



BreathAsure: From Bootstraps to Bankruptcy Court

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FEB. 19, 2001 12 AM PT



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With millions of malodorous mouths worldwide and a catchy marketing pitch featuring actor George Kennedy that “guaranteed . . . clean, fresh breath that lasts for hours,” the success of family-owned BreathAsure Inc. seemed, well, assured.

But the company, once hailed as a shining example of bootstraps entrepreneurship, has landed in Bankruptcy Court and is set to be auctioned next month to the highest bidder.

Hitting \$30 million in sales in 1997, the Westlake Village company at one time boasted that it had “America’s No. 1 breath freshener”--a soft-gel capsule that the company said would work “with your digestive system.”

That was before an arm of the Better Business Bureau and drug maker Warner-Lambert Co. began questioning the company’s advertising.

Everything was challenged, from the claim that the product worked internally to one that it worked at all. Even its name was deceptive, Warner-Lambert charged in U.S. District Court in New Jersey, falsely implying that consumers using the product could be assured of fresh breath.

After a string of legal defeats, including a permanent injunction last year barring the company from calling its product BreathAsure, the company filed for Chapter 11

bankruptcy protection in December.

“For the past three years, the Warner-Lambert company has been after us,” said Anthony Raissen, executive vice president of BreathAsure and husband of Lauren Raissen, the company’s president and chief executive. “They left us very little alternative but to file for Chapter 11, and that’s what we ended up doing.”

In June 1998, BreathAsure was one of three local success stories highlighted at the first San Fernando Valley conference on international trade. Two years later, it arrived in Bankruptcy Court, with \$2.7 million in assets, \$2.4 million in debt and a potentially budget-busting penalty from a November 2000 civil contempt-of-court finding.

The company filed for bankruptcy about a month after U.S. District Judge John W. Bissell ruled that there was “clear and convincing evidence” that the company did not take adequate steps to make sure products with the BreathAsure name were not being sold after July 25, 2000.

The product is still offered for sale on at least half a dozen Web sites.

Anthony Raissen declined to talk in detail about his company’s dramatic reversal of fortune, referring calls to attorneys.

In past interviews, he has portrayed the case as David versus Goliath, in which Warner-Lambert--the maker of such market icons as Certs, Clorets and Dentyne--went after the home-grown start-up and its tiny golden pill of parsley seed and sunflower oil. (In June, Warner-Lambert merged with Pfizer Inc., forming the world’s largest drug company.)

But others say the company fell victim to its own aggressive marketing.

“I’ve been doing advertising litigation for 25 years,” said Thomas C. Morrison, a New York attorney who handled the case for Warner-Lambert. “Usually, it involves a claim that’s exaggerated or goes too far. Never in my life have I run across a product that didn’t even work. This was unprecedented.”

According to court papers, BreathAsure did not contest that scientific evidence had established that its products “were not effective in reducing bad breath.”

But Joel Wolosky, the New York-based attorney who represented BreathAsure in the Warner-Lambert challenge, said the Raissens never conceded that the product did not work.

“We stipulated to that because we couldn’t prove in court that it worked in the way that the court wanted us to prove that it worked,” he said.

But just what the product really did was the subject of dispute almost from the time the couple began marketing the pills after testing them at the 1992 Los Angeles Garlic Festival.

In 1994, the National Advertising Division of the Council of Better Business Bureaus, which helps resolve disputes about advertising claims, launched the first of three inquiries into BreathAsure’s advertising claims.

In each case the division recommended that the ads be modified, with some claims removed.

In November 1997, the National Advertising Division referred the BreathAsure case to the Federal Trade Commission for possible enforcement action, finding that the company had “failed to demonstrate a good-faith attempt to comply with NAD’s decision in a timely manner.”

The bureau makes such referrals infrequently. “We get two to five a year,” said Lee Peeler, associate director of advertising practices for the FTC. Peeler said the agency decided not to take action against the company because it did not meet its case-selection criterion.

Wolosky said the Raissens ran into some of the same “proof” problems with the Better Business Bureau, which they would later face in court.

One early test of the product, which was described in ads as a “clinical study,” was actually an in-home self-conducted study by fewer than 100 participants. The NAD asked that the scientific-sounding language be removed.

Much of the evidence that the couple used to support their belief that the product works involved consumer testimonials, Wolosky said.

Absent the kind of scientific proof that the courts would accept, the company was stripped of its signature product name and even prohibited from saying that it worked.

The FTC’s Peeler said the court’s decision to block the company from using the BreathAsure name was “a relatively rare remedy.

“Both the courts and the FTC are reluctant to say you can’t use a trade name,” said Peeler, who could recall only one other similar case in recent years--one involving automobile brakes. “It’s a fairly drastic remedy, and both the courts and the FTC look to see if there is some way the trade name can be qualified so it’s not deceptive.”

Despite the court defeats and bankruptcy filing, the company continues to operate. The old capsules have been “reconfigured with a mint coating” and are being sold under the name Mint Asure, said Joseph Eisenberg, one of the attorneys handling the bankruptcy case for BreathAsure.

The company will be sold at auction during a bankruptcy hearing scheduled for March 13. It has attracted interest from three companies, including Florida-based Nature's Pride, said Steven Spector, another BreathAsure bankruptcy attorney.

It was unclear whether the new company would include Lauren and Anthony Raissen, who remain convinced that their product works, Wolosky said.

“They believe it works based upon the fact that they get requests for the product still, all the time,” Wolosky added. “You can’t use the name BreathAsure, you can’t make any claims, but people still want the product. That says something.”

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