

:: USE IN ADVERTISING OF SUPERIORITY STATEMENTS THAT EXCLUDE OTHER PRODUCTS ::

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To sustain that a product is “the best” implies a comparison, as well as a superiority statement with respect to the other products commercialized in the relevant market and which belong to the same category or segment.

The use of the expression “the best” tends to highlight that the advertised product beats the other products within its category in terms of quality.

The syllogism is simple: “If a product is the best one, the others are worse”.

When the alleged quality of the product promoted as “the best” refers to the qualities that may be objectively verified and it is not an obvious exaggeration that the public will not believe, the use of this superlative form goes beyond the mere expression of opinion –or ‘estimated criterion’– and instead, it is a statement that excludes the other products, and requires, in order to be legal, that such superior quality may be objectively and certainly verified.

Therefore, it is illegal to advertise that a product is “the best” when said superior quality cannot be verified or is not true. In such event it would be an event of misleading advertising.

In other words, in order to validly state that the quality of a product is superior than that of others belonging to the same category, said statement must be supported by objective and verifiable facts.

Applicable regulatory framework

The need to specify the content of the message in a proper manner is a principle that has been set for in the advertising field. It intends that the product be safely and rationally used by consumer, informing its properties in an objective manner, without tricks or mistakes, offering truthful, precise and clear information.

It is also a required by the law

Section 10 bis of the Paris Convention [1], subsections 2) and 3), sets forth that every competition act contrary to fair practices in the industrial or commercial field constitutes an act of unfair competition (subsection 2) and which in the first place must be forbidden, for the purposes hereof:

“... 2nd. In case false allegations are made, in the practice of trade, tending to discredit the establishment, products or the industrial or commercial activity of a competitor; 3rd. The indications or allegations which use, in the practice of trade, may mislead the public on the... characteristics... of the goods.” (Subsection 3).

Section 11 of the new legal regime of Fair Commercial Practices, passed by the Emergency Decree 274/2019 (the “ED”), forbids the so-called “misleading advertising”, reproducing for such purpose section 9th of the derogated Act 22,802.[2]

The regulation forbids –again, as far as is herein concerned- any kind of advertising that by using inaccuracies may mislead, deceit or confuse consumers as regards the characteristics or properties, nature, origin, quality purity, mix, quantity, use, price, commercialization conditions or goods production techniques.

In turn, Subsection a) of section 10 of the ED, sets forth that the following are considered unfair competition acts “a) Misleading acts: To mislead on [the] main characteristics... quality... and, in general, on the attributes, benefits or conditions corresponding to goods and services.”

Section 4th of Act 24,240, on the Consumer’s Defense, that regulates the duty to provide information, sets forth in turn that the supplier is obligated to supply to consumer in a certain, clear and detailed manner all issues related to the essential features of goods and services supplied by it.

The Civil and Commercial Code of the Nation, in its section 1.101, subsection a), forbids advertising that contains false indications or that may mislead consumer, when they refer to essential elements of the product or service.

The Code of Ethics and Self-regulatory advertising of the Self-regulatory Advertising Council (CONARP) considers that the use of phrases that state the superiority of a product is illegal when said argued superior quality cannot be verified or is not true.[3]

As regards food advertising, Annex III, paragraph 2.9 (I) of Provision 4980/2005 issued by the National Administration of Drugs, Food and Medical Devices (ANMAT), forbids statements stressing that a product has a comparative attribute or feature superior than another one or that the advertised product is the only possible alternative within said line of products, expressing for example: “the product”, “the most often chosen”, “the unique”, “the most commonly recommended”, “the best”, unless it is supported by reliable and verifiable data.

Pursuant to the applicable legal framework –partially quoted in the preceding paragraphs - it is clear that if a superiority statement is not supported by objective and verifiable facts, then it will have a misleading nature. Because it is obvious that “... aside from being a praising phrase or admiration of the product itself, it hides a comparison that openly or in a veiled manner implies a disadvantage for competitor, evidencing an unfair competition element by means of advertising that exaggerates... or rather directly lies.”[4]

Ultimately, advertising must not qualify a product as “the best” unless said superiority statement is subject to a certain and sustainable verification.

A recent precedent

In a recently decided case, the Ethics Court of the CONARP analyzed the radio and TV advertising of a manufacturer of food in which the advertiser stated that dry pasta that it manufactures and commercializes under its trademark “Molto” “are the best”, which together with the sauces also manufactured and commercialized by it under the same trademark “are superior” and that “due to its quality, Molto is the right choice”.

