

**February 2–3, 2022 | Virtual Conference**

ACI's 5<sup>th</sup> Annual

LEGAL, REGULATORY AND COMPLIANCE FORUM ON

# ADVERTISING CLAIMS SUBSTANTIATION

*Develop successful strategies to substantiate claims in the new advertising landscape*

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NA, Marketing*  
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**Amy Mudge**  
*Partner and Co-Chair  
Advertising, Marketing and  
Digital Media Practice Group*  
**Baker & Hostetler LLP**

## » HIGHLIGHTS FOR 2022:

**Spotlight on:** Claim Substantiation Concerns Under the COVID-19 Consumer Protection Act



**Barry Ritz, PhD**  
*VP and Head, U.S. Regulatory  
and Medical Science*  
**Nestle Health Science U.S.**



**Ashley Saba**  
*Senior Corporate Counsel*  
**Clorox**

**Think Tank on:** Developing Effective Risk Management Strategies Around Social Media Influencer Claims and Consumer Endorsements



**Christopher Lucas**  
*Senior Director,  
Associate General  
Counsel*  
**American Eagle  
Outfitters Inc**



**Craig Moore**  
*Senior Counsel,  
Marketing  
Brand/Advertising*  
**Wells Fargo**



**Debora Welch**  
*Assistant General  
Counsel, NA Beauty  
Professional*  
**Henkel Corporation**

**Strategy Session on:** The Top Traps to Avoid When Making Environmental and Sustainability Claims



**Sally L. Davis**  
*Senior Director, Counsel*  
**S. C. Johnson & Son, Inc.**







**Adam Ekonomon**  
*Vice President and  
Deputy General Counsel  
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**The J.M. Smucker Company**

Plus Special Q&A Sessions with **NAD and CARU**

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-  **Q & A Sessions with the Regulators**
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-  **1:1 Networking Breaks**

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**Unilever**



**Amy Mudge**  
Partner and Co-Chair Advertising,  
Marketing and Digital Media  
Practice Group  
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## Speakers



**Lauren Aronson**  
Partner  
**Crowell & Moring**



**Kathleen Benway**  
Partner  
**Alston & Bird LLP**



**Katie Bond**  
Partner  
**Lathrop GPM**



**Caleb Brian, Ph.D.**  
New Product Claims Specialist  
Stationery and Office  
Supplies Division  
**3M**



**Jacqueline Chan**  
Partner  
**Kleinfeld Kaplan Becker**



**John Cooper**  
Director of Strategy  
**Veeva Claims**



**Sally L. Davis**  
Senior Director, Counsel  
**S. C. Johnson & Son, Inc.**



**Pamela Deese**  
Partner  
**Arent Fox LLP**



**Adam Ekonomon**  
Vice President and  
Deputy General Counsel  
Marketing and Regulatory  
**The J.M. Smucker Company**



**Erin Evans**  
Director, Legal and Government  
Affairs – Marketing Practices  
**T-Mobile**



**Leonard Gordon**  
Partner  
**Venable LLP**



**John Graubert**  
Partner  
**Covington & Burling LLP**



**Carrie Kovalerchik**  
Senior Legal Counsel – Marketing  
**Unilever**



**Mamie Kresses**  
VP, Children's Advertising Review  
Unit (CARU)  
**BBB National Programs**



**Mark Levine**  
Associate General Counsel  
**Reckitt Benckiser**



**Christopher Lucas**  
Senior Director, Associate  
General Counsel  
**American Eagle Outfitters Inc.**



**Limor Robinson Mann**  
Chief Oral Care Marketing  
Counsel – Global  
**Colgate Palmolive Company**



**Gonzalo Mon**  
Partner  
**Kelley Drye & Warren LLP**



**Craig Moore**  
Senior Counsel, Marketing  
Brand/Advertising  
**Wells Fargo**



**Megan Olsen**  
Vice President & Associate  
General Counsel  
**Council for Responsible  
Nutrition**



**Barry Ritz, PhD**  
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and Medical Science  
**Nestle Health Science U.S.**



