



Best Practices for Materiality Surveys in False or Deceptive Advertising Cases

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This article provides an overview of materiality's important role in false and deceptive advertising law, centered around the role of consumer surveys. It explains the legal requirements for materiality under different advertising laws, when advertisers may be able to rely on a puffery defense, and how to design a survey intended to provide evidence of materiality.

Proving that an advertising claim is false or deceptive is sometimes not enough, by itself, to secure a victory for the plaintiff. Under federal advertising law, plaintiffs may also need to show that the claim was material to the purchase, that is, likely to affect consumers' purchasing decisions. That is true for any claim being considered by the US Federal Trade Commission (FTC), which has expressly said that it cannot pursue a false advertising case if the claim was not material. It is also true for false advertising cases that invoke the Lanham Act, under which judges have established a similar requirement that plaintiffs show materiality. In fact, it is often true even when the court has already determined that an advertising statement was false or deceptive.

As a result, parties who want to build a strong case for false or deceptive advertising usually need evidence about whether the disputed claim affected purchasing decisions. To establish whether it did, many parties conduct—and the courts often favor—consumer surveys.

Proving Materiality

Plaintiffs in deceptive advertising cases may need to prove three things:

1. The defendant made some advertising communication (or omission, or practice) that is false or misleading.
2. Reasonable consumers from the targeted group are likely to be deceived, under the circumstances in which it was made.
3. That communication is material to consumers' purchasing decisions or other behavior.¹

The third requirement calls for a showing of materiality. In cases where it is required, this showing of materiality is just as important to the case as the other requirements. Courts have dismissed cases where there is no showing that the claim at issue was material, even if they agreed that it was deceptive or misleading. This provides defendants with an opportunity to defend against false advertising claims by demonstrating that the plaintiff cannot show materiality.

The details of the materiality requirement differ slightly between FTC actions, which are brought by the federal government, and Lanham Act cases, which are brought by private parties (often consumers of or competitors to the product in the advertisement). Cases heard by private dispute resolution forums, such as the BBB National Programs, National Advertising Division (NAD), would apply whichever body of law is at issue—most likely the Lanham Act.

The materiality requirement under the Lanham Act is not in the statute, but is judge-made law that evolved over several decades.² In 1974, a Northern Illinois federal district court set this standard when it created a test for a viable false advertising claim under the Lanham Act, including a requirement that the "deception is material, in that it is likely to influence the purchasing decision."³ Numerous courts took up that test, entrenching the materiality requirement.⁴ Today, Professor J. Thomas McCarthy recognizes the requirement, writing that the "Plaintiff must make some showing that the defendant's misrepresentation was material in the sense that it would have some effect on consumers' purchasing decisions."⁵



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Despite this requirement, plaintiffs can sometimes avoid making this showing; under certain circumstances, judges may presume statements are material. Those circumstances include situations in which the challenged statement was:

- About an inherent quality of the goods or services being advertised.
- Highlighting the "unique virtues" of the product, or "actually creates the desire for the product," which includes statements about price, regulatory approval, health, and safety.
- Found literally false by a court.
- The result of proven intent to deceive.

- The result of a substantial expenditure of resources by the advertiser.⁶

These presumptions are rebuttable, meaning that defendants can argue that they do not apply under the circumstances of the particular case.

Similar rules apply to FTC actions. In its 1983 Policy Statement on Deception, the FTC defined a material misrepresentation or practice as “one which is likely to affect a consumer’s choice of or conduct regarding a product.”⁷ Because of this, the FTC does not require proof that any consumer has made a purchase. Furthermore, the FTC has a rebuttable presumption that certain statements are material, meaning that it does not need to prove materiality if it can show that the advertiser deceptively made:

- An express claim—that is, a claim that is stated outright rather than implied.
- An implied claim, when there is proof that the advertiser intended to make it.
- A claim that “significantly involved health, safety, or other areas with which the reasonable consumer would be concerned.”
- In some circumstances, a claim about the purpose, efficacy, cost, or safety of the product, or durability, warranties, performance, or quality.⁸

Again, defendants can rebut presumptions of materiality based on these circumstances. However, in cases where no presumptions apply, plaintiffs will need to bring reliable evidence of materiality to prove their cases. And defendants in false or deceptive advertising actions may want to bring their own evidence that a statement was not material, either to counter a plaintiff’s evidence or to rebut a presumption of materiality.

In any of these cases, a widely accepted way to provide evidence of whether the statement was material to target consumers’ purchasing decisions is to ask them through a survey. Surveys are so common in Lanham Act false advertising cases that one commentator describes them as “standard fare”⁹; the Second Circuit has described them as “routinely admitted.”¹⁰ While judges may determine for themselves what they believe a reasonable consumer would think,¹¹ and some may admit evidence of actual confusion from real-world purchasers,¹² well-designed surveys remain a standard and widespread way to provide evidence of materiality.

