

Research on the Judicial Application of the Prohibition of Absolute Advertising Terms

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Abstract: The absolute terms of one-size-fits-all provisions and high-standard fines, revocation of business licenses and other penalties are considered too strict. From the point of view of judicial practice, the vague definition of legal absolute advertising terms makes it difficult to judge illegal liability, and the punishment means of Advertising Law is too single, which leads to excessive punishment and misconduct. On the premise of making clear the legislative background and purpose of absolute advertising language prohibition, we should explore the escape path of predicament, and limit the judicial interpretation of absolute advertising language from its connotation and extension to make the law applicable to the correct adjustment object. Secondly, some articles of Administrative Punishment Law should be used as the punishment method of absolute advertising language in Advertising Law to form a benign interaction between the two to ensure a reasonable and fair judgment.

Keywords: Absolute Advertising language; Advertising law; Judicial Application

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1 The legislative background of the addition law against exclusion of adlamination

1.1 Amendment of the Advertising Law under realistic demand

Advertising is an important part of modern business operation mode. From the economic point of view, its essence is the means of promoting and selling goods or services for more profit. In 1994, China's Advertising Law began to implement, which provided an important basis for standardizing advertising activities in China. In the 21st century, due to the rapid development of media such as network and the diversity and complexity of the form and content of advertising, the old Advertising Law has been difficult to shoulder the important task of effectively regulating the advertising industry. Therefore, China has revised many contents of the law and formally implemented the new Advertising Law in 2015.

1.2 The purpose of legislation prohibiting the use of absolute advertising terms

Any law has a corresponding purpose, and the new Advertising Law prohibits the use of absolute advertising language legislators summed up the following two points:

1.2.1 Protection of consumer rights

As an important body of the market, consumers play an important role in the modern market economy, and protecting the rights and interests of consumers is the focus of economic legislation of various countries. Compared with operators, consumers are in a weak position in information ability, economic ability, litigation ability and psychological tolerance, and there are many obstacles to self-protection.^[1] Therefore, consumers should be inclined to protect. This is well reflected in the Advertising Law. It can be seen that one of the legislative purposes of the Advertising Law on the absolute prohibition of advertising terms is to protect the legitimate rights and interests of consumers.^[2]

1.2.2 Maintenance of market competition order

In order to occupy the advantage, the opposite of words often appears in advertising, and the absolute language becomes the object that advertisers scramble to use. This results in the belittling of similar goods or services, damage to other businesses and form a distorted market atmosphere. The Advertising Act prohibits the use of absolute advertising language precisely because of this concern.

2 Dilemma in the application of the ban on absolute advertising terms

In order to better understand the problems in the application of the absolute advertising terms in the new Advertising Law, the author uses the China judgment document Network to collect cases, take "absolute advertising" as the key word, and take October 15, 2019 as the deadline. Finally, the data are summarized in the following table:

Type of case	Quantity	First instance	Second instance	Retrial rate
Civil cases	23	15	8	34%
Administrative cases	27	13	14	51%

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It can be seen from the table that the retrial rate has reached a higher value, and the retrial rate of administrative cases has even reached half. It is not difficult to find out that the problems encountered in the application of the absolute prohibition of advertising terms in the new Advertising Law in China are as follows:

2.1 Difficulties in determining liability

First of all, even if the absolute terms listed in the Advertising Law are used in the advertisement, if the description in the sentence is consistent with the actual situation, whether it is considered to be in violation of the advertising law, if it is considered to be illegal, It is a metaphysical quagmire that makes the law a one-size-fits-all color,^[3] but it may waste a lot of judicial resources and reduce judicial efficiency. Secondly, advertising with absolute words is not all the same as the initial purpose. For example, "be the best down jacket brand in China", the word "best" clearly belongs to the absolute term prohibited by law, but the merchant wants to express the meaning that the goal is to be the best down jacket brand in China. Unlike the "best down jacket brand in China", it directly promotes extreme quality to induce customers. For example, in the case of Yan Mou v. Nanyang Lukangyuan Department Store Co., Ltd., Farmer Springs Co., Ltd., false propaganda dispute, the court held that the description of the product on the outer packaging of the beverage produced by Farmer Springs Company was not an absolute advertising term, because it was an interpretation of the traditional tea culture concept and human pursuit of a better life.^[4]

