

Substantiation, defense and risk of sensory claims used for packaged foods

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Abstract

Sensory claims, which are descriptive communications about a product's sensorial attributes, are used in the food and beverage industry to market products every year. Food manufacturers use puffery, non-comparative and comparative (unsurpassed or superiority) sensory claims to communicate to consumers about sensory attributes and how they compare to other brands. However, food manufacturers cannot do so without the proper data to support them. Sensory and consumer perception studies can be used to provide the needed data to support sensory claims in a court of law. However, researchers must ensure data used to support these claims are defensible by a sound research plan which includes representative products tested by a suitable sample size of representative users in key geographical areas. Food companies spend thousands of dollars per year on sensory tests to specifically support food product claims. However, is this research worthy of investment by food companies when the risk, the likelihood of a challenge by competitors, consumers or public interest groups, may be high?

Standards for conducting tests to support sensory claims were reviewed. Additionally, challenges of sensory claims were examined to determine the risk by claim type. Parallels from industry standards, sensory and advertising law experts, and cases from the National Advertising Division were drawn to assess the risk associated with different types of food claims and the likelihood of being challenged. Results show that a claim is likely to be challenged if it references or draws comparisons to a competitor's product. One hundred percent of challenges in the past ten years regarding sensory claims were led by competitors, with a majority resulting in discontinued or modified claims. Therefore, to reduce wasted resources, a food manufacturer should spend the time, money and energy to properly conduct claims testing when looking to

make comparative claims. Sensory scientists should also review past claims cases and extensively understand how a case is reviewed and what the review panel considers as adequate support. With this knowledge, a sensory scientist can direct which claims to focus their company's resources on, ensure a robustly designed study, achieve a higher likelihood of succeeding any challenge from the National Advertising Division or a competitor, and thus reduce the overall risk of making a claim.

Further research connecting each claim type to actual revenue would be of interest. This information is limited as it lies within each company and may be a moving target as marketplaces and consumer preferences evolve over time.

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Substantiation, defense and risk of sensory claims used for packaged foods

Introduction

Consumers have many choices in the food market. How does a food manufacturer differentiate its products from competitors? Companies may use the product and packaging itself, placement in stores, promotions, including advertising, or pricing to grab a consumer's attention (Aramouni and Deschenes, 2015). A powerful tool which may relate to packaging and promotions are sensory claims. Understanding and utilizing sensory claims to highlight product features, should help in developing a market strategy and focus for advertising (Stone et al, 2012). Research shows that 73% of purchase decisions are made at the point of sale (Connolly and Davidson 1996). Therefore food manufactures must use quick, concise information to communicate to their consumers about why their product is superior in order to influence a sale.

Food manufacturers use puffery claims, unsurpassed or superiority comparative claims, or non-comparative claims to communicate to consumers about the sensory attributes of their products and how they compare to other brands (ASTM, 2018). Manufacturers should take care to make claims only with the proper data to support them, as they are likely to be inspected closely by competitors and may be challenged through a court of law (ASTM, 2018). Sensory and consumer perception studies can be utilized to provide this needed data to support sensory claims (Stone et al, 2012). Since supporting food product claims through research can cost thousands of dollars for food companies every year, care must be taken to ensure representative products are tested with a suitable sample size of representative users in key geographical areas

to ensure a sound research plan. Additional money may be spent defending these claims in a court of law if challenged or merely up keeping them as new products come onto the market.

Is the research worthy of investment by food companies when the risk, the likelihood of a challenge, may be high? This paper aims to review industry standards for substantiating sensory claims and challenges made against food companies with sensory claims to understand the level of risk associated with each type of sensory claim. Standards for conducting tests to support sensory claims were reviewed. Additionally, challenges of sensory claims were examined to determine the risk by claim type. Parallels from industry standards, sensory and advertising law experts, and cases from the National Advertising Division (NAD) were drawn to assess the risk associated with different types of food claims and the likelihood of being challenged. Risk was defined as the likelihood that a sensory claim would be challenged. Likelihood was determined by if a claim was challenged in the last ten years. Only food and beverage product sensory claims relating to packaged foods reviewed by the NAD were reviewed. Cases completed through the Children's Advertising Review Unit (CARU) which reviews consumer goods for babies and children were not included in this review.

Objective

Determine how sensory claims are classified and regulated. Furthermore, to determine if specific types of claims are riskier than others by investigating cases reviewed by the National Advertising Division.

Claims Substantiation and Regulation

Each sensory test to substantiate ad claims is unique. There is no one design that can be applied across all types of products or types of sensory claims that will guarantee a claim is safe from challenges (Sidel and Stone 2004).

There are multiple governing agencies which may review a claim (Buchanan and Smithies 1991) (refer to Table 1 for review sources of food/beverage), each with their own unique focus and/or standards (Zelek 1990). There are also multiple sources for which a challenge may originate including competitors, consumers or a consumer interest group, or a governing body.

