Challenging a Competitor's False Advertising Claim

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A Practice Note discussing considerations in challenging a competitor's false advertising claim. It discusses the preliminary steps necessary to investigate an advertising claim and various options for taking action, such as writing a demand letter, filing a challenge with the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB), starting a network challenge, and suing under Section 43(a) of the Lanham Act. It includes a chart for comparing the different forums for taking formal action against a competitor.

All companies may, at some point, face the challenge of dealing with a competitor's false advertising. The competitor may publish a false explicit comparison between the two companies' products or services or simply publish a false claim about its own products or services. If the competitor's false claim threatens the company's reputation or market share, it may want or need to take action to address the false claim.

The company's initial reaction may be to sue the competitor. Formal litigation is usually expensive, time consuming, can splinter off in unintended directions, and perhaps most importantly, can divert attention from the intensely competitive day-to-day operation of the business. Litigation should therefore generally be looked to as a last resort, albeit an option that must remain a genuine threat. A company instead needs a set of options to orchestrate a response, not only to address the actual legal issues, but also to set its expectations.

This Note addresses a series of steps a company may take to address false advertising by a competitor. It discusses:

- Preliminary steps before engaging with a competitor (see Preliminary Steps).
- Measures to resolve the situation short of challenging the advertising in a court of law or self-regulatory forum (see Informal Resolution).
- Forum options for taking action against a competitor should other measures fail (see Options for Taking Formal Action).

PRELIMINARY STEPS

Before engaging with a competitor regarding false advertising, a company should first investigate both the competitor's claim at issue and its own advertising claims.

EVALUATE THE CLAIM AT ISSUE

Once a company has identified competitive advertising it believes to be false, it should research the exact claim and identify the specific falsity for both express and implied claims. Whether the competitor is making a singular claim about its own product or service or a comparative claim referencing the company's product or service, the company needs to find out as many details as possible, including:

- The context in which the claim is made, including all related advertising materials, which may include product packaging as well as all known media in which the claim is running.
- Any similar claims, other iterations, and related marketing materials published by the competitor.
- Prior claims disseminated by competitors concerning competing products or services.
- Any substantiation the competitor may have about the claim.

Advertisers have no obligation to publish their substantiation, so not all of the competitor's evidence may be publicly available. Enough information should be public to make an educated guess regarding the truth or falsity of the competitor's claim. For more information about substantiating advertising claims, see Practice Note, Substantiation of Advertising Claims (W-001-8556).

The company should also assess the importance of the claim to consumers. Although the existence of a competitor's false advertising claim in the marketplace can be frustrating, not every false claim necessarily calls for action. If the claim is not likely to have a material adverse impact on consumer-purchasing behaviors, the company may decide to take a wait-and-see approach. There, the company should continue to closely follow the competitor's advertising and consumer reaction until the impact, if any, becomes clearer.

CONSULT WITH INDEPENDENT SOURCES

If the internal evaluation results in a decision to move forward, individuals outside the company may have a different view of the significance of the competitor advertising at issue. Sometimes a company can focus so closely on a problem that it risks losing any clear-eyed objectivity about the claim. Advertising is judged by the message the reasonable consumer receives (that is, a claim means what a reasonable consumer thinks it means). Company employees may not always be able to objectively see from the perspective of reasonable consumers.

The company therefore may want to seek outside advertising counsel to help assess the situation. A consumer perception study may also help the assessment as it could validate the company's interpretation of the claim. Additional layers of review may not be possible due to other factors, such as:

- Time constraints.
- Maintaining privilege.
- The need to avoid exposing trade secrets or other strategic information.

Even if constraints do not allow for a study, outside advertising counsel can help evaluate the possibility of success in pursuing action with its broader perspective.

CHECK THE COMPANY'S CLAIMS IN ANTICIPATION OF A COUNTERCLAIM

Challenging a competitor's advertising claims opens the door to a counterclaim from the competitor. Therefore, while investigating the competitor's claim, the company should also review its own advertising claims. It is best to move forward with a false advertising claim with the cleanest hands possible.

Evaluating the company's own claims for vulnerabilities may include, for example, confirming that its own comparative claims are not based on an outdated product formulation. The company may consider altering its own advertising before taking action against the competitor.

Even if the company considers its own advertising claims to be fully substantiated, the competitor may still assert a challenge merely for the leverage it could bring.

INFORMAL RESOLUTION

A company can sometimes resolve a false advertising claim through a series of calls or letters to the competitor. Networks also often require a challenger to attempt to resolve a claim issue before filing a challenge with them (see Network Challenges).

CONSIDER STARTING WITH A PHONE CALL

For companies that consistently conflict with the same competitors, it is beneficial for the company's advertising attorney, whether in-house or outside counsel, to establish a good relationship with the competitor's attorney. If a relationship between the attorneys or another connection already exists that enables a dialogue, begin with a phone call.

