False Advertising Claims: Opting for Court

Advertising

For years, many companies that have taken issue with their competitors' advertising claims have relied on the self-regulation process to sort out their concerns. But lately, some seem increasingly ready to take a different avenue—and head instead to federal court.

The National Advertising Division, part of the Council of Better Business Bureaus, is a voluntary forum in which companies can challenge competitors' advertising. Traditionally, many companies preferred to bring false advertising disputes before the NAD as a matter of course. They viewed the NAD process as fast and inexpensive compared to litigation on the merits. Unlike a court trial, there is no formal discovery at the NAD, and the burden of proving that claims are substantiated falls on the advertiser that is challenged, rather than the challenger. And the process is relatively straightforward: "You initiate a challenge by writing a brief," says Holly Melton, a partner at Crowell & Moring and vice-chair of the firm's Advertising & Media Group. "Each side has the opportunity to provide two written submissions, unless the challenge is expedited, in which case each side submits one written submission. Each side then meets separately with the NAD, after which the NAD issues a written decision with recommendations."

The advantages of the self-regulation process seem clear enough. But recently, some companies have been willing to forgo the NAD process and instead take their competitors to federal court. "In the past year or so, we've seen an uptick in Lanham Act false advertising litigation," says Melton. "Many advertisers have elected to pursue claims in federal court, even when the advertising at issue is not necessarily expressly false but only impliedly so, which carries the additional evidentiary burden of proving consumer deception." Recent Lanham Act cases have involved companies in the telecommunications, consumer goods, and food and beverage industries.

There has also been an increase in the number of companies that, when challenged, either decline to participate in the NAD process or refuse to comply with its written decision. In those instances, the NAD automatically refers the matter to the Federal Trade Commission, a move that carries the risk of a government investigation and litigation by the agency.

The reason for companies' increased willingness to fight it out in federal court seems to stem from a combination of factors.

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For one, some companies say they have perceived a shift at the NAD. "Companies used to report that the NAD's approach to cases was somewhat predictable, and a decision that split the baby to give each side a win on at least one issue was commonplace," Melton says. "Today what I more often hear from advertisers is that they view the NAD process as less predictable, and we are seeing more decisions with a clear winner and a clear loser." With this in mind, some companies may be making the calculation that they might be just as well off in court.

Melton says that the stronger appetite for litigation may also be the natural result of more aggressive marketing strategies and the increased use of expressly comparative claims, as well as increased competition overall. In that kind of environment, an aggrieved company "might feel the need to litigate to send a stronger message," she points out. In addition, federal court offers the possibility of monetary damages, which the NAD proceedings do not. NAD rulings are often prescriptive and call for modifications to advertising. "A federal judge is going to be less inclined to give specifics about how to change the ads," she says. "So some companies may be less interested in receiving, and being required to implement, specific feedback regarding how to shape their advertising."

General counsel need to understand these changes. "It used to be that if your advertising was literally truthful but subject to being construed as misleading, companies could rest easy that the most likely avenue for a challenge would come through NAD. Companies were less likely to be challenged in court because of the higher evidentiary burden relating to impliedly false advertising claims," says Melton. "I don't think companies can rest so easy these days. They should be aware of the increased appetite for filing false advertising cases in court."