Table 1: Challenger and Review Sources for Food/Beverage Claims

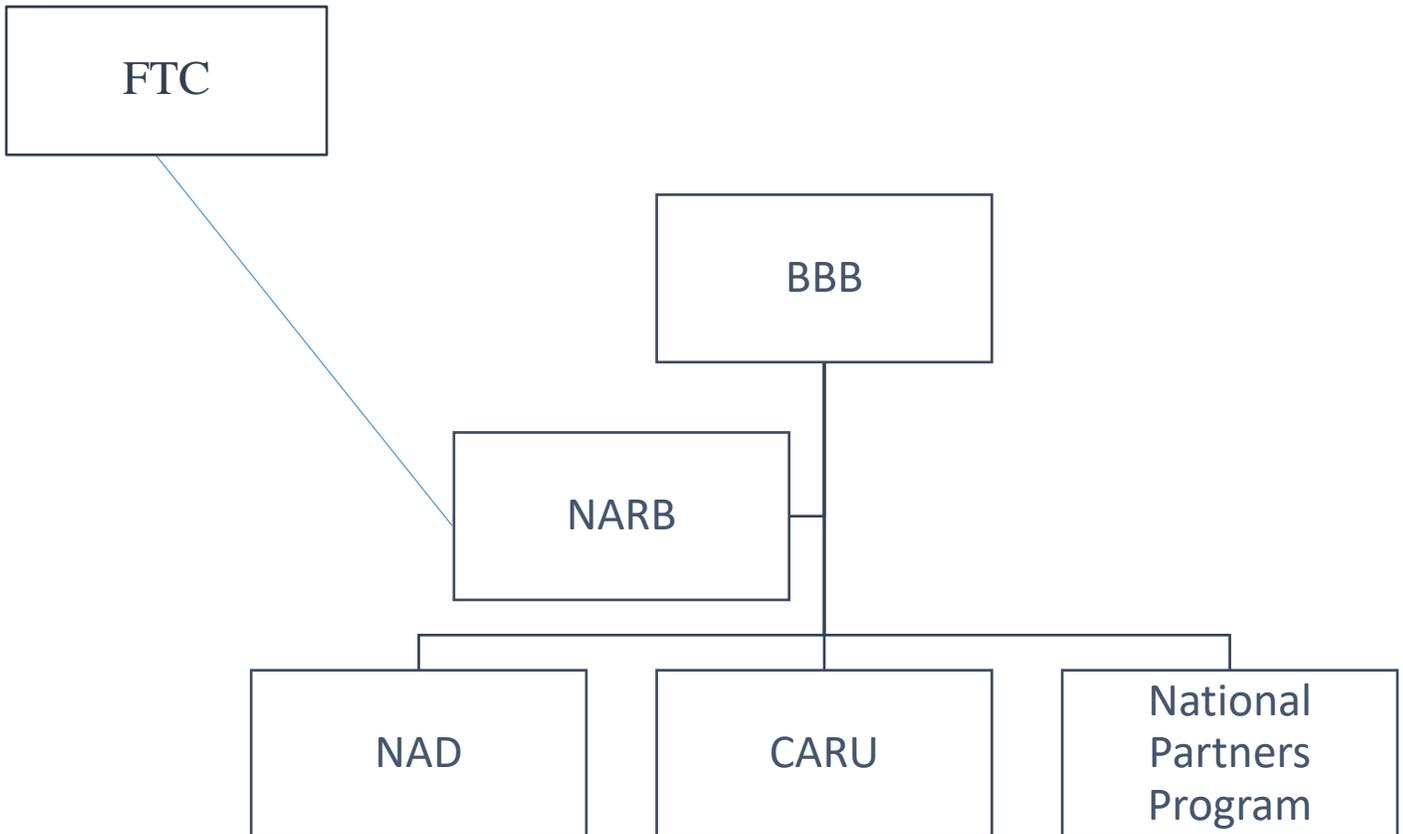
Challenger/Review Sources¹	Description
Council of Better Business Bureaus (CBBB)	Reviews claims made by businesses to enhance consumer trust; serves as liaison between consumers and businesses
National Advertising Division (NAD)	Reviews claims made by businesses; subgroup of BBB; specialized sections for claims aimed at children, electronics, consumer goods
National Advertising Review Board (NARB)	Appellate body of the NAD
Federal Courts under the Lanham Act	Focuses on trademark infringement and false advertising
Federal Trade Commission (FTC)	Focuses on consumer protection and fair business practices
Competitors	May challenge a claim via one of the above
Consumer Complaints	A source of evidence for challengers
Media	Media sources such as print, broadcast, or electronic media that also may challenge a claim via one of the above
National Partners Program	Network of leading businesses and law firms which champions industry self-regulation, ethical business practices, truth and accuracy in advertising and reduced government regulation

¹Additional programs within the CBBB exist which focus on electronics, advertising towards children, automobiles, privacy and cyber security. These are not discussed within this body of research.

The Council of Better Business Bureaus (CBBB) includes local Better Business Bureaus (BBB) which set standards for ethical business behavior and evaluates business against the standards to ensure compliance. A section of the CBBB includes the National Advertising Division (NAD) which reviews claim disputes. The NAD is responsible for reviewing cases and making decisions on whether claims have been substantiated. Although not part of the government, the NAD is recognized as the leading regulating body. Seeking a resolution through the NAD instead of through the court system can save a company time and money, and maintain

confidentially as data which is reviewed is not public. As it is not a government regulating body, the NAD can only make decisions which are suggestions to a company regarding their claims (ASRC Review.org). If a company would like to appeal the NAD's decision, they can appeal to the National Advertising Review Board (NARB) which is the appellate body of the NAD. The NARB will then review the case and again make a decision. In the event that a company does not wish to comply with the NARB's decision, the NAD then will refer the case to the appropriate governing agency, usually the Federal Trade Commission (FTC) (Insider's Guide to the NARB, 2014). Figure 1 displays the hierarchy of the BBB and subsequent governing bodies.

