

The Most Effective Ways to Challenge Suspect Competitor Ads

An important adjunct to aggressive promotion of your own products or services is the aggressive discipline of competitors' claims that may be overreaching, unsubstantiated, or outright false. Determining which of numerous possible options is best suited for any particular competitive challenge would depend on a number of factors including your specific objectives (do you want injunctive relief, damages, or simply modification of the claims?), the time frame (immediate or long-term?), your budget, your relationships with competitors (is there a history of challenge or do you want to remain anonymous?), your knowledge about your competitors' substantiation (are you shooting in the dark or you pretty certain your competitors have no support for its claims?), and your confidence that your own claims are bullet proof (in the event of a counter-challenge).

Outlined below are the pros and cons associated with challenges to competitors' claims in various fora and media outlets.

1. CALL THE COMPETITOR TO REQUEST SUBSTANTIATION FOR THE CLAIMS AND/OR DEMAND THAT THE CLAIMS BE DISCONTINUED OR MODIFIED.

Pros:

- This approach can work well if you have a good relationship with the competitor, or with the company's lawyers.
- This is the least time and resource-intensive way to challenge a

competitor's claims.

- It helps create a record of your good-faith efforts to resolve the issue. This can be important if more aggressive methods, such as a network challenge, are used later.

Cons:

- A competitor is not as likely to take the request seriously when it comes in a phone call.
- The competitor may simply delay giving you the information, which will then postpone more aggressive options for challenging the claims.
- Unless you keep notes from the call, there will not be a written record of the request. A paper trail can be beneficial for a later challenge.

2. SEND THE COMPETITOR A LETTER DEMANDING SUBSTANTIATION FOR THE CLAIMS AND/OR THAT IT DISCONTINUE OR MODIFY THE CLAIMS.

Pros:

- Very little time and resources are required for this approach.
- A demand letter may have more impact if it comes from outside counsel and cites specific authority for your position.
- It enables a quick response to the competitor's changing claims.
- The competitor may provide information that you could use in future

advertising.

Cons:

- The competitor may simply ignore your demands.
- If the demand letter threatens action and the competitor does not change its advertising, you should be willing to follow through with the threatened action.
- Such a letter may cause the competitor to scrutinize your ads more carefully and raise concerns about your claims.
- Again, there is the possibility that the competitor will string you along to delay a more aggressive challenge.

3. INITIATE A NETWORK CHALLENGE IF THE ADVERTISEMENTS APPEAR ON ABC, CBS, OR NBC.

Pros:

- The three major networks have comprehensive standards for advertising review, which in some cases go beyond the Federal Trade Commission's (FTC) rules and guides.
- This approach also does not require significant time or resources.
- The competitor will have a large incentive to modify its claims if one or more of the networks pulls the challenged ad.

Cons:

- Some of the advertisements that you find objectionable may not appear on network television channels.
- The networks put some restrictions on challenges. For example, before you can challenge an ad at ABC, you must show

that attempts to settle the dispute failed, and that the claims are not currently the subject of any litigation or government action.

- A competitor would only have to switch its television advertising from the networks to cable channels. The cable channels do not offer this mechanism to challenge advertisements.

4. INITIATE A CHALLENGE BEFORE THE NATIONAL ADVERTISING DIVISION OF THE COUNCIL OF BETTER BUSINESS BUREAUS (NAD)¹

Pros:

- The challenge process moves quickly and may be resolved in several months unless you or the competitor appeals NAD's decision.
- NAD attorneys have expertise in substantiation and advertising issues.
- You could proceed without knowing exactly what evidence the competitor has to substantiate its claims. However, you would need to provide sufficient information to convince NAD to investigate the claims, including possible consumer perception evidence if implied claims are involved.

Cons:

- NAD may not accept the challenge for several reasons, including: if the advertising is not national in character; if it is so technical that NAD could not conduct a meaningful analysis of the issues; and if it

¹ NAD is a self-regulatory board where advertisers can challenge their competitors' advertising. After giving the advertiser the opportunity to respond to the challenge, NAD will issue a decision either finding that the claims are substantiated or recommending that the advertising be modified. Compliance with NAD decisions is voluntary.

is without sufficient merit to warrant the expenditure of NAD resources.

