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July 3, 2014

NAD SETTLEMENTS — THEY'RE POSSIBLE AND WORTH CONSIDERING

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*This article was originally published on Venable's **All About Advertising Law** blog on June 23, 2014. Law360 also published it on July 3, 2014.*

Many advertisers who appear before the National Advertising Division assume that once an NAD challenge is filed there's no turning back. The NAD rarely declines an opportunity to review cases, and when it does reject a complaint it is usually for one of the narrow reasons stated in **Section 2.2(B)(i) of the ASRC Policies and Procedures**. Those reasons include where the challenged advertising is local in nature, subject to pending litigation, exceedingly technical, or permanently withdrawn before the challenge. In other words, short of one NAD party filing a lawsuit against the other, an advertiser and challenger who wish to mutually resolve a pending NAD dispute may believe they have no way of doing so. But before you resign your advertising to the self-regulatory microscope, there's still hope for settlement that avoids the costs of litigation and the risks of a detailed public case report.

The NAD recently issued a trio of case reports (Cases #5719, #5720, #5721) administratively closing cross-challenges between T-Mobile and AT&T based on settlements that the NAD found satisfactory. The NAD's one-page orders in each case are succinct and substantively identical. First, the NAD explains that "[d]uring the pendency of the instant inquiry, the parties informed the NAD that they reached an agreement concerning the challenged claims." Next, the NAD notes that "the parties' agreement regarding the advertising claims at issue addresses NAD's concerns for the public's interest in receiving truthful and accurate information." For these reasons, the NAD concludes that "supplemental review by the self-regulatory forum would be duplicative and, consequently, *lacks sufficient merit to warrant the expenditure of its resources*"—a catch-all basis for administrative closure under Section 2.2(B)(i)(f) of the ASRC Policies and Procedures. Finally, in a footnote, the NAD reserves the right to re-open the challenges "[i]n the event of a breach of the settlement agreement by either party."

Although the AT&T and T-Mobile settlements are the most recent examples of NAD settlements, they are not the only instances. Indeed, the NAD has sanctioned settlements intermittently over the years, including a May 1997 partial settlement involving SmithKline Beecham Consumer Healthcare (Case #3385); a January 2000 settlement between Metabo Corp. and Fexovit USA (Case #3619); a February 2002 settlement involving the Butcher Co. (Case #3881); a September 2008 settlement between TeleNav, Inc. and Garmin International (Case #4907); and a May 2014 settlement between Church & Dwight, Inc. and GlaxoSmithKline Consumer Healthcare (Case #5712).

Given the potential for NAD settlements, advertisers summoned before the NAD should at least consider two alternative approaches before sinking resources into a full-throated defense.

The first and most obvious approach is to explore whether the challenger is interested in settling the dispute at the outset. For the advertiser, this approach is especially advisable where the NAD is likely to recommend discontinuance of the challenged advertising. By settling early, the advertiser will avoid wasting litigation resources and can stem a potentially embarrassing case report. At the same time, the challenger might also be incentivized to settle. Although settlement would mean foregoing a detailed public case report in its favor, the NAD's strict policy against challengers publicizing favorable NAD decisions largely nullifies this benefit. Moreover, the challenger may place greater value on the opportunity to preserve legal resources and to ensure the swift discontinuance of the challenged advertising without enduring a multi-month NAD process followed by a potential NARB appeal.

The second approach advertisers should consider is whether to put the challenger's skin in the game by immediately filing a counter-challenge. ASRC's Policies and Procedures do not allow for counterclaims *per se*, but **advertisers are free to reflexively initiate separate NAD proceedings** to examine the

challenger's advertising by simply paying the NAD's filing fee. Typically, the advertiser stands little to gain from filing an immediate counter-challenge. Aside from retribution, a contemporaneous counter-challenge is often a distraction to an advertiser who is already saddled with trying to determine on short notice how to best defend its advertising against a freshly minted NAD complaint. However, where an advertiser who wants to pursue an NAD settlement is stymied by a recalcitrant challenger, a counter-challenge may be what it takes to break the impasse.