Advertisements were questioned by a competitor, who argued the following (i) that said statements showed, very clearly, the alleged superiority of the advertised products in connection with those of its unnamed and multiple competitors in the Argentine market of dry pasta and (ii) that, on one hand, said superiority statements did not intend to be justified, at all, by the advertiser and on other hand, that they were false.

The Ethics Court sustained the competitor’s claim considering the following:

"2. That the analyzed message uses objective superiority statements, without including other references to justify said leadership;

3. That the same cannot be interpreted as an advertising exaggeration or puffery, since they proved to be plausible and credible for consumer, therefore they must be verifiable and accurate, so as to guarantee a truthful information within the framework of fair competition;

4. Under no circumstances shall the superlative form be used without technical conclusive and relevant evidence that duly justify and prove the statements made;

5. That, accordingly, the message may confuse consumer when stating qualities or properties that have not been duly proven ... generating thus unfair competition against the other competitors of the market when raising the positioning of the product without due support;"

Based on such considerations, the Ethics Court resolved that the message was subject to observation – quoting several regulations of the Ethics Code and certain papers of the CONARP [5]- to state the legal bases of a decision, therefore it requested from the responsible parties to immediately adjust the communication, detailing as they considered advisable the extent of the transmitted advantages, substantiated in a robust and relevant statistical support duly sustaining the information of the message, in line with the principles that the Self-regulatory Advertising Council (CONARP) details in its Code and attached papers.

Finally, the Court decided that if the superiority rating could not be guaranteed – as it really was not - it should be removed.

Comparative Law

In comparative law the use of superlative “best” has been subject to consideration and analysis, and there are a great number of precedents that have rejected phrases or advertising slogans for being misleading and which intended to falsely sustain that a product was “better” than another one.

Following the renowned Spanish doctrinarian Carlos Lema Devesa[6] it may be sustained that: “Among the different forms of advertising expression that excludes other products appearing in the Spanish advertising, superlative adjectives stand out. And, in turn, within this degree of superlative comparison “the best” is the one that appears more frequently in advertisements and advertising expressions [to] praise products or services... through this superlative form it is clearly and precisely highlighted that the advertised product exceeds the quality of the other products of the same kind”.[7]

When reviewing some cases of this type of advertising that was rejected in Spain for being misleading, the author has listed some clues that guide the interpreter in examining the outlined expression:

“Hence, the advertisement “the best razor blade” would be legal if the praised article exceeds the one of its competitors as regards the raw material used, hardness of the blade, thinness, etc. On the other hand, the slogan “the best cigarette”, will be lawful if said cigarette has been manufactured with a more selected tobacco than the cigarettes of competing trademarks, if it has less content of nicotine than the other ones, if it has less tar content than the remaining cigarettes, etc. Finally, the advertising phrase “the best forklift” shall be lawful when the advertised forklift is more powerful, provides a higher load capacity, consumption, is easily maneuvered, etc. than those of competitors.

It may be assumed from the foregoing that, bearing in mind that the above said superlative adjective implies an allegation on the quality of the praised product, said allegation “the best merchandise” will be truthful only if the praised merchandise offers a higher quality than that of the remaining products of competitors”.[8]

The existence of an allegation that excludes another product, composed by the advertising phrase “In my opinion, the best anti-wrinkle cream in the world” was resolved by the Advertising Jury of the Association for Self-regulation of Marketing Messages (Jurado de la Publicidad de la Asociación para la Autorregulación de la Comunicación Comercial) in Spain.

At that time, it was decided that “When interpreting such allegations, it must be borne in mind that as this Jury has made clear several times, advertisements and the remaining advertising expressions do not admit purely literal or grammatical analysis. Quite the contrary, the advertising messages must be analyzed in accordance with the meaning that said messages have for an average consumer within the specific recipients circle to whom the advertisement is addressed...”

In a case resolved in Chile derived from the questioning of an advertisement with the slogan “Without any doubt, there is no one better than Drive”, which purpose was to promote a washing powder”.[9] the following was resolved: “... clearly, the wording of such statements leads to consider them with those that

must be conveniently proven, since besides being limited and quantifiable, they imply superiority with respect to all its competitors...". The entity understood that the advertising units were a "tall order that had not been duly checked and which is in conflict with advertising ethics, as pointed out in section 4th of the Chilean Code of Advertising Ethics".

