

# Misleading and Disparaging Advertisement:

## A Business Perspective Analysis

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### SUBJECT

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Business Law



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## Table of Contents

1.	INTRODUCTION.....	3
2.	MISLEADING ADVERTISEMENTS.....	4
3.	COMPARATIVE OR DISPARAGING ADVERTISEMENTS .....	6
4.	IMPACT OF MISLEADING AND DISPARAGING ADVERTISEMENT .....	8
5.	LAWS RELATED TO MISLEADING ADVERTISEMENTS IN INDIA .....	10
6.	PROBLEMS WITH THE LAWS AND AGENCIES.....	12
7.	OUR RECOMMENDATIONS TO THE LEGAL ISSUE .....	13
8.	CONCLUSION .....	14
9.	REFERENCES.....	15

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# 1. Introduction

India has a long tradition of advertising, recognizing that the first newspapers were published in India in the 19th century. The first advertising agency was established in 1905, B. Dataram and Company. Advertising expenditure in the 1950s just after the independence was estimated at US\$300,000. In 2020, India's total advertising revenue was over 700 billion Indian rupees, and the country was ranked as the third-largest advertising market across the world in terms of ad spending.

The primary purpose of advertising is to be educational. It is a form of communication used to encourage or persuade its intended audience to continue with products or take new products. Advertising is an integral part of modern business. We come to know all about new products through advertisements. Advertising fulfills the 'Right to Information' and 'Right to Choose' for consumers. The desired result of advertisement is to drive consumer behavior concerning a product and persuade people into transactions that they might otherwise avoid due to lack of information.

We can judge the power of advertisements because it has capabilities to associate certain qualities with the brand in the minds of consumers. For example, a detergent powder is commonly referred to as SURF, and a photocopy is referred to as XEROX in households. However, XEROX and SURF are companies and not the product.

The issue that needs to be understood is that although advertisements are informative and educational, they sometimes become misleading or disparaging.

Skechers – “Shape up while you walk.”

Nivea “Bio-Slim Complex”

Duracell “Lasts Even Longer”

“Secured loan in 10 minutes”

We all must have heard these lines on televisions, radio, etc., or must have seen them on billboards, the internet, etc. Being constantly surrounded by such advertisements, there is very little chance that we can prove these are, in fact, misleading advertisements.

Also, companies use comparative advertisements to promote, compare and highlight the superiority of their product concerning that of the competitor. However, in doing so, there is a tendency to cross the line and stray into the realm of product disparagement.

In this analysis, we will discuss how this particular issue impacts business and, as a business manager, our stand/opinion/solution regarding the issue.

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## 2. Misleading Advertisements

Advertisements, as we all know are meant to promote a product or a service. We can see some exaggeration in the way they tell us about the product, but when it goes beyond and start knowingly utters a falsehood or tries to misrepresent facts thereby misleading the consumer, then it becomes objectionable. Few examples to understand this are:

- Edible oil ad gives us the impression that we are free of heart problems so long as we are using that particular oil – Misrepresenting facts
- Ad of a water purifier that filters only bacteria (not viruses) claims that it gives 100% safe water – False statement
- Retailer claims that they are offering a special discount on goods as part of a festival celebration, while actually using the festival as an excuse to get rid of old and outdated goods – Deceiving consumers
- Ayurveda pharmacy launched the COVID medicines, claiming to have developed a 100% cure to COVID-19 – False statement

A misleading advertisement satisfies two essential elements:

- It will deceive or have the potential to deceive the persons to whom it is addressed to.
- Due to its deceptive nature, likely to affect the economic behavior of the persons to whom it is addressed or harm a competitor.

Broadly these misleading advertisements are classified into below mentioned categories

- **Violates “Right to Information”** - Use of incorrect information to convince buyers, quoting misleading prices, disparaging a rival product in a misleading manner is some examples of misleading advertisements. Examples are advertisements of anti-aging creams, fairness creams, weight loss products, etc. are usually guilty of making exaggerated claims.

*In the case Buddhist Mission Dental College and Hospital vs Bhupesh Khurana and Ors (Civil Appeal No 1135 of 2001) decided by the Supreme Court in February 2009, 11 students of the college had filed a case seeking compensation for the academic years lost on account of an unfair trade practice by the college. When the students joined the college in 1993, the college had claimed that it was affiliated to Magadh University, and the bachelor of dental surgery course was recognized by the Dental Council of India. Both turned out to be untrue. Here, the national commission awarded a compensation of Rs 20,000 to each student, besides refund of all the fees paid to the college. The Supreme Court asked the college to pay an additional compensation Rs 1 lakh to each of the complainants, and also pay the cost of litigation quantified at Rs 1 lakh to each of them*

- **Violates “Right to Choice”** – The facts about product which are likely to influence buying decisions of customers are not disclosed or are wrongly mentioned, the advertisement becomes deceptive. In many advertisements, we notice 'conditions apply' but the conditions are not stated. This impacts the business as consumer falls for other products.

