

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

NAD DECISION ON CHALLENGE TO WEGMANS' IN-STORE POINT OF SALE DISPLAYS OFFERS GUIDANCE ON GROCERY STORE PRICE ADVERTISING

A decision by the National Advertising Division (NAD) on a challenge by Costco Wholesale Corporation to in-store point of sale display advertising by Wegmans Food Markets, Inc. offers important lessons for grocery stores and other retailers interested in making comparative pricing claims.

COSTCO'S CHALLENGE

Costco challenged Wegmans' in-store point of sale displays, which compared Wegmans' prices for certain food products to Costco's prices for the same or similar products.

Every Monday, Wegmans sent "pricing coordinators" to Costco stores to collect pricing information on various items for sale at Costco. Wegmans would then add certain of those prices to its "pricing boards," which showed that Wegmans offered lower prices than Costco on the specified items. Costco argued that because it conducted its own competitor price comparisons on Wednesdays and Thursdays, and frequently lowered its prices on Fridays to remain competitive with prices being offered at Wegmans, Wegmans' pricing boards were only correct, if at all, for a few days and not for a full week. Because of the means at Wegmans' disposal to monitor those prices and change its signage accordingly, Costco asserted that Wegmans should be responsible for more frequently monitoring and

THE BOTTOM LINE

Although the NAD refused to disrupt precedent allowing grocery stores to update their comparative prices on a weekly basis, it left open the possibility that this standard could change upon evidence that retailers check prices more frequently. Retailers should, in all cases, ensure that they are providing accurate, up-to-date pricing comparisons, and that they are adequately disclosing the nature of those comparisons.

changing its pricing comparisons to ensure they are accurate.

Costco also asserted that Wegmans occasionally compared prices for dissimilar products sold by the two retailers. For example, Costco said, Wegmans' price comparison boards compared the price of its bone-in pork shoulder to Costco's boneless pork shoulder. Because the two products are typically priced and used differently, Costco argued that Wegmans was making an apples-to-oranges comparison, and was not adequately disclosing the difference between the items being compared.

NAD'S DECISION

The NAD first upheld NAD and Federal Trade Commission guidance allowing grocery stores to update and post pricing on a weekly basis. Although Costco argued that technology allowed retailers to compare prices on a daily basis, the NAD refused to disrupt prior decisions, noting that Costco had not provided evidence that retailers collected price comparison data by means other than weekly in-store visits or that they feasibly could do so. The NAD also acknowledged that Wegmans' price comparison boards disclosed that the listed prices had been determined on a specific date, but nevertheless

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recommended that Wegmans also clearly, conspicuously, and prominently disclose that prices were subject to change.

Regarding Wegmans' comparison of dissimilar items, the NAD first reaffirmed the "well-settled" principle that marketers are permitted to compare prices for dissimilar products in advertising. The NAD recommended, however, that companies advertising food products should compare prices of "like" products "when possible." When there is no identical product, the NAD said, an advertiser should either indicate that there is no applicable price for the

competitor's product or adequately disclose the different products being compared.

Against this backdrop, the NAD found that the price comparison charts at issue were labeled with the name of only one product each, and, therefore, conveyed the "main message" that they compared identical products. The NAD accordingly determined that regardless of the adequacy of the size and placement of accompanying disclosures, such disclosures contradicted the main message being conveyed by the charts, and at best conveyed a confusing message to consumers.

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