Presenting a live 90-minute webinar with interactive Q&A

Challenging Competitors' Comparative Advertising
Evaluating Legal Options to Respond to False or Misleading Marketing

THURSDAY, JANUARY 12, 2012
1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

Today’s faculty features:

Rick Kurnit, Partner, Frankfurt Kurnit Klein & Selz PC, New York
Barry M. Benjamin, Partner, Kilpatrick Townsend & Stockton, New York
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Challenging Competitors’ Comparative Advertising

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Analysis

- What do we want to stop?
- What claims are made?
- What can they substantiate?
- What will they be able to say?
- Does that work for us?
What can we get?

- Stop the advertising
- Corrective Advertising
- Treble Damages
- Attorney’s fees
- Restitution
- Fines/Penalties
Lower Expectations

- Change in the advertising
- NOT that they stop advertising
- What they do next may well be better
- Counterclaim
- Discovery!!!
- Public Relations
People in Glass houses....

- Analyze all of our advertising:
  - Websites, sell sheets, out of date still in circulation
- Clean up our act
What are our tools?

- Friendly Persuasion
- Cease and Desist
- Responsive Advertising
- Self Regulation
- Government Regulation
- Litigation
- Violence
Friendly Persuasion

- Possible it is all a mistake
- Legal Department to Legal
- CEO to CEO
- Credibility of the Industry
- Save face
First Question:

- Did you ask the other side?
- Networks, Regulators, Judge on a TRO.....
Cease and Desist

- Are they going to go Declaratory Judgment Action?/ Shop Circuit?
- Is time of the essence?
- What if it is a mistake?
- What if they were just trying to see…
...will pursue appropriate remedies....

- Do not specifically threaten litigation
- You have more investigation
- Litigation = counterclaims
Litigation?

Advertising Loses

“... counselor your client wouldn’t spend all this money on advertising just to tell the truth.”
Regulators?

- Networks
- NAD/NARB
- FTC
- A.G.
- Local
Network Clearance

- Preclearance
- Substantiation
- Compliance with Regulations
- Taste, Sex, Violence
Network Challenge

- Consumer takeaway
- Substantiation
- Might have been cleared subject to challenge
Network Challenge

- Ask for a meeting
- Bring the R&D folks
- Can move quickly

(Only covers network buy)
Government Regulators?

- FTC
- A.G.
- Local
Gets Serious

- Attention on the industry
- Level playing field
- Takes on a life of its own
- Publicity?
NAD

- National Advertising Division Council of Better Business Bureaus
- Identify Claims
- Review Substantiation
- Uphold or Require modify claims
You and NAD: Putting the Self Control Back in Self Regulation

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The Express and Implied Promises* of Self-Regulation

- “A Low-cost Alternative to Litigation”
- “Quick and private process”
- “Experts in Advertising Review”
- “Ensures a Level Playing Field”
- “Settles Disputes Fairly and Efficiently”

*http://www.nadreview.org/AboutNAD.aspx
Low-Cost Alternative to Litigation

- Filing fee $6-20K
- No discovery
- No discovery battles
- 2 briefs and an ex parte meeting per side
- Surveys and experts optional not required
- Lower legal fees; likely fewer business distractions
Quick Process

- Nothing is faster than the speeding bullet of a TRO. Nothing.
- Faster than full blown litigation, due to no discovery
- NAD’s growth and success has produced a case backlog. Expect 4-6 months.
- Even with a win, Advertisers get time to modify
Private Process

- Decisions published in subscription database
- Press releases issued but surprisingly little publicity for most cases
- Challenger commits not to publicize or subpoena
- Can influence where NAD sends press release
- Case files are confidential but can be produced in subsequent litigation
Experts in Advertising Review/Level Playing Field

- Dedicated staff reviewing ad disputes full time
- Informal and friendly process
- Appeals to NARB
  - a real jury of peers – advertisers
Settles Disputes Fairly and Effectively

- NAD makes a recommendation; no means of enforcement
- Advertisers who do not comply are referred to the FTC
- Advertisers who do comply still may face litigation or investigations
- Challengers must be proactive post-decision and monitor compliance
Life is Full of Surprises: Always Have an NAD Plan B
NAD’s Jurisdiction

- Broad but not unlimited
- Ads targeted to adults (over 12)
- “National in scope”
- Objectively provable claim
  - Product performance
  - Superiority claims
  - Scientific and technical claims
- Not questions of morals or good taste
- Not marketing practices
- Current not discontinued ads
- No kitchen sink disputes
Advertiser Refuses to Participate

- A press release is issued
- Cases referred to FTC
- But what does that really mean?
  - FTC has enforcement discretion & limited resources
  - Not generally concerned with purely competitive comparative disputes
  - NAD referrals get close scrutiny but do not always result in enforcement action

