



**4th Advanced Forum on Resolving
& Litigating Advertising Disputes
March 12-13, 2015**

Svetlana Walker
Corporate Counsel
Clorox

Andrew Sacks
Vice President, Legal
T-Mobile USA

Kenneth A. Plevan
Skadden, Arps, Slate, Meagher
& Flom LLP

DISSECTING NAD PROCEEDINGS

◆ Why the NAD?

- Why the NAD? Mostly, because it works, as advertised.
- The NAD route is a lot less expensive, and less of an imposition on the executives and staffs of the participants, than engaging in a Lanham Act lawsuit.
- Protesting to a governmental agency, such as the FTC, is rarely a good idea.
- NAD challenges/defenses can be handled effectively by Company in-house counsel, but in-house counsel may opt to use outside counsel with NAD experience.

- NAD provides reputable advertisers with reasonable, independent guidance (precedent), from an impartial panel of experienced attorneys.
- **Added bonus:** NAD's work appears to help government enforcers (e.g., the FTC) devote their resources elsewhere.

◆ Limitations

- There are, of course, a few drawbacks.
- NAD does not always get it right, and that can be frustrating, as an advertiser or a challenger
- The NAD, from a challenger's perspective, can seem painfully slow.

- A preliminary injunction motion in federal court requires the commitment of significantly more resources, but typically will get resolved much faster.
- However, the increased need to prove immediate, irreparable damage to qualify for a preliminary injunction may make the Lanham Act lawsuit less appealing.
- An adverse NAD decision, easily accessible to the "plaintiff's bar," can result in the filing of a consumer class action.
- An NAD decision adverse to an advertiser might supply the necessary "plausibility" to meet Twombly/Iqbal standards.
- That is, unless the NAD decision is based strictly and narrowly on a "failure to substantiate standard."

◆ ABA Committee Task Force

- Currently in the process of drafting a report (“white paper”).

◆ Initial Considerations

➤ The Challenger

- When representing a challenger, make sure “the client” understands the process, and how long an NAD proceeding might take.
- Make sure client is fully understood that until a decision is issued, the process is confidential, and that NAD decisions, no matter how favorable, are not to be used for marketing purposes.

- A pre-challenge protest to the competitor is not required, but is often (but not always) a good idea.
- Once a challenge is filed and an NAD inquiry initiated, it is too late to try to “work it out” with the advertiser.
- A challenger can in theory withdraw the challenge, but once NAD has issued its inquiry letter, it acts independently in the public interest.

◆ The Advertiser

- As a recipient of an NAD inquiry, the advertiser typically has little choice but to participate
- FTC staff participants in the annual NAD fall seminar insist that they take NAD referrals seriously.

- FDA has apparently expressed little to no interest in NAD proceedings or outcomes.
- Refusal to participate could also lead to a Lanham Act lawsuit, filed by the challenger.
- Judges typically do not consider the NAD “delay” one that undercuts the timeliness of a preliminary injunction application.
- If you are the advertiser, and the challenge targets a key advertising claim, consider filing a declaratory judgment in the federal court of your choice.
- File a lawsuit, and NAD will then close the inquiry.

◆ Network Challenges

- At one time, network challenges to CBS, ABC, and/or NBC were common.
- Today standard practice is to simply file an NAD challenge and skip the national networks.

◆ “Counterclaims”

- There is no NAD procedure for a counter-challenge. The advertiser is free to file its own challenge, but the two will rarely be “consolidated.”

◆ The NAD Process

- The advertiser will typically need to submit its response within 15 business days.
- Make sure the advertiser client understands that an NAD inquiry is a serious matter, and the final decision will need to be complied with.
- Consider changing the advertising?
- The best way of understanding how NAD works and thinks, is to attend the annual NAD seminar, and hear what the NAD staff has to say.

- NAD rules currently limit submissions to 8 pages, but that is never honored and 8 pages is usually not enough.
- In your submissions, cite NAD authority if reasonably on point.
- Note that the assigned staff person's initials appear at the end of the case report.
- In a challenge situation, the advertiser can declare certain substantiation as confidential, meaning the challenger does not see it. A detailed summary, however, must be provided.

