Podcast Transcript

AD Nauseam: NAD and Why Can't We Be Friends

Date: February 6, 2024

Guests: Amy Ralph Mudge, Daniel Kaufman

Host: Leah Brave

Run Time: 21:07

For questions and comments contact:

Amy Ralph Mudge

Partner
Washington. D.C.
T: +1.202.861.1519 | amudge@bakerlaw.com

Daniel Kaufman

Partner
Washington. D.C.
T: +1.202.861.1523 | dkaufman@bakerlaw.com

Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, 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're 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 Nauseam, Amy and Daniel do a deep dive into the National Advertising Division and talk about strategies to consider when your competitor is engaging in false advertising. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back, everyone, to AD Nauseam. I don't know if you've noticed, but I certainly have, that we've been giving a whole lot of love to the FTC on AD Nauseam and very little attention to the NAD, and we can't have that. It is false advertising because AD Nauseam has been billed as a podcast dedicated to all things FTC and NAD, and I simply must insist on equal dignity.

Kaufman: Okay, Amy, let's be clear. It is not always love that we're giving to the FTC at the outset.

Mudge: Well…

Kaufman: Look, there has been a lot going on at the FTC in the last few months and it has been hard to catch our breaths. Of course, NAD's been busy, too. But it was at more of a steady drum beat that we expect, while the FTC's been throwing whole symphonies at us. But now when we talk about taking center stage, Amy, I know you are an enormous fan of the awards season. Have there been any surprises for you though, so far?

Mudge: Love, love, love award season. So much better than football and basketball. So, for TV, it's been all about Succession, The Bear, and The Beef. And I have to say, I was actually in love with all the attention that The Bear has been getting. And even more interested in the fact that for all of the lauds, plaudits that The Bear has gotten, it seems like the Jeremy Allen White Calvin Klein underwear ads have taken over all this, and it is really not often that ads take over pop culture like that. But you know I love it when I see it. But I had no beef with the TV awards. I would have liked to see Cousin Richie recognized for his Bear performance. But it really, The Bear was the show for me in 2023. And I think that Christmas episode was one of the most intense hours of TV I have ever seen in a good, traumatic way. Jamie Lee Curtis is just incredible. So, what about you?

Kaufman: So, that is definitely on my to-watch list. Like what has…

Mudge: Oh.

Kaufman: I've not watched The Bear yet, no. But what has shocked me is, I have seen like no movies this year. I have no qualms sitting on my sofa binging Better Call Saul, episode after episode, which I'm doing right now, which is amazing. But commit to a two-hour movie? I really can't do that.

Mudge: No Barbenheimer for you? You weren't there that weekend?

Kaufman: I didn't see either. I really have to start going back to the movies. But I have loved all the love to Succession, and seeing Kieran Culkin finally get recognized, because I just think he is brilliant in that show and his performance in particular.

Mudge: Absolutely. He will, I've got to say, I'm catching up on older TV, and I'm just getting into Fargo, and he was only on Fargo for a really short time. That was an amazing performance.

Kaufman: Didn't realize that. But let's get back to the business at hand here. Amy, quickly, how does NAD work? And am I going to get in trouble with you if I call it nad as opposed to NAD?

Mudge: It is not nad. It is always N-A-D, right? I mean, we say FTC not ftc.

Kaufman: Well, maybe start a new thing, ftc.

Mudge: People ask what, it just is. You got to, if you're going to say, oh, we're going to go to the nad. That just sounds a little too anatomical. It is just, it is not right. So please, please, everybody, it is the NAD.

Alright. Now, what is it? And I know almost everybody who is listening to us knows about this, so I'm going to just do a real quick drive by here. But it is an arm of the Better Business Bureau, part of their national programs, where a company can pay a filing fee, it is tiered based on U.S. revenue, and then can challenge advertising claims that a competitor is making. There is a couple of rounds of briefs that are exchanged and then each sides meets with the NAD to argue their case. And then NAD issues a decision, either finding the claims that were challenged were supported, or recommending that they be modified or discontinued. It is all voluntary process. But if companies don't participate, or if they don't agree to comply with NAD's recommendations, the stick is there is an FTC referral. And, Daniel, I know you can tell us lots about what happens when that happens.