Figure 1: Hierarchy of the BBB and subsequent governing bodies which may review food/beverage claims



Additional review sources for claims include the Federal Courts under the Lanham Act and media sources. Companies can also challenge a claim made by a competitor by appealing to the NAD or NARB. This is considered a critical role in the industries self-regulation process and commitment to the truth. By having competitors bring forth challenges, it allows the NAD to locate inaccurate claims more often and set precedent on substantiation (ASRC reviews.org). However, this ability to challenge each other does not come without cost. Currently, to challenge a claim through the NAD or NARB, a \$15,000 to \$25,000 filing fee is assessed, depending on the size of the company and whether the company is a “partner” of the CBBB. This fee is to help offset the costs of the CBBB. The CBBB will however waive the fee entirely if you are a consumer directly filling a claim or waive/reduce the fee if a small to medium sized company can prove economic hardship.

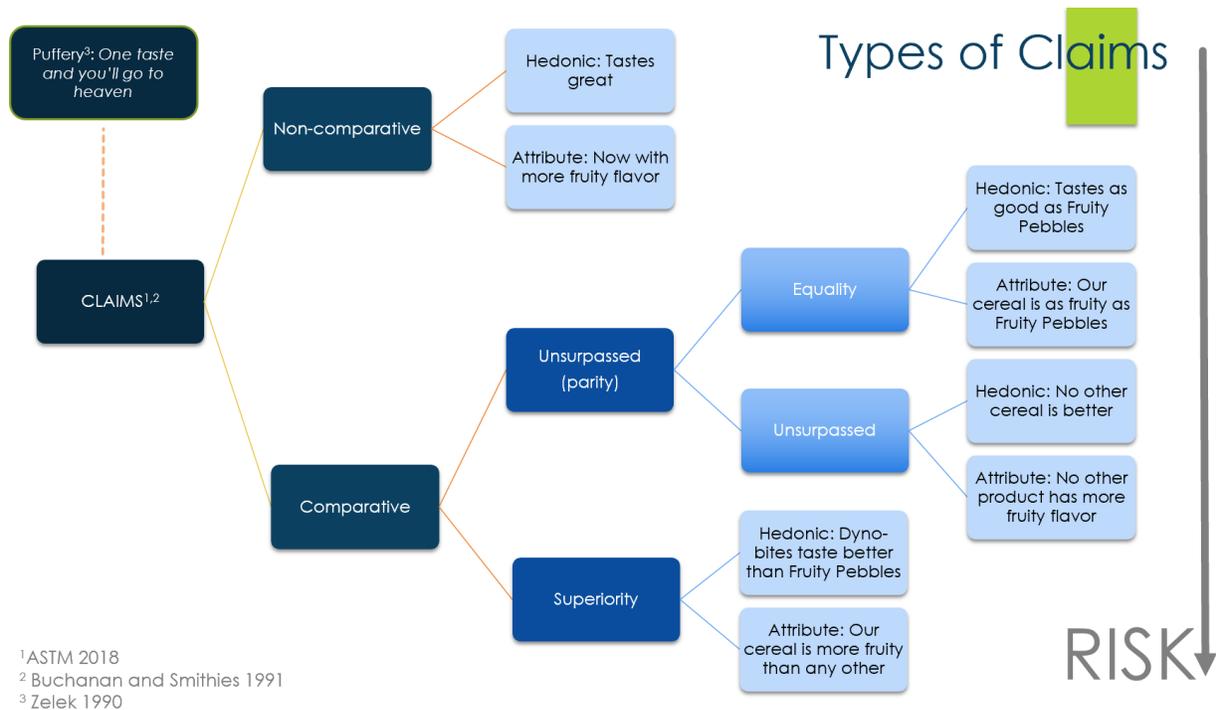
Any company may apply to become a partner of the CBBB. The CBBB will then review that company to ensure it meets ethical business practice standards, has a history of being compliant to local BBB and passes approval from the CBBB Board of Directors. Partners are considered an exclusive network of companies that are leaders in their industry, committed to advancing trust in the marketplace through industry self-regulation, setting and applying standards, and celebrating role models. CBBB National Partners pay dues based on their annual reported sales (example of range: \$5k for sales below \$500M; \$75k for \$50B and above) (Council of Better Business Bureaus, 2018). The benefits of becoming a partner are access to the variety of review bodies, preferred pricing on advertising challenges, access to case reports and educational/networking resources. The benefit to the CBBB of partners is that it promotes an industry of truth and minimizes the needs for government involvement. Currently there are approximately 130 active partners in the program.

Types and Testing of Advertising Claims

Three main types of sensory claims exist: puffery, non-comparative and comparative (ASTM 2018). These are highlighted in Figure 2. Puffery is a claim which is obvious hyperbole and, thus, reasonable people would not believe it to be true. For example, “one taste and you’ll go to heaven” or “light as a feather” are examples of puffery claims. They communicate a positive feeling toward a product, but are generally assumed to be an exaggeration. Non-comparative claims draw conclusions about a company’s own products, but do not compare them to a competitor. Examples of non-comparative claims include “amazing taste” and “incredibly satisfying”. Food companies use these to communicate benefits about their own products. Comparative claims draw comparisons, whether directly or indirectly, usually to a competitor. Within comparative claims, a claim could express that a product is unsurpassed (formerly called a parity claim), unsurpassed i.e. others are equal to or not greater than this product, or that the product is superior. Examples of comparative claims include, “tastes as good as...” (unsurpassed) or “tastes better than...” (superiority). Companies use comparative claims to send a strong message that their products are superior in some way to other products.

