

BEWARE OF MAKING UNSUBSTANTIATED ANTI-AGING CLAIMS

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Manufacturers, distributors, and retailers often tout the anti-aging effects of certain cosmetics and nutritional supplements. Of course, the term “anti-aging” is not intended to literally mean that a product prevents aging. To the contrary, it is understood by both the industry and consumers as describing a product that is designed to mitigate, mask, or soften certain cosmetic indicators that come with age. These typically include wrinkles, discoloration, greying of the hair, or a loss of skin firmness.

Anti-aging litigation has proven popular with the plaintiffs’ bar. In the past five years, there have been at least 31 class action complaints filed alleging deceptive advertising of anti-aging products, and at least 10 enforcement actions brought by the Federal Trade Commission (FTC).

Often such putative class actions allege that advertising which touts a product’s anti-aging properties is deceptive and misleading to consumers. Typically, complaints over anti-aging claims lack affirmative evidence that a cosmetic product fails to produce the advertised effect. Rather, plaintiffs attempt to challenge the sufficiency of the advertiser’s substantiation for an anti-aging claim or, more recently, attempt to characterize an anti-aging product as an unregistered “drug,” for which FDA approval should have been obtained.

Marketers of cosmetic products should consider the following when reviewing their anti-aging claims, and their potential exposure to litigation:

- **Structure Claims to Focus on Consumer’s Perception.** Most cosmetic products are designed to conceal, mask, or mitigate the visual effects of aging, not to reverse the aging process itself. Consider drafting advertising language to make clear that the cosmetic product is designed to reduce the *appearance* of aging. This may prevent plaintiffs from trying to characterize an advertisement as claiming the product in fact reverses the aging process itself.
- **Establishment Claims.** An “establishment” claim refers to an advertisement that makes clear the type, and quantity, of evidence that the advertiser has to support a statement. Courts often evaluate establishment claims by asking whether the advertised level of evidence exists. If it does, the claim is arguably not deceptive. By drafting advertising language to include mainly

establishment evidence, thus disclosing the precise quantity and type of evidence supporting a claim, marketers can often pre-empt arguments by plaintiffs' attorneys contending that the marketer should have had a greater volume of evidence.

- **Prior Substantiation.** The FTC, as well as some state regulators, take the position that a marketer is required to have substantiation (*i.e.*, proof) that supports an advertising claim *before* that claim is made. Although plaintiffs often seize upon the position of regulators, most courts have held that, in the context of private litigation, a company is not required to maintain a bank of substantiating evidence for each claim that it makes. Accordingly, a complaint cannot be filed in order to “fish” for substantiating evidence that may, or may not, support an advertising claim.

For more information, contact the authors, or any member of our [Retail](#) team.

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