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*Indian auto major Maruti Udyog Ltd (MUL) has been ordered by the New Delhi District Consumer Disputes Redressal Forum asked to pay Rs one lakh to one of its customers as compensation for "inducing" Rohini resident Sharma to buy a car through misleading advertisements on its mileage. Holding MUL guilty of resorting to unfair trade practice, also asked it to conduct its own fuel efficiency test and inform buyers about the minimum and maximum possible mileage in its future advertisements. Sharma had alleged that MUL in its advertisement in a leading newspaper had claimed that its Zen car had a fuel efficiency of 16.7 km per litre, relying on which he purchased a Maruti Zen LX in 2005.*

- **Violates "Right to Safety"** – This includes health products, cures and drugs of questionable efficacy. These are most dangerous, as they can have a severe repercussion on the health and safety of the consumer. This impact business as one bad product or service can taint the entire line of the product in consumer eyes.

*In matter of Ajay Gautam Vs. Amritsar Eye Clinic and 6/6 Lasik Laser Centre, Dehradun & others National Consumer Disputes Redressal Commission (NCDRC) (Judgement Dated: 26.02.2010) held that doctors cannot advertise anything that would mislead a person into going for a treatment based merely on the doctor's claim that he/she would be cured completely, according to a judgement. Dr Dinesh Sharma of Amritsar Eye Clinic, Dehradun had advertised that his laser surgery could correct visual acuity and therefore one could get rid of spectacles. Upholding a fine of Rs 1 lakh on the doctor, the commission, found the doctor and the hospital where the surgery was done "guilty of adopting unfair trade practice", and violating the MCI code of ethics by publishing "misleading advertisement". The doctor was fined Rs 1 lakh for publishing misleading advertisement.*

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### 3. Comparative or Disparaging Advertisements

Advertisements are designed to introduce products and services to prospective consumers. Every company wants to have most impact on a consumer in the short duration of an advertisement and thus, advertising wars between market players dealing in similar products and services is not new. In common scenario, this is known as “comparative advertising”. However, in doing so, there is a tendency at times to cross the line and is called as “product disparagement”.

Broadly these comparative or disparaging advertisements are classified into following categories

- Advertisements asserting that they are better than others in the market with/without referring to any particular competing product.
- Advertisements asserting that they are better than a particular class or categories of products/ services in the market.
- Advertisements asserting the measurable features of the products/services and making an objective comparison.
- Advertisements providing the information already provided by the competitors in their advertisement, but stating the deficiencies of a competitor product vis-a-vis their product.
- Advertisements referring to the competitor’s product with a blurred trademark.
- Advertisements directly claiming that they are better than any single product/competitors.

Honest practices are mandatory but in today’s competitive environment, businesses are using a method of advertising which is a mockery at a brand that can sometimes appear scandalous or baseless. This sometime leads to brands competing in courts and courts decided the definitions through judgements.

#### **Reckitt and Colman of India Limited vs. Kiwi T.T.K Limited**

*The Delhi High Court summarized the law on the subject in case of Reckitt & Colman v. Kiwi TTK, as follows:*

*A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue. He can also say that his goods are better than his competitor’s, even though such statement is untrue. For the purpose of saying that his goods are the best in the world or his goods are better than his competitor’s he can even compare the advantages of his goods over the goods of others. He, however, cannot while saying his goods are better than his competitors’, say that his competitors’ goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.*

#### **Dabur India Limited vs. Colortek Meghalaya Pvt. Limited**

*The guiding principles relating to comparative advertisement were laid down in Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd, In Dabur’s case, the Delhi High Court clarified that while intent, manner, storyline and message are important factors, what is pertinent is the over-all effect of the said advertisement, whether the advertisement simply promotes the product in question or does it disparage or denigrate a rival product. In this context it is to be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavorable comparison without necessarily ‘falsely’ denigrating or disparaging a rival product. If the ‘comparison’ is by and large truthful, such a comparison may be permissible even if it amounts to disparagement. In other words, truthful disparagement is permissible, whereas untruthful disparagement isn’t.*

