

# Liability for Marketing Claims in California

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## Introduction

Does a company expose itself to liability in California when it boasts that its products are the “safest in the business?” The answer will depend on whether courts will consider that statement to be a misleading claim or mere advertising puffery.

## The California False Advertising Law

The California False Advertising Law prohibits companies from making any statement concerning the business’s products or services that is untrue or misleading, and that is known, or by the exercise of reasonable care should be known, to be untrue or misleading. Cal. Bus. & Prof. Code § 17500. A violation of the law is a misdemeanor, punishable by up to six months in jail or by a fine of up to \$2,500.00. Also, violations may expose the company to private claims for restitution or injunctive relief under the False Advertising Law. Cal. Bus. & Prof. Code § 17535. In addition, the Attorney General “or any district attorney, county counsel, city attorney, or city prosecutor in [California]” may bring a claim under the False Advertising Law for not only restitution and an injunction but civil penalties of up to \$2,500.00 per violation.

The False Advertising Law **specifically addresses claims regarding product safety**. It provides that a business advertising in California may not make:

“[A]ny false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) **compare the product’s effectiveness or safety to that of other brands or products**, or (3) purport to be based on any fact.” Cal. Bus. & Prof. Code § 17508 (emphasis added).

For these types of advertising claims, the government can request, and the business must provide, “evidence of the facts on which the advertising claims are based.” *Id.* If the company does not respond, or the requesting official has reason to believe that the advertised claim is false or misleading, the official may (1) seek an injunction requiring the advertiser to revise or stop the claim; and/or (2) disseminate information to the public about why the official believes the claims are false or misleading. *Id.*

Manufacturers should know that it is not particularly difficult for consumers to gain the standing necessary to bring private claims. The consumer must simply demonstrate that he “suffered injury in fact and lost money or property as a result.” *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1168 (C.D. Cal. 2011). A plaintiff can do this by simply asserting that he would not have purchased the product but for the claims made in the challenged advertisement. *Id.*

## What Constitutes an “Untrue or Misleading” Statement?

A statement is “untrue or misleading” under the False Advertising Law if “members of the public [are] likely to be deceived by the advertising.” *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 120 (2009). This standard covers not only statements that are false, but statements “which, although true, [are] either misleading or which ha[ve] a capacity, likelihood or tendency to deceive or confuse the public.” *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1025-26 (N.D. Cal. 2012). In applying this standard, courts consider whether a reasonable consumer is likely to be deceived. *In re Vioxx Class Cases*, 180 Cal. App. 4th at 130.

However, an advertisement that is not literally true will not incur liability if it qualifies as “mere puffery.” For example, claims “that a computer is ‘ultra-reliable’ or ‘packed with power’ say nothing about the specific characteristics or components of the computer” and merely constitute non-actionable puffery. *Elias v.*

*Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 855 (N.D. Cal. 2012). Similarly, a fast-food restaurant would not be liable under the False Advertising Law for boasting of its “high-quality ingredients, innovative recipes, and time-tested cooking methods” because such statements constitute nonspecific puffery that is unlikely to deceive or mislead a reasonable consumer. *Fraker v. KFC Corp.*, 06-CV-01284JMWMC, 2007 WL 1296571 (S.D. Cal. Apr. 30, 2007).

The upshot is that courts analyzing claims under the False Advertising Law must decide whether the statements at issue are so specific and factual that they are likely to deceive reasonable consumers, or are simply mere puffery.

### **“Puffery” Versus “Untrue or Misleading” Statements**

In a recent case involving highly publicized automotive safety defects, the U.S. District Court for the Central District of California explored the boundaries between vague, general statements of product superiority and specific claims likely to mislead reasonable consumers. See *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Products Liability Litigation*, 754 F. Supp. 2d 1145 (C.D. Cal. 2010)

In *In re Toyota Acceleration*, the court analyzed an extensive advertising campaign that touted the reputation of Toyota’s cars for high quality and safety. Toyota found itself defending several lawsuits, including claims under the False Advertising Law, after problems surfaced with the acceleration control mechanisms in the vehicles. In a pre-answer motion to dismiss, Toyota argued that its advertising campaign constituted only a collection of simple statements of general superiority, which are permitted by the False Advertising Law. However, the court disagreed, and concluded the campaign contained specific representations regarding safety features and that, therefore, the advertisements constituted more than mere puffery.

Additionally, the court explicitly credited the plaintiffs’ allegations that certain Toyota advertisements “misdescribed” the relevant safety features. *Id.* at 1176-77. The court held that the False Advertising Law could potentially apply even to Toyota’s more general safety claims because such claims formed part of “a campaign by Toyota in which it represented itself as prioritizing (even ‘obsessing over’) safety.” *Id.*

### **Other Laws Implicated by “False and Misleading” Statements**

Other California statutes also prohibit false advertising. For example, the California Unfair Competition Law prohibits “unlawful, unfair or fraudulent business act[s] or practice[s],” Cal. Bus. & Prof. Code § 17200, and “[a]ny violation of the [False Advertising Law] constitutes a violation of the [Unfair Competition Law],” *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Similarly, the California Consumer Legal Remedies Act prohibits “unfair methods of competition and unfair or deceptive acts or practices” and is often pleaded with False Advertising Law claims. Cal. Civil Code § 1770.

In addition, common law theories of liability, such as unjust enrichment, breach of warranty and fraud, may also apply to the same set of facts that form the basis of a False Advertising Law claim. See *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 587 (9th Cir. 2012) (unjust enrichment); *In re Vioxx Class Cases*, *supra*, (breach of warranty); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 967 (N.D. Cal. 2008), *aff’d* 322 F. App’x 489 (9th Cir. 2009) (fraud).

## Closing Thoughts

Of course, the False Advertising Law requires that the challenged statement must actually be false. Thus, a manufacturer's advertisement that its products are "the safest in the business" would not likely create liability under the False Advertising Law unless and until a safety defect is discovered.

Moreover, even if safety defects are discovered, a manufacturer marketing its products as "the safest in the business" would not necessarily be liable under the False Advertising Act. This is because such general assertions regarding product safety may not be considered to be specific claims about a product's performance. Rather, courts may consider such statements to be generic, nonspecific claims constituting mere puffery, which are not actionable as false statements. *Elias*, 903 F. Supp. 2d at 855; *Fraker*, 2007 WL 1296571. This is particularly so when the company does not purport to obsess about safety. That particular boast by Toyota was specifically relied upon by the court when it ruled against the car company.

Still, the key takeaway from *In re Toyota Acceleration* is that a sustained and pervasive marketing campaign touting product safety may be considered sufficiently specific to contain false and misleading statements, rather than mere puffery. See *In re Toyota Acceleration*, 754 F. Supp. 2d at 1176-77.

While it may make business sense to tout a product's safety features, companies must be aware of the risk of expensive litigation under the California False Advertising Law. They should carefully draft their representations to be as general as possible, but remain mindful that even nonspecific safety claims may subject them to significant exposure.

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