A call could resolve the issue quickly for several reasons, including that:

- The competitor's counsel had not approved the claim and she is open to withdrawing it.
- The claim is already near the end of its lifecycle, so the competitor may agree not to run it again.
- The competitor offers an acceptable quid pro quo and, in exchange for removing its claim, the company is willing to amend or discontinue one of its own claims.
- The competitor is open to discontinuing the claim for other business reasons.

A phone call to work out the problem among lawyers can often resolve issues before positions get entrenched and the parties default to formal legal action. A quick resolution could benefit the company by saving it inordinate amounts of time, money, and frustration. Attorneys should memorialize any agreement reached by phone in an email or other writing (such as a confirming email).

WRITE A DEMAND LETTER

Without a phone call, a private demand letter is usually the first step in making direct contact with the competitor. A letter may also provide a fast resolution if the competitor ultimately agrees to resolve the dispute without further action. A letter shows the competitor that the company is aware of the situation and demonstrates some measure of good will by complaining privately, without immediately filing an action. The company should not send a demand letter unless it is prepared to take follow-up action if the competitor fails to respond or refuses to comply.

A good demand letter includes:

- The claim at issue, the context in which it appears, and why it is false.
- The steps the company would like the competitor to take to discontinue the claim.
- A deadline for completing the discontinuance.
- A date by which the company wants to receive a response back.
- A mention that, if the company does not receive a response or competitor refuses to discontinue the claim, the company will consider taking other action.

Like a phone conversation, a demand letter may result in a quick and efficient resolution.

Sending a demand letter has a few drawbacks. First, there is no guarantee that the competitor will respond, in which case the company needs to be prepared to move forward with more formal action. If the competitor agrees to the demands, nothing prevents the competitor from going back on its word and resuming the false claim at a later date. Further, sending a demand letter may reveal to the competitor the company's strategies, thoughts, and potential actions, and may give the competitor time to launch a counter-offensive. That counter-offensive could include filing a declaratory judgment action. The demand letter, particularly when future legal action is threatened, must be carefully written.

OPTIONS FOR TAKING FORMAL ACTION

If the company cannot resolve the dispute informally, or business reasons require more formal, immediate action, it should evaluate the different forums available for initiating a false advertising challenge. The company should weigh several factors when deciding which avenue to pursue, such as:

- Expense, including outside counsel fees and filing fees.
- Dedication of company time and resources.
- Available remedies.
- Timing of any expected resolution.

NETWORK CHALLENGES

Major networks publish long manuals setting out their individual advertising standards. These standards also include a process by which advertisements running on their airwaves can be challenged. The process generally requires a company to try to settle the matter informally with its competitor before filing the challenge with the network, such as with a phone call or a demand letter.

A network challenge consists of a letter to the network by the challenger and a response by the challenged party. The network has the discretion whether to permit replies or sur-replies and to determine the timing for resolving the challenge. Networks usually stay their own internal challenge if the challenger pursues the dispute in a self-regulatory forum or a court of law. Networks review all commercials before agreeing to broadcast them, so their personnel may already be familiar with the claims at issue. In addition, because the networks' primary business model is generating revenue by running advertising, they may not want to alienate an advertiser by finding its claims to be false.

Network challenges have a few advantages, including:

- Quick resolution.
- No filing fees.
- It is inexpensive to prepare the challenges.
- A limited time commitment.
- It is confidential, as the advertisements will simply no longer run, without any formal announcement.

Although networks tend to resolve challenges quickly, their decisions can be unpredictable. Decisions are final with no appellate process. Each major network runs its own process, so if the advertising runs on multiple networks, the company needs to conduct multiple, separate proceedings.

A positive result on one network does not guarantee the same result on any of the others. Even if the company obtains a positive result on all of the networks, the advertiser may continue to run the offending advertisement elsewhere such as cable stations without similar advertising standards and proceedings.

A success with a network challenge can get an offending advertisement off the air quickly, even if just on one network, and the competitor receives a clear message that the company does not take false advertising lightly.

NAD CHALLENGES

The National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) is the advertising industry's self-regulatory forum for resolving disputes over truth and accuracy in national advertising. The forum is intended to resolve cases quicker, at lower cost, and more privately than litigation in court.

Participation in a dispute resolution proceeding and compliance with NAD rulings is voluntary and the challenged advertiser can decline to participate. National advertisers generally do elect to participate. The NAD staff attorneys handling cases are experts in evaluating advertising claims and weighing substantiation. Although proceedings are private while they are conducted and submitted documents remain confidential, the NAD ultimately publishes its decisions which contain a detailed analysis of the legal arguments and factual support. The NAD also issues a press release summarizing the key points of each decision.

The process does not permit any discovery and consists of written submissions by the parties, specifically:

- A challenge.
- A response from the advertiser.
- A reply by the challenger.
- A final response from the advertiser.

The NAD also offers an expedited proceeding option which streamlines the process so that there is only one round of written submissions (a challenge and a response). Parties can provide supporting documents like studies and tests as part of written submissions, and each side can also request an in-person meeting (without the other side present) with the NAD to discuss the issues.

The advertiser bears the burden of proof that its claims are fully substantiated, and must show that the context in which they appear is truthful and not misleading. The advertiser is responsible for supporting all express and reasonably implied claims. Resolutions can take three to six months or more, plus additional time for an appeal.

