

'Fresh, Local, Quality' — How Unverifiable Opinions Evade False Advertising Claims

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For a consumer, the words "Fresh. Local. Quality." attached to a product might draw connotations of craft beer, artisan goods or farm-to-table restaurants. But could a competitor sue under the Lanham Act if those "local" goods are actually shipped over from a neighboring state? When the Tenth Circuit Court of Appeals recently evaluated these words used to promote a bakery's bread, it deemed the tagline not actionable as false advertising and merely opinion. A lack of "*verifiable factual meaning*" prevented the words from being deemed true or false — no matter what the tagline might evoke.^[1]

Along with bringing trade secret theft and trade dress infringement claims, Bimbo Bakeries USA, Inc. (Bimbo Bakeries) alleged that United States Bakery (US Bakery) engaged in false advertising when it used the tagline "Fresh. Local. Quality." to advertise US Bakery's bread in stores and on its delivery trucks. Following a trial in which Bimbo Bakeries provided survey evidence on what consumers believed "local" meant, a jury deemed US Bakery's tagline false advertising and awarded Bimbo Bakeries over \$8 million in damages. On review, the Tenth Circuit was unimpressed with the outcome.

Bimbo Bakeries focused its argument on the fact that US Bakeries claimed its bread was "local." However, US Bakeries baked some of its bread outside of the states in which they were sold. This was true for the loaves sold in California as well as in Utah following a bakery closure in that state. Through consumer survey evidence, Bimbo Bakeries defined "local" as "baked in-state" and argued that all out-of-state bread was therefore falsely advertised as "local."

The appellate panel assessed that "Bimbo Bakeries' survey, which asked consumers about the meaning of 'local,' cannot somehow convert the word into a statement of fact" and that "the word 'local' cannot be adjudged true or false . . ."^[iii]

Only statements of fact are actionable under the Lanham Act.^[iii] A plaintiff alleging false advertising must prove that the promotional statement is either false or misleading. And only factual statements are inherently able to be proven true or false.

"Local" proved especially challenging for the Court due to definitions failing to provide how large that area or place can be. The dictionary definitions offered by Bimbo Bakeries — "relating to or occurring in a particular area, city, or town" and "pertaining to or characterized by place or position in space; spatial" — had no clear outer boundary.^[iv] "In the absence of mile markers, literal or figurative, we are unable to assess a locality claim as a factual matter. We are left with the conclusion that 'local' is simply a statement of opinion with which others may agree or disagree without generating legal liability."^[v]

Opinion — Something Other Than Puffery?

The Court deemed "quality" as "quintessential puffery outside the Lanham Act," but the panel did not describe "local" as puffery.^[vi] Puffery, which has long been deemed non-actionable under the Lanham Act, "is an exaggeration or overstatement expressed in broad, vague, and commendatory language."^[vii] Claims deemed puffery are generally ones of product superiority such as "America's Favorite Pasta," and it is not clear that "local" necessarily fits that category of bragging or boasting.^[viii]

In the Southern District of California, a district court assessed a similar situation: Whether a brewer describing its beer as "artfully crafted" was actionable under California's unfair competition laws.^[ix] That court concluded that the statement lacked a specific meaning and merely stated the brewer's subjective opinion on its beer, allowing the brewer to escape liability.

There is no hard line between opinion and puffery though. A recent Ninth Circuit Court of Appeals decision deemed a five-star rating system in a guidebook to be unquantifiable assertions that are "classic, non-actionable opinions or puffery."^[x]

Context Can Create Factual Statements from Opinion

The analysis cannot stop there. What appears to be puffery or opinion can be transformed into verifiable fact depending on the context. In a legal battle between pizza chains, the tagline "Better Ingredients—Better Pizza" appears on its face to be innocuous puffery. However, when the line was used as part of a larger, comparative ad campaign against its rival, the Fifth Circuit Court of Appeals held that opinion had transformed into a statement of fact in the mind of a reasonable consumer: The "better pizza" came from specific, "better ingredients." Because the advertising explained that the

pizza comes from identified fresh ingredients, fresh dough, and filtered water, the Court of Appeals felt that context had defined "better." As a result, the tagline took on the "characteristics of a statement of fact."^[xi]

In *Bimbo Bakeries*, the Court found that even when considering all the context, the entire tagline "is simply US Bakery's opinion about its product."^[xii] The generality and subjectivity of "fresh" and "quality" water down whatever specific meaning a consumer might place on "local." The rest of the visual advertising context did not imply or provide meaning to the term given that there were no comparative statements to other brands and no reference to a state or city. When the brand's Salt Lake City bakery was active, it paired the tagline with the slogan "Freshly baked in Utah," but it ceased using that when that baking facility closed.

Consumer Misunderstanding Cannot Generate False Advertising Claim Alone

The appellate panel conceded that some segment of consumers might have been misled into believing that US Bakeries baked its bread in state: "But not every subjective interpretation of ambiguous language is actionable false advertising."^[xiii]

Quoting the Eighth Circuit's opinion on "America's Favorite Pasta," the panel noted that "the Lanham Act protects against misleading and false statements of fact, not misunderstood statements."^[xiv] It summarily concluded, "When the language in question is incapable of objective verification as to truth or falsity, it is not a statement of fact, and no amount of misunderstanding will give rise to an action under the Lanham Act."

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[i] *Bimbo Bakeries USA, Inc. v. Sycamore*, 29 F.4th 630, 644–45 (10th Cir. 2022) (emphasis in original).

[ii] *Id.*

[iii] *Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292, 302 (4th Cir. 2017) ("[I]n order to be 'false' in any way cognizable under the Lanham Act, a statement must also be one of fact.").

[iv] *Bimbo Bakeries*, 29 F.4th at 645.

[v] *Id.*

[vi] *Id.* at 647.

[vii] *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993).

[viii] *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004).

[ix] *Parent v. MillerCoors LLC*, No. 3:15-CV-1204-GPC-WVG, 2015 WL 6455752, at *9 (S.D. Cal. Oct. 26, 2015).

[x] *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021) (quoting *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020)).

[xi] *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 501–02 (5th Cir. 2000).

[xii] *Bimbo Bakeries*, 29 F.4th at 647.

[xiii] *Id.*

[xiv] *Id.* at 646 (quoting *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 393–94 (8th Cir. 2004)).

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