- An advertising inquiry issue is not “moot” unless the claim was withdrawn before the NAD letter arrived. Id. § 2.2(B)(i).
- It is not a defense at the NAD to point out that others, such as the challenger, are making comparable claims.
- There are no affirmative defenses such as unclean hands or laches.

◆ Interpreting Claims

- NAD, as with the FTC, requires the advertiser to have support for all messages reasonably conveyed.
- As with the FTC, NAD uses its experience and common sense to construe the meaning of advertising claims.

- Not surprisingly, NAD often sees consumer communications that the advertiser's marketing department "missed."

◆ Consumer Communication Surveys

- With respect to communication surveys, the challenger has a slight advantage, in that it has plenty of time to commission a survey.
- The advertiser will not likely be able to have time to run a survey within the 15 business-day response time.
- However, the advertiser can (i) critique the challenger's survey in round one, and (ii) submit the advertiser's survey with the final submission, which is typically not due until 7 weeks after the NAD inquiry is received, allowing plenty of time within which to conduct one.

- Note also that NAD will often give little weight to the survey and rely on its own interpretation of the consumer message.

◆ Meeting with the NAD Staff

- The challenger must meet with the NAD staff first; the advertiser gets the last word.
- Staff meetings are a must in every NAD inquiry, for the challenger and advertiser alike. Always take advantage of this opportunity.
- Ex parte meetings.
- As respects cost, if you are an out-of-state entity, an in-person presentation can still be effective with one or two individuals at NAD's offices, and others on the phone.

- At the presentation, counsel should let the marketing and technical executives do most of the talking.
- Place the key business people right in the middle of the long table, where they will be directly opposite the NAD staff representatives.
- Company executives must be well-prepared for the “give-and-take” with the NAD staff.
- Consider using at the meeting with NAD, and leaving behind, an outline of the presentation.
- Use the screen for showing the advertising, and to emphasize key points or present technical data.

◆ **Advertiser's Statement/Press Release**

- The advertiser must state that it is complying, or appealing.
- You can comply as to some claims and appeal as to others.
- Occasionally, comments on the press release will be accepted, but in my experience this is rare.

◆ **Length of NAD Decisions**

- Do they have to be as long as they typically are?

◆ **NAD Reconsideration of a Decision**

- NAD reconsideration is extremely rare, but not out of the question.

◆ NARB Appeals

- Jennifer Fried is appellate counsel, assisting the staff lawyer who handled the inquiry.
- Appeals appear to be on the increase.
- In 2013-2014, 17 appeal decisions were released. In comparison, ten years earlier, between January 1, 2003 and January 1, 2005, there were 10 appeal decisions released.
- NAD's position on the appeal is always that NAD was right, a standard one could question.
- NAD does not always win the appeal, contrary to popular myth, perpetuated by NAD at its annual seminar.

- The advertiser can always appeal. Challenger appeals are discretionary.
- Five panelists; one advertising agency executive, one public interest representative, and three marketing representatives.
- The “record” on appeal, and how to improve its usefulness.
- NARB staff review of presentations to ensure “no new evidence” is being added to the record.

◆ Electronic Retailing Self-Regulatory Program

- The ERSP's mission is to enhance consumer confidence in electronic retailing (also known as national direct response advertising).
- Direct response advertising means any commercial message where consumers are asked to place or obtain information about a product or service using an electronic device, such as a telephone number or an online request, typically through television, radio, or the internet.
- ERSP procedures are similar to NAD procedures except for the following significant differences:

- First, a challenger may choose to either actively participate in the challenge, or, rather not actively participate and can remain anonymous.
- If the challenger does not participate, it will not receive any substantiating information provided by the advertiser and will not be able to submit a reply.
- Second, there is currently no appeal process for ERSP decisions.

◆ **The Accountability Program**

- This is an internet-based advertising accountability program which regulates behavioral advertising across the internet in an effort to build consumer trust in such advertising.
- Online behavioral advertising uses information collected across unaffiliated websites to predict user preferences for ads.
- The Accountability Program enforces seven regulatory principles, including the transparency principle calling for clearer and easily accessible disclosures to consumers about data collection and practices associated with online behavioral advertising.

◆ CARU