Legal views of deceptive advertising

FTC Guidelines
Discussion points

- Implicit/explicit information
- Accessibility of information
- Availability to conscious evaluation
- Effectiveness, impact on behavior
- Measure of potential harm
- Defining “normal” consumer
1. First, there must be a representation, omission or practice that is likely to mislead the consumer.

Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.
Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions.
How do we determine if an ad is “likely to mislead?”

Of course, the Commission must find that a representation, omission, or practice occurred. In cases of express claims, the representation itself establishes the meaning.

In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.

In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims. In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.
The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.

The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.
Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.

Claims phrased as opinions are actionable, however, if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or if the recipient reasonably interprets them as implied statements of fact.
Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances.

If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.
An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim.
Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not, a representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.
How many people must be deceived before we conclude that a “reasonable” consumer is “likely” to be deceived?
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FTC cases: 20-25%

Lanham cases: 15%
3.

**Third**, the representation, omission, or practice must be a "material" one.

The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice.
The Commission considers certain categories of information presumptively material.

First, the Commission presumes that express claims are material. As the Supreme Court stated recently, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."

Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect. Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.
Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material.

Information has been found material where it concerns the purpose, safety, efficacy, or cost, of the product or service.

Information is also likely to be material if it concerns durability, performance, warranties or quality.

The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned.

Information pertaining to a finding by another agency regarding the product may also be material.
Some case studies of ads deemed deceptive
1.
The ad:

TRIUMPH BEATS MERIT

Triumph, at less than half the tar, is preferred over Merit. In fact, an amazing 60% said 3 mg. Triumph tastes as good or better than 8 mg. Merit.
The facts:

Of consumers surveyed:
36% said they preferred Triumph
24% said the two were equal
40% said they preferred Merit.
The legal case:

Philip Morris (maker of Merit) sued Lorillard (maker of Triumph) under the Lanham Act.

An expert witness for Lorillard “a distinguished and obviously experienced president of a preeminent advertising agency” claimed it was legitimate to say Triumph had won the survey on the basis of the fact that cigarettes with lower tar should not come close to tasting as good as a higher tar cigarette.
Aspercreme:

The ad:

“Aspirin, which is taken by mouth, must be dissolved in the stomach, and enter the bloodstream before it is conducted to the site of pain. However, Aspercreme concentrates all the strong relief of aspirin directly at the point of pain. And with no upset stomachs!”
The facts:

Medical studies of the effectiveness of Aspercreme showed that the active ingredient, chemically similar, but not known to have the pain-relieving properties of aspirin, did not penetrate below the most superficial layer of skin.
Thompson Medical countered with studies that indicated there was no difference between reported pain relief found in aspirin and Aspercreme.

(20 subjects were used to report the null result)
PT-1 Prepaid Phone Cards

The ad:

"LOWEST INTERNATIONAL RATE CARD

CALL THROUGHOUT THE US FOR ONLY 19¢ PER MINUTE

24 HOURS 7 DAYS SAME LOW RATES "

The complaint:

alleges that PT-1 imposes a connection charge on all domestic long distance calls equal to the cost of one minute of calling time, without disclosing this charge to consumers.

In addition, the FTC's complaint alleges that PT-1, since April, 1996, imposed a service fee, reducing the value of its pre-paid phone cards 25 cents per card for each month after the first month of active use, without disclosing this fee to consumers.
R.J. Reynolds Tobacco Co.

The ad:

Ads for Winston cigarettes (No Bull, Bo Additives) prominently advertises its lack of additives in cigarettes.
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The complaint:

According to the FTC, R.J Reynolds allegedly “implies, without a reasonable basis, that Winston cigarettes are safer to smoke because they contain no additives.”

Among other reasons, the agency alleged, the smoke from Winston cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins.
The settlement:

would require Reynolds to include a disclosure in most advertising for Winston or any other tobacco products Reynolds advertises as having no additives.

The disclosure must be included in all advertising for Winston no-additive cigarettes, regardless of whether that advertising contains a "no additives" claim, for a period of one year beginning no later than July 15, 1999.

The disclosure is not required if Reynolds has scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes.
Kraft Singles Cheese slices

The ad:

Claimed that each Kraft Singles’ slice has 5 oz. of milk, compared with “hardly any” for competitors. The ad emphasized the calcium provided by the milk ingredient. The graphics display showed a glass filled to the 5 oz. mark with milk, and then being transferred by means of graphics animation onto the cover of a Singles package.
The complaint:

The FTC charged that consumers were deceived into believing:
1) that each slice of cheese food had the calcium content of 5 oz. of milk
2) that Kraft slices had more calcium than competitors