It is widely assumed that the more comparative in nature a claim is, the more “at risk” the claim is for being challenged. That is because of the likelihood that in stating why a product is superior to another brand a more direct attempt has been made to take market share away from the other brand. Thus, competitors are more likely to challenge the claim and thoroughly dissect the scientific methods and results. Figure 2 outlines the various types of sensory claims and the associated assumed risk.

Figure 2: Types of sensory claims, examples of each and assumed risk



¹ASTM 2018
² Buchanan and Smithies 1991
³ Zelek 1990

Learnings from Regulation History

ASTM International Committee E-1958 (ASTM 2018) standard guide for sensory claim substantiation is an excellent resource for designing a study to support claim substantiation. However, as a sensory scientist trying to apply the guide, the guide can be quite broad or overly vague. Understandingly it is written that way to encompass many possible study designs and to allow freedom to apply the standard as needed. However, along with the ASTM standard, sensory scientists should equally be invested in reading and understanding the NAD review and decision-making process. How are sensory scientists able to design suitable claim substantiation tests if they are unaware of the ways in which claims are challenged and dichotomized?

Some corporate law groups are disinclined to share the resources of the ASRC online archives, thus keeping the knowledge of legal proceedings to their department. This illustrates

the importance of a sensory team to forge a trustworthy, working relationship with their company's legal team. One major benefit of forging a strong collaboration with legal is that any planning and testing that results from the collaboration becomes attorney-client work product, a type of document that has a high level of protection in challenges and court proceedings (Garner, 2000). Some people think creating a claim substantiation study is easy. After all, it's just a more complex IHUT or CLT right? Running the study is easy. The hours of pre-work and getting legal to collaborate can be time consuming. The stronger the relationship is with legal and sensory, and the more ability to understand each other's fears and discourse, the stronger the product claim will be and the greater the chance of winning any challenges.

Background of the NAD:

The National Advertising Division monitors national advertising in all media, enforcing high standards of truth and accuracy. NAD examines advertising claims made for goods and services. NAD's decisions represent the single largest body of advertising decisions in the U.S. It handles about 150 cases each year and publicly reports its formal decisions. (Council of Better Business Bureaus, 2018).

Since NAD represents the single largest body of advertising reviews, advertisers and challengers will routinely submit previous NAD rulings as evidence during cases. Therefore, it is imperative sensory scientists review NAD cases to ensure adequate understanding of the review process and what stands up in court so that they can design the best sensory test possible. In the absence of consumer perception evidence, NAD will rely on its expertise to determine the messages reasonably conveyed by the challenged advertising (#6079, 2017). They will typically review the net impression created by a whole advertisement, not merely words or phrases

standing alone, and also take into consideration the entire ad, including words and images (#6195, 2018). Since the NAD creates its own impression of the messages conveyed, it is important that sensory scientists understand the NAD and what they are looking for when they review cases.

NAD precedent makes clear that an advertiser is obligated to possess support for its claims, both express and implied, at the time its advertising is disseminated to the public (#5453, 2012). Evidence is not required to be perfect, but rather to provide a reasonable basis for the claims (#6115, 2017). NAD appreciates how important it is for an advertiser to be able to distinguish its product from competing products. However, a delicate line sometimes exists between an advertiser's right to showcase the benefits of a product and at the same time, not to criticize a competitor's. In these cases, NAD must walk this fine line, carefully balancing the rights of both challenger and advertiser (#5359, 2011). They support the freedom of companies to promote their products but find that poor humor and exaggeration do not negate one's responsibility to substantiate the implied claims created by its advertising (#4981, 2009). Their mission is to simply evaluate advertising claims for truth and accuracy. They do not however have any legal precedent and do not strive to assess whether an advertiser's conduct complies with the law (#5453, 2012). Overall, once an advertiser has provided a reasonable basis for its claims to the NAD, the burden shifts to the challenger to show that either there was a material flaw in the advertiser's evidence or that it has more reliable evidence demonstrating a different result (#4994, 2009).

NAD's General Viewpoints on Sensory Testing:

The NAD expects advertisers to be responsible for all reasonable messages conveyed by their claims, not just the messages they intend (#5233, 2010). When a claim conveys a message about both objective results as well as the subjective feeling of those results, objective testing is appropriate (#6195, 2018). NAD routinely finds that claims using sensory invoking terms such as "feel", "look", or "odor" are not machine measurable claims, but rather sensory claims pertaining to consumers perceptions (#6195, 2018). Therefore, objective testing evidence should be submitted for review. The NAD appreciates that when companies provide evidence, they submit information concerning the test methodology, data and results to allow for review. Of note, the NAD states that the complete submission of data is particularly important if an advertiser seeks to support a ratio claim (i.e. preferred two to one) (#5274, 2011).

The best evidence to support taste preference claims consists of double-blind testing of comparative products and involves a geographically dispersed sample that reflects the target market. The NAD has long considered an ideal taste test to be comprised of the following: (1) compares products with similar shelf life that were purchased in the test market; (2) prepares both products according to instructions; (3) presents and tests products in the same way; (4) requires test subjects to cleanse their palate prior to tasting each product; and (5) produces statistically significant results (#5715, 2014). NAD considers the length of the survey, what type of questions were asked prior to the claim and what type of questions are asked in totality. Anything that is found to bias the subjects, such as considering specific attributes of each product before asking overall opinion or preference, or which includes questions not relevant to the claim, give cause for concern (#4915, 2008). Additionally, any demographic or branding questions must be asked after the product evaluation or there is a risk that responses have been

biased. Brand usage question which are asked prior to the study as a way to screen participants are appropriate. However, care must be taken that subjects cannot guess which brands are being targeted for testing (#6115, 2017). The ASTM guideline has additional information and examples of how to reduce bias while screening.

