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Advertiser Self-Regulation And Class Actions: Part 2

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Companies voluntarily participate in proceedings before the National Advertising Division as a way of resolving disputes without litigation. But are attorneys actually scouring NAD decisions to find possible litigation targets? The first installment of this article broadly examined correlations between NAD decisions and class action filings since the start of 2013. This installment will analyze the timing of specific class action filings in relation to adverse NAD decisions.

Timing Is Everything

We now turn to the timing of the class action filing to get a better sense of whether the adverse NAD decision may have been a substantial contributing factor. We do this because it seems reasonable to assume that a follow-on consumer class action would be filed soon after an adverse NAD decision if that decision truly was the plaintiffs attorney's basis for bringing the case.

Six out of the 17 unique class actions brought post-2013 followed NAD decisions that occurred prior to 2013. These actions were filed anywhere from three to approximately six years following the NAD decisions they referenced.[1] Given the time frame of these filings, we find it likely, or, at the very least, plausible, that the class actions were not based on any adverse NAD decision, but rather on some other outside force.

Out of the remaining 11 unique class action cases, only three were filed within six months of the corresponding adverse NAD decision — those class actions involved Huggies Natural Care Wipes, Sanderson Farms chicken products and Tom's of Maine "Naturally Dry" Antiperspirant. This seems to strongly suggest that plaintiffs firms are not actively trolling for adverse NAD decisions. If they were, why wait to file? There is no benefit in doing so, and, in fact, a later filing may increase the chances that someone else will beat them to the courthouse.

So what about the three class actions that were filed within six months of an adverse NAD decision? Is there a direct link between those complaints and the adverse decision? Maybe, but maybe not.

For example, in July 2015, Procter & Gamble Co., manufacturer of Pampers Sensitive Wipes, challenged advertising statements its competitor, Kimberly-Clark Corp., made about Huggies Natural Care Wipes.[2] Procter & Gamble took issue with the advertiser's statements that its Natural Care Wipes "clean better" than the competing product explaining that "a baby wipe's cleaning performance is important to consumers," making the challenged claim "an impactful one."[3]

The challenger also took issue with Kimberly-Clark's substantiation for its claim that its baby wipes "clean better."[4] The NAD concluded that "the advertiser's subjective consumer home-use test survey results were insufficient to support the objective superior performance claim, 'clean better* *Huggies Natural Care wipes vs. Pampers Sensitive Wipes, among those with a preference.'"[5] Accordingly, the NAD recommended that the claim be discontinued.[6]

Less than a month later, Kimberly-Clark found itself facing a class action in the Southern District of New York for consumer fraud claims involving its Huggies Natural Care Wipes.[7] Naturally, this consumer class action had to be the direct result of the NAD decision, right? Not so fast.

While the timing is certainly auspicious, the class action actually challenged the baby wipes' designation as "natural," alleging Kimberly-Clark's representations that the wipes were natural, environmentally sound and safer alternatives to traditional wipes, including Huggies' wipes, were not true.[8] Interestingly, the class action complaint did not challenge the claims' substantiation, but rather based its challenge on the premise that the baby wipes contain "unnatural" ingredients.[9]

Thus, any statements concerning the natural nature of the products constituted consumer fraud, according to the plaintiff.[10] It cannot be said with positive assurance, therefore, that the Huggies Natural Care baby wipes class action was a direct result of the adverse NAD decision.