**Ashley Saba**  
Senior Corporate Counsel  
**Clorox**



**Ronald Urbach**  
Partner  
**Davis+Gilbert LLP**



**Zheng Wang**  
Attorney  
**National Advertising Division,  
BBB National Programs**



**Ivan Wasserman**  
Partner  
**Amin Talati Wasserman LLP**



**Debora Welch**  
Assistant General Counsel,  
NA Beauty Professional  
**Henkel Corporation**



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Join us at **ACI's 5th Virtual Advertising Claims Substantiation** as our esteemed faculty of advertising industry stakeholders, including in-house counsel, law firm attorneys, and representatives from consumer protection groups will keep you informed on the latest legal and regulatory challenges facing advertising and marketing professionals.

**Gain valuable insights on:**

- » The implications of the *AMG Capital Management* vs. *FTC* decision
- » New NAD and CARU initiatives
- » New consideration for health and wellness claims under the COVID-19 Consumer Protection Act

**Spotlight on:**

- » Made in the USA claims – Substantiating Country of Origin claims
- » Developing strategies for compliant Green Claims
- » Social Media and Influencer claims risk mitigation

Don't miss this opportunity to align your advertising practices with regulatory priorities and expectations.

 **Expand Your Learning With One or Both of Our In-Depth Workshops**

PRE-CONFERENCE WORKSHOP  
Wednesday, February 2, 2022

8:00–10:00 am

**A** **Advertising Claims 101** – A Complete Roadmap to a Successfully Substantiated Advertising Campaign

POST-CONFERENCE WORKSHOP  
Thursday, February 3, 2022

2:00–5:00 pm

**B** **Working Group on Substantiating Advertising Claims for FDA Regulated Consumer Products:** OTC Drugs, Food, Dietary Supplements and Cosmetics

 **WHO WILL YOU MEET?**

**In-house counsel and business executives responsible for:**

- » Advertising and Promotion
- » Social Media
- » Digital Marketing/Communications
- » Corporate Communications
- » Interactive Marketing
- » Entertainment/Media
- » Emerging Technologies
- » Brand Management and Development
- » Crisis Communications
- » Public Relations
- » Intellectual Property
- » Privacy

**Outside counsel with practices in:**

- » Advertising
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- » Privacy
- » Intellectual Property
- » Technology and Digital Media

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# PRE-CONFERENCE WORKSHOP • Wednesday, February 2, 2022

🕒 8:00–10:00 am



## Advertising Claims 101 – A Complete Roadmap to a Successfully Substantiated Advertising Campaign

👤 Pamela Deese, Partner, **Arent Fox LLP**

👤 Gonzalo Mon, Partner, **Kelley Drye & Warren LLP**

The session will provide a comprehensive overview of both the content and terminology used to support claim substantiation for product and service advertisements, as well as the higher standards applied to comparative claims. Whether you are new to the industry or an advertising professional interested in a refresher, this pre-conference workshop will provide the foundation for the main conference.

Points of discussion will include:

- When is substantiation required? Benefits of truthful claims
- Defining key advertising terms relative to claims substantiation
  - » Claim
  - » Reasonable basis
  - » Competent and Reliable
  - » Highest possible standard
- How much substantiation is needed?
  - » Tests Prove
  - » Studies Show
  - » Doctors Recommend
  - » Health and safety claims
- Differentiating between different types of claims
  - » Express vs. implied
- What evidence is necessary to substantiate a claim? How to examine the quality of the substantiation—it is not all created equal
- Exploring the role of statistics and scientific evidence in the claim substantiation process
- Examining testing requirements used to substantiate claims
  - » Are the tests required dependent on the type of claim?
  - » How do these tests differ based on the product or service?
- Using experts, consumer surveys and other extrinsic evidence to determine what an ad conveys
- How to appropriately use qualifications or disclosures in advertising
- Comparative claims: pitfalls and standards
- Exploring ways in which a substantiated claim may be utilized
- Understanding the interplay between marketing and legal departments when making a claim on a product or service
- Identifying regulatory bodies and watchdog groups that monitor advertising—there are real consequences to false claims
  - » FTC
  - » State Regulatory Agencies and Attorneys General Offices
  - » NAD
  - » CARU
  - » Network Reviews
  - » Advertiser Litigation
  - » Class Actions
- Examining the steps in the creation of an advertising campaign relative to claims substantiation
- Understanding how the requirements for substantiation change when working with a new product vs. an established product
- Ensuring the method matches the message
- Key language to use and avoid in an advertisement
- Successfully displaying a stated goal
- Understanding when a trademark can be considered a claim
- Using US origin as a claim