November 30, 2011

Ms. Lydia B. Parnes
Mr. Nathan Ferguson
Wilson Sunami Goodrich & Rosati, PC
1700 K Street, NW 5th Floor
Washington, DC 20006

Re: Blue Buffalo Company, Ltd., FTC File No. 102-3144

Dear Ms. Parnes and Mr. Ferguson:

The staff of the Federal Trade Commission’s Division of Advertising Practices has conducted an investigation into whether representations made by your client, Blue Buffalo Company, Ltd. (“Blue Buffalo”), regarding its pet foods violated Section 5 of the Federal Trade Commission Act, following a referral from the National Advertising Division of the Council of Better Business Bureaus (“NAD”). Blue Buffalo participated in the NAD’s self-regulatory process and appealed one of the NAD’s adverse findings to the National Advertising Review Board of the Council of Better Business Bureaus (“NARB”), which agreed with the NAD decision.

The FTC staff reviewed claims brought to its attention by the NAD and some additional claims. The review included Blue Buffalo’s claims that its pet foods contained “no animal by-products,” contained human-grade ingredients, helped protect pets from age-related diseases, and contained ingredients that had been proven to provide a significant health benefits for pets. Additionally, the staff reviewed, at the NAD’s request, Blue Buffalo’s continuing claims that its pet food ingredients provided superior anti-oxidant protection, after Blue Buffalo promised to stop doing so.

Upon review of the matter, we have determined not to recommend enforcement action at this time. Among the factors we considered are Blue Buffalo’s substantial website changes, which included the removal of age-related disease claims, establishment claims, and human-grade ingredients claims; and Blue Buffalo’s removal of “no animal by-products” claims from its website and packaging. This action is not to be construed as a determination that a violation
NAD’s Jurisdiction

- NAD will not open a case or will close a pending case if learn:
  - The ad claims at issue are or become subject of pending litigation or a court order
  - Subject of a federal government agency consent decree or order
- Selecting NAD as the forum of choice may not be the final decision point
FTC or State AG Investigation Underway

NAD® News

For Immediate Release

NAD® RECOMMENDS REEBOK DISCONTINUE CERTAIN CLAIMS FOR 'EASYTONE®' SHOES
Study Doesn’t Support Quantified Performance Claims, NAD Finds


NAD, as part of its routine monitoring program, requested substantiation for certain performance and establishment claims made by Reebok for EasyTone shoes in print and Internet advertising.

Claims at issue in NAD’s inquiry included:

• “It’s the shoe proven to work your hamstrings and calves up to 11% harder and tones your butt up to 28% more than regular sneakers just by walking.”
• “Discover up to 28% more of a workout for your butt. And up to 11% more toning in your hamstrings and calves.”
• “Better legs and a better butt with every step.”

Reebok, in responding to NAD’s inquiry, noted that EasyTone shoes are the only fitness shoes that incorporate a “balance ball” design on the sole to create instability in each step which, in turn, requires muscles to work harder. The advertiser offered as support a study that it commissioned in 2008.

The study’s author noted that the results offered “compelling evidence for greater muscle activity,” and the author stated that “[t]he increased muscle activation amplitude and/or activation duration seen in these muscles during the EasyTone shoe condition suggest the potential exists for both greater muscle force generation and greater metabolic energy expenditure.”

The advertiser argued that the author’s statement was a confirmation that EasyTone shoes showed an incremental toning benefit.

NAD, however, noted in its decision that “results that suggest potential toning are clearly insufficient to support unequivocal claims that you will ‘tighten and tone with EasyTone’ and ‘get a better butt.’”

(Full text of decision available to media, upon request.)

Given that testing involved only five subjects and that the researcher concluded only that the test results suggested the shoe design may potentially promote toning, NAD found the evidence insufficient to support the claims.

Contact: Linda Bean
212-705-0129
Subsequently filed class action

- Several NAD cases administratively closed last year due to a later class action filing covering same claims

- Stay tuned as change may be underway
Advertiser Wants Its Day in Court

Verizon Wireless

Bio Spot

Priceline Negotiator

Stolichnaya Russian Vodka

“Gotta shrink your tar!”
Monitoring Cases
NAD Case Reports

- Available via online subscription at: http://www.nadreview.org
Strafford Publications
Challenging Competitor Comparative Advertising
Lanham Act Federal Court Litigation

January 12, 2012

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INTRODUCTION

• Lanham Act – much more powerful over the past decade
• Marketplace more aggressive
• Courts much more willing to enjoin major advertising campaigns
• Costs and Reasons to Avoid:
  – Difficult to budget, Expensive
  – Fast paced
  – Counterclaims certain
  – Disruption—depositions, discovery, interviews
  – Class action lawyers follow
  – Media attention and publicity
• Sometimes litigation necessary
  – Unreasonable competitor
  – Resolution not possible without formal action
  – Business suffering – market share loss, need speedy resolution
  – “Send a message”
  – Want $$ damages
• Process –
  – TRO
    • Only appropriate where no serious factual or scientific dispute
    • Not usu’y approp for implied claims that require survey evidence
  – PI
    • Discovery?
    • Evidentiary hearing
  – Permanent Injunction after full trial
    • Monetary damages provable
• Traditional expert witness testimony may be required
  – All that entails in any litigation
Two kinds of falsity (generally) under the Lanham Act:

