Advertising Law

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SPECIAL FOCUS: Strategies for Challenging Comparative Advertising Claims

In a challenging economic environment, advertising battles are on the rise. False and potentially misleading advertising by competitors can present serious issues for a company's marketing efforts and importantly, their bottom line. Faced with this situation, what are a company's options for challenging false advertising, and how can companies successfully protect their brands?

Manatt partner Chris Cole, a nationally known advertising litigator who has challenged and defended scores of advertising claims in court and before the National Advertising Division (NAD), will be moderating a panel of distinguished presenters – including NAD Assistant Director David Mallen – on these very topics at the ABA Consumer Protection Conference on February 3, 2011. In advance of the conference, our newsletter editors caught up with Chris for a preview of the presentation, including strategies for bringing or defending against comparative advertising actions, and the implications of the available remedies.

Editors: We have seen a flurry of comparative advertising claims in the current environment. When a company's competitor is running a false, impliedly false or misleading advertising campaign, what are the potential legal remedies?

Cole: There are a number of potential options available beyond filing a federal action. A company may decide to send a cease-and-desist letter to the advertiser, laying out the issues with the competitor's advertising. The challenger can also inform the government about what the competitor is doing, which may prompt the FTC or another agency with jurisdiction to take the matter on. You can also bring the matter to the NAD, a self-regulatory body that hears these types of claims. Whichever option is initially chosen, it is important to remember that the forums are not bifurcated. We have increasingly seen more and more cases going back and forth between the agencies, courts and the NAD.

Editors: Considering that companies are constantly scrutinizing their competitors' advertising, what can advertisers do to protect themselves against such lawsuits?

Cole: There aren't many false advertising cases that come out of the blue. Often, you know that your company (or client) has engaged in a potentially risky campaign that may generate attention. Understanding this as their attorney, you have adequately prepared, devoted time to assessing potential risks and outcomes, and you have formulated strategies for dealing with the ways you might be challenged. You may have even developed alternative advertising, in the case your currents ads are successfully challenged. In addition, as the advertiser, you have more control over the venue than you might believe, and you should consider your options in advance – federal court, the NAD, the FTC or any other agency that might have jurisdiction over the claim.

Editors: What are the remedies available to a company if an advertiser fails to comply with a decision rendered by the NAD, a voluntary tribunal?

Cole: There are various instances where an NAD decision may not be the end of the matter. The advertiser may choose not to comply with a decision and instead appeal to the National Advertising Review Board (NARB), in which case the advertising claims at issue will continue while the matter is being

considered. The NAD may also decide to refer the matter to the FTC or another agency with jurisdiction over the claims. Or, depending on the situation, the competitor may decide to file a declaratory judgment action in federal court.

Editors: If the matter has been heard at the NAD before winding up in federal court, can the adversary obtain discovery over the NAD proceeding?

Cole: Yes, a party can obtain discovery over the entire NAD case file from the parties to that proceeding. The records are in your possession, and they may be subpoenaed or requested in discovery. The only agreement the parties make by taking the matter to the NAD first is that they will not subpoena the NAD itself. It is crucial to recognize that the NAD record is discoverable.

Editors: As an advertiser whose claims are being challenged, is there a venue choice that might be more favorable?

Cole: If you are the advertiser, you might under some circumstances consider going to court as opposed to the NAD. In the NAD, the burden of proof rests on the advertiser to substantiate its own claims and must substantiate all reasonable implications of the challenged ads. In federal court, however, this burden is reversed; the challenger or plaintiff has the burden of proof. If a challenger is coming in on an implied claim and the argument is quite tenuous, the NAD will step into the mind of the advertiser to reach its decision, which can be disadvantageous. Additionally, the NAD doesn't hear counterclaims, so if you have solid counterarguments, there could be an advantage to taking the matter to court.

Editors: After evaluating the options and potential outcomes, what if you decide that staying at the NAD is the best choice for the particular situation at hand?

Cole: If you start at the NAD and believe it is advantageous to stay there, don't take "no" for an answer. There are ways you can stay at the NAD;

defend your choice of forum. If the case is far enough along in the NAD proceeding, the court may decide to stay the NAD proceeding and remand the case back to the NAD.

Chris' upcoming panel presentation, "The Winning Strategy for False Advertising Cases: NAD or Federal Courts, or Both?" will be held at the ABA Section of Antitrust Law's Consumer Protection Conference in Washington, D.C. on February 3, 2011. For more information about the presentation topic or the event, click here.