies can effectively promote beauty products without crossing regulatory lines. With that, welcome to AD Nauseam, and let’s turn it over to Amy and Daniel for this week’s episode.

Mudge: Welcome back, Daniel. You look well rested and relaxed from your lengthy Mediterranean cruise. Tell us all about it.

Kaufman: I was about to say delighted to be back, but I really can't say that with a straight face, Amy. No, I had a wonderful trip. It actually was a transatlantic that went from New York City to Barcelona with a few stops in between. It was my first time doing a two-week cruise, and I had a blast, spent a little time in Europe afterwards. But I'm back now. But it was fun. I was a little worried about two weeks on a cruise ship because...

Mudge: Yeah?

Kaufman: ... a lot of days at the sea. I had a great time, great food, spent time with some good friends. It was wonderful.

Mudge: Right. So, you're clearly pro cruise. I mean, cruising is a very polarizing form of vacationing, but you did inspire me. And I'm taking my own two-week cruise later this summer, notwithstanding the news that everyone's been reading about lately, but we'll see if it is for me too. But dear listeners, send thoughts and prayers. I'm not sure I'm a boat person, but we will figure that out. Now, Daniel, can I ask, did your boat have a spa, and did you visit it if so?

Kaufman: So, this is only my second cruise. Actually, my first cruise, I did get a great facial on the ship, but I did not do that again this trip. Didn't use the spa.

Mudge: Right, well, I thought that was a good segue or at least an attempt at a segue in today's topic.

Kaufman: It was good. It was good.

Mudge: So, do you have favorite cosmetic products or beauty rituals you'd like to share with our listeners?

Kaufman: Oh, Amy.

Mudge: If you say drink a lot of water and get a lot of sleep.

Kaufman: No, I drink a lot of diet soda, and I drink a lot of coffee. And my Samsung Watch keeps on telling me I'm sleeping awfully, so I am doing everything wrong at the moment. My skin care regimen I do, but I will say I switched it up about a year ago. A good friend of mine sent me a care package of this Korean skin care stuff. So, I switched to that, and I feel like I'm seeing results, but I am the ultimate placebo effect when it comes to a skin care regimen. As soon as I start using something new, I'm like, I look three months younger. So pretty vulnerable to all of it.

Mudge: You always look good to me. We'll dabble with this offline because I do want to hear about the Korean stuff. I have to say I've become a new adopter of eye patches. I don't know at what age I developed giant bags under my eyes, but I'm exploring all of these. I like Summertime Fridays. I like Patchology. I like Augustinus Bader for a splurge but that is my new go-to. So, Daniel, let me ask, have you ever fallen prey to cosmetic promises that might have fallen a bit short?

Kaufman: So, I can't say they've fallen short yet, but I am using a red-light therapy device now also. So, giving that a try. I'm approaching a big number in the near future. So, we're trying everything, and maybe something will work magic. We'll see.

Mudge: For me, it's always been self-tanner. I'm on a lifelong journey because I am translucent. I meant how pale I am, and I've been on a lifetime journey to find one that doesn't stink, doesn't turn you orange, doesn't go on streaky. And I'm probably more prone to these than you are, but hair defrizzers. I've also probably bought every product for defrizzing your hair since we live in D.C., and it is a literal swamp, and none of those seem to work well for me either.

Kaufman: Yeah, and I will say coming back to 95-degree heat just a couple days ago was not enjoyable. But anyway, Amy, shockingly sounds like you have fallen victim to some perhaps overhyped cosmetic claims. Our topic of today and how to avoid them, of course. So why don't you set the table for us with the basics?

Mudge: Sure, Daniel. So, cosmetics are one of those product categories where the FTC and the FDA share dominion over product claims. Now there is no federal preemption in this area, so states can and do get involved, particularly California, over ingredients used in cosmetics. The FTC has oversight for advertising and the FDA for product labeling, similar to what we see in dietary supplements or other products that the FDA regulates. There is a new federal law, MoCRA, that gave the FDA expanded authority for safety, but of course, on AD Nauseam, we're going to focus on product efficacy claims.