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**Dabur vs. Colgate**

*In Dabur and Colgate, the courts employed the 'ordinary person test' to determine whether an 'ordinary person' with reasonable intelligence is likely to get impacted by a factual representation conveyed in such advertisements. Such an ordinary person is less likely to factually analyze an advertisement and may form a view or bias against a product being disparaged. In this context, one therefore needs to examine the impression that such advertisement may leave in mind of the ordinary person with reasonable or average intelligence. However, at the same time, an ordinary person is not assumed to be gullible and is presumed to have the ability to take the puffery exhibited in the advertisement with a pinch of salt.*

**Tata Press Limited vs. Mahanagar Telephone Nigam Ltd.**

*In a landmark judgment, the Supreme Court of India in the case of Tata Press Limited v. Mahanagar Telephone Nigam Ltd. held that commercial advertisement is protected as a form of free speech and expression which is protected under Article 19(1)(a) of the Constitution and can only be restricted in accordance with law enacted under Article 19(2) of the Constitution. Additionally, it also held that a corporate entity is entitled to protection under Article 19(1)(a) of the Constitution. Therefore, competitors can use their right to freedom of speech to compare and promote their products.*

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## 4. Impact of Misleading and Disparaging Advertisement

The utmost concern which businesses are facing today is that now a wide number of people are prone to get incorrect information through misleading and disparaging advertisement, the canvas has increased multifold in India in recent years considering below mentioned numbers as of 2020.

- 75 million direct to home subscribers.
- Overall readership is 425 million readers.
- Second-largest market of newspapers and magazines in the world. Over 100,000 publications, 240 million circulations and 1300 million readers.
- Listenership surges to 51 million.
- 624.0 million internet users.
- 448.0 million social media users.
- 1.10 billion Mobile connections.

Businesses are tempted to deceive in advertisements to attract new customers and to persuade customers to buy products and subscribe to services. This strategy proves bad for the future of company, and it also possibly hinder the success of the business. This kind of advertisements are not helpful and it will deprive consumers of the accurate information they need to make good, well-informed decisions. The harmful effects of such advertising affect multiple players in the business world, and are not helpful at all.

The misleading and disparaging advertisements can be fatal to businesses:

- **Lead to investigations into business** – If a consumer complaint against advertisements for being misleading and disparaging or the authorities think that they are misleading then the business can be investigated.

*ASCI received a complaint about an advertisement spot telecast on Cine Cable Channel, Sahara TV, in October 2002, wherein the advertisement for Ajanta Dento White Toothpaste said “Indian Dental Association has endorsed this product with its seal of acceptance”. IDA confirmed that such endorsement had not been provided by them. ASCI took an ex-parte decision in July 2003, saying that the claim was false.*

- **Injunction Orders against Advertisements** – Businesses are battling out their differences in the courts and while proving who wrong, courts can give injunctions to stop the advertisements. In order to bring again the advertisements, businesses have to spend more money to correct.

*A complaint registered in October 2003, referred to an advertisement that appeared in Sunday Times of India in September that year and issued by Hindustan Lever (HL), saying Pepsodent is “one and a half times better at fighting germs than the popular toothpaste”. The complainant alleged that HL’s own clinical tests confirmed that Pepsodent Germicheck fights germs up to 150 that is only 0.5 times better and not one and a half times better, as claimed in the ad. CCC held in December 2003 that the claim was misleading. The advertisement was withdrawn.*



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- **Incur Financial Losses** – If a business is caught advertising falsely, it could end up losing a lot of money. If business is forced to pull your ad, it will lose money that was spent developing that ad. Also, be charged a fine by the regulator for the false advertising. If business is sued, then it has to deal with legal fees and settlement money in case of loss.

*In the year 2003, Consumer Education and Research society, Ahmedabad, had to bring to the notice of the regulatory authority in Gujarat, the sale and promotion of certain health gadgets by Conybio Health Care, in violation of the Drugs and Magic Remedies (Objectionable Advertisements) Act. The company was promoting and distributing sun shade to cure several diseases. When the regulator asked the company to produce scientific evidence to support the effect of infrared rays which it claimed was present in the products, the company said it had never undertaken such studies by any recognized Indian institute. Subsequently, the regulator prohibited the sale and promotion of the products.*

- **Loss of Customer Trust** – When business engage in misleading and disparaging advertising, consumers will perceive it as untrustworthy. Customers tend to feel betrayed them and take business elsewhere. Brand will get a negative reputation, which results reduction in future business prospects.
- **Adverse impact on employees** – Employees of the company bear consequences of the misleading and disparaging advertisements. Employee sometime deal with unhappy customers and can be blamed even though they have no fault in the process.
- **Legal consequences** – Misleading and disparaging advertisements can lead to the civil suit. The complainant can file a claim for an injunction of damages against the business.
- **Threat to a healthy competition** – This is the worst effect of misleading and disparaging advertising. When businesses have healthy competition amongst them, they encouraged to improve their products and services along with cost reduction which further passes on to the customer. Businesses because of the competition are forced to get creative and to spend money on R&D to improve. But when businesses start spending their money on making misleading and disparaging advertisements and start making false claims about their products, then other competition and businesses also end up investing in the same, rather put money in innovation. The result is business-wide damage.

