



## "Fresh, Local, Quality" – How Unverifiable Opinions Evade False Advertising Claims | *IP Litigator*

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By Matthew Hartzler

Highlighting a recent decision from the US Court of Appeals for the Tenth Circuit, the article illustrates the limited application of the Lanham Act over false advertising claims arising from opinion statements. In *Bimbo Bakeries USA Inc. v. Sycamore*, a Tenth Circuit panel assessed Bimbo Bakeries' claim that a competitor, United States Bakery (US Bakery), had engaged in false advertising through its use of the tagline "Fresh. Local. Quality." Undoing a district court jury's verdict in favor of Bimbo Bakeries, the Tenth Circuit determined that the tagline was not actionable false advertising under the Lanham Act, but instead, was merely opinion.

The article explains that Bimbo Bakeries focused its argument on US Bakery's use of the term "local." Given that some of US Bakery's products were baked outside of the states in which they were sold, Bimbo Bakeries maintained that "local" indicated the bread was "baked in-state" and, therefore, the origin of all bread baked out-of-state was falsely advertised. The article notes that Bimbo Bakeries had supported its position with survey evidence demonstrating what consumers believed was the meaning of "local."

Outlining the Tenth Circuit's reasoning for rejecting Bimbo Bakeries' false advertising claim, the article explains that only factual statements are actionable under the Lanham Act. The Tenth Circuit ultimately concluded that "local" did not qualify as a factual claim, and accordingly, did not fall within the purview of the Lanham Act.

"'Local' proved especially challenging for the Court due to definitions failing to provide how large that area or place can be," according to the article. "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."

The article points out that the Tenth Circuit found the term "quality" amounted to "quintessential puffery outside the Lanham Act" – but did not describe "local" as puffery. Highlighting decisions from other courts, the article poses the question of whether "opinion [is] something other than puffery" and notes that "it is not clear that 'local' necessarily fits that category of bragging or boasting." The article further explains, however, that context can transform what appears to be puffery or opinion into a factual statement. In reviewing the full tagline and the advertising context, the Tenth Circuit ultimately determined that the tagline "is simply US Bakery's opinion about its product."

The article notes that the Tenth Circuit acknowledged that some segment of consumers might have been misled into thinking the tagline indicated that US Bakery's bread was baked in-state. However, the panel observed that "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."

The article [first appeared](#) in *Kattison Avenue* | Issue 8.

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