

Risky Business

Know the facts about comparative advertising

While watching television a few weeks ago, I was aghast at what I saw.

A large cable television company ran a commercial about a new competitor. The large cable company identified its competitor by name and showed a bull-headed service technician offering service to a homeowner, who interpreted anything the homeowner said as wanting service. Then, he beckoned an earth mover to dig up the homeowner's lawn and sent a forklift to the house to carry the bill. The ad depicted people ripping up the yard, breaking a water line and putting lives in danger, ultimately suggesting these actions are typical of the competitor's installation process. I was admittedly amused by the ad, but shocked nonetheless by the cable company's boldness.

This type of advertisement is called comparative advertising. Comparative advertising is a form of advertising that identifies a competitor's product to show its inferiority to the advertiser's product. Comparative advertising may be done by comparing a specific attribute (e.g., price) of the advertiser's product to a competitor's product; or it may be executed as a general, all-encompassing comparison (e.g., claiming that customers prefer one brand over others).

Competitors' products may be identified explicitly (by name) or implicitly (by characteristics). Popular examples of comparative advertising include Pepsi's "Pepsi Challenge" campaign, Apple's Mac Guy versus PC Guy commercials, Progresso Soup's ad claiming "7 out of 10 prefer the taste of Progresso" and Dunkin' Donuts' taste-test campaign stating: "Friends don't let friends drink Starbucks."

Comparative advertising is becoming more and more popular—especially in this economic climate. Lawsuits against companies that are the subject of comparative ads also are becoming more popular. And, both propositions are not surprising—comparative advertising works.

Comparative advertising is risky business. The Federal Trade Commission (FTC) regulates advertising in the United States. Though the FTC encourages the use of comparative advertising, it mandates the campaign be truthful, fair and not deceptive. The statement does not have to be

literally false to be actionable. Representations made by implication or innuendo also can constitute false and misleading advertising.

Under the FTC guidelines, an advertisement is considered "deceptive" if it contains a representation or omission that is likely to mislead reasonable consumers, and if the representation or omission is material to the consumer's choice. The FTC requires advertisers to have substantiation for their express and implied claims. Typically, substantiation is provided through testing and should exist prior to the publication of the advertisement.

Overly aggressive comparative advertising campaigns have cost companies multi-million dollar judgments in lawsuits filed by competitors (who no doubt have seen their market share and revenue decrease as a result of the ads). One such case involved U-Haul, where U-Haul recovered \$40 million as a result of a competitor's advertisement. Shortly thereafter, the competitor filed for bankruptcy.

A review of the legal dockets, a few weeks ago, did not turn up any lawsuits filed over the cable television company's commercial. But, I learned the cable company that ran the commercial was served with a cease and desist letter from the competitor to stop running the commercials. Interestingly, I haven't seen the commercial since. While I do not anticipate the advertising cable company to file bankruptcy anytime soon, or to stop running its comparative ads, I do anticipate hearing more about this matter in the legal news.

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