Seek alternatives to costly ad litigation

By Bart A. Lazar

MARKETING AND THE LAW

One problem with being an attorney today is that litigation can be just so darn expensive. If a client is concerned about a claim being made by a competitor in advertising, sometimes there is no significant incentive to litigate. While a cease and desist letter can cost less than $1,000 to research and send, and a complaint less than $2,500 to draft, the cost of not being a paper tiger and going forward with litigation all the way through to trial can easily reach six figures in legal fees. And in order to prevail, you may need to conduct surveys and hire experts in the marketing and damages areas whose fees will also be in at least the tens of thousands of dollars.

For these reasons, it can be frustrating to counsel a client who believes that a competitor is taking too many liberties with its advertising. But there are alternatives to litigation available to marketers, including self-regulatory mechanisms and mechanisms available through government regulation. Depending on the circumstances a marketer is facing, it may make sense to explore these alternatives.

The National Advertising Division (NAD) of the Council of Better Business Bureaus Inc. (CBBB) is among those alternatives. Policies and procedures for the advertising industry's system of self-regulation—including NAD—are established by the National Advertising Review Council (NARC) based in New York. NARC also sets policies and procedures for the CBBB's Children's Advertising Review Unit (CARU), the National Advertising Review Board (NARB) and the Electronic Retailing Self-Regulation Program (ERSP).

NAD examines national advertising and accepts complaints from both consumers and competitors. If a company believes that an advertiser is engaged in false, deceptive or unsubstantiated advertising claims in a national advertising campaign, it can file a complaint with the NAD in New York. NAD evaluates the complaint, and if it determines it has jurisdiction (when the complaint is national in scope and contains objectively provable claims) it requests that an advertiser provide substantiation for its claims.

There are several advantages to a NAD proceeding. First is that the procedure is relatively quick, efficient and inexpensive. The complaint serves as a compact legal brief, asserting the factual basis for the objection, as well as the legal support underlying the complainant's belief that the advertising is inappropriate. The advertiser's response is in a similar format, only rebutting the complainant's objection to the advertisement or presenting evidence that substantiates the claims made in the advertisement. There is no discovery as in litigation or as is sometimes permitted in other forms of alternative dispute resolution. There is also no formal hearing before NAD (although there can be one at the appellate level before the National Advertising Review Board). For this reason, while pursuing an advertising review proceeding at NAD is not necessarily "cheap," it is a cost-efficient method of getting a ruling from a knowledgeable and impartial finder of fact, can be handled in-house and, even if outside counsel is used, the typical legal fees ought not exceed five figures.

A second advantage to a NAD proceeding is that the advertisers and complainants are putting their fate into the hands of attorneys and business professionals who have a great deal of specialized knowledge and experience in reviewing advertising. While there are many federal judges who bring a great deal of experience and creativity to dealing with false advertising claims, they have a varied case load, and it is difficult to predict whether you will be assigned a judge with a high level of subject-matter expertise in the Lanham Act and marketing and advertising issues. NAD attorneys handling claims have a great deal of experience in these matters, so they do not need to be educated on advertising law issues.

The potential negatives to going the NAD route mostly have to do with enforcement. If a company believes it is being seriously and irreparably harmed by advertising and needs immediate action, namely a temporary restraining order, NAD would not be the route to pursue. Since NAD involves vol-

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Challenge labeling issues through government agencies

untary self-regulation, NAD's rulings either find that the advertiser has substantiated claims at issue or recommend that the advertiser modify or discontinue its advertising. They do not provide emergency or preliminary relief while the case is going on. NAD can, however, refer companies that fail to respond or follow its decision to the Federal Trade Commission (FTC), which provides strong backup and support for the self-regulatory forum or other appropriate government agencies. NAD also cannot award damages or attorneys' fees—but that may be a secondary consideration to many companies that simply want a competitor to cease a particular claim or type of advertising.

Another alternative to litigation is a direct challenge to the media involved. While not always receptive, most media outlets do not want to host advertising that appears to be illegal. Sometimes a media outlet will act as its own mediator or arbitrator and require an advertiser to modify or discontinue particular advertisements they do not believe meet their own standards.

Finally, if a company is concerned by statements that are made on labels for products, there are several government agencies that have jurisdiction over labeling issues. For example, the Bureau of Alcohol, Tobacco and Firearms (BATF) regulates alcohol labeling, the Food and Drug Administration (FDA) regulates food labeling, and the FTC sometimes gets involved in the labeling of all types of products. A challenge to a government agency does not have to be expensive, and can sometimes yield satisfactory results. For example, several years ago, I represented the Confederation of Belgian Brewers of Brussels, Belgium. The Confederation was concerned that the labeling of a beer marketed by Coors Brewing Co. based in Golden, Colo.—its Blue Moon Belgian White Brand beer—was creating the false impression among American consumers that its beer was brewed in Belgium, when it was actually brewed in the United States.

In addition to pursuing other available legal options, we challenged Coors' labels for its beer. Ultimately, the BATF ruled in my client's favor and revoked the Coors label. If you go to a liquor store or bar today (a tough homework assignment for many of you, I know) and look at the packaging for Blue Moon beer, you will now see qualifying language that the beer is a "Belgian-style wheat ale," and that the beer is "Brewed in the U.S.A." This was a success for the Confederation, since this kind of qualifying language made it reasonable to conclude that a consumer would not believe the beer had been brewed in Belgium.

Thus, a regulatory or self-regulation challenge could be a viable alternative to litigation you may consider when a competitor's label statements or advertising claims are troubling. It certainly helped keep the world safe for Belgian beer. ■

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