Studies, as well as products should always be blind so that subjects do not respond with the responses they think are preferred by the sponsor (#6195, 2018). If consumers are generally aware of the benefits of consuming a product, they might be biased into reporting they feel those effects. Care must be taken to keep the study as blind as possible. Additionally, including a control group in testing may be useful to show reliability of results.

A taste preference test normally requires respondents to taste one product, cleanse their palette, taste the second product and then state which, if any, they prefer. The design of the survey, as well as each individual question, is also important. A taste preference survey should focus only on key components relevant to the claim (taste preference), remove any questions that might bias the main claim question, and take care to place the key claim question before any non-relevant questions (#5023, 2009). Advertisers should be aware that conducting two preference tests with the same subjects may be a cause for concern for the NAD. Depending on how similar the product pairs are, the first set and questions could possibly bias the second (#5782, 2014).

Scientists need to determine if an expert panel or consumers need to be used to substantiate testing. NAD distinguishes between claims about a product meeting quality or a certain taste profile and claims that tout similarity to another product. To establish the quality of a product, an expert or descriptive analysis panel may be used. However, such a panel is not sufficient to support claims indicating that there are not differences between taste or other

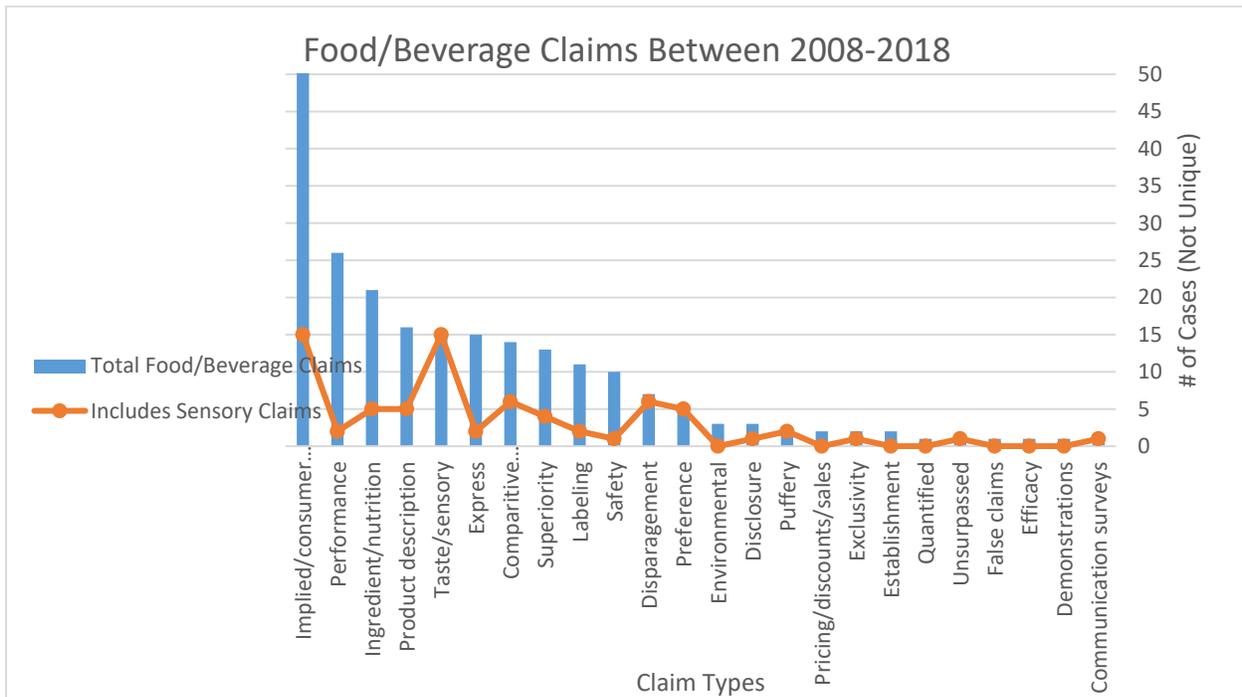
qualities. As a general rule, the NAD think descriptive analysis is useful, but is not sufficient to support comparative taste claims (#5609, 2013).

10 Year Review of Advertising Claims for Packaged Foods and Beverages at NAD

There are 100 cases that the NAD has reviewed over the last ten years within the food and beverage category. However, not each case included a sensory perception claim. Each of the 100 cases were reviewed for containing a challenge about a sensory claim or including taste tests as a key method. Figure 3 depicts the number of cases per claim category for food and beverage claims in the past ten years. Of the 100 cases, 69 were found to have claims pertaining to something other than a sensory or taste claim. Although some of these 69 cases used survey methods that could also be used by sensory scientists, the cases were focused on non-sensory advertising purposes such as: product ingredients, safety, nutritional facts, product labeling or environmental implications. Additionally, a small percentage of cases were listed as being brought forth for review, but then indicated the review did not happen due to pending litigation or discontinuance of claims prior to the challenge. In each of those events, NAD did not use their resources to review.

