Comparative Advertising Do's and Don'ts from the NAD - Part 2

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Last week we blogged about a recent decision of the National Advertising Division of the Better Business Bureau, holding that two YouTube videos for Rayovac brand batteries misleadingly communicated an unsupported "line" claim of superiority against all Energizer batteries. This post will discuss a second decision issued by NAD a few days later, also finding comparative advertising to be misleading. The problem this time? The product testing conducted by the advertiser on which the advertising claims were based failed to evaluate the performance of the competitive products in accordance with the manufacturer instructions for use. *Zoetis, Inc.* (Case # 6013 Oct. 31, 2016).

Zoetis made claims on its website and in print advertising that its Simparica brand oral flea and tick medication for dogs provided better protection than the competitive Trifexis product marketed by the Elanco Animal Health division of Eli Lilly. Both Simparica and Trifexis are administered on a monthly basis and are FDA approved for re-dosing after 30 days. The labeling on both companies' products directs consumers to repeat the treatment after one month.

Zoetis commissioned a study that compared the efficacy of both products after an initial administration of the competing flea and tick medications. Dogs were re-infested at days 0, 7, 14, 21, 28 and 35, without having re-dosed the dogs after 30 days, as directed by product labeling. Measurements of effectiveness were taken on these milestone days at

8, 12 and 24 hour intervals. Zoetis's advertising featured a chart that highlighted results of the study showing better efficacy by Simparica on day 35. Zoetis argued that day 35 results were relevant to pet owners who may forget to re-dose the dogs at the end of the month. According to Elanco, however, it was misleading to evaluate the efficacy of Trifexis on day 35 -- 5 days beyond the recommended re-dosing date. Elanco also complained that Zoetis had "cherry picked" data points for its chart showing superior performance by Simparica at the 8 hour measurement point on certain milestone days, whereas the products had more equivalent effect at 12 and 24 hours on those days.

NAD concluded that it was misleading for Zoetis to advertise the day 35 results: "Testing the advertised products as they are intended to work, by following manufacturer's use instructions, provides the basis for a claim that a product is measurably better than its competitor because it does not materially distort the performance capability of competing products.... While consumers are free to disregard product instructions if they wish, advertisers have an obligation to follow product use instructions when conducting comparative performance testing for the purposes of claim support." NAD also agreed with Elanco that touting the better performance of Simparica at the 8 hour measurement point while ignoring the 12 and 24 hour measurements that showed more equivalent efficacy communicated the impliedly misleading message that Simparica was superior to Trifexis on the entire milestone day tested.

NAD recommended that Zoetis discontinue advertising claims based on comparative performance after 35 days, but observed that Zoetis could make a non-comparative claim that Simparica is effective for 35 days, particularly for consumers who forget to re-dose their dogs on a monthly basis. NAD also noted that the different product performance results at 8, 12 and 24 hour intervals on the milestone days could have been properly advertised as a speed-to-efficacy superiority claim, rather than one of overall efficacy.

The overarching lesson from the two NAD decisions discussed in Parts 1 and 2 of this post is that comparative advertising claims must be carefully and narrowly crafted. Competitors identified in such claims will likely scrutinize the advertising for both express and implied messages that cannot be substantiated. The pitfalls are many, and different types of comparative advertising calls for different precautions. But following the do's and don'ts of NAD in *Spectrum Brands* and *Zoetis* will help: If specific models of competitive products are the intended comparison of an advertisement, <u>do</u> identify those specific products clearly and unambiguously. <u>Don't</u> depict product varieties, use props or narrative content or tag lines that suggest a broader comparison is being made. If the comparative ad is based on performance testing of the competitive products, <u>do</u> test the products in accordance with labeling directions for use by consumers. <u>Don't</u> cherry pick data from test results if doing so communicates a misleading message of overall superiority. And <u>do</u> carefully correlate the advertising claim to the specific aspect of superiority revealed by the product testing.