The second case did not involve an NAD proceeding brought by a competitor, but rather involved an advertising challenge initiated by the NAD itself. As part of its routine monitoring program, the NAD requested that Sanderson Farms Inc. provide substantiation for certain advertising claims made regarding its Sanderson Farms chicken.[11] The NAD challenged Sanderson Farms' claims that other chicken producers' statements that their chickens are raised without antibiotics are a marketing "gimmick."[12]

The NAD questioned whether Sanderson Farms' "commercials reasonably convey the message that all poultry labels which state 'raised without antibiotics' are meaningless or whether they convey the message that there are no attendant health risks associated with consuming farmed animals that have been raised by antibiotics ... regardless of whether these animals are 'free of antibiotics' before they leave the farm, and if so, whether such messages are substantiated."[13]

The NAD concluded that, while certain of the advertiser's statements may have been literally truthful, claims that the statement "raised without antibiotics" on competitors' products is just a "marketing gimmick" and other similar claims should be discontinued, due to the lack of any scientific consensus concerning the safety of consuming animals raised using antibiotics.[14]

Interestingly, similar claims were already pending in a consumer class action filed prior to the NAD decision.[15] After the decision, however, the plaintiffs amended their preexisting class action claims to reference the NAD's findings.[16] The amended complaint stated that the NAD decision bolstered the plaintiffs' allegations concerning the advertiser's marketing claims.[17]

Can it be said then that the plaintiffs attorneys in this matter were monitoring the NAD decisions? Or it is more likely that they were monitoring news and Google alerts on their case, amending their complaint to reference the adverse NAD decision in an attempt to bolster their preexisting allegations? It is not clear, but as we previously mentioned, the preexistence of the class action claims seems to suggest that the attorneys were not monitoring NAD decisions, at least for the purpose of bringing a consumer class action.

An interesting side note: The NAD instituted the Sanderson Farms proceeding. If the NAD brings the challenge itself, does that make it more likely that a company faces a consumer class action? Including the Sanderson Farms case, four of the post-2013 follow on class actions initially discussed were filed after an adverse decision where the NAD initiated the challenge.[18] One was the previously mentioned Bremmen Clinical case. The other two both concerned marketing statements about dietary supplements. The NAD specifically noted those actions were brought in conjunction with the NAD's initiative with the Council for Responsible Nutrition — well known as the leading trade association of the dietary supplement industry.[19]

One of the class actions regarding the dietary supplements at issue discussed the NAD determination in some detail,[20] while the other did not.[21] Is it more likely that the companies the NAD targets are perceived as "bad actors" and therefore more likely to be subject to a consumer class action? Four cases is not exactly a large sample size, so it is not clear what these data suggests. We do note, however, that cases the NAD initiates itself usually do not consider comparative claims, unlike many of the cases brought by challengers.

The third case filed within six months of an adverse NAD decision presents an interesting scenario. This case involved Unilever United States Inc.'s challenge of numerous express and implied claims made by competitor Colgate-Palmolive Co. concerning its Tom's of Maine "Naturally Dry" Antiperspirant.[22] Unilever challenged the following express claims about Tom's of Maine: that the product is "Naturally Dry;" "It really works. Naturally;" that it contains "Natural Powder;" and that its ingredients "meet our stewardship model for safe, effective and natural."[23]

Unilever also challenged the implied claims that: "Tom's Naturally Dry product does not contain aluminum;" "Tom's Naturally Dry product is made with natural processing methods;" and "Naturally Dry is produced through natural processing."[24] The NAD recommended that the advertiser discontinue its marketing claims.[25]

About a month later, a class action referencing the NAD decision was filed.[26] What is interesting about the Tom's of Maine actions, however, is that the advertiser very publicly settled a prior class action alleging substantially similar claims in 2015 — before the NAD decision in September 2016 (indeed, the NAD decision referenced that litigation).[27]

As a part of that settlement, Tom's of Maine agreed to pay approximately $4.5 million dollars to consumers who had purchased its products before Sept. 23, 2015.[28] The new class action sought payment for products purchased after that date, based on, at times, exactly the same labeling as the prior lawsuit.[29]

So what does this mean? Was the new class action a result of the adverse NAD decision, or a result of the media attention given to the Tom's of Maine allegations that were already making their way around the internet and airwaves? It is difficult to tell for sure, but the increased media scrutiny of certain

products that are subject to class actions following a decision by the NAD, such as daily fantasy sports websites,[30] certainly appears to be more of a contributