



Podcast Transcript

AD Nauseum: It's Always Sunny in Philadelphia for the NAD Conference

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Brave: Thank you for joining us for another episode of BakerHosts' AD Nauseum, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Leah Brave, and you are listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two Partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseum, Amy and Daniel discuss the upcoming National Advertising Division Conference in Philadelphia, and explore the NAD's priorities, precedence, processes, and procedures. With that, let's turn it over to Amy and Daniel.

Kaufman: Thank you very much, and welcome back to AD Nauseum. So, we've been talking a lot about the FTC lately. Lots of FTC love here on AD Nauseum, and, to be clear, they've given lots and lots for us to talk about this year and last year as

well. But this is a podcast dedicated to ad law and the FTC and the NAD, and we thought it was time to balance the scales a little bit. Today, Amy and I, we're going to talk about the NAD process, and how to make the most of this forum and it really is a timely moment to talk about this because the NAD conference is coming up September 19th to 20th this year in Philadelphia. It is certainly a must-attend conference for anyone who focuses on advertising claims and claims substantiation and you can, of course, find details on the conference on BBB National Programs website. Please do let us know if you are coming. We would love to connect in Philly. But, Amy, it is summer concert season. I think you have been doing the rounds of summer concerts. You have been fortunate in that regard. I have not done that since the 80s, but what have you been seeing this summer?

Mudge: You are hard to get out. I have invited you to concerts, and I will continue to do that because you know I think that going to concerts is life. I say I've never gone to live music and once I've gotten there said, I wish I was somewhere else. And it took me a while in the pandemic to get back out there. This is really the first summer that I am back. The best thing I've done, the most joyful thing I've done was to see Beyoncé. I was incredibly, incredibly lucky to do that with my daughter. We saw her last tour seven years ago and to see this as her graduation present and it was the Renaissance. Daniel, I know you listen to Renaissance in your office. I have been there, and the concert was everything you could possibly think it was.

Kaufman: So, I adore Renaissance. I am still devastated that it did not win the Grammy for album of the year. I felt the same way about Lemonade. Totally deserving, both of them, to be album of the year and shockingly, Beyoncé did not get it either year. But no, I am totally envious. She puts on an amazing show. I would love to see her at some point. So jealous you saw her. Now you also saw Pink, right?

Mudge: I did. Pink is lovely. Pink is empowering. She is wonderful. The other concerts I really loved this summer, Fitz and the Tantrums. Do not sleep on those guys. I Can Hear Your Hands Clap. They put on a hell of a show, but we've also seen some '80s stuff. Now, Daniel, you must have seen some concerts back in the day.

Kaufman: Oh, certainly, growing up in Brooklyn, going to the outdoor concerts at Jones Beach, and, oh gosh, there is another location that had just a great summer series. So, back in the day seeing whether it was Culture Club, Cindy Lauper, Paul Young, The Cure. I definitely saw them all during summer shows in New York. There is something about a summer concert that is particularly enjoyable.

Mudge: That is true. I did not make it out to Jiffy Lube Live, which is, feels like it is in Virginia, to see Boy George and Cindy Lauper, but I did see The English Beat and I did see Nick Lowe. So, those folks are on the smaller concert tour. It is always great to see.

Kaufman: Well, that is pretty awesome, and I hope our listeners are going to see some great shows as well. Getting to the matter at hand.

Mudge: The only thing I love talking about more than live music is talking about the NAD.

Kaufman: Forget the FTC. We are, well actually we are going to talk about the FTC a little bit because we can't avoid that, but we're going to focus on the NAD. And our listeners probably know NAD is the place where companies can go pay their filing fee, and then have the NAD look at their competitors' advertising claims and look at their support to decide if those claims are substantiated. So, far cheaper, far quicker than litigation, of course, and it is a streamlined process with generally two rounds of briefing, a meeting, and then a decision that gets issued and of course can be appealed also. And I have to see as a former FTC-er, I always sort of look at this, I'm sort of fascinated by it. So, I always wonder, why does self-regulation work, and why would companies agree to have their ads reviewed? Now, working at the FTC, of course, we had subpoenas and we issued CIDs and companies certainly had no choice but to provide that information, but here it is voluntary, and people seem awfully agreeable with the process. I mean, issues are raised from time to time, again, of course, about aspects of it, but like, what is going on? Explain this to me, Amy.