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10:30

## Co-Chairs' Opening Remarks

 **Kathryn Farrara**, Associate General Counsel NA, Marketing, **Unilever**

**Amy Mudge**, Partner and Co-Chair Advertising, Marketing and Digital Media Practice Group, **Baker & Hostetler LLP**

10:45

## 2021 Year in Review: Examining How Key Legal Developments and Trends in Advertising Claims Substantiation Will Impact Your Business Practices in 2022

 **Lauren Aronson**, Partner, **Crowell & Moring**

**Limor Robinson Mann**, Chief Oral Care Marketing Counsel – Global, **Colgate Palmolive Company**

Join us for an interactive discussion about significant advertising claim substantiation developments and trends in 2021 and predictions for 2022. Points of discussion will include:

- Highlights of recent cases and actions taken by the FTC, NAD, state AGs and private plaintiffs which have impacted the world of claims substantiation
- Assessing how leadership and policy changes at the FTC may impact claims substantiation as we enter 2022
- Emerging regulations, industry trends and initiatives to watch in the claims substantiation sphere

11:45

## Examining the Implications of *AMG Capital Management vs. FTC*: What Will the Future Hold for Monetary Relief in False or Deceptive Advertising Cases?

 **John Graubert**, Partner, **Covington & Burling LLP**

The Supreme Court's groundbreaking decision in *AMG vs. FTC*, struck down the FTC's ability to seek monetary relief under Section 13(b) of the FTC Act. This includes cases where there are findings of unfair or deceptive advertising and marketing practices. This panel will examine the implications of this ruling and discuss:

- The latest actions being taken, and bills being considered by Congress to overturn the Court's decision
- Other avenues the FTC is trying to take to seek monetary redress outside of their previously utilized 13(b) power
- If the Senate does reinstitute the FTC's 13(b) authority to seek monetary relief, will there be specific conditions that must be satisfied? Might it only be in cases of blatant fraud?
- What will the implications of this be for the future of ad claims substantiation litigation and relief going forward?




12:30

## 1:1 Networking and Lunch

For the first 10 minutes of this break, you will have the opportunity to connect, chat and share contact details with up to 3 other attendees, selected at random, for a one-on-one conversation

1:30

## Lessons Learned from Recent Advertising Claims Class Actions and Future Forecasts for State and Private Plaintiffs Advertising Claims Litigation in the Wake of *AMG v. FTC*

 **Leonard Gordon**, Partner, **Venable LLP**

Piggy backing off the discussion of our pre-lunch panel, this session will explore:

- Recent decisions from class action cases focused on advertising claims substantiation
- Best practices for building a strong defense for the substantiation of a claim
- The impact of *AMG v. FTC* on the future of ad claims litigation
  - » How are State AGs filling the enforcement void in light of the FTC being stripped of its remedial powers under 13(b)?
  - » Anticipating future trends in state AG litigation and private litigation brought by the plaintiffs' bar in the ad claims space