Designing a Materiality Survey

When conducting a survey on materiality, the first question may be whether to incorporate materiality questions into an advertising communications survey. A survey on materiality can stand alone or be added to a survey that measures what messages consumers take away from the disputed ad.¹³

A false or deceptive advertising survey will typically show the ad, then start by asking about what messages the advertisement communicated, often as open-ended questions that allow survey-takers to fill in responses in their own words. As the survey goes on, the survey asks questions that are progressively more focused on the issues of interest, often closed-ended questions. This “funnel” design is intended to avoid leading survey-takers to any particular answer by not drawing attention to the issues of interest until after they have provided initial thoughts.¹⁴ Because of the need to put open-ended questions first, materiality questions may come after the advertising communications questions, if they are included in the same survey.



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Regardless of whether they stand alone or are part of an advertising communications survey, survey questions intended to measure materiality must investigate whether the allegedly deceptive claim would have any effect on survey-takers’ purchasing decisions.¹⁵ There are multiple ways to approach that goal, including:

- Testing likelihood to purchase among a test group that sees the disputed statement and a control group that does not.
- Directly asking how a specific statement would affect respondents’ likelihood to purchase.
- Asking whether, based on the ad or the statement in question, respondents would be willing to pay more, less, or about the same as what they typically pay for this kind of product.
- Asking about reasons for purchasing the product and tallying responses that mention (if open-ended) or select (if closed-ended) the statement of interest.
- Asking respondents to rate the importance of product features on a scale.
- Conducting a conjoint survey that requires respondents to weigh the value to them of various product features.

Which method to use depends a great deal on the circumstances of the case.

Showing Evidence of Materiality

There are not many texts explaining how to measure materiality. However, it may be appropriate to import the standards that apply to advertising communications or false advertising surveys. In those surveys, there is no numeric threshold at which courts must find that survey measures show that advertising is deceptive.¹⁶ Rather, as in likelihood of confusion surveys, courts look for a substantial, or “not insubstantial,” measure.¹⁷ One commentator has written that net survey percentages of 15% or higher are “almost always” accepted by courts, although lower percentages have been accepted by some courts.¹⁸

Using Puffery as a Defense

Although the law permits courts and regulators to presume materiality in certain circumstances, it has also created a situation where they can presume the opposite—that a statement cannot be material. “Puffery” describes advertising claims that are so exaggerated or hyperbolic that a reasonable consumer cannot possibly rely on them. As Judge Learned Hand put it in 1918, “There are some kinds of talk which no sensible man takes seriously, and if he does, he suffers from his credulity.”¹⁹

Puffery has been described as the reverse of materiality: a “puffed” claim by definition cannot be material to purchasers, because reasonable consumers never believed it in the first place.²⁰ Puffery is a defense to a false advertising claim—the entire claim, not just the materiality part.²¹ As a result, advertisers who can get a judge to agree that a claim was puffery do not need to provide any further evidence. However, what courts and regulators believe is puffery can be inconsistent,²² so no puffery defense is a guaranteed winner.

Puffery Legal Standards & Gray Areas

The legal standard for determining puffery, like the standard for materiality, is what a reasonable consumer would believe.²³ However, courts have been inconsistent in the way they have applied these rules to the facts before them. One authority noted that “puffery appears to be an ‘I know it when I see it’ phenomenon to which the closest broad definition of the concept is then applied after the fact.”²⁴ Different courts have defined puffery as:

- “A general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”²⁵
- “Obviously a statement of the seller’s opinion.”²⁶
- “An outrageous generalized statement, not making specific claims, so exaggerated as to preclude reliance by consumers.”²⁷
- “Generalized statements of product superiority that are expressed in broad, vague, and commendatory language.”²⁸
- “[A] statement [that] is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained.”²⁹

Because these standards vary, the results of puffery claims do too, even for claims that seem similar. But another important factor is context. The federal courts, the NAD, and the FTC will all consider advertising claims in the full context in which consumers see them. As a result, a claim that is considered puffery on its own, such as “far brighter than any [home movie] lamp

ever before,” may be transformed into a legally actionable statement if the advertiser adds a claim that the lamp has “35,000 candle power,” which is capable of being measured.³⁰

In another case, the slogan “Better Ingredients. Better Pizza.” was held to be an opinion statement and therefore puffery—until the advertiser added details about its ingredients, at which time it became a superiority claim.³¹ For advertisers, the bottom line may be that a puffery defense is not a slam dunk, because an experienced advertising law attorney may be needed to determine whether a statement is, in fact, puffery.



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Partnering with Materiality Survey Experts

Materiality surveys are critical tools in false or deceptive advertising litigation, helping parties demonstrate whether a disputed claim truly influences consumer purchasing decisions. Courts and regulatory bodies often require this evidence, and well-designed surveys can make or break a case. Whether you are building or defending advertising claims, working with experienced survey professionals ensures that your evidence meets legal standards and withstands scrutiny.

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