2.2 The risk of improper punishment

Another reason why the retrial rate of cases involving absolute advertising terms is so high is that the trial results are not satisfactory to the parties, and according to the actual cases, In most cases, the punished person is constantly seeking legal relief because the punishment result is difficult to accept. As mentioned above, the most striking thing about the absolute prohibition of advertising terms in the new Advertising Law is its penalty standard. The amount of 200000 penalty is already a higher standard in administrative punishment, and the consequence of revocation of business license is self-evident. Secondly, the fine of 200000 to 1 million is a very large choice range, such a large fine flexibility to the discretion of the judge put forward a great test, it is easy to produce different cases of the same case, so there is concern about improper punishment. For example, the "Fang Lin Fu case", which has aroused great social repercussions, is a good evidence. Fang Lin Fu's speculation shop was fined 200000 yuan by Hangzhou Xihu District Market Supervision Bureau for using "Hangzhou's best chestnut" and "Hangzhou's best speculation shop" when promoting commodities. For a small-cost speculation shop, 200000 may be a half-year or even a year's profit, just because of an advertising sentence seems to be biased.^[5]

3 A way out of the dilemma of absolute advertising terms prohibition

3.1 restricting legal interpretation and regulating discretion

The legislative purpose of the absolute prohibition of advertising terms in the Advertising Law mainly includes the protection of consumer rights and interests and the maintenance of a fair competitive environment in the market. It is not difficult to find that the application of the law has exceeded the legislative purpose in practice, so it is necessary to restrict the interpretation of the law in order to regulate discretion. First, absolute terms that do not deceive and mislead consumers should not fall within the scope of the prohibition, including :1. Since one of the purposes of prohibiting the use of absolute terms is to prevent them from deceiving consumers, if the term is objective and true, it should not be included in the scope of prohibition and punishment.^[6] Although the 2. statement is not true, it does not lead to misunderstanding of the absolute language, mainly: in a clear exaggeration, banter way of absolute advertising language publicity and absolute language system of product or service quality subjective evaluation.

3.2 The mechanism of combining the Advertising Law with the Administrative Punishment Law

On penalties for absolute advertising, The provisions of the Advertising Law are relatively simple. If the punishment of the act of absolute advertising language is only in accordance with these provisions, it often leads to the problem of insufficient optional law, And often leads to misdeeds, A good law must be very positive, Therefore, the penalty provisions of the Advertising Act do not meet this positive demand, Other legal remedies are needed. Because of the special relationship between economic law and administrative law, We can find the corresponding supplement from the Administrative Punishment Law of our country. For example, article 27, paragraph 1, of the Administrative Punishment Law of our country provides for four situations in which the punishment can be mitigated, They are : " actively eliminate or mitigate the harmful consequences of illegal acts ", " coerced by others to have illegal acts ", " cooperate with administrative organs to investigate and deal with illegal acts have meritorious performance " and " other laws according to law." The situation of mitigating administrative punishment. When penalizing absolute advertising campaigns, If the parties meet the above conditions may consider mitigating punishment.

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[3] "State Administration for Industry and Commerce on the packaging of the word " best " (2000), " Drug Advertising Standards " (2007) Article 10.

[4] Nanyang Intermediate people's Court (2013) Nanmin word No .00327 civil judgment.

[5] Hangzhou Intermediate people's Court (2018) Zhejiang 01 line final 511 administrative judgment.

[6] Shi Lidong: The Differentiation and Punishment of Absolute Advertising Terms, Law,Fourth Issue ,2019.