2:15

## Advertising in the Age of COVID-19: Claim Substantiation Concerns Under the COVID-19 Consumer Protection Act

 **Katie Bond**, Partner, **Lathrop GPM**

**Barry Ritz**, PhD, VP and Head, U.S. Regulatory and Medical Science, **Nestle Health Science U.S.**

**Ashley Saba**, Senior Corporate Counsel, **Clorox**


- Examining FTC enforcement of the COVID-19 Consumer Protection Act
- Update on the latest government agency monitoring and enforcement efforts targeting companies whose advertising tout COVID-19 related health benefits
- Masks, sanitizers, cleaning supplies and immunity boosting supplements and foods: what do recent NAD/FTC cases say about which claims are appropriate and which ones are not?
- Mitigating risk when engaging in the marketing of such products
- Avoiding the dangers of implied claims relative to health benefits in this area

3:00 | Afternoon Break



3:30

## It's Not Easy Being Green: The Top Traps to Avoid When Making Environmental and Sustainability Claims

 John Cooper, *Director of Strategy, Veeva Claims*

Sally L. Davis, *Senior Director, Counsel, S. C. Johnson & Son, Inc.*


Adam Ekonomon, *Vice President and Deputy General Counsel, Marketing and Regulatory, The J.M. Smucker Company*

Ronald Urbach, *Partner, Davis+Gilbert LLP*

Companies touting the environmental friendliness and sustainability of their products are facing increased scrutiny and lawsuits. Join this panel as they analyze this year's most significant "greenwashing" lawsuits, as well as traps to avoid when engaging in the green marketing of products. Then, test your comprehension of truth-in-advertising principles through an interactive series of mock ad comparisons followed by anonymous polling questions on advertising claim scenarios. Discover how your approach to tackling the substantiation of environmental claims compares to your peers, and benefit from a practical discussion of the polling results and important takeaways for your practice.

4:30

## Spotlight Interview and Q+A with CARU: A Deep Dive into Recent New Changes to Children's Advertising Guidelines

 Mamie Kresses, *VP, Children's Advertising Review Unit (CARU), BBB National Programs*

Following our last event, CARU issued newly revised advertising guidelines applicable to all child-directed advertising which will officially go into effect on January 1, 2022. Join us for an in-depth interview with CARU and hear firsthand what the new guidelines will entail and how they will be enforced. From new disclosure requirements for digital media ads, to directives against negative social stereotyping, to revised rules for in-app and in-game advertising and purchases – tune in for essential compliance tips for all varieties of future campaigns.

5:30 | Conference Adjourns to Day 2

# MAIN CONFERENCE DAY 2 • Thursday, February 3, 2022

9:00

## Co-Chairs' Opening Remarks and Recap of Day 1

9:15

## Morning Coffee and Q+A with the NAD

 Zheng Wang, *Attorney, National Advertising Division, BBB National Programs*

Join us for an interactive conversation with the NAD as they discuss recent hearings and enforcement actions affecting the advertising claim substantiation arena, as well as their latest initiatives to promote truth in advertising claims, and perspectives on upcoming changes that will shape industry for 2022 and beyond. *At the end of this session, we will open the floor to questions from the audience.*

9:45

## Advertising "Under the Influence": Developing Effective Risk Management Strategies Around Social Media Influencer Claims and Consumer Endorsements

 Christopher Lucas, *Senior Director, Associate General Counsel, American Eagle Outfitters Inc*

Craig Moore, *Senior Counsel, Marketing, Brand/Advertising, Wells Fargo*

Debora Welch, *Assistant General Counsel, NA Beauty Professional, Henkel Corporation*

**PANEL MODERATOR:** Amy Mudge, *Partner and Co-Chair Advertising, Marketing and Digital Media Practice Group, Baker & Hostetler LLP*

With the rise of advertising through social media influencers, the lines between what is and isn't an "advertisement" have become increasingly blurred. More than ever before, companies need to be proactive about sufficiently substantiating influencer claims, insisting on proper disclosures and protecting themselves from rogue influencers. This panel will take a close look at:

