CLIENT ALERT

Advertisers in the Ring – A Roundup of This Month's Competitor Advertising Challenges: Best Brands, Hometown Brands, and Playing by NAD Rules

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Below, we provide a high-level summary of some of the NAD decisions reported in recent weeks. A summary of NAD decisions from earlier in 2016 can be found here.

As prior cases have often illustrated, claims need to be appropriately tailored to the underlying support. In two recent NAD decisions, we see how very different kinds of claims ("best-in-class" and "where soups are made") are held to this standard and fall short when the claims imply broader results than supported by the underlying data. In addition, several other recent cases illustrate NAD's procedural responses to different kinds of non-participatory behavior.

Defining Best-in-Class

In *Bausch & Lomb Inc.: Ultra Contact Lenses with MoistureSeal*, Case No. 5944 (April 4, 2016), Johnson & Johnson Vision Care, Inc., maker of Acuvue Oasys contact lenses, challenged various comparative claims made by Bausch & Lomb. The challenged claims included the claim that Bausch & Lomb's contact lenses contained "significantly more PVP" (a wetting agent) and provided best-in-class performance.

NAD concluded that Bausch & Lomb had substantial evidence to show that its lenses contained PVP, but that the evidence about *how much* PVP its lenses contained was unreliable. Accordingly, NAD recommended that Bausch & Lomb discontinue the claim that its lenses contained "significantly more" PVP than the competitor's lenses.

NAD also found that Bausch & Lomb's "best-in-class performance" claim conveyed a message of objective comparative performance. Yet, the support for the claim was based largely upon a consumer preference survey about various lens attributes, rather than on objective testing. To the extent that objective attributes were measured, NAD found the advertiser had not demonstrated that features like "less rigidity" or "higher oxygen permeability" were attributes that necessarily supported a "best-in-class" claim. For these reasons NAD recommended discontinuing the "best-in-class" performance claim.

The Home Team

In *General Mills, Inc.: Progresso Soup*, Case No. 5940 (March 23, 2016), Campbell Soup Company challenged General Mills advertisements for Progresso in which Vineland, NJ was identified as "the home of Progresso" and the place where Progresso "light soups are made." Campbell argued that the advertisements implied that Progresso soups were entirely made in Vineland and locally sourced by a small rural company rather than one headquartered in Minneapolis.

Even though Progresso's headquarters and corporate functions were located in Minneapolis and not all of its soup is made in Vineland, NAD found that it was appropriate to claim Vineland as the "home" of Progresso soups because the majority of its employees worked at the Vineland location and because it had an established and continuous 70-year presence in Vineland,

including significant community ties. NAD also noted that Progresso is an extremely well-known brand, whose soups are not likely to be mistaken by consumers as the product of a tiny rural company.

In contrast, NAD recommended that the advertiser discontinue or appropriately modify its "where Progresso soups are made" claim because the unqualified claim could imply that all soups were made in Vineland, when it was undisputed that approximately 40 percent of its soups were made elsewhere.

Procedure-Driven Results

Recent NAD decisions included several whose resolution was not based upon the merits of the advertising claims and support, but instead upon procedures that resulted in referrals to the FTC or case closures.

In *Steuart Laboratories: Steuart's Pain Formula*, Case No. 5900R (April 4, 2016), the advertiser claimed that its product provided significant and speedy joint and muscle pain relief. For instance, the advertiser claimed that its product could reduce pain in 5-15 minutes and last up to 8 hours. The advertisements also included testimonials alleging that the product worked better than anything else on the market, that it took away pain after a rigorous triathlon, and even that it allowed someone to stop using arthritis medication. The claims were challenged by a competing homeopathic product maker, EuroPharma, Inc. However, the advertiser declined to submit any response to NAD. NAD referred the matter to the FTC. After being contacted by the FTC, the advertiser agreed to participate at NAD, but again failed to submit any responses. Accordingly, NAD referred the matter back to the FTC for possible law enforcement action.

In *Reckitt Benckiser LLC: Finish Automatic Dishwasher Detergent*, Case No. 5942 (March 29, 2016). Procter & Gamble (P&G) challenged advertisements touting Finish as "rated best buy 3 years in a row." As stated in a small disclaimer, the rating claim was based on 2011, 2012, and 2013 results from a consumer publication. P&G argued that the claim implied that the Finish product is currently rated as a "best buy." In response, the advertiser agreed to discontinue the advertisements, but reserved the right to resume advertising if it received new support. As a result of the advertiser's agreement to permanently discontinue the challenged claim, NAD closed the matter.

In *The Procter & Gamble Co.: Olay Ultra Moisture Beauty Bar*, Case No. 5929 (March 23, 2016), Unilever challenged claims that women preferred Olay to the leading beauty bar. The advertiser requested that NAD administratively close the case. The advertiser argued that no "extraordinary circumstances" existed to open a new matter under NAD Policy and Procedure § 3.8, because a prior NAD case involved the same parties, the same product, and substantially similar claims regarding women's preference for Olay Ultra Moisture versus the "leading white bar." The challenger relied on a consumer survey as the basis for re-examining the claims, but NAD sided with the advertiser and found that the challenger's consumer preference test did not constitute the "extraordinary circumstances" necessary for re-examination. NAD administratively closed the matter, but noted that the challenger had the option of initiating a compliance proceeding.

Takeaways for This Month

The lessons for this month include remembering to match objective performance claims with objective performance testing, recognizing the distinction between claims about the historical origin of a company versus the source of current product, and taking NAD procedures and recommendations seriously.

Other Articles in This Month's Edition:

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