- The competitor is likely to counter-challenge at least some of your advertising claims. You should be sure that all of its claims are substantiated before initiating an NAD challenge.
- Because compliance with the NAD decision is voluntary, the competitor may simply ignore NAD's recommendation. In this situation, NAD may refer the case to the FTC, but the FTC does not have to act on the referral.
- You could not use the NAD decision for any advertising or promotional purposes.

5. BRING CLAIMS TO THE FTC'S ATTENTION.

Pros:

- This approach requires little expenditure of time or resources. Of course, the FTC is more likely to be interested in the case if you provide substantial information to support your complaints.
- You could provide the information to the FTC anonymously, which would minimize the risk of retaliation by your competitor.
- Even if the FTC does not ultimately issue a complaint against the competitor, the staff may send out an initial letter of inquiry that will prompt the competitor to discontinue or modify the claims.
- You could lobby the FTC to implement a rulemaking or guide regarding the specific area of concern. This may be the best way to ensure a level playing field for all competitors in the industry.

Cons:

- Delay -- The FTC is not required to start an investigation and if it does bring a case, it could take years.
- Because all FTC investigations are confidential, you would not know whether the FTC was investigating the claims until either a settlement or complaint was announced.
- The FTC is likely to scrutinize all advertising in your product category more closely and may ask you for substantiation for some claims. Therefore, you should be sure that all of its advertising claims are substantiated before using this approach.
- The FTC will not investigate advertising claims unless the ads have been widely disseminated.
- Depending on the advertising claims, the FTC may consider it a competitive issue that should be resolved by NAD or in court.

6. SEEK A REFERRAL TO THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL OR SPECIFIC STATE ATTORNEYS GENERAL.

Pros:

- You would incur few costs. Again, the more information that you can provide, the better.
- You could provide the information to the states anonymously.
- A State Attorney General might be interested if the competitor's ads are disseminated in only a few states, or if there is some local interest.

Cons:

- Like the FTC, the State Attorneys General are not required to start an investigation.
- If they do bring a case, it may take years.
- You would not know anything about the case until either a settlement or complaint is announced.
- The states also would be more likely to scrutinize advertising in general, and may take issue with some of your claims.

7. BRING A LANHAM ACT SUIT IN FEDERAL COURT.

Pros:

- A competitor cannot simply ignore a lawsuit in federal court, as it can an NAD investigation.
- You could seek an injunction to stop the competitor from disseminating the challenged ads.
- Although damages actions under the Lanham Act are generally difficult to prove, you could seek damages from the competitor.
- A victory would get the attention of other competitors who might be considering similar claims.

Cons:

- Lanham Act suits generally are very expensive and can continue for years, particularly if the decision is appealed.
- The competitor is likely to file a counterclaim against your advertising claims, so you would need to be sure that your claims are substantiated.
- Depending on the claims in the ads, you

may need to conduct a nationally-projectable consumer perception study to establish what message consumers take away from the ads.

- You would have to prove that the ads are false or misleading. It is not sufficient to prove that the claims are unsubstantiated. Since you bear this burden, it would be risky to initiate a Lanham Act suit without knowing the competitor's substantiation.

8. CONTACT LOCAL NEWS ORGANIZATIONS, CONSUMER INTEREST GROUPS, OR OTHER NEWS OUTLETS.

Pros:

- This effort would require little expenditure of time or resources.
- This approach works best when the advertisement or issue is trendy or causes economic injury to consumers.
- Such coverage would virtually assure wide public awareness of the challenged practices.
- It is useful for maintaining a good dialogue with consumer interest groups.

Cons:

- This approach could backfire, and the organizations could investigate your claims.

9. USE ALTERNATIVE APPROACHES TO COUNTER THE COMPETITOR'S CLAIMS.

Pros:

- You could disseminate advertising to counter the claims made in the competitor's ads.
- The company also could arm its sales force with information to correct the impres-

sions made by the competitor's ads.

Cons:

- Giving additional publicity to the offending claims may only reinforce the claims in consumers' minds. Using the sales force to correct the false impressions generally does not raise this problem.

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Kelley Drye Collier Shannon's Advertising & Marketing practice comprises attorneys with proven success in advertising litigation and NAD proceedings; expertise in the area of advertising, promotion marketing, and privacy law; and experience at the FTC, FDA, and the Offices of State Attorneys General. We help leading companies identify risks, respond effectively to inquiries, and prevail in contested proceedings.

ABOUT KELLEY DRYE COLLIER SHANNON

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