Comparative Advertising Pitfalls – Consumers Shouldn't Have To Do The Math

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by Sandra Edelman

Comparative advertising can be an effective marketing tool to tout product benefits vs. competitors, but consumers shouldn't need to read confusing fine print disclaimers and whip out their calculators to understand the ad claims. This was the lesson of a recent decision involving competitive drinkable yogurt for kids, described by the court as "the latest in a series of culture wars between two of the biggest players in the market for yogurt" (get the pun?) Chobani had included an ad claim on the packaging of its new Gimmies Milkshakes yogurt that the product contained "33% less sugar than the leading kids drinkable yogurt." SDNY Judge Colleen McMahon agreed with plaintiff Danone that Chobani's comparative ad claim was misleading, but denied Danone's motion for a preliminary injunction due to failure to prove irreparable harm.

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Chobani’s “33% less sugar” claim appeared in “readable typeface” without any qualifiers on the front and top of the overwrap for the Gimmies products, and there was no dispute that the “leading kids drinkable yogurt” referred to Dannon’s Danimals Smoothies. The ad claim also appeared on the back of the Gimmies packaging, with asterisks referring to two footnotes below the nutrition facts panel in typeface the court described as “so small that it is barely legible.” Here’s what the footnotes said:

*Chobani® Gimmies™ Milkshakes: avg. 8g sugar; leading kids’ drinkable yogurt: avg. 12 g sugar, per 4 fl oz serving

**Chobani® Gimmies™ Milkshakes: net 4 fl oz; leading kids’ drinkable yogurt: net 3.1 fl oz.

Got that? Even if a consumer read the footnotes, it would be hard to decipher how Chobani arrived at its 33% less sugar claim, because it involved averaging sugar content across a line of Gimmies products sold in three flavors in 4 fluid ounce bottles, compared with the Danimals product line, which comes in eight flavors sold in 3.1 ounce bottles.

Have I lost you yet? To make matters more complicated, until early January 2019, two of the Gimmies flavors contained 9 grams of sugar, while the third flavor contained 7 grams of sugar. All eight of the Danimals flavors contain 9 grams of sugar per bottle, but three of the flavors had 10 grams of sugar up until June 2018 when the sugar content was reduced to 9 grams, although Danone continued to sell these three flavors for many months in left-over packaging that listed 10 grams of sugar.

According to the court, "On a per ounce basis, Chobani's product had less sugar (by a gram or two) than did Dannon's." But substantiating Chobani's claim in the way it appeared on packaging, was "anything but uncomplicated", involving mathematical "contortions," reading "barely legible footnotes" and knowledge the consumer likely did not have about the different flavors in Chobani's product line and their varying levels of sugar content. Danone presented survey evidence on the motion showing that a substantial portion of consumers would misunderstand similar comparative labeling claims about the fat content of hypothetical ice cream products. Danone's expert also testified that, based on academic literature, consumers would not likely focus on the disclaimers on Chobani's packaging due to their location and would not understand the disclaimer language even if they did read them.

The court determined that Chobani's ad claim was not literally false because the language in the 33% less sugar claim was "ambiguous" and thus "susceptible of more than one meaning." The court cited Danone's own survey evidence showing different interpretations of a claim of this type. However, the claim was held to be impliedly false and thus misleading, because Chobani had offered "no persuasive evidence that a consumer would read the packaging in the manner needed to convey all the information that renders the 33% less claim true, or would understand in what sense the claim was true." In support of this holding, Judge McMahon cited the recent Second Circuit decision in *Mantikas v. Kellogg Co*. (blogged about in The TMCA here), involving the labeling of Cheez-It packages with the prominent claim "MADE WITH WHOLE GRAIN", in combination with fine print disclaimers and qualifying language. As the appellate court held in *Mantikas*, while a challenged advertisement must be considered "as a whole, including disclaimers and qualifying language," consumers "should not be expected to look beyond misleading representations on the front of the box to discover the truth [regarding the advertisement] in small print on the side of the box."

Judge McMahon stated that "The same principle applies here. Reasonable purchasers of Gimmies who see '33% less sugar than the leading brand' on the front of the box cannot be expected to study the back of the packaging in the detail necessary to discover the cryptic, microscopic footnoted disclosures explaining Chobani's '33% less sugar' claim – never mind figure out what needs to be 'averaged' with what and perform the multiple calculations needed to make sense of that claim."

There was a much easier way for Chobani to communicate that its Gimmies products had a lower sugar content than Dannon's Danimals -- by comparing the amount of sugar per ounce in both products. Chobani did indeed transition to that form of comparative claim after the lawsuit was filed. The revised ad claim stated: "30% less sugar"* with the asterisked footnote as follows: "*than the leading kids drinkable yogurt. Gimmies: 2g sugar per fl. oz; leading kids' drinkable yogurt: 2.9g sugar per fl. oz." The court commented in its decision that the redesigned packaging incorporated "easy-to-understand and literally true statements about the relative amount of sugar between Gimmies and Danimals…."

While Danone established that it was likely to succeed on the merits of its advertising claims, the court ultimately denied preliminary injunctive relief due to failure to establish irreparable harm. According to the court, the evidence "strongly suggests that neither Danimals' sales position nor its brand equity has suffered irreparably." The fact that Danone continued to sell several of its flavors in packaging that overstated the amount of sugar after Danone had reformulated the flavors to lessen the sugar content was significant to the court: "Dannon was perfectly willing to sell Danimals in packaging that said the product inside had more sugar than it actually does – all to save money rather than to have to throw away incorrect packaging. That undermines any suggestion that Chobani's packaging is working irreparable harm on its competitor."

While Danone did not obtain the preliminary injunction it sought, the opinion builds on the recent *Mantikas* decision about the perils of using fine print disclaimers on different parts of product packaging from the main claim. Further, companies should draw comparisons that are easily understood by consumers. If different product sizes or varying products in a line result in calculation difficulties, the best approach is to present the comparison in the clearest possible way that will be understood unambiguously by consumers.