



Strategies for Controlling Costs in False Advertising Cases: Consider NAD

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False advertising is an expensive business model. In a recent case involving infomercials for coral calcium supplements which allegedly cure cancer (among other things), the First Circuit affirmed an order requiring the defendants to disgorge nearly \$50 million in gross revenues -- not just profits -- on the ground that the "consumer loss" was an appropriate measure of damages.

But false advertising can be expensive for plaintiffs, too. Companies whose competitors are engaging in unfair or deceptive advertising practices often face a dilemma -- take action and run up their own legal bills, or stand quietly by and watch someone else eat their lunch.

Nearly 300 in-house counsel considered the options last week at the annual meeting of the Association of Corporate Counsel (ACC) in San Antonio. I moderated an interactive program in which in-house counsel were shown a series of advertisements and asked to vote with handheld clickers as to how they would advise their clients. The results were interesting.

And the In-House Counsel Survey Says . . .

When presented with a television advertisement that the Federal Trade Commission (FTC) found to contain false and misleading statements, panelists were asked how they would respond if the company thought that it might be losing sales as a result of the false advertisement but was not sure. Surprisingly, 46% of the respondents indicated that they would file a claim with the National Advertising Division (NAD) of the Council of Better Business Bureaus, even though only a very small number of respondents had any prior experience with NAD. By comparison, 33% would report the matter to the FTC, 18% would bring a civil lawsuit under the Lanham Act, and 2% would do nothing.



What is NAD?

NAD is a voluntary, self-regulating program in which parties submit their false advertising disputes to trained professionals. Any party may file a complaint with NAD, alleging that a national advertisement is not truthful or accurate. NAD will investigate the claim and, provided that the complaint meets certain basic criteria, commence a case against the advertiser. The advertiser and challenger each have an opportunity to make up to

two submissions and meet privately with the decisionmaker. If the advertiser declines to participate in the NAD process, NAD will refer the matter to the appropriate federal or state authorities (such as the FTC), and publicize the fact that it has done so.

NAD adheres to detailed procedures with strict deadlines, and ordinarily delivers a written decision within a few months of the filing date of the complaint. This accelerated procedure often allows for a case to be resolved while the accused ad campaign is still running.

At the conclusion of the case, and subject to a further review process, the challenger's and advertiser's positions, NAD's decision, and a statement by the advertiser are made public on the NAD website. If an advertiser fails to comply with the final decision, this fact will ordinarily be reported to the FTC or other appropriate authorities. Thus, the rate of compliance with NAD decisions is high.

Why Try NAD?

Damages and discovery are not available in NAD proceedings, so why try NAD? The low cost and fast timeframe allows companies to resolve their advertising disputes relatively cheaply and efficiently. One panelist estimated that a recent NAD proceeding cost the challenger in the range of \$35,000, which is far less than a company would expect to pay if it commenced a civil lawsuit.

While enforcing claims through NAD is more expensive than notifying the FTC or other regulatory authorities and allowing them to address it, the challenger is able to fully participate in the NAD proceeding and can therefore be relatively certain (once a threshold showing has been made) that the advertiser will be forced to respond directly to the challenger's claims.

These benefits were undoubtedly attractive to the 46% of in-house counsel audience members who chose NAD as the preferred forum for addressing their clients' hypothetical false advertising dispute.