For the challenger, the NAD challenge process has a potentially significant drawback. While the proceeding is on-going and during the appeal period, the advertiser may continue to run the advertisement in dispute. The NAD cannot issue any form of preliminary injunction or temporary restraining order (TRO). In addition, because the decisions are publicly available, class action lawyers are known to review them.

The NAD does charge significant filing fees for handling a challenge. The fee is reduced if the challenger is a CBBB National Partner. Both the challenger and advertiser may also choose to use survey experts and run consumer perception tests on the claim to bolster their arguments which adds to the cost of the proceedings. (See Comparison Chart for more information on NAD fees.)

The outcome of an NAD proceeding is a written decision finding that the claims are substantiated or recommending that the claims be modified or discontinued. As a voluntary process, the NAD cannot:

- Award monetary damages.
- Impose injunctive relief.
- Enforce its recommendations.

The NAD can refer an advertiser that refuses either to participate in the proceeding or to comply with its recommendation to the appropriate regulatory authority, usually the Federal Trade Commission (FTC). In addition, if an advertiser agrees to comply with the NAD's recommendation and then does not (or does not do so in a timely manner), the challenger may request that the NAD open a compliance proceeding. If the NAD then determines that the advertiser has not made a good faith effort to comply with the NAD's recommendation, it will refer the advertiser to the appropriate regulatory authority.

Participants at the NAD typically comply with the recommendation. The advertiser also has the right to appeal decisions to the National Advertising Review Board (NARB). In addition, the NAD recently instituted a new procedure that allows either party to reopen a case if it has new evidence relating to the disputed claim. For more information on the new procedure, see Legal Update, Advertisers May Now Introduce New Evidence to Reopen Closed NAD Proceedings (W-017-0727).

LITIGATION UNDER THE LANHAM ACT

The federal Lanham Act allows an advertiser to file a claim to recover for injury resulting from false or misleading claims made by competitors. Under Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)), a plaintiff may bring a false advertising suit if it shows:

- The competitor's ad contains a false statement of fact about its own or another's product or service.
- The statement deceives or has a tendency to deceive.
- The statement is material (for example, if it affects the purchasing decision).
- The statement appears in commercial advertising in interstate commerce.

Although expensive and time-consuming, one benefit of litigation is that interim injunctive relief is available. Interim injunctive relief can provide a much-needed reprieve when the offending advertisement is causing genuine, potentially long-term harm to the company's brand.

Unlike an NAD challenge, where the burden is on the advertiser to prove that its claims are true and substantiated, in court the plaintiff bears the burden of proving that the advertiser's claims are false. In addition, the plaintiff's evidentiary burden will vary depending on whether the offending claim is:

- Literally (expressly) false.
- False by necessary implication.
- Only impliedly false.

As in all litigation, the company must engage in discovery and its attendant concerns, such as:

- Expense.
- Time.
- Devotion of company resources.
- Distraction from the company's day-to-day business.

Unlike the network and NAD options, monetary damages are available to a successful plaintiff in addition to a permanent injunction and an order mandating the publication of corrective advertising.

For more information about bringing a false advertising suit under the Lanham Act, see Practice Note, Lanham Act Section 43(a) Claims: False Advertising Claims (W-005-9404).

COMPARISON CHART

This chart summarizes the advantages and disadvantages of the three forums for taking formal action against a competitor's false advertising:

	Network Challenge	NAD Action	Lanham Act Litigation
Scope of Media Distribution	Must be in a TV commercial on that network.	Must be in national advertising in any media (including packaging).	Can be national or regional advertising in any media (including packaging).
Burden of Proof	The advertiser bears the burden, and has usually already submitted its substantiation before airing.	The advertiser bears the burden of proof showing substantiation for the claims at issue.	The challenger bears burden of demonstrating the falsity of the ad, whether expressly or impliedly false.
Cost	Inexpensive; no filing fees.	Filing fee required ($15,000 for CBBB for companies who are National Partners for greater than a year, $17,500 for National Partners less than a year, sliding scale based on company size for non-partners), but relatively inexpensive compared to overall cost of litigation. Supplemental costs can add up depending on the type of claim, necessity for expert testimony or a survey, and an appeal (separate filing fee for an appeal).	Most expensive option. Costs include: discovery; expert evaluation of scientific testimony; consumer perception surveys; damages calculations; possibility of counterclaims; and appeals.
Remedies	Commercial immediately removed from the network.	Recommendation to modify or discontinue claims. Participation in NAD process and compliance with NAD recommendation is voluntary only, but public persuasion can be powerful. NAD may refer a non-participant or non-complying party to the FTC for further action.	Full range of legal remedies available, including: TRO; preliminary and permanent injunction; monetary damages; corrective advertising; recovery of attorneys' fees.
Appeals Process	No opportunity to appeal.	Decision can be appealed to the NARB. A closed case can be reopened (for a fee) on introduction of new evidence.	Decision can be appealed through the court system.