Another precedent that I consider relevant is the campaign of a razor and its foamy shave cream, with the slogan "Gillette Sensor, together with the valuable foamy shave cream, for the best shave a man may have!"

When analyzing the advertisement, the NAD (National Advertising Division of the Council of Better Business Bureaus of New York) determined that the statement "the best shave" had not been sufficiently proved, because it was not shown beyond doubt that said product really provided the "best" shave. The statement had been made without having categorical elements supporting the truthfulness thereof.[10]

In conclusion, I point out the decision of the NAD of Florida (The National Advertising Division of the Council of Better Business Inc. of Southeast Florida) that objected to the slogan "Nescafé, the best solution in compact specialty coffees (please read granulated coffee)".

Like in the other cases mentioned above, the entity resolved that, since the statement "the best" implied that the product had certain attributes that could be objectively measured as regards the qualities of the other competing products and that such superiority attributes had not been duly proven, it was recommended to discontinue the advertisement.[11]

Exaggerations or "Puffing"

None of the above implies that the creative resource of the obvious exaggeration should be excluded from advertisements. And the use of metaphors should not be excluded either. Nor humor.

In my opinion, the expressions of opinion on intangible issues (such as, for example, "the tastiest" or "the best taste") may be used also.

The "exaggerations" or "puffing" or "dealers' talks", are allowed because – or rather, when - they cannot cause a mistake, deception or confusion.

Then, one of the main issues of the analyzed matter is to determine when the use of superlative forms means a mere exaggeration or expression of opinion and when we are in the presence of a statement that excludes a product and requires a statement that excludes other products and requires the test of truthfulness to be lawful.

On this respect there exists certain doctrinal consensus as regards the fact that the comparison between products relieves from the test of truthfulness only in the case of an excessive praise of a product or service, which lacks a sound basis and is so unreal that nobody can believe it.

In other words, harmless exaggerated expressions, because consumers do not believe them, are excluded from deception.

The paradigmatic example is the advertising in which rice was so big that, only one grain was enough to prepare “paella”. The figure is so exaggerated that it may be defined as a “quackish exaggeration” and due to such reason, it is unbelievable.[12]

Conclusion

Out of the scope of advertising exaggerations, humor and metaphors - in all cases, when they are impossible to believe – or when they are expressions of opinions on intangible issues, the use of the expression “the best” necessarily requires to prove the truthfulness of the statement.

The allegations that exclude other products, such as the message that uses the superlative form “the best” when referred to qualities that may be objectively proved, shall be lawful, then, provided that they respect the principle of truthfulness, i.e., provided that they are true and verifiable.

In other words, the message that appeals to the use of the superlative form “the best” shall not be objected to provided that its truthfulness can be proved. That is to say, provided that it may be proved that, as evidenced by the controversial expression, the product is, qualitatively, the best of the market.[13]

[1] At the time of inclusion into the Argentine body of laws, with the reviews of Brussels dated December 14, 1900, of Washington dated June 2, 1911, of The Hague dated November 6, 1925, of London dated June 2, 1934 and of Lisbon dated October 31, 1958.

[2] Section 11 of the Emergency Decree 274/2019 reads as follows: “The following is forbidden: any kind of presentation, of publicity or advertising that through inaccuracies or concealments may induce to a mistake, deception or confusion with respect of the characteristics of properties, nature, origin, quality, purity, mix, quantity, use, price, commercialization conditions or production techniques of personal property, real property or services.”

[3] Section 19 of the above said Ethics Code sets forth that “The messages that contain comparisons of prices or other characteristics must:... 2. Have as a purpose to inform consumer on the verifiable advantages of the advertised product” and Section 11, that “Advertising must be truthful and avoid every deception or exaggeration that attempts against the public’s good faith; abuses of its trust or exploits the lack of culture, knowledge or experience of the recipients”. Its section 16, in the same line, sets forth that “The messages must not contain statements or visual presentations which directly or by implication, omission, ambiguity, minimization or exaggerations, may induce to a mistake with respect to: 1. The

characteristics of the advertised product, as well as its nature, origin, manufacturing, composition, quantity, usefulness, qualities or properties, value or usage ...". I understand that the Ethics Code regulations would apply also. Said regulations set forth the following "Advertising must respect ... the legal regulations in force, especially among others: the Consumer Protection Act ... Fair Commercial Practices Act ...", whereas "... advertising must be honest, truthful and trustworthy.", whereas: "Advertising must avoid all what harms the essential concepts and values of society, for example, among others:... d)the legal regulations in force...", which orders to avoid "All what implies the competitors' discredit or underestimation", the one that sets forth that "No message, can directly or indirectly contain descriptions, images or texts that contribute to confuse the public..." and in the specific case of advertising of food, the one of subsection 32nd, paragraph 1, that provides that: "1. Food: its advertising shall be subject to the strict observance of the legal regulations in force as well as those set forth by the industry itself".