Now, the FDA has said that cosmetic claims should focus on beautifying or on altering the appearance types claims, and they should not include structure-function claims or how products can affect or alter bodily function. And that is a little bit of a hard one because we're used to structure-function claims being acceptable in the cosmetic realm. Now, of course, cosmetic claims should never veer into drug territory, promising to treat or cure any disease or condition. Now, that one sounds easy, but it can get tricky with things like claims about hair growth, alright? Or because we know that there can be conditions that cause your hair to fall out, and that can veer into the drug space versus there can be perfectly appropriate claims about making hair appear thicker, et cetera. So, figuring out what you're saying and where you fall in the continuum is really important.

Kaufman: Yeah, so the FTC has never made cosmetic claims an enforcement priority the way they have with diet sups, but the agency absolutely has investigated and brought cases where there were real overhyped performance claims. And some classic examples are the FTC's case involving L'Oreal, which made claims that one of its lines was quote, clinically proven to boost genes' activity and stimulate the production of youth proteins. But according to the FTC, the company didn't have any testing of its products or even its ingredients. And these are establishment claims. The claims itself tell you that L'Oreal did a clinical test on its product. And this means in a lab, in controlled conditions, testing the product on actual humans.

Mudge: Oh, I want to know what youth proteins are. I want those. Sign me up. Yes, please. Yes, please. Well, because the FTC has not been super focused on cosmetic cases, the NAD often has stepped in here and for years has brought monitoring cases on and off but pretty consistently in the cosmetic area. And the NAD has really given us a good understanding of best practices for how to substantiate appropriate cosmetic claims. And it is a very good idea to have some objective lab testing of product performance but coupled with consumer use sensory testing.

So for example, if you're promoting a hydrating moisturizer, there will be lab testing of the product using standardized equipment such as a corneometer to test the skin's surface hydration or a TEWL test to test for transepidermal water loss. And we've got to make sure these types of tests are sufficiently powered. Typically, at least 30 people is an important threshold and that there is going to be other controls there, such as blinding, testing at baseline for a control. And these are just some of the considerations that would go into making sure that the testing is competent and reliable.

Kaufman: The NAD has been clear about what kind of testing is required for different kinds of claims. If the claim relates to the objective performance or efficacy of a product, then there needs to be lab testing. You can't rely on consumer perception studies to support claims about whether a product objectively works or not. And in a case last year involving Bubble skincare, there were claims that products cleansed, moisturized, and provided sun protection for users under the age of 13. Bubble provided safety data and the results of an in-home consumer use test, but NAD found that these were objective product claims that needed to be lab tested on the target audience.

Mudge: Absolutely. But IHUTs are still really important. They are used to support sensory claims about how a product makes skin or hair look or feel. So going back to my saying a product hydrates, that does require lab testing. But saying consumers report their skin felt more hydrated, that is going to require sensory testing. And NAD really likes to see them both together so there is objective proof that a product does what it says it does, and with the sensory testing, that you've got consumers that can actually see or appreciate noticeable results. So those two together are really important. But so those general claims about how a product works requires lab testing. Claims about how a product makes you look or feel requires sensory testing. But the one plus one definitely is the way to go.

Kaufman: And sensory testing is important to design the correct way as well. There was a case from 2024 that involved the Solawave Advanced Skincare Wand, and the NAD found that the sensory test suffered from fatal flaws, including the lack of a washout period where participants were instructed to stop using any anti-aging products before starting the test. Then the participants were not instructed to keep a diary but were instead asked questions at the end of the use period, such that NAD was concerned that it was more of a memory test rather than a recording of their reactions in real time. And you need to be careful to give consumers use instructions, often including a washout period from the use of prior products.

And then after using the products, questions have to be asked, of course, in a non-biased way. So, asking people how it makes their skin feel rather than asking them how soft does your skin feel on a scale of 1 to 10. So, and the questions, of course, need to match up to the claim you want to make. And in Solawave, this was an issue, for example. The claim was that 86% of users reported smoother appearance of fine lines, but the study asked participants if they noticed a reduction in fine lines with nothing about smoothness.

Mudge: Well, that seems a little picky. I think it is actually important. What I'm hearing here is details do really matter. And to make sure you have support even for some fairly benign claims like moisturizing, hydrating, smoothness, that you've got to have some substantiation for it.

Now, we of course can have absolutely no discussion about cosmetic claims without talking about those before and after pictures. They're used all the time in the weight loss context, but they're certainly used all the time with cosmetics. And those before and after pictures in and of themselves often are claims about how a product will perform. And so, some watchouts there that we've gotten both from NAD and from the FTC are those before and after pictures need to be taken in a uniform matter to reflect the level of product efficacy that a reasonable consumer can expect to achieve when they use the product as instructed.

