Think Your Prescription Drug Advertising is Beyond NAD's Purview? NAD Disagrees.

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Those of us who spend our days at the intersection of law and advertising of health products generally accept that the prescription drug world is a universe unto itself, overseen by the FDA pursuant to the Prescription Drug Marketing Act. As prescription drug companies have increased their direct-to-consumer outreach through social media, native advertising, and health information platforms, questions have arisen as to the role that the NAD might play in regulating these advertisements. For those who are unfamiliar, the NAD is the National Advertising Division of the Better Business Bureau. It is an industry self-regulatory body that is charged with hearing and rendering decisions in advertising disputes, typically among competitors. It is commonly used amongst advertisers of consumer-directed products and services. It is not commonly used amongst prescription drug advertisers and, until recently, many likely assumed that NAD did not have jurisdiction to hear prescription drug advertising challenges.

A relatively recent NAD decision makes clear that that body believes that it has jurisdiction over prescription product advertising, however. Late last year, the NAD evaluated advertising by Synergy Pharmaceuticals for its Trulance product, which is prescribed for chronic idiopathic constipation. Allergan, maker of a competing product, challenged the advertising on the basis that it included false implied superiority claims, expressly false superiority claims, and undisclosed native advertising in the form of a waiting room pamphlet that allegedly was positioned as independent and impartial patient education material.

Synergy refused to participate in the NAD process on the grounds that the advertising was developed in accordance with FDA's requirements and FDA has primary jurisdiction over prescription pharmaceutical products. NAD referred the matter to "the appropriate regulatory authorities," noting the following: "*While the FDA has jurisdiction over the advertising and promotion of prescription pharmaceutical products, FDA jurisdiction does not preclude NAD from providing self-regulatory guidance on the challenged advertising, particularly whether the challenged advertising for Trulance communicates a misleading message about competing products*." [emphasis added]

We do not know the outcome of that referral. Nevertheless, this challenge is notable for the following proposition: Going forward, prescription drug competitors are likely to look to NAD as a potential forum to challenge aggressive claims. Even if the advertiser refuses to participate and the challenge results in a referral to FDA, an NAD challenge produces a press release and a public decision that details why the advertising is allegedly misleading, which may be picked up by industry press. Simply put, in the high dollar world of prescription drug advertising, an NAD challenge could produce a lot of bang for the buck.

For more discussion on this and related issues, check out the "Advertising in a Multi-Screen World: Promotional Challenges of New and Emerging Technologies" panel at the upcoming Drug Information Association (DIA) Conference on March 8-9.