Kaufman: Yeah, the NAD referrals to the FTC. Look, the mantra has always been, they're taken very seriously, and they go to the top of the pile. And that is true. When I was a baby attorney working in advertising practices, I had a few different NAD referrals I had to look at. And I will tell you, in those cases, the FTC will reach out to the companies, to the complaining company, engage with them, try to get changes to be made behind the scenes. But you don't see a huge number of NAD referrals that turn into cases. There is a lot happening…

Mudge: But why not? Why not?

Kaufman: Part of the challenge is the FTC is generally not focused on purely competitive issues. They're focused on health issues. They're focused on safety claims, or whether consumers pay too much. But are they going to get really worked up over slight differences? And that is how the FTC will perceive them between one product versus another product. Now again, if there is a theory that these competitive claims, or not necessarily always competitive claims, of course, are causing harm to consumers in some fashion, then the FTC is certainly going to be more interested in it. But you don't see that necessarily in a lot of the referrals.

Mudge: That is interesting. So, the stuff that competitors probably get the most worked up about, who tastes better, who smells better, who is softer, is not the stuff that the FTC typically stays up at night worrying over.

Kaufman: Yeah. Look, I would have a hard time finding a recent FTC case involving taste, feel, sensation, issues like that. And things like that are really important to businesses and to industry, but less so to the FTC.

Mudge: Yeah. Well, I guess what I've heard when I've encouraged the FTC to take up a referral is sometimes there is this idea of with scarce enforcement resources, big companies can handle these disputes themselves. The P&Gs of the world do not need the FTC protecting them. But, oh my gosh, we're talking about the FTC too much again.

Kaufman: Force of habit, force of habit. Damn agency. So, Amy, at the end of the day, why does a competitor want to go to the NAD instead of simply filing a Lanham Act false advertising case?

Mudge: There is a couple issues there, cost and burden. Timing, but a little bit less so. So, it is always going to be far cheaper to go to NAD than it is to file a Lanham Act case. And a Lanham Act case, you are almost always going to be facing a counterclaim, so you're never just a plaintiff. You're almost always a plaintiff and a defendant, while at NAD there is no counterclaims. Your company can file a separate counter challenge, but in an individual case, it is only about the challenge to claims. And there is a filing fee you've got to pay. But there is no discovery, so that inherently reduces the cost very significantly.

Timing, usually you're going to get an NAD resolution more quickly. Of course, in a Lanham Act case, if something really bad is going on, you can run to court, you could ask for a TRO. Even if you can't get that, you get a PI.

And then the burden of proof is the last thing. In a Lanham Act case, competitor challenger has to prove the advertising is false, and sometimes that in implied claims has to involve survey evidence. Where at the NAD, you pay your money, and you challenge certain claims and that is all you need to do. The burden of proof is on the advertiser to show that they have a reasonable basis for their claims.

Kaufman: So, it is interesting. So, an advertiser being before the NAD is much more akin to being before that agency, the FTC, where they have to show that their claims are truthful and non-misleading. But one thing that has always struck me is, obviously before the FTC, you're experiencing a lot of discovery. No discovery there at the NAD. So how does the NAD make a reliable determination that there is or isn't a reasonable basis to support any of the challenge claims?

Mudge: Well, first of all, there is a good faith element to this process. That people going in, both the challenger and the advertiser, will be forthcoming with the NAD. But in this case, I mentioned that the challenger just needs to file, to pay their money and say, hey, I don't like these claims. And then the burden shifts over to the advertiser. But in truth and practice, the challenger does way more than that. They usually will open a challenge and say, we know these claims aren't supported or we know these claims are false, and they will tell the NAD why. Sometimes the challenger will actually test the competitor's product and put in evidence that way. And when it is the advertiser's turn to support its claims, the advertiser will share its testing. Everything is confidential at the NAD. There is a lot of reliance on that, in good faith participation of the parties.

