

KTS Advertising Law Guides

Anatomy of a False Advertising Challenge

“They are lying about us, you need to do something, NOW!”

At some point in any lawyer's career, it is likely that a client will come to them demanding action about a competitor's false advertising. Whether the competitor is lying in an explicit comparison with your client's product or service, or just lying about their own product that implies that your client's is worse, your client will demand action. And quickly. At that point, you will need a playbook to

orchestrate a response, not only to address the actual legal issues, but also to manage your client's expectations.

Litigation, as we all know, is expensive, time consuming, can splinter off in unintended directions, and often most importantly, can divert the company's attention from the day to day, intensely competitive operation of the business. For those reasons, litigation should always be a last resort, albeit an option that must be a genuine threat.

What follows is a description of steps to take to address false advertising by a competitor.

1 Check, then double check, the claim at issue. If the competitor is making a claim about their own product, find out everything you possibly can about the claim. Advertisers need not publish their substantiation, so not everything will necessarily be publicly available. Enough should be public, though, to make an educated guess as to the truth or falsity of the claim.

2 Check with independent sources. If possible, have the offensive claims reviewed by people outside the client's company to confirm that they view them the same way you and your clients do. This may not be possible due to timing constraints, to maintain privilege, or to avoid exposing trade secrets or other strategic information. However, sometimes your clients can be too close to a problem that their objectivity is lacking. Advertising is always judged by the message the reasonable consumer receives, and company employees may not be able to “stand in the shoes of” the reasonable consumer.

3 Expect a counterclaim. Your clients will always tell you that your company's advertising claims and substantiation are perfect and bullet proof. Never believe it. If you have not already reviewed your client's advertising claims, do it immediately. If you assert a challenge against your competitor, expect a counterclaim. Even if your claims are, in fact, bullet proof, the competitor may assert a challenge merely for the leverage it could bring.

4 Make a phone call. For competitors that expect to make competitive advertising claims, it is a good idea for the lawyer to have a good relationship with the competitor's lawyer. If you are able to make a phone call to work the problem out before it reaches a boiling point, that could be a big win for the company, saving inordinate amounts of time and money over something that could have been worked out ahead of time. If it works and the matter is resolved short of litigation, your client may not even know exactly how much time, money, and grief you saved them, but it is important to try.

5 Write a demand letter. Without a phone call, a demand letter is usually the first step in making direct contact with the competitor. This may provide a fast resolution if you can get the competitor to agree to resolve the dispute without further action. This will show the competitor that your client is keeping an eye on them and demonstrate some measure of good will by complaining privately, without immediately filing an action. However, there is no guarantee that the competitor will even respond, and even if the competitor agrees, nothing prevents the competitor from going back on their word and changing its mind. Furthermore, sending a demand letter may well tip your hand to the competitor as to your strategies, thoughts, and potential actions, and may give them time to launch a counter-offensive.

If action must be taken, you have a number of options.

A NAD Complaint. The National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) is the advertising industry's self-regulation forum for resolving disputes over truth and accuracy in national advertising claims. The forum is intended to resolve cases quickly, at lower cost, and more privately than litigation in court. Participation and compliance with NAD rulings is entirely voluntary, and the rulings are simply recommendations without any enforcement power. The attorneys hearing cases are experts in evaluating advertising claims, and while proceedings are private while they are on-going and submitted documents remain confidential, decisions are ultimately publicly published and made available. The process does not permit any discovery. Resolutions can take three-six months or more, plus additional time for appeals, and while the proceeding is on-going, the advertiser may continue to run the advertisement in dispute. Costs will include filing fees, attorney's fees, survey experts, and tests. No monetary damages or injunctive relief is available.

B Network Challenge. Major networks have advertising standards and a process by which advertisements running on their airwaves can be challenged by competitors. Timing is often quick, but can be unpredictable. Also, each major network runs their own process, so you may have duplicate proceedings in each network's forum. Moreover, even if you obtain a positive result, the advertiser may continue to run the offending advertisement elsewhere.

C Litigation. The federal Lanham Act, 15 U.S.C. § 1125(a)(1), allows an advertiser to file a claim to recover for injury resulting from false and/or misleading claims made by competitors. A plaintiff must show (i) the competitor's ad contains a false statement of fact about its own or another's product; (ii) the statement deceives or has a tendency to deceive; (iii) the statement is material (i.e., it affects the purchasing decision); and (iv) the statement appears in commercial advertising in interstate commerce. While it will be expensive, the benefit of litigation is that interim injunctive relief is available if successful – which is good when the offending advertisement is causing genuine, long-term harm to your brand. The burden of proof may vary depending on whether the advertisement is literally false / false by necessary implication, or only impliedly false. Discovery and its attendant concerns – expense, time, mind-share – will be necessary. Monetary damages are available as well.

What follows is a quick chart comparing an NAD action with litigation:

	NAD Action	Litigation
Type of Claim	Must be national advertising	Can be any type of claim
Burden of Proof	Advertiser bears the burden of proof showing substantiation for the claims at issue.	Higher burden of proof – challenger bears initial burden of demonstrating the ad is either literally false, or if literally true, still misleading.
Cost	Relatively inexpensive, but costs can add up depending on the type of claim, necessity for expert testimony, and/or appeal.	Can be extremely expensive. Discovery; expert evaluation of scientific testimony; consumer perception surveys; damages calculations; and possibility of counterclaims.
Remedies	Compliance with NAD recommendation is voluntary only, but public persuasion can be powerful. NAD may refer non-complying party to the FTC for further action.	TRO/PI; Court orders available, as well as the full panoply of remedies permitted by a court; attorney's fees recovery possible.

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