Advertising Law Alert -- The Brand vs. The Claim

By Kyle-Beth Hilfer and Shana Dunning

Brands should be careful when choosing a trademark that describes product performance. Such a trademark could be seen as an advertising claim in need of substantiation.

In a recent case, the National Advertising Division, a program of the Better Business Bureau (NAD), reminded brands that trademarks may not be seen as mere puffery if accompanied by unsubstantiated advertising claims.

Sunbeam Products, Inc. challenged SharkNinja Operating, LLC's national advertising as part of the NAD's industry self-regulatory process. Sunbeam argued that SharkNinja's advertising for non-stick cookware products marketed under the brand name "Foodi NeverStick" constituted misleading advertising. Sunbeam complained about the trademark as well as SharkNinja's claims in the advertising that the cookware "never sticks, chips, or flakes." In addition, Sunbeam challenged the advertised "lifetime guarantee", given that the product had a five year warranty.

Pursuant to Section 5 of the Federal Trade Commission Act, all advertisers have a legal obligation to avoid misleading, deceptive, or unfair commercial speech. Various states have enacted laws that impose similar requirements. The NAD makes recommendations regarding national advertising claims. If an advertiser does not agree with an NAD decision, it may appeal the NAD's decision to the National Advertising Review Board of the BBB National Programs. If the advertiser chooses not to participate in the NAD's process or to comply with the NAD's recommendations, the NAD may refer the matter for further investigation to the Federal Trade Commission.

In response to Sunbeam's challenge, the NAD reviewed SharkNinja's testing and Sunbeam's rebuttal evidence as to whether the product "never sticks." It found that the advertising contained unsubstantiated implied claims that the SharkNinja line of products was superior to the products of its competitors in the marketplace. Indeed, it is hornbook advertising law that a brand is responsible for both express and implied claims embedded in its advertising. Furthermore, the NAD found the "lifetime guarantee" claims to be confusing for the reasonable consumer, and that such confusion was only enhanced, rather than mitigated by brand's disclaimer, "When used as directed. Lifetime based on 5 years of use." Accordingly, the NAD recommended that SharkNinja discontinue both the "never sticks" advertising copy and the "lifetime guarantee" copy.

With such changes, the NAD decided that the brand name "Foodi NeverStick" was acceptable. In its decision, the NAD reminded advertisers that advertising context is crucial for determining if a trademark is merely a brand name or whether it is an advertising claim.

SharkNinja agreed to comply with the NAD's decision in its advertiser statement.

Takeaways

When choosing and clearing a trademark that describes a product's performance, a brand should do more than just trademark availability analysis. The brand should also evaluate the trademark under advertising law principles. A brand's marketing team should consider what express and implied claims about the product will appear in advertising. If those claims are not substantiated, the advertising campaign could make the trademark itself susceptible to a false advertising challenge.

Find the NAD's summary of its decision here.

For further information, contact Kyle-Beth Hilfer, Shana Dunning, or your CLL attorney.

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Kyle-Beth Hilfer has over thirty years' experience providing legal counsel to advertising, marketing, promotions, intellectual property, and new media clients. Leveraging her deep understanding of branding, Kyle-Beth ensures regulatory compliance for her clients' advertising and marketing campaigns.

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