Mudge: It is good, God-fearing, flag-waving American companies do participate in self-regulation generally because they value the process. They value having a place where they know they're going to get challenged but they can also bring a challenge. And I think it is especially important for comparative claims that maybe the FTC or the state AGs these are not super interested in, and they really view those as a matter between big companies. To be able to have a place to go, as you exactly said, quicker and cheaper than filing a Lanham Act case, the system only works if people agree to participate when they're challenged. Most companies really do. The rate of not participating is quite low. That is the stick that is built into self-regulation. If companies don't agree to participate or they don't agree to NAD's recommendations, then the response is to send their file over to the FTC. And that's always been something that's been a little bit scary. Today I think it really sets appropriate fear in the hearts of most companies.

So, Daniel, I'm interested in, and like you said, there is a really high rate of participation, but when files do get sent over to the FTC, what happens? What does the FTC do with them? What is the process through which the FTC evaluates whether it is a case worth pursuing?

Kaufman: You know, it is funny. I get asked this a lot and they are, let me be clear, taken very seriously. If the company is not participating in the process, is not adhering to what NAD or NARB is recommending, it is assigned to someone at the FTC who will take a close look at it. I worked on a few of these over the years at the FTC. I remember one I worked on, it was a fly-by-night company that just did not participate, and I remember spending quite a while trying to track them down. It was sort of a, for lack of a better word, a preposterous product making preposterous claims, they did not participate in the NAD process. I don't think I was ever able to even find them, so that really went nowhere, but there was another far more complicated one I remember working on. Very legitimate company in the pet health industry. And I had lots of discussions with the company, with the challenger, to better understand the science, the

substantiation, did my independent analysis. I think they even might have talked to some outside experts on the case, but handled it very seriously. And it is, to the extent that the FTC has the ability to prop up self-regulation by making it clear that we're looking closely at things that are referred to us and you should take self-regulation seriously. That is an important message for the FTC. So, the bottom line is if you get a referral, I can pretty much guarantee it will be looked at closely at the FTC. I'm almost certain they will be talking to the advertiser, certainly the if challenger, if there is a challenger, wants to talk to the FTC that can also certainly happen. Look, it is not like there are hundreds of them that get sent over to the FTC each year. It is a relatively small number, and it is a small enough number that the FTC can take them seriously.

Now, I know there is sometimes dissatisfaction because the other thing we certainly used to do at the FTC was get the companies to comply. To have a discussion. To have some back and forth and to sort of encourage compliance short of an enforcement action. So certainly, that happens behind the scenes quite a lot as well.

Mudge: Daniel, I'm going to push a little bit on you about that because certainly we definitely have heard every time the FTC's come out for speeches, Leslie Faire used to always say, if something comes over from the NAD to the FTC, it quote, goes to the top of the stack. And definitely we understand that it goes to ad practices and somebody in ad practices takes a look at it. I have heard they do use the bully pulpit to really call an advertiser and say, you don't want to mess with us, and strongly encourage a return to NAD and I think we do see that in a lot of cases. But at the end of the day, I'd suspect that the FTC is not going to take a case for enforcement unless it fits in with the FTC's enforcement priorities. Things like the FTC is going to look at the advertising and say, is there a consumer harm here? Are consumers paying more for something that they would pay less for if they knew the truth? Or is this an issue where consumers are making a choice to their detriment, like taking a dietary supplement instead of seeing their doctor? But if it doesn't fit into one of those two buckets, if it really is just a I smell better than other people sort of narrative claim, I haven't seen the FTC picking those up.