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## 5. Laws related to Misleading Advertisements in India

In Indian context, we have several acts and laws that are present to both protect and punish offenders in our constitution. Apart from these, we have various other provisions and bodies that also are active to stop, punish businesses against misleading and disparaging advertisements. There are specific sections in the laws which directly handle the misleading and disparaging advertisements in India.

- **The Consumer Protection Act, 1986 (COPRA)** – Section 2 (r) of the COPRA provides definition of Unfair Trade Practices (UTPs) and section 14 provides directions that the court can give to handle with such practices. The consumer forum can issue interim orders stopping such advertisements pending disposal of the case. They can award compensation for any loss or suffering caused on account of such false advertising. They can also award punitive damages and costs of litigation. Most important, they can direct the advertiser to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.
- **Food Safety and Standards Act (FSSA), 2006** – FSSA seeks to regulate the law relating to advertising and unfair trade practices in the food sector. Section 24 of the Act places restrictions of advertisement and prohibits UTPs. It lays down the general principles for advertisement. Section 52 and 53 of the Act prescribe the punishment for selling misbranded food and also for misleading advertisements. Section (53) prescribes that any person who publishes, or is a party to the publication of an advertisement, which falsely describes any food or is likely to mislead as to the nature or substance or quality of any food or gives false guarantee shall be liable to a penalty which may extend to ten lakh rupees.
- **The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954** – This Act basically prohibits advertisements pertaining to drugs and magical cures. Section 3 further prohibits any advertisement promoting drugs for the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule Section 4 of the Act prohibits advertisements relating to a drug if the advertisement contains any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false claim for the drug or is otherwise false or misleading. Section 5 of the Act prohibits advertisements of magic remedies for treatment of certain diseases and disorders.
- **Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003** - An act to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto.
- **The Emblems and Names (Prevention of Improper Use) Act, 1950** – Act prohibits the use by any private party of certain names, emblems, etc.

- **Drugs and Cosmetics Act, 1940** - Rule 106 of the Drugs and Cosmetics Rules, 1945 framed under the Drugs and Cosmetics Act refers to “Diseases which a drug may not purport to prevent or cure” - No drug may purport or claim to prevent or cure or may convey to the intending user thereof any idea that it may prevent or cure, misleading advertisements: laws and regulations 17 one or more of the diseases or ailments specified in Schedule J. No drug may purport or claim to procure or assist to procure or may convey to the intending user thereof any idea that it may procure or assist to procure, miscarriage in women
- **The Bureau of Indian Standards Act, 1986** - The Bureau of Indian Standards (Certification) Regulations, 1988 Rule 7 (1) (l), (g) and (h) prohibits misleading advertisements pertaining to BIS certification.
- **The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 and the Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Amendment Act, 2002** - This law prohibits advertisements and promotion of infant milk substitutes, feeding bottles, and infant foods because their promotion creates a misconception and thereby misleads consumers into believing that infant foods or milk substitutes sold in the market are as good or better than mother’s milk.

Regulatory authorities which regulates advertising in their respective domain.

- Insurance Regulatory Development Authority (IRDA)
- Telecom Regulatory Authority of India (TRAI)
- Securities and Exchange Board of India (SEBI)
- Reserve Bank of India (RBI)
- Medical Council of India (MCI)

Apart from these laws, there is also an attempt for self-regulation by the industry body.

#### **Advertising Standards Council of India (ASCI), established in 1985**

A voluntary body of all those involved in advertising, including advertisers, agencies and the media, ASCI has drawn up a comprehensive advertising code for self-regulation. Two of four fundamental principles of the code related to misleading and disparaging advertisements are:

- To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.
- To ensure that advertisements observe fairness in competition so that the consumer’s need to be informed on choices in the market place and the canons of generally accepted competitive behaviour in business are both served.

If a consumer or even an industry, feels that an advertisement contravenes the code or is of the view that an advertisement could be false or misleading, a complaint can be sent to ASCI. In fact, ASCI’s advertisements exhort consumers to complain, whenever they come across advertisements which they think is false or misleading or unethical. “If an ad is wrong, we will set it right”; “If an ad is misleading, we will set it right”, “If an ad is dishonest, we will set it right” says ASCI in its advertisements issued at regular intervals.