- Recent activity of consumer protection regulators in targeting deceptive influencer practices
- How are the latest guidance is impacting the activity of influencers and advertisers on newer social media platforms like TikTok, Instagram stories, Snapchat, etc.?
- Understanding the different requirements and best practices relative to:
  - » Consumer endorsements
  - » Expert endorsements
  - » Reviews on other third-party websites
  - » Repurposed reviews
  - » Disclosures of material connections to the brand or seller of the advertised product

- Examining the recent announcement by SAG-AFTRA (Screen Actors Guild) that influencers are now eligible to join the union – what will the implications of this be?
  - » How will this impact what is included in unionized influencer contracts, how claims by influencers are treated and substantiation of influencer claims?
- What steps should a company take to ensure that influencer campaigns do not create legal liability for the brand?
- Best practices for preventing rogue influencers from touting unsubstantiated influence



10:45

## 1:1 Networking and Lunch

For the first 10 minutes of this break, you will have the opportunity to connect, chat and share contact details with up to 3 other attendees, selected at random, for a one-on-one conversation

11:15

## A Tactical Toolkit for Effectively Utilizing Consumer Surveys to Substantiate Ad Claims

 **Caleb Brian, Ph.D.**, *New Product Claims Specialist, Stationery and Office Supplies Division, 3M*

**Carrie Kovalerchik**, *Senior Legal Counsel – Marketing, Unilever*

**Jacqueline Chan**, *Partner, Kleinfeld Kaplan Beckerr*

Companies frequently rely on consumer surveys as a basis for substantiating advertising claims. However, developing effective consumer perception surveys can be laborious and costly, and depending on the type of claim being made, may be deemed insufficient to substantiate the claim. This panel will address topics including:

- Understanding the types of claims for which survey evidence may be most useful
- Best practices for survey development and execution, and identifying what kinds of experts are important to involve and how to use them
- An overview of recent cases involving consumer survey evidence
- The latest FTC and NAD guidance/rulings on the sufficiency of consumer survey evidence as well as:
  - » Under what circumstances and for what kinds of claims more reliable scientific evidence or clinical trials are needed
  - » How survey evidence is looked at and weighed when considering subjective vs. objective claims
  - » How consumer survey evidence is treated vs. consumer panel evidence
- Examining how Artificial Intelligence may be used to test perceptions of a specific ad: will AI give us a path to understanding consumer perceptions that is better than the current consumer survey approach?

12:15

## “Made in the USA” – Or Is It? Ensuring Substantiation of Country-of-Origin Claims Amidst Increased FTC Scrutiny

 **Kathleen Benway**, *Partner, Alston & Bird LLP*

**Erin Evans**, *Director, Legal and Government Affairs – Marketing Practices, T-Mobile*

This past August, the FTC finalized its Made in the USA Labeling Rule, to deter “rampant Made in the USA Fraud.” This action reinforces the importance of this initiative to the Biden Administration and drives home the need for consumer product companies to tread carefully when making country of origin claims. This panel will delve into topics including:

- The implications and limitations of the FTC rule on marketers and the impact of allowing FTC to seek civil penalties for violations
- How are courts interpreting the “all or substantially all” element of the FTC Rule absent a bright line rule for determining whether that has been met?
- Determining the impact of recent political influence by the Biden Administration on enforcement priorities
- Understanding manufacturer-retailer liability with materials and ingredients coming from different countries and the impact of COVID-19
- Determining when the term “made in the USA” can be utilized when making comparative claims

1:00 | Main Conference Concludes



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## POST-CONFERENCE WORKSHOP • Thursday, February 3, 2022

🕒 2:00–5:00 pm

### **B** Working Group on Substantiating Advertising Claims for FDA Regulated Consumer Products: OTC Drugs, Food, Dietary Supplements and Cosmetics

🗣️ **Mark Levine**, Associate General Counsel, **Reckitt Benckiser**

**Megan Olsen**, Vice President & Associate General Counsel, **Council for Responsible Nutrition**

**Ivan Wasserman**, Partner, **Amin Talati Wasserman LLP**

Generally, products related to consumer health or safety require a relatively high level of substantiation. This interactive working group will explore the necessary requirements and nuances of claims substantiation of FDA-regulated consumer products, including OTC drugs, dietary supplements, food, and cosmetics. The Working Group leaders will walk you through the complexities of inter-agency policies and procedures governing what claims you can safely make and those you cannot and will provide you with the key information necessary to make properly substantiated claims.

