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Key Takeaways – Panel Discussion on Litigation versus National Advertising Division for Advertising Disputes

by Bryan J. Wolin

Bryan Wolin was honored to moderate a panel at the 2026 Association of Corporate Counsel (ACC) Annual Meeting in Boston, MA on how businesses confronted with a false advertising dispute should consider the choice between litigation and a challenge at the National Advertising Division (NAD), and was joined by Phyllis Marcus (Vice President, National Advertising Division, BBB National Programs) and Kathryn Farrara (General Counsel Beauty & Wellbeing, Unilever North America). Litigation and NAD challenges are both capable of resolving false advertising disputes, but they differ in important ways. The panel discussed three different high-level questions businesses should consider when choosing between forums.

The first question businesses need to ask is: What do I want? Within that question are four factors to consider:

Relief:

- **NAD** can recommend discontinuation or modification of advertising claims, but cannot award damages or other monetary relief or address collateral, non-advertising issues. NAD does not limit the scope of claims it assesses to only those about products or services, and laches does not apply in NAD challenges.
- **Courts** can award damages, disgorgement of the defendants' profits, and injunctive relief, and can also resolve other collateral claims that often arise in false advertising disputes, such as trademark infringement, tortious interference, and the like. Lanham Act false advertising claims are limited to advertising claims about a product or service, and laches can preclude challenges to longstanding claims.

Speed:

- **Courts** can take years to issue a final decision. Temporary restraining orders and preliminary injunctions can be obtained in days, weeks, or months.
- **NAD** issues fast-track decisions in about 1 month, and standard track decisions in about 6 months.

Publicity:

- **Court** cases are generally public from day 1 and can be used for marketing purposes.
- **NAD** cases are confidential until a final decision is issued. NAD decisions may not be used for promotional purposes.

Compliance:

- **Court** decisions are binding. While most parties voluntarily comply with court decisions, some require additional post-judgment litigation to force compliance.
- **NAD** participation and compliance is voluntary. However, non-compliance by advertisers is exceedingly rare (on the order of 5%), thanks to NAD's soft enforcement tools such as referrals to the FTC, FDA, State AGs, and other enforcement bodies for non-compliant parties and direct reporting relationships with major social media platforms.

The next question businesses should ask is: What are my resources? Within this question are another four factors to weigh:

Cost:

- **Court** cases are costly, reaching into the millions of dollars for cases that do not settle quickly.
- **NAD** challenges are comparatively inexpensive. Filing fees are assessed on a sliding scale based on the size of the challenger's business, and legal fees can be as little as 10% of litigation fees.

Internal Resources:

- **Court** cases that survive the pleadings phase or involve emergency relief require substantial internal resources, ranging from custodian interviews and document collection to depositions and trial testimony.
- **NAD** challenges ask comparatively little of participants. There is no discovery, depositions, or trial. Businesses typically need to provide modest support interpreting technical data, provide a declaration or two, and attend one meeting with the assigned NAD attorney at the end of the challenge.

Burden of Proof:

- **Courts** require the plaintiff to affirmatively prove that the advertiser's claim is false or misleading.

Mere absence of evidence on the part of the advertiser is inadequate. Plaintiffs must also prove the existence of any implied claims being challenged, often using survey evidence.

- **NAD** flips the burden by requiring the advertiser to provide a reasonable basis for its advertising claims in the first instance and may assess implied claims without survey evidence.

Complexity:

- **Court cases are complex.** Pleadings, motion practice, discovery, third-party discovery, trial, and more all create myriad opportunities for unpredictable outcomes.
- **NAD** challenges are streamlined. In a standard challenge, each side submits two letters and has one ex parte meeting with the assigned NAD staff attorney – no discovery, no depositions, and no trial.

The final question businesses should ask is: What risks can I tolerate? This question also has – you guessed it – four factors to assess:

Counterclaims:

- **Court** cases allow for counterclaims, including compulsory counterclaims.
- **NAD** challenges do not allow for counterclaims.

Discovery:

- **Court** cases can involve invasive discovery, including third-party discovery.
- **NAD** challenges do not involve discovery. Parties submit or withhold evidence at their discretion.

Sealed Filings:

- **Court** filings are presumptively public. Parties may request that filings be fully or partially sealed.
- **NAD** filings are non-public. The only public record of an NAD decision is the final decision and associated press release by NAD itself.

Forum Expertise:

- **Court** cases are assigned to generalist judges. False advertising cases are uncommon, so many judges lack meaningful experience with them.
- **NAD** exclusively handles advertising disputes. Its staff attorneys know the law around advertising,

have a 50+ year record of NAD precedent upon which to draw, and have reviewed all manner of complex evidence before.

Taken together, litigation can be beneficial when there is real, provable monetary harm, or when the business wants to make a very public statement. In many other cases, NAD provides a compelling alternative.

The panel discussion provided attendees with a valuable framework for weighing competing forum options. For more information, contact Bryan Wolin: bwolin@ktslaw.com.