Kaufman: Yeah, it is interesting though. Coming here about two years ago, I've gotten to learn a lot more and have a lot of fun working with you on aspects of the NAD process. It is one that I've definitely seen large advertisers are really passionate about on multiple directions, and there is a lot of discussion I'm hearing about speed. We've got challengers saying the process takes way too long and companies are just sort of milking it out, and making ad campaigns run longer that shouldn't. And of course, advertisers thinking it is far too short. And what is your take on this? A little bit of column A, a little bit column B, or…

Mudge: Absolutely. If you are the challenger, you always want it to move faster, right? Because you've got issues with the competitors advertising, and you want that advertising changed. If you're the advertiser, you pretty much like your advertising. You want to keep things going. So, it is just, there is a lot of that tension back and forth.

One of the nice things, though, is people at the NAD are, sometimes you're a challenger, sometimes you're the advertiser. So, on some level, folks are protective of the process, generally. Because they know they're going to be on one side one day and the other side another day.

There is a set timeline within the NAD procedures, but people ask for extensions, right? And things can end up getting delayed. The NAD has worked really hard to try to shorten those types of delays and to try to really shrink the process. In addition, in the last couple of years, there's been some new options. There is a SWIFT option, which you can challenge a single claim and get a result in 20 days. Or there is a complex track that takes longer but is probably the place that is more appropriate for very claim-rich and substantiation-rich cases.

Kaufman: So, what industries do you see as sort of the heaviest users of the NAD process?

Mudge: Telecom, telecom, telecom. NAD every year issues an annual report. It is a great thing for everybody to read. As long as I can remember, when they list the industries who are users, telecom is always the biggest slice. Sometimes it is as much as 30% of the NAD's docket. Your large consumer products companies are always going to be there, P&Gs or Unilevers, etc. They know how to use the NAD process, and really treat NAD as something they consider as part of its marketing arsenal. There've always been some long standing and weird wars between certain companies. We've seen a lot of vacuum cases. There was a newer set of wars that involved orthodontics and teeth whitening. There is always kind of a set industry that is there more often, but really it is the telecom and the CPGs that are the work horses at NAD.

Kaufman: Okay. So, Amy, theoretically there is an ad I hate, and I've got money spilling out of my pocket. Could I personally file an NAD challenge if I wanted to?

Mudge: Oh my gosh. You are just so vindictive, sir. I can't even believe it. And, you know what? I'm sorry, Daniel. You are too busy. You have movies to watch, and you have to get caught up to television shows of this general era.

Kaufman: Yes.

Mudge: So, no. You, I'm going to, you are not going to bring a case at NAD. But could you? Yes, you can. But, unlike in the Lanham Act case where the plaintiff has to be a competitor of the advertiser, that is not a requirement here. It is what usually happens. But we do see consumers, actually for free, can file an NAD action, and there is one or two a year. NGOs or nonprofits can file those, and we've actually seen, we've seen a little more of that recently, environmental groups filing challenges to green claims.

Kaufman: One thing the FTC has that NAD doesn't is real enforcement discretion. And when you're at the FTC, anytime you're considering an investigation, a potential case, part of the analysis is, is this going to be a case on the margin? Is this going to be a case that is hard to sell, that is hard to come up with limiting principles? And there are times you might put a pin in something and see, well, let's see how this issue evolves. Is more science going to come out? Is, are disclosures going to become more obvious to consumers?

So, there are definitely areas where the FTC will sometimes step back and pause to see how things evolve, but the NAD has no choice. They've got a claim, they've got to address it. Is this clear and conspicuous? They've got to focus on the issue, and the FTC has that ability to put things on hold and see how the market changes or doesn't change.

Mudge: Absolutely, 100%. Occasionally I get upset with NAD and I say, oh, they've decided this case in a way that FTC never would, and those are always in the cases of the really hard cases. The NAD can actually file its own cases, monitoring cases. In that respect, it chooses the cases it brings on its own. But any competitor case, it has got to decide what is before it.

Now, one of the good things is that the NAD really has developed a lot of experience with the kinds of claims that are before them regularly. Things like those sensory claims, the tastes better, smells better, softer, and the ASTM standard that is used to support those types of sensory claims. NAD deals with these things all the time. NAD also sees a lot more consumer perception surveys than the FTC. Lot of the cases the NAD gets are just different than the ones that the FTC would pick up. But, yeah, they've got to decide what is before them.

