

Advertising Litigation On the Rise

November 30, 2009

The news media have taken notice of the increase in advertising lawsuits and formal grievances filed against competitors. This month, *The New York Times* and *The AmLaw Daily* reported on the recent up-tick in false advertising challenges.

The New York Times article, ["Best Soup Ever? Suits Over Ads Demand Proof"](#) from November 22, 2009, noted that the number of cases appears to have grown as the economy has declined. Kelley Drye & Warren partner, John E. Villafranco, explained, "In this economy, where margins are a bit tighter, a lot of marketing departments have decided to become more aggressive in going after their competitors in the hopes that they can either protect their market position or capture additional market share."

Increased Activity at the NAD and in the Courts

Most advertising cases are filed either in the courts or before the self-regulatory body, the National Advertising Division of the Council of Better Business Bureaus ("NAD"). *The New York Times* reported that complaints filed with the NAD hit a record number of 84 in 2008. The year before, the NAD received only 62 complaints, and it received only 52 complaints in 2006. The NAD is on track for a new record in 2009, with 82 complaints filed so far.

No reliable numbers are available for false advertising cases in the courts, but lawyers in the field report an increase. Cases in the courts and at the NAD have involved advertising for telecommunications products and services, health benefits claims for foods and dietary supplements, advertising for over-the-counter drugs, advertising for personal care products, advertising about taste tests, pet food advertising, claims about savings to consumers, and claims that products are environmentally friendly.

For an analysis of alternatives to standard court proceedings, see the article, ["Making it Stop: A Practical Guide to Challenging Your Competitor's Advertising Claims."](#)

Aggressive Enforcement at the FTC

While competitor challenges have heated up, advertisers also should be aware that the Federal Trade Commission ("FTC") has remained active and aggressive. David Vladeck became the Director of the Consumer Protection Division in April. He has stated in speeches that enforcement priorities will include advertising related to consumer economic welfare, advertising related to consumer health, advertising about environmental benefits, and advertising to children. Cases initiated by the FTC have reflected these priorities.

Additionally, on October 5, 2009, the FTC released stringent new guidelines for using endorsers in

advertisements. These guidelines affect a broad array of advertisers, including those who do not use typical consumer, celebrity, or expert endorsers. The guidelines, for instance, cover the situation where a company gives free products to bloggers for their honest, unedited opinions and the situation where an employee, on her own accord, disseminates a message about her employer's products or services on the internet. For more information, reference the Kelley Drye Client Advisory, ["FTC Issues Final Sweeping Changes to Endorsement and Testimonial Guides."](#)