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5 KEY TAKEAWAYS

Nuts and Bolts of NAD Proceedings: 2022 ANA Masters of Advertising Law Conference

Barry M. Benjamin, managing partner of Kilpatrick Townsend's New York office and chair of the firm's Advertising and Marketing group, was honored to co-present with Laura Brett, Vice President and New York Office leader at BBB National Programs, and Robert Jones, Corporate Counsel with S.C. Johnson & Son, at a session from the 2022 ANA Masters of Advertising Law Conference. As the title indicates, they discussed the specifics of proceedings at the National Advertising Division of the BBB National Programs.

Key takeaways from the program include:

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The NAD is Monitoring. The National Advertising Division (NAD) of the BBB National Programs was founded in 1971 as a system of independent industry self-regulation to build consumer trust in advertising and support fair competition in the marketplace. NAD holds national advertisers to high standards of truth and accuracy, by reviewing challenges from businesses, trade associations, and consumers, as well as initiating its own reviews.

NAD is Effective. NAD is not empowered as a court is – it has no ability to issue fines, penalties, money judgments, or issue any order that has the force of law to compel action or compliance. In addition, there is no discovery – no depositions, no exchange of documents, or any other common court-compelled discovery vehicle. NAD's power is in the voluntary persuasion of compliance, and it levels the playing field for advertisers that could otherwise make false claims.

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Basics. A challenge is initiated by filing a challenge letter. The challenge letter is conceptually like a combined complaint and summary judgment motion in a lawsuit, albeit more streamlined. It lays out the specific claims being challenged, the specific advertisements where those claims are found, and why the challenger believes the claims are false. The challenger may also submit with the letter any evidence it may have, including copies of the challenged ads and, potentially, affidavits, expert reports, news articles, and anything else concerning the ads and their truth or falsity. NAD will then, typically, accept the challenge, notify the advertiser of the challenge, and provide them with a copy of the challenge letter. If the advertiser agrees to participate—as most do—it then has the opportunity to substantiate the challenged claims with a responsive letter and any additional documents or evidence it wishes to provide. In an NAD challenge, unlike a federal court litigation, it is the advertiser's burden to prove that its claims are true. In most NAD challenges, the challenger may then reply, and the advertiser may file a final sur-reply.

Meetings and Decision. Once each party's written submissions are complete, the NAD will schedule two ex parte conferences, one with the challenger and one with the advertiser, where each may make a presentation to NAD summarizing their arguments and rebutting the other party's arguments. This will typically happen within a few weeks after the final submission. NAD then issues a written decision which summarizes each party's arguments, sets forth NAD's analysis and conclusions, and then states its recommendations with respect to the challenged advertisements and claims. The advertiser has the chance to submit an advertiser's statement that gets published with the decision, generally either agreeing to comply with the decision, refusing to comply, or stating its intention to appeal. NAD will then issue a press release summarizing its decision, though the decision itself is only released on NAD's archive, which requires a subscription.

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Three Tracks; Fees. NAD now has three different tracks available for prospective challengers: Fast Track, Standard, and Complex. The Standard Track process is the historic, basic process, and usually proceeds to a final decision in approximately four to six months. Written submissions for Standard Track proceedings are generally limited to 20 pages. NAD's new Fast-Track SWIFT challenge option provides a more expedited resolution process in some of the less complex challenges that do not require a full set of briefing. These challenges are intended to be resolved from start to finish within 20 days and are limited to those that pertain to only a single issue that concerns (i) the prominence or sufficiency of disclosures; (ii) misleading pricing and sales claims; or (iii) misleading express claims that do not require review of complex evidence or substantiation. The Complex Track is designed for challenges involving multiple expert reports concerning substantiation or consumer-perception issues, and/or which involve a large number of claims or advertisements. On the Complex Track, the complaint is limited to 30 pages, rather than 20, and the fees are increased to account for the added complexity of the challenge. Fees vary depending on the challenger's status as a member or non-member and the track selected.

Parties before NAD would do well to familiarize themselves with NAD's rules, procedures, and different tracks. While some things remain the same throughout—e.g., the burden of proof and substantive precedent—the different procedures provide a great deal of opportunity to expedite simple matters and carefully structure more complex ones. It is also crucial to remember that the advertiser always bears the burden of substantiating all claims made in its advertising, which is reasonable given that the NAD's primary purpose is to ensure truth in advertising. NAD is a very effective cleanser of marketplace pollution, that is, pollution in the form of false advertising. And simply because participation at NAD is voluntary does not mean that nothing happens to a company that declines to participate. If any party declines to participate, or fails to comply with an NAD recommendation, NAD will refer the party to the U.S. Federal Trade Commission, and those referrals receive top priority from the FTC's government enforcers.

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