CHALLENGING AND DEFENDING ADVERTISING CLAIMS

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CHALLENGING ADVERTISING CLAIMS

Three Primary Options

- Network Challenge
- National Advertising Division
- False Advertising Lawsuit under the Lanham Act

COMPETITIVE CHALLENGE OPTIONS: NETWORK

- Inconsistent Procedures
  - Every network has a different process
  - Some networks defer to NAD; others do not
  - Some networks want surveys to demonstrate implied claims; others do not
  - Most cable channels will not entertain competitive challenges at all
- Weak Relief
  - Networks are reluctant to pull an ad altogether
  - Every network will make its own determination
  - An advertiser can circumvent a negative network decision by running its commercial on cable channels without any modification

COMPETITIVE CHALLENGE OPTIONS: NAD

- Easier to prove false advertising
  - NAD free to discern implied messages, even without survey
  - **Advertiser** must demonstrate claim is adequately substantiated
- Limited remedies
  - 4 to 6 months for decision
  - Sole remedy is NAD recommendation, although threat of FTC referral creates strong incentive for compliance
  - Each side bears its own costs
- Less publicity, risk and expense
  - Proceedings are confidential until NAD publishes decision
  - Counterclaims not permitted
  - No discovery permitted and parties retain discretion as to what materials they submit

COMPETITIVE CHALLENGE OPTIONS: COURT

- Harder to prove false advertising
  - Survey required to prove implied claims
  - **Challenger** must prove claim is false
- Broader remedies
  - Preliminary injunction possible in 4 to 6 weeks, maybe less
  - Monetary damages, corrective advertising, and disgorgement of profits
  - Attorney's fees and costs
- Greater publicity, risk and expense
  - Proceedings are public from day complaint is filed
  - Counterclaims permitted
  - Discovery permitted

COMMON ISSUES IN DISPUTE

- Test population
- Single vs. Multi-market Testing
- Presentation of products
- Fairness of questions
- Consumer relevance of testing results
- Adequacy of fit between test results and advertising claim
- Claims of privilege and/or work product over communications with testing professionals

CASE STUDIES: HD PICTURE QUALITY



Comcast wins the HD Picture Challenge.

Satellite customers agree: HD looks better with Comcast.

HD is all about picture quality. That isn't news. But it is news whose picture is better. In a side-by-side picture quality test, even satellite customers agreed that Comcast HD has a better picture.

Comcast HD. The way HD was meant to be.

CASE STUDIES: YOPLAIT GREEK TASTE-OFF



QUESTIONS?