

World's Best Legal Advice on Puffery

By Lori Beam Proceed with caution when making claims your product or service is the “best,” warns the National Advertising Division (NAD), part of the Council of the Better Business Bureau. In a new decision, the NAD recommends that tractor company Mahindra USA discontinue claims that it offers the industry’s “best” warranty, the “best” in loader capacity and the “best value.” When do words like “best” constitute objective claims that require substantiation rather than mere puffery? Puffery generally refers to advertising claims that are:

- Blustering and boasting that no reasonable buyer would rely on.
- Exaggeration so vague it is incapable of objective measurement or proof.

Broad, non-comparative superlatives like “great,” “delicious” and “magnificent” are readily understood as subjective expressions of opinion, not fact. So they typically aren’t actionable and don’t require substantiation. But comparative superlatives such as “best,” “better,” “superior” and “favorite” create greater risk of implying an objective claim. Comparative superlatives often cross over from puffery to an objective claim when combined with a claim capable of measurement, a specific product trait, or a direct comparison to a competitor product. That’s what NAD concluded about several elements of Mahindra USA’s radio, television and internet advertising:

<u>Mahindra Ad Statement</u> “Best” warranty” Industry Leading” Warranty “#1 with best-in-class loader lift capacity”	<u>NAD Decision</u> Not puffery because the warranty’s quality is capable of measurement, and ad lacks significant hyperbolic or fanciful elements of puffery Not puffery because loader lift capacity is measurable, and Mahindra failed to demonstrate that the chart and videos in the ads featuring the loader lift capacities of competing brands gave apt comparisons
“The Best vs. The Rest”	Not puffery and Mahindra failed to show reasonable basis to claim superior overall performance
“Toughest Tractors on Earth”	Puffery because it is a broadly defined claim, and it’s not clearly tied to objectively measurable attributes of the tractors

Mahindra says it plans to appeal the decision. In analyzing your ads, review puffery in the context of the entire ad:

- A statement in isolation may be puffery, but transform into a measurable objective claim in the context of the ad.
- Including a direct comparison to a competitor in an ad that uses puffery likely converts it to a measurable objective claim.
- Even where no competitor is mentioned, comparative superlatives like “better” or “best” may be considered measurable objective claims, especially when used to describe a product attribute.

For example, if I claimed I’m the “best lawyer in the world,” that is likely puffery. If I said I’m the “best blog-writing lawyer for the KCDMA,” that is likely true (because I am the only one), but likely not puffery

and instead a measurable objective claim. So just be careful when touting your product's "claim" to fame if it could be measured objectively! Lori Beam is a shareholder at Seigfreid Bingham where she chairs the firm's Advertising, Marketing and Promotions practice group. Contact her at lbeam@sb-kc.com or 816-421-4460. *This article is general in nature and does not constitute legal advice. Readers with legal questions should consult with an attorney prior to making any legal decisions.