Kaufman: Yeah, no, look, you're very much correct. There is, the substance of the case matters also to the FTC and generally when you're getting an NAD referral, you're hoping it is going to be something that actually fits within the broader theme of the FTC. Are people paying more money? Is there harm? You know, what are the ramifications of it? But no, you are absolutely correct. The FTC is rarely going to do a true competitive issue where companies are just fighting over sort of a pretty narrow issue that may or may not be that material to consumers. So, the FTC definitely has limited resources and can't bring those cases and really does rely upon companies participating in the NAD process to address those kind of claims.

Mudge: Although you have been clear to tell us that this FTC is very focused on larger companies and getting some headlines or making points with larger companies.

So probably now is not a good time to take a referral, particularly if you're a big tech or even a tech company, regardless of the type of claim at issue.

Kaufman: Yeah. I think avoiding referrals to the FTC is a good idea right now. That would be my starting recommendation for most companies.

So, one thing I'm wondering, I've gotten mixed answers about this, but what is the legal precedent the NAD applies to its cases? And the reason I'm asking this, there have been times where NAD has given a company a pass on a certain claim and the FTC has actually followed up and brought a case there. There is some inconsistency between the NAD approach at times and the FTC approach. I mean, that could just be a law is gray, and there are always going to be areas of gray. But what is your take on the NAD legal precedence?

Mudge: In my experience, the NAD has been more exacting than the FTC has been. And I think the real difference is the FTC does have that enforcement discretion, and can decide what cases it believes it should bring given the limited amount of time that it has. NAD doesn't have that. It has to decide the cases that are brought before it. We might talk in a minute about monitoring cases. Those are ones the NAD brings themselves. But if a competitor brings a case, if it is a case that involves current national advertising, the NAD has to make a decision. Now, in those cases, it certainly looks to FTC, less to FTC cases, more to FTC guidance, business guidance and other statements, things like testimonial endorsement guides, the Made in U.S.A. enforcement policy. That is certainly good guidance that the NAD looks to. The NAD will also look to its prior cases, what it has said in the past, although it is not always consistent, and I think what NAD lawyers would tell you is every case is different, you have to look at every case in context, which of course is correct. We always argue legal precedent at NAD and sometimes it wins the day and sometimes it doesn't. I have not heard the NAD ever say the FTC is wrong, we take a different approach. So, FTC guidance they will follow. Less so, litigated cases involving private litigants. Very rare do we see NAD cases that cite Lanham Act decisions or class action decisions as something they look to. It can happen but that is pretty rare.

Kaufman: So, a few years ago, I know NAD introduced, and it was a big deal, the new faster SWIFT track. So, a company can challenge one discrete issue and get a decision in 20 days, which is pretty amazing. So, what are some things for a company to consider when picking regular track versus SWIFT track? And I have to imagine a lot of companies are trying to sort of shoehorn into the SWIFT track what should be in the regular track, so how is this played out?

Mudge: So, there was great angst when NAD announced the SWIFT track a few years ago and it is interesting because the challenger in an NAD proceeding always thinks that people are dragging their feet and things should move more quickly. And this was really NAD's response to say, hey look, we're going to give you a faster track, we're going to give you a 20-day track, but it only works in certain cases. So, the key to SWIFT is, you got to bring one issue. In any other NAD case, you can challenge multiple claims about a product. Multiple claims in an ad campaign. With SWIFT, it is one. So, you pick your battle, and it really has to be

a claim that is not something that there will be a lot of scientific substantiation or difficult things to dig into. It basically has to be facial advertising case that NAD can look at pretty quickly and say, yup, this looks good or nope, this is a problem, and move forward. It has been wildly popular. I think more popular than even NAD thought it would be in terms of the number of cases. At the conference, and we do hope lots of you join us there, the NAD also always gives its annual stats, so it'll tell us the number of cases. But it is about a quarter of their docket, is going through this SWIFT track. And the key thing for advertisers to decide, do you want fast? Okay, you get to challenge one thing. If you want to challenge more things, or you want to challenge things where substantiation comes in to play, that is where you've got to go down on the regular track, or even the complex track, which they added at about the same time, that almost no one is using.