[4] Zavala Rodríguez, Juan Carlos, "Publicidad Comercial" (Commercial Advertising), Printing House Depalma, Buenos Aires, 1947, page 272.

[5] (*) The Code of Ethics and Self-regulatory Advertising

* Section 11º.- Advertising must be truthful and avoid every deception or exaggeration that goes against the public's good faith; abuse of its trust or that takes unfair advantage of the lack of culture, knowledge or experience of recipients.

* Section 16º. The messages must not contain statements or visual merchandising which directly, by implication, omission, ambiguity, minimization or exaggerations, may mislead with respect to: 1. The characteristics of the advertised product, such as its nature, origin, manufacturing, composition, quantity, usefulness, qualities or properties, its value or directions for use (...)

* Section 19º.- The messages that contain price comparisons or other characteristics should: (...) 2. Aim at informing consumer on the verifiable advantages of the advertised product (...)

* Section 28º. Every advertising that uses researches must be supported by identifiable, verifiable and available sources.

Truthfulness in Advertising Paper

(...) the objective statement that may be verified must be specific and precise, and verifiable (...)

(...) The context of the message shall define if it is puffery or a positioning attempt as a market leader, in which case objective elements should be presented to justify its use, clearly informing the extent of the aforesaid advantage. In principle as a general rule, it is advisable to limit superlative references specifically referred to objective attributes, since the subjective ones cannot be verified.

Likewise, the subjective statements that are not evident exaggerations but, on the contrary, have a certain degree of truth, and therefore are credible, must be avoided since they may generate the consumer's confusion (...)

Comparative Advertising Paper

(...) comparative advertising must not mislead consumer, it must be truthful and observe fair competition regulations, based on the comparison of elements objectively verifiable and equally exposed in the advertisement avoiding to denigrate competition, their trademarks and products.

This implies to exercise responsibly the freedom of commercial expression right through competitors and consumer-friendly advertising in favor of fair competition, avoiding the use of exaggerations or groundless superlative expressions and having information, important and relevant market researches or statistically robust tests supporting the information offered in the messages, made or guaranteed by independent third parties of renowned standing on the subject (...)

- [6] Quoted in Resolutions of the Advertising Jury, case Procter & Gamble España, SA, v. L’Oreal España SA, August 4, 2005, Madrid, Spain, page 4.
- [7] Lema Devesa, Carlos, “La publicidad de tono excluyente” (Advertising that excludes other products), Printing House Montecorvo, S.A., Madrid, Spain, page 503.
- [8] Lema Devesa, op. Cit., page 510.
- [9] Extracted from the Compilation of Jurisprudence of the Self-regulatory Advertising and Ethics Council of Chile, Case ROL: 571/03, Procter & Gamble Chile Inc. v. Unilever Chile Ltda.
- [10] Report of Narb Panel # 53, Disposition of Advertising referred to Narb regarding advertising for Gillette foamy shave cream, July 20, 1991, New York, USA.
- [11] Extracted from the resolutions of the NAD Southeast Florida, “Nestle & BBB of Southeast Florida participate in NAD self-regulatory process, December 28, 2004.
- [12] Revista de Derecho Privado y Comunitario - Consumidores - (Private and Community Law Magazine - Consumers) Civil and Commercial Jurisprudence- Advertising and Consumers, Aída Kemelmajer de Carlucci, Rubinzal Culzoni, pages 90-91.
- [13] Quoting the CONARP: This implies to exercise responsibly the freedom of commercial expression right through consumer-friendly advertising in favor of fair competition, avoiding the use of exaggerations or groundless superlative expressions and having information, important and relevant market researches or statistically robust tests supporting the information offered in the messages, made or guaranteed by independent third parties of renowned standing on the subject.

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