



Client Alert



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Reducing the Risk in Comparative Advertising

The idea of comparative advertising can simultaneously excite and worry a business. Your marketing team wants nothing more than to highlight the weaknesses of your competition. In-house counsel and management, however, may believe that this type of advertising will expose them to liability. A recent federal court decision, however, reiterates that, if you use your competitor's trademark in a nominative fashion, a comparative advertising campaign does not have to be a risky proposition.

The Lawsuit

Ebates, an online retail marketing company, sued its competitor, Integral, when the latter displayed Ebates' trademarks on Integral's web site in a tongue-in-cheek ad that advertised to Ebates customers that Integral gives them more and better benefits. Ebates moved for a temporary restraining order, complaining, as most plaintiffs do in such lawsuits, that Integral's advertising would irreparably damage the reputation, customer trust, and goodwill associated with the Ebates trademarks.

The Court disagreed. It held that Ebates' alleged reputational losses could, in fact, be made whole by adequate compensation if Integral's advertising was ultimately found unlawful. Because proof of irreparable harm is the primary factor in determining whether an injunction should be granted, Ebates' request for a temporary restraining order was denied.

Though not discussed in the Court's opinion, a separate likely underlying reason for the Court's ruling is the fact that Integral used Ebates' trademarks in a nominative fashion, i.e., merely to identify Ebates and its competing services. Had Integral used Ebates' trademarks in a manner to suggest that Integral was affiliated with Ebates or if Integral had misrepresented the parties' respective trademarks and services in some manner, the Court would likely have come down the other way.

What This Means For You

Comparative advertising can be an effective tool to gain an edge in the marketplace. The key is to balance the creativity of the advertising with the facts communicated to your customers. Be clear in drawing a distinction between the products and services sold under your trademarks and your



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competitor's trademarks. Finally, if touting qualitative or quantifiable results, be sure to have the data and tests to support your advertising claim.

Not If, But How.

Arnall Golden Gregory, LLP has significant experience in the area of marketing and promotions, including evaluating advertisements and advertising-related disputes. Do not hesitate to contact us if we can be of help to you.

The lawsuit referenced in this article is *Ebates Performance Marketing, Inc. v. Integral Technologies, Inc.*, No. 12-cv-06488-YGR, United States District Court, Northern District of California. A copy of the order discussed in this article is available at www.justia.com or by clicking [here](#)¹.

¹ <http://www.agg.com:80/files/uploads/Documents/Ebates Order.pdf>

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