1. “False endorsement” — a false representation regarding origin, sponsorship, endorsement or association of goods or services with another

2. “False statement of fact” — a false or misleading description of fact … which … in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of [the advertiser’s] or another person’s goods, services, or commercial activities.”
• BUT – applies to all kinds of statements:
  – Express and implied claims
  – Misstatements of material facts
  – Partially correct statements
  – Oral or visual statements
  – Failure to disclose material fact
  – Product demonstration

  – And can apply to ALL MEDIA
    • Traditional advertising
    • E-mails
    • Powerpoint presentations
    • Press releases
    • Statements in blog posts and social media forums
    • Any corporate communications
Burden of Proof:
1. False statement of fact, in commercial advertising;
2. Statement actually deceived or has tendency to deceive;
3. Deception was material (influenced purchasing decision);
4. Defendant caused statement to enter interstate commerce; and
5. Plaintiff has been or is likely to suffer competitive injury
• **Express Claims**: only evidence required is showing literal falsity
  – Or false by “*necessary implication*”, meaning susceptible to no more than one interpretation
  – Enjoin without showing impact on public

• **Implied Claims**: plaintiff must have extrinsic evidence, usually consumer survey, but also can be deposition testimony or other (actual consumer feedback)
  – Need to show what the target audience understood the message to be
• Ads that specifically mentions competitor = presumption of irreparable injury
• Ads mentioning own product – need to show some indication of actual injury and causation (not speculative injury)
• Damages can range
  – Lost profits (plaintiff’s sustained damages)
  – Disgorgement (defendant’s wrongful gain)
  – Corrective advertising (correct “pollution”)
  – Trebel damages and attorneys fees (if willful, malicious - statutory)
• Standing Issues
  – Statute says “any person who believes that he or she is or is likely to be damaged by [the false advertising]”
    • BK Franchisee standing to sue over fraudulent McDonald’s game promotions?
      – Yes injury stemming from ads, yes likely to be injured, but NO STANDING because proving link between games and lost sales is “tenuous, to say the least.”
Claim substantiation standards for categories of advertising claims

1. Establishment v. Non-establishment
2. Express v. Implied
3. Comparative v. Monadic
4. “Doctor recommended”
• Establishment v. Non-establishment
  – Establishment - “Tests prove” “proven formula” “medical study” “scientific report”
    • “clinically proven to help regrow hair”
  – Non-establishment – general claim of superiority, effectiveness or quality, or competitor’s inferiority, ineffectiveness, or lack of quality
    » “kills germs best”
• Establishment v. Non-establishment
  – **FTC**: ad claims must be supported by “reasonable basis”
  – **NAD**: need “reliable and well-controlled clinical studies” (but depends on subject)
  – **Federal Court**: estab claim – show advertiser’s evidence doesn’t estab the claim;
    • non-estab claim – provide evidence affirmatively demonstrating falsity of the claim
- **Express v. Implied**
  - **Express** – direct representation of fact
    - “Advil not only relieves the body aches and pains of the flu, it also reduces fever fast.”
  - **Implied** – represents the fact at issue in an indirect manner
    - “ABC Mouthwash kills the germs that cause colds”
      - Implies but doesn’t directly state that the product prevents colds
• **Express v. Implied**
  - **FTC**: assess the “net impression” of the ad
  - **NAD**: advertiser must support all reasonable interpretations of claims made in advertising, even if not intended

  – **Federal Court:**
    - express claim – show falsity of claim;
    - implied claim – need extrinsic evidence of what the implied claim is, and why it is false through surveys or other evidence
• Comparative v. Monadic claims
  – **Comparative** – compares adv’d product to another
    • “Proven to increase vertical leap by twice as much as [competitor product].”
  – **Monadic** – refers only to the advertised product
    • “Proven to increase vertical leap by 40%”
• Comparative v. Monadic claims
  – Federal Court:
    • Advertiser must substantiate any comparison made with reliable, statistically significant data
    • Higher burden with comparison claims
    • “easy to use” – monadic, internal studies
    • “easier to use” – implies comparison, need data comparing product to competitors’ products
• “Doctor Recommended”
  – Doctors carry great weight with consumers
  – Substantiation requirements much higher, closely scrutinized
• Be careful with
  – 3rd party substantiation (journal articles)
  – Ingredient claim (works as separate ingredient, does it work in your product?)