Kaufman: Amy, I know one of the questions we get asked a lot is, should we be really worried about taking an FTC referral? Let's say a company doesn't want to comply with whatever the NAD directive is.

Mudge: What do you think, Daniel? I bet you know the answer to this one.

Kaufman: 2024, I would not be eager to take an FTC referral. Even though, and that is the thing, we've talked about the fact that not many of the referrals turn into cases. But this is an FTC that is aggressive. I think also, there is something that is a reputational hit when the headline is, company decides not to comply with self-regulatory process. It is not a great look. And I can guarantee you, the FTC will be looking into your practices. So again, it may or may not turn into a case. But this is not necessarily a great time to be risking that and putting a spotlight on you that is shining at the FTC.

Mudge: Yeah, 100%. I think that's always been the case, taking a referral, but you're right. With this FTC, you've got to take an extra pause. I'm hard pressed to imagine any situation where I would tell the client, yeah, you know what? Let's go to the FTC, we've gotten as far as we can at the NAD. You're taking an incredible risk right now.

But, short of that, there is something you can do if you don't like NAD's decision, which is you can appeal it. So, why don't you walk us through that NARB process, Daniel? Because I know you've had some more experience there. And it, I think it is absolutely fascinating that the NARB, the appellate arm of NAD, is overseen by Mary Engle. Who, of course, for many years ran ad practices at the FTC and now one of the directors, kind of spearheads the NARB process was, again, spent her entire career at the FTC. So, I suspect you know what is in these folks' hearts and minds.

Kaufman: I know a lot about those folks, but not that much I can mention on this podcast. Maybe another day. But what struck me about the appeal process is, in many respects, it is sort of like the inverse or backwards of regular court. It is much more like a jury trial where you have the people deciding the appeal. It really surprised me to see that the panel for the NARB is made up of people from the ad world who usually aren't lawyers. So, usually it is marketing law professors, ad agency directors, in-house marketers. You get a panel of five for a regular case, you've got three for a SWIFT appeal, and it is a pretty streamlined process.

So, you get one round of briefing and an argument with all the parties together, and each side is given time to argue, and the panel has time to ask questions. So, the director then sits with the panel and the panel decides the case, but eventually the director writes up the opinion with their findings. So, a key thing to keep in mind here is that much like a jury, these panels can be unpredictable. So, any advertiser considering an appeal should really be mindful of that. Sometimes decisions can get worse and not better.

Mudge: It is true, and we are seeing more and more cases that are being appealed at NAD. That process, I think, is being used more than it has in the past. Can be a little bit of a live wire. But, alright, we're getting down to the wire as far as our timeline.

Kaufman: Which is another show I have not seen, The Wire.

Mudge: I have no words, but alright. So, takeaways for when to bring an NAD case, I think we talked a fair amount about when to take a referral, which is almost never. We talked about using some caution when you appeal, but that is certainly an option. But takeaways on whether to bring a challenge at all. One thing that a company seeking to bring a challenge is to remember, NAD decisions are often used as kind of roadmaps for others in the industry going forward. So, if you're going to bring a challenge, you might have to live with the consequences as well. And really, there also should be no throwing stones at glass houses. If you go after a competitor while there are no counterclaims, that competitor might wake up and come after you. It doesn't mean you shouldn't use the process, but just make sure you really have your house in order before you move forward.

Another thing to look at as, if you challenge a competitor, are they just going to go do something smarter, better, faster? Really take a look at the claim and ask whether this is just something you as a competitor don't like, or do you think that this is something that is actually compelling in the marketplace? I can't tell you how many times I've seen challenges where it is based on a social media post that's gotten 10 views, and probably the 10 views are the marketers and the lawyers. So, ask if this is actually something that is affecting you in the marketplace before you go forward.

But other than that, I wish more companies did think like the big consumer package companies, and really did treat NAD as a part of its marketing toolbox, because sometimes, most often, it is better to compete better, do better marketing. But sometimes if a competitor is really going over the line, the NAD is an absolutely terrific place to go. And so, with that, thank you so much for joining us, and this ends another edition of…

Both: AD Nauseam.

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-ttorneys Law Blog at www.adttorneyslawblog.com, and check out all AD Nauseam podcasts by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.