The remaining 31 cases included direct sensory claims and/or substantiation methods. These 31 cases are discussed in detail for the rest of this chapter. The highest number of cases involving sensory (Figure 3) were shown to be labeled as cases of: taste/sensory (n=15), implied consumer perception (n=14), disparagement (n=6), comparative performance (n=6), ingredient/nutrition (n=5), product description (n=5), preference (n=5) and superiority (n=4).

Figure 3: Food and Beverage Claims Reviewed by NAD in the past Ten Years



After reviewing the 31 sensory related cases that the NAD has reviewed over the past 10 years, there are key take-aways and themes present amongst its decisions. Those themes have been documented and categorized in the following paragraphs.

Puffery:

Many of the cases reviewed by the NAD focused on determining whether or not a claim was considered puffery. In most cases, the challenger asserted that the claim was not merely puffery and rather a comparative claim, while the advertiser claimed it was puffery. NAD recognized that while individual “taste” is subjective and may be a matter of individual opinion, advertising claims that tout a product’s superior taste, preference by consumers or comparative taste attributes, may suggest a measurable level of performance and require taste test evidence or other sensory analysis for support. (#5359, 2011)

There are two forms of puffery: (1) a general statement about a product's superiority that is so vague as to be perceived as a mere expression of opinion; and (2) an exaggerated statement, often made in a blustering or boasting manner, upon which no reasonable consumer would rely (#5359, 2011). In determining whether a claim is puffery or an objective measurable claim, NAD considers several factors including: whether the claim concerns general matters that cannot be proven or disproven, whether the claim is differentiated from other more specific, measurable depictions, or whether the wording uses expressions of opinion that will be discounted by the buyer (#5984, 2016). It is also dependent on what is communicated, i.e. what, if any, consumer expectations are created. Obvious hyperbole, exaggerated displays of pride and other non-provable claims have been found to constitute puffery. (#6079, 2017). These are claims in which a "reasonable" consumer will not expect substantiation. "Reasonable" can be interpreted in various ways, thus sometimes advertisers or challengers may conduct research to determine the main messages of a product ad from these "reasonable" consumers as to provide evidence about the messages conveyed by the ad. Alternatively, where an objective representation regarding a measurable product attribute is made, thus creating expectations for consumers, it takes a claim from puffery to the need for substantiations (#6079, 2017).

Line Claims:

A line claim is a claim which implicates the whole brand of products. For example, "Hunt's Traditional Pasta Sauce Taste Preferred over Prego". Here, since the exact product being compared to Hunt's Traditional Pasta Sauce is not disclosed, the preference claim becomes a claim against the entire line of Prego varieties of pasta sauce. Therefore, NAD recommends that when making a comparative claim, the exact competitor brand and style(s) tested against need to

be specified, otherwise data must support testing against the entire brand (#5607, 2013). NAD reviews the following factors when determining if a line claim is being made: (1) whether there are general brand references, (2) if the copy effectively limits the applicability of the claim, (3) if only one variety of the product is shown and (4) whether the imagery used in the advertisement effectively limits the claim (#5984, 2016; #5782, 2014). NAD has stated that not all of these factors need be present to determine whether an advertiser is making a line claim. Also, no one factor implies that a line claim is being made.

Comparative Claims:

Comparative claims are one of the most popular claims to make, with arguably the most impact on consumers. NAD takes comparative claims seriously and across decisions, it has developed somewhat of a standard for comparative taste claims. The overarching standard for comparative claims includes a double-blind testing of comparative products and involves a geographically dispersed sample that reflects the target market (#5023, 2009). NAD reviews the protocols and methodology and looks for the following factors within the study design for substantiation: (1) compares products with similar shelf life that were purchased in the test market; (2) prepares both products according to instructions; (3) presents and tests products in the same way; (4) requires test subjects to cleanse their palate prior to tasting each product; (5) produces statistically significant results; and (6) that the final claim identifies the product(s) that are the objects of the comparison (#5023, 2009).

Companies first and foremost should select the object of comparison very carefully. While advertisers are free to choose the basis of comparison for comparative claims about their products, they need to clearly indicate the exact product to which its advertised comparison

refers so as not to lead to any consumer confusion. This is particularly important when the brand has many product lines that could be the bases of comparison. In such situations, “advertisers should take care to ensure that their advertisement does not communicate the message that their competitor does not make a more similar product than the one being compared to” (#6085, 2017). If the product being compared to is not crystal-clear, the ad claim could adversely be viewed as an entire line claim which would be unsupported unless tested.

Secondly, selecting the basis of comparison should include the most similar product of the competitor’s, unless there is very good reason to do so. While the NAD states that a company can choose to compare against a slightly dissimilar product in order to highlight features or attributes of their products, companies often choose the most similar product so as not to convey the misleading message that a more similar product doesn’t exist (#5446, 2012). Similarity of a competitor’s product should be assessed in terms of total size, serving size, flavor and method of cooking. If the claim is a bit broader and is not comparing an exact product, then the test should be comprised of the majority, if not all, the products that could fall within the claim. NAD has found that testing two out of six possible offerings was insufficient to support a broader attribute line comparison (with or without a claim disclosure) (#5023, 2009).

The NAD has also made it clear that they prefer comparative claims to have been evaluated side by side for complete comparison. They believe that comparative advertising claims naturally imply the use of a comparative test design that presents two products simultaneously (#5023, 2009). They go on to state that although a side by side comparison is not absolutely required, simultaneous presentation provides the most direct comparison of the products and avoids execution bias and sensitivity issues.