Kaufman: Yeah, so, it is interesting. The FTC of course has all of its enforcement discretion, bringing the cases they feel are significant, what they want to bring, what they want to focus on. NAD does have their monitoring cases, which I thought has been really interesting, where it is both the challenger and the decision maker. So, what has been your take on how the NAD approaches this? How do they prioritize what they're focusing on, what the issues are, what have you seen?

Mudge: So, I think it's changed over time. Back in the, I'll call it BL, before Laura Brett, when Andrea Levine was the director. Andrea tended to bring monitoring cases in areas where she thought there wasn't enough challenges between companies. So, cosmetic cases were a large part of the monitoring docket, because there weren't a lot of challenger-initiated cosmetic cases at the time. Under Laura Brett's directorship, I think there's been a far more focus on filling in gaps. When something new comes out, or when something is interesting, before the FTC issues guidance, the NAD will sometimes offer its views on things. Things like native advertising. Before the FTC issued its native advertising guidance, the NAD brought multiple cases as monitoring cases to lay out what it thought advertisers should do. We've seen that a lot more recently with the NAD bringing environmental cases, particularly focused on aspirational claims, or forward-looking claims that a company has made. That's been a huge part of their docket this year. And more recently, I think we've seen them just trying to get in the game where they want to have some NAD precedent. So, we've seen them bringing more review cases, more native advertising cases, they've even brought a subscription case, which doesn't seem like an advertising-type case, but trying to make sure that the NAD puts its stamp on the key issues of today.

Kaufman: So, let's turn to the conference a little bit. So, we're going to be in Philadelphia next month. I will say at the outset, if you haven't been to Reading Terminal, I love Reading Terminal. The art museums are wonderful, both the major art museum and the Barnes exhibit. Again, if you haven't seen them and are at all interested and you're coming to Philly, highly recommend it. But in addition to Reading Terminal and the art museums, what can we expect to hear and learn at the NAD conference. Like, what are some of the big trends you think we're going to be discussing at the conference?

Mudge: Well, their conference in some ways follows a typical pattern, but it really is worth going, it is a very interesting conference. The NAD will give its year in review, where it breaks down the types of cases, which industries are bringing the most cases, and does a lot of slicing and dicing which is quite interesting. And the NAD will do deeper dives in the areas that it knows are top of mind for advertisers. Some of the things I talked about before, like aspirational environmental claims, native advertising reviews will certainly be things that we hear about at the NAD conference. Something I'm actually really interested in is they very recently brought their first monitoring case in the area of stereotypical advertising. So, looking at advertising that an app was doing, it was a before-and-after app, where the advertising showed ugly women doing very poorly in the world and with the app, if you made them prettier, then they were very successful. And this was the first case out of the gate where the NAD has brought a case like this that typically would not be something that it focused on. What was really interesting to me is it found a way to say that this case was misleading advertising, and actually found that some of the very sexist, stereotypical ads weren't actually reflective of the app, the game itself, so that there was a misleading type of bait-and-switch aspect to the ads. But certainly, NAD has for a very long time said these kinds of cases are not appropriate for NAD, which are appropriate for truth in advertising, and there is the first amendment issue, which is very important. But more recently, the NAD has said no, we want to be involved, we want to be part of the process of making sure that advertising and DENI is something that the NAD considers. And so, I'm really excited to hear about them talk about this case and where they might go as far as looking at stereotypes portrayed in advertising.

Kaufman: Well, it is going to be an interesting conference. We really appreciate everyone joining us here today. We do want to remind you, if there are topics and issues that you think Amy and I should discuss here, we are open to suggestion.

Mudge: Reach out. We're happy to hear your feedback.

Kaufman: Right.

Mudge: Only if it is good. No, kidding.

Kaufman: We take constructive feedback also.

Mudge: We do, we do. Thanks so much to our wonderful listeners, and that is it this week for AD Nauseum.

Brave: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our AD-torneys Law Blog at www.adttorneyslawblog.com, and check out all AD Nauseum episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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