Points of discussion will include:

- How COVID-19 has raised the bar for claims substantiation of FDA regulated consumer goods
- Exploring the relationship between the FTC and FDA in this arena
- Analyzing FTC advertising guidelines (deception, substantiation, environmental, endorsements/testimonials, Made in USA)
- Determining the scientific evidence necessary to meet FTC claim substantiation standards
- Assessing if a clinical trial or study is necessary in view of recent pronouncements
- Taking a closer look at how the FTC and FDA views claims on these products via social media and influencers
- Reviewing the latest pronouncements on “organic,” “all-natural” “green,” “clean” and “100% real ingredients” claims
- Analyzing the current status of CBD relative to FDA regulated consumer goods -- Where do the FDA and FTC stand on the use of this ingredient? Do hemp products hold different regulations from products containing CBD?
- Exploring enforcement activity for unsubstantiated claims, including recent warning letter analysis
- Examining the recent challenges against claims made for these types of products
  - » NAD challenges
  - » Class actions

## Upcoming Events



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January 18–19, 2022  
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9th Annual Legal, Regulatory,  
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**COSMETICS**  
& Personal Care Products

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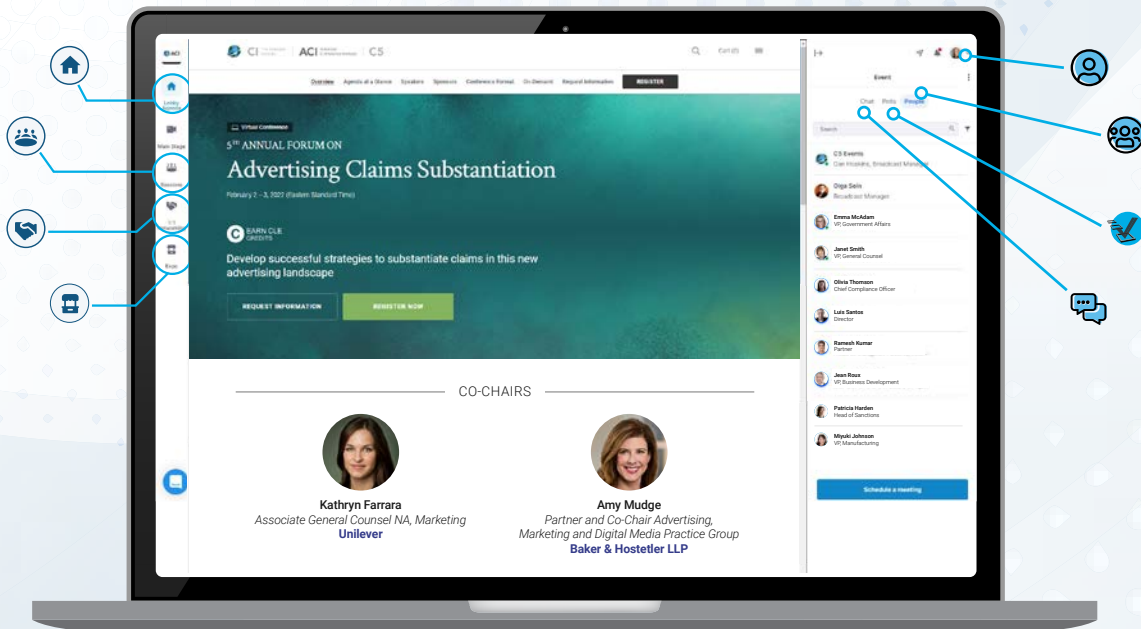
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