A unique problem presents itself when the object of the test can typically be highly customized. For example, evaluating sub sandwiches presents a product where consumers typically customize according to their preference of ingredients. NAD has found that it is still acceptable to test and be an object of comparative testing. In one such case, the advertiser tested the sandwiches according to each websites' listed ingredients for the sandwich. Therefore, they kept the main ingredients consistent and allowed consumers some level of customization with condiments such as salt, pepper, mustard and mayonnaise. Consumers were also screened to ensure they were acceptors of each of the ingredients within the sandwich (#5023, 2009).

Use of Specific Terms or Phrases:

NAD's attitudes on specific words were found throughout the 31 cases analyzed. The specific words or phrases, and NAD's viewpoint of them, are as follows.

- When using the term "better", it refers to quantifiable performance attributes and not puffery. It thus must be substantiated (#5274, 2011).
- The term "now" in the context of describing "now with even more [attribute]", invites consumers to make a temporal comparison between the current and previous formulas. Therefore, it is a comparative claim (#5274, 2011).
- When a product has been improved and there is evidence of such, the NAD does not require a company to disclose the nature of the improvement whenever it makes a "new and improved" claim (#5233, 2010).
- "No wonder it tastes so good," is considered to be puffery and merely an expression of a company's pride in its product. However, if the claim is stated near or after any type of comparative claim or information (such as nutritional

content), the NAD has determined consumers might link the comparative claim to the taste claim and therefore it goes from puffery to an implied taste superiority claim. In summary, “no wonder” can act as a tie from the tag line to the comparative information (#6035, 2016).

- Unless there is clear evidence to support that consumers are confused or misled by a products name, NAD has a general rule of being reluctant to require an advertiser to change the name of a product simply because a challenger speculates that it might be misleading. NAD often finds that consumers appreciate the hyperbolic nature of many product names (#4994, 2009).

Disclaimers or “Supers”:

Disclaimers may be used to describe how the claim was determined and provide context for consumers. However, an advertiser must take care that the disclaimer or “super” does not contradict the main message of the ad and that it is clear and visible. Specific wording of the disclaimer, although important, is not the focus. Instead, the overall net impression of the entire ad including the disclaimer, is reviewed (#5023, 2009). NAD states that disclaimers that substantially contradict or change the main message in an advertisement are inadequate to prevent inaccurate consumer take-aways (#4915, 2008). Therefore, disclaimers should always be used to help limit the scope of the claim and provide consumers with a clear take away. They should not just describe the test method, but instead reinforce the key message being delivered (#6195, 2018).

Sampling the Correct Population:

Under sampling and over sampling are a key concern of NAD when reviewing the populations tested. NAD looks to see if a representative population of the target population has been used. NAD has acknowledged that an under-inclusive population is generally a greater problem in substantiation and claim interpretation research than over-inclusiveness (#5453, 2012).

A test should include the targeted population, but also must be specific enough that those consumers selected have consumed that category of item. It is a delicate balance to include target users but also be cognizant of either recruiting too wide or too narrow. For example, taste tests should not be conducted on users of the overarching category (e.g., ice cream) but on the specific product/flavor at issue (e.g., chocolate ice cream). Additionally, subjects should only be included if they are involved with the category; those who customarily use the specific type of advertised products (#5023, 2009), are planning to purchase again, and are likers of a product and flavor (#6115, 2017). It is not enough to have respondents who have eaten products in the same broad food category as the tested foods or consumed products from the companies involved (#5023, 2009). Especially regarding flavor, you need to identify a user that has eaten or is likely to eat the flavor(s) that are the subject of the taste test (#6115, 2017). Consideration should also be given to include users who may not purchase the product, but may be the main consumer of it (#5782, 2014), and users who may not be the intended target of the ad claim, but still are heavy users (#6195, 2018). NAD has deemed many taste tests unreliable if the sampled population is not familiar enough with the advertised product.

Conclusion

Utilizing sensory claims is a beneficial way to communicate about a product and to tell consumers why a product is different or superior to similar products. Since several sensory claims are available to accomplish this, it is important for a company to weigh the risks associated with each type of claim. The risk may increase as comparisons to competing products are made since competitors are likely to challenge them. This is a probable cause, along with cost, of why so few sensory claims were made within the past ten years. As demonstrated within this review, there are many avenues where a claim may be challenged and reviewed for accuracy and truth. Even if the NAD only saw a tenth of the claims within the past ten years, the number of sensory claims is relatively low compared to how many food products are out on the market today. I believe once sensory scientists are guarded with the additional information reviewing NAD cases provides, the risk of making a sensory claim decreases and is worth the time, effort and monetary expense for a company. Therefore, companies should consider utilizing sensory claims more often to differentiate their products in the marketplace and to tell their product's story.

There are two main considerations for future research to understand the world of sensory claims. One, research should be conducted to understand what type of sensory claims within each claim category resonate with consumers. This would be important to understand in determining how much risk one needs to assume. For example, if a puffery or non-comparative claim resonates stronger with your specific consumer, there is no need to put forth the resources and risk of a comparative claim. Secondly, it would be of interest to correlate the costs of generating the data for claims, as well as the upkeep of claims (retesting if formulas change, legal fees, etc.) against the revenue gained from making them. Historical company data may

show that the revenue gained from a product claim does not negate the costs associated with generating and maintaining the claim, meaning it was all for naught. Unfortunately, this data lies within each company and may be a hard metric to track as marketplaces and consumer preferences constantly shift and evolve. What may resonate with your consumers today might not tomorrow. Still, sensory claims are an important discussion for a team during a product's development and should be considered as part of the overall marketing tactic.

