

Crossing the Line - Two More NAD Decisions on Unsubstantiated Comparative Line Claims

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Comparative advertising can be highly effective in touting the advantages of a company's products against those of its competitor, but the language used must be carefully crafted and accompanying visual depictions should be examined to determine if they convey an unintended message about the scope of the ad claim. Two recent decisions by the National Advertising Division highlight the problems that arise when comparative advertising communicates an implied message about an entire line of a

competitor's products, even though the advertiser may only be able to substantiate the comparative claim as to specific products sold by the competitor.

The first case ([NAD Case No. 6041, Dec. 23, 2016](#)) was brought by L Brands, owner of Bath & Body Works, challenging a 60 second online video ad entitled "Let Your Senses Decide," created by Unilever United States for its Suave Essentials Body Wash products. In the video, women were shown taking part in a blind sniff and compare test of three particular bath and shower gels sold by Bath & Body Works vs. three Suave body washes. The results of the sniff test revealed a preference for the three Suave products. L Brands argued that the commercial communicated a broader "line" claim about a general preference for Suave body washes over the entire line of Bath & Body Works bath and shower gels. NAD agreed.

NAD first reiterated the four factors it considers to determine whether a commercial

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communicates a “line” claim: (1) are there general brand references in the ad; (2) does the text of the ad limit the applicability of the ad claim; (3) does the ad show just the specific competitive product targeted by the claim; and (4) is there a “beauty shot” of a full line of products that may reinforce the extended applicability of the ad claim. As a general rule, according to NAD, “where an advertisement makes general brand references but fails to adequately qualify the claim to limit its applicability to the one product shown in the advertisement, NAD has found that it is likely to convey the message that the benefits or attributes touted extend to the entire product line.”

In the case of the sniff test video, the Suave Essentials brand logo remained on screen for almost the entirety of the video, and consumer respondents shown in the ad made general comments about Bath & Body Works. The specific fragrances tested were held up in the ad, but fleetingly, and the identification of the three products compared was communicated clearly only in the last few seconds of the commercial. A basket of Suave products was also displayed on screen with the three fragrances tested, but it was difficult to identify what was in the basket. All of these elements contributed to NAD’s conclusion that the net impression from the video was a general comparison of the Suave line of body washes to the full line of Bath & Body Works bath and shower gels. Because Unilever did not have substantiation for a full line comparative ad claim, NAD recommended that Unilever’s commercial be discontinued. In the Advertiser’s Statement, Unilever expressed its respectful disagreement with the decision and stated that it intended to appeal to the National Advertising Review Board.

In a second decision (NAD Case No. 6043, Jan. 2017), Procter & Gamble successfully challenged Reckitt Benckiser’s 15 and 30 second television commercials comparing its Finish Tablets with Powerball detergent vs. Procter & Gamble’s Cascade Gel. RB’s advertising claim expressly stated that “unlike Cascade Gel, Finish has active enzymes,” but P&G argued that the ad did not sufficiently highlight that RB was comparing two different types of detergent products. In addition, other aspects of the commercial communicated a misleading message about the broader Cascade detergent line, when in fact, all of the products in the Cascade line *except* for Cascade gel contain active enzymes.

On the first point, NAD observed “While advertisers are free to highlight differences between their products and can compare two dissimilar products even if there are more similar products made by the respective companies, the advertising should clearly identify the objects of the comparison and avoid implying that the comparison is to a competitor’s more similar product, or that the competitor does not make a more similar product.” NAD concluded that RB’s commercial featured an “inappropriate apples-to-oranges comparison” because the objects of the product comparison were not clearly identified.

NAD further determined that the challenged commercial reasonably communicated a line claim both as to Finish and Cascade, based on the four factors listed above in the *Suave* case. Although the Finish ad specifically mentioned Cascade Gel, the commercial showed a woman picking up a different Cascade product that did contain enzymes --

Cascade Action Pacs. The commercial also included general brand references to both Finish and Cascade, *e.g.*, “Finish is recommended by more dishwasher brands worldwide than Cascade.” As NAD concluded, “The depiction of other Cascade products as well as the general reference to Cascade muddies the basis of comparison because the Cascade product shown in the commercials is the enzyme-containing Cascade Action Pacs.” Accordingly, NAD recommended that the television commercials referencing the challenged enzyme and performance claims be discontinued. In the Advertiser’s Statement, RB accepted NAD’s decision on the line claim issue, but said it would appeal other aspects of the decision on which P&G prevailed.

The takeaways from these two cases is that comparative advertising must be carefully targeted and narrowly drawn to refer only to specific products of the competitor unless a company has adequate substantiation to justify a line claim. Surrounding context, such as visual elements, other products shown or general brand mentions elsewhere in the ad can transform a specific product comparison to a line claim that cannot be substantiated. Further, apples-to-oranges comparisons are permissible, but again, surrounding context may create a misleading impression if the ad does not clearly identify the objects of the comparison and highlight material differences in the products being compared.