In that *Solawave* case, for example, the lighting was clearly different, NAD said, in the before versus the after pictures. Even a more recent case just from this year involving Pretty Boy Cosmetics and there were before and afters of a skin care product, and these were user pictures, that showed reduction in redness. And NAD said, look, these pictures, we don't doubt they're real users' pictures, but you've got to have objective testing that demonstrates efficacy and so you know that the products you're showing in your advertising actually are showing typical results. There was another case from earlier this year involving a Revlon, a hair care, and there were before and after pictures there that showed hair smoothness and silkiness. But the photos showed a dry-styled hair, and the testing was done on wet hair. So, NAD said that the photos didn't match up to how the testing was conducted.

Kaufman: And there have also been a number of cases involving not before and afters but really just the afters, models in makeup or nail color ads. And NAD has considered challenges when such photos are enhanced, such as a case involving mascara, where the models were wearing the mascara, but they also had lash extensions. In these cases, NAD typically finds photos of spokesmodels to be a representation of how a product looks in real life, so touching up a photo that goes to enhancing the performance of the advertised product is likely going to be considered deceptive.

Mudge: There have also been lots of challenges over the years to ingredient or product makeup claims as well. And if you're using terms that your product is clean or simple, NAD has generally counseled that it is a good idea to explain how you're using these terms because they're not words or claims that have a uniform,

consistent understanding. So, adding more detail into how you're using these terms gives them context and gives them qualification.

Kaufman: Yeah, and along those lines, the FTC did bring a series of cases against makers of cosmetics, skin care, and sun care products that were making claims that their products were 100% natural when there were ingredients included that were artificial. And there have been many NAD cases looking at naturally and naturally derived claims as well. Similarly, NAD has looked at a number of cases that a cosmetic is free of a certain undesirable ingredient. And in these cases, NAD has said a product must be free of that ingredient but also should not contain other ingredients that have the same _____. So, an example is shampoos claiming to be SLS-free but that contain other sulfate-based surfactants. That can be a problem.

Mudge: Absolutely. Now, on the flip side of this, often cosmetic companies will want to promote when their products do have hero ingredients, alright? Things like hyaluronic acid or acai berry. We've seen coconut oil. But what if those ingredients are in the product in very small amounts, such that they're not drivers of efficacy? Sometimes in the dietary supplement context, that is often referred to as fairy dusting. There is an NAD case I come back to time and time again, over a decade old now, involving OGX shampoos and conditioners. And there what the NAD said is, in a cosmetic context you can promote the inclusion of your hero or exotic ingredients.

But you can't say or imply these products are in efficacious doses if they're not. In that case there were, the exotic ingredients were included in the product names, but the product name also included the benefit. And so, and NAD said, look, you've just got to separate out the calling out of the ingredient from any performance benefit. So, for example, the original name of one of their products was Nourishing Coconut Milk Shampoo. The NAD said, no, that really implies you're getting the nourishing benefit from the coconut milk. But NAD said, it might work if you said something like nourishing shampoo with coconut milk or nourishing shampoo plus coconut milk. So, you can see the adding in some separation there.

Kaufman: I did have a lot of good coconut milk-based cocktails on the ship but bringing it back full circle.

Mudge: That is why you look so smooth and relaxed. And probably it gets good to put it on your face and drink it down too. With a little while, you can only get better. Good on you, Daniel.

Kaufman: Well, let me sum up things. So, some of the takeaways here are watch that fine line between healing and fixing claims versus appearance claims. Nothing prevents wrinkles and no cosmetic is better than surgery or better than Botox. Objective performance claims need quality lab testing. Third, look and feel claims need consumer sensory data, making sure you're matching your questions to your claims very tightly. And number four, before and after or just after photos, are visual express claims and they need to reflect the results that typical users

can get when they follow the direction. Fifth, be specific and qualify terms like clean, simple, and natural as appropriate. And finally, don't overpromote your hero ingredients if they are not what is making your products work.

Mudge: And dear listeners, Daniel and I want to tell you, we think you are all beautiful just the way you are. We hope that you please keep tuning in. And that is another wrap on 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.

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