In summary, it is in a company's best interest to ensure a claim has the proper data to support it. Sensory scientists should not only be up to date on current guidelines set forth from the industry, such as the ASTM guide for claims substantiation, but should also be actively reviewing NAD cases and working with their legal counterparts to understand how claims are reviewed and dissected for evidence. Once a sensory scientist also understands the legal proceedings and how a claim is reviewed, only then can the risk of utilizing a claim be reduced.

References

1. Aramouni F, Deschenes K. 2015. The Essentials of Marketing Food Products. DEStech Publications, Inc. Methods for Developing New Food Products: An Instructional Guide. p. 254-274.
2. ASRC Review. 2018. Council of Better Business Review; [cited 2018 October 29]. Available from <http://www.asrcreviews.org/>
3. ASRC Online Archive. 2018. National Advertising Division; [cited 2018 October 29]. Available from <http://case-report.bbb.org>
 - a. Abbott Nutrition (Ensure Nutrition Products), Report #6195, *NAD/CARU Case Reports* (June 2018)
 - b. Anheuser-Busch Companies, Inc. (Select 55 Beer), Report #5233, *NAD/CARU Case Reports* (October 2010)
 - c. Blue Diamond Growers (Almond Breeze Almondmilk), Report #6079, *NAD/CARU Case Reports* (May 2017)
 - d. CAMPBELL SOUP COMPANY (Campbell's Select Harvest Soups), Report #4981, *NAD/CARU Case Reports*(March 2009)
 - e. CAMPBELL SOUP COMPANY (Prego Traditional Pasta Sauce), Report #5607, *NAD/CARU Case Reports* (June 2013)
 - f. CAMPBELL SOUP COMPANY (Prego Traditional Pasta Sauce), Report #6085, *NAD/CARU Case Reports* (May 2017)
 - g. ConAgra Foods, Inc. (Marie Callender's Frozen Three Meat and Four Cheese Lasagna), Report #5446, *NAD/CARU Case Reports* (April 2012)
 - h. Domino's Pizza, Inc. (Oven Baked Sandwiches), Report #5023, *NAD/CARU Case Reports* (May 2009)
 - i. French's Food Company (French's Tomato Ketchup), Report #5984, *NAD/CARU Case Reports* (August 2016)
 - j. General Mills, Inc. (Progresso Light Soups), Report #5274, *NAD/CARU Case Reports* (January 2011)
 - k. General Mills, Inc. (Yoplait Blended Greek Yogurt), Report #5715, *NAD/CARU Case Reports* (May 2014)
 - l. Kraft Foods Global, Inc. (All-Out Squeeze Kraft Products), Report #4994, *NAD/CARU Case Reports* (April 2009)
 - m. Kraft Foods, Inc. (Tombstone Pizza), Report #4915, *NAD/CARU Case Reports*(October 2008)
 - n. LALA-USA, Inc. (La Crème Real Dairy Creamer), Report #5359, *NAD/CARU Case Reports* (August 2011)

- o. Mizkan American, Inc. (Ragú Homestyle Traditional Pasta Sauce), Report #6115, *NAD/CARU Case Reports* (September 2017)
 - p. MOM Brands Company (Malt-O-Meal Brand Cereals), Report #5782, *NAD/CARU Case Reports* (November 2014)
 - q. OCEAN SPRAY CRANBERRIES, INC. (Ocean Spray Cranberry Juice/NARB #179), Report #5453, *NAD/CARU Case Reports* (April 2012)
 - r. Starbucks Coffee Company (Verismo Single-Serve Coffee System), Report #5609, *NAD/CARU Case Reports* (July 2013)
 - s. The Kraft Heinz Company (Kraft Salad Dressings), Report #6035, *NAD/CARU Case Reports* (December 2016)
4. ASTM E-1958. 2018. Standard Guide for Sensory Claim Substantiation. ASTM International, West Conshohocken, PA, 2018, www.astm.org
 5. Bryan A. Garner, ed. (2000). "Work-product rule". Black's Law Dictionary (Abridged 7th ed.). St. Paul, Minn.: West Group. p. 1298.
 6. Buchanan B, Smithies R. 1991. Taste claims and their substantiation. *J Advert Res* 31(3):19.
 7. Connolly A, Davidson L. 1996. How does design affect decisions at point of sale?. *Journal of Brand Management*. 4(2):100-107.
 8. Council of Better Business Bureaus, Inc. 2018; [cited 2018 November 10]. Available from <https://bbbprograms.org/programs/nad/>.
 9. Sidel J, Stone H. 2004. Special problems. In: Taylor SL, editor. *Sensory evaluation practices*. 3rd ed. Burlington: Elsevier Science. p. 290-294.
 10. Stone, Herbert, Bleibaum, Rebecca N., and Thomas, Heather A. 2012. *Strategic Applications*. Elsevier Science. *Sensory Evaluation Practices*. 4th ed. p388-392.
 11. Weisman R, Block I. 2014. "An Insider's Guide to the NARB" at the 2014 NAD Annual Conference.
 12. Zelek E. 1990. Legal aspects of sensory analysis. *Food Technology* 44(11):168-174.