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## 6. Problems with the Laws and Agencies

There are several problems associated with the laws and agencies which directly handle the misleading and disparaging advertisements in India.

- **Problem with Advertising Standards Council of India (ASCI)** – The problem is that it takes between four to six weeks for the Consumer Complaints Council (CCC) to view questioned advertisements and ASCI to convey its decision. After that, the advertisers are given 15 days to modify the ad or remove it per the suggestions of CCC. It is too late as the advertisement would have already conveyed the message and reached millions. Also, ASCI do not undertake to issue directions to air course corrective ads as a penalty. Another problem is the black sheep among the members who may violate the code or not comply with the CCC's decision or those in the industry who do not believe in self-regulation and therefore do not want to become ASCI members.
- **Problem with Drugs and Magic Remedies (Objectionable Advertisements) Act** – The problem with the law is that it is outdated and inadequate to deal effectively with the situation as it exists today. Also, its enforcement is not adequate, and we can still see many such advertisements.
- **Problems with The Cable Television Network Regulation Act and Rules** – The trouble with the law is its inadequate implementation. The structure mentioned in the law is not implemented to a satisfactory level, and rules and wordings in the law are confusing.
- **Problems with Food Safety and Standards Act (FSSA)** – The problem is to lack the inability to issue directions to air course corrective ads as a penalty. As a result, the damage cannot be corrected.
- **Problem with Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act** – Businesses have adopted a way of surrogate advertising to get away with this law, and businesses start using sponsorships or even disguised the customer promoting other products with the similar brand name.
- **Laws are at initial stages** – The rules and regulations to govern the misleading and disparaging advertisements are in the very initial stages in India and are still in the process of development. With the rapid and continuous growth in the business world, there is a need for more specific laws and regulations.

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## 7. Our Recommendations to the Legal Issue

After understanding the issue of misleading and disparaging advertisements, we could tell for a fact that despite being so many laws to curb this, businesses are using these either to gain a competitive advantage or to spread misinformation.

### Our Stand

As a business manager, our stand on misleading and disparaging advertisement is

- Businesses should use effective ads to change the perception and views of the consumer about the products and services.
- Companies should not engage in misleading and disparaging advertisements as it is fatal to the business and is not justice to the customers on social grounds.
- Businesses can use comparative advertisements on facts but do not engage in disparaging at all.

### Our Opinion

As a business manager, our opinion on misleading and disparaging advertisements is that in the cutthroat competition prevailing in businesses, businesses tend to use misleading and disparaging advertisements knowingly. Companies are engaging in misleading and disparaging advertisements because

- India's laws around misleading and disparaging advertisements are weak and confusing to many extents.
- There are loopholes and inadequacies in existing Indian regulations which are being exploited by the businesses.
- Most of the laws are outdated and are not up to the mark to handle current business scenarios. Also, the enforcement of the rules is weak.
- Lack of self-regulation, social and moral responsibilities of the businesses.

### Our Solution

As a business manager, our solution to misleading and disparaging advertisements is to overhaul the existing framework and laws on misleading and disparaging advertisements.

- **To improve and strengthen the existing laws** – Aim should be to provide more teeth to different laws that exist. For example, to give powers to order for course corrective advertisement following the damage. Apply heavy penalties and jail term for the offenders based on the seriousness of the effect of the ad in question.
- **To have effective monitoring and implementation of laws** – Essential step is to ensure the implementation of laws and also regular monitoring of laws to keep them updated with new restrictions and as per current business scenarios
- **Focus on self-regulation, social and moral responsibilities** – Enable businesses to be more self-regulated when it comes to advertisements and also to ensure that businesses are being aware of the moral and social responsibilities towards the consumer and the impact of misinformation and incorrect data.

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## 8. Conclusion

In due course of our assignment, we studied that advertising can be informative and, at times, be misleading to the consumers. We learned about comparative advertising few reasons leading to disparagement. We had gone through case studies on legal aspects of misleading advertisements available for reading on web search. We got to know the various Indian ads that are misleading. We derived the impacts of misleading and disparaging advertisements on business. Then studied the laws related to misleading and disparaging advertisements in India and found several problems with these laws. To the end of our study, we came up with our stand, opinion, and solutions to the legal issue.

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## 9. References

Reference links used to understand the legal issue are listed below

- [https://consumeraffairs.nic.in/sites/default/files/file-uploads/misleading-advertisements/misleading\\_advertisment\\_and\\_consumer%20%281%29\\_0.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/misleading-advertisements/misleading_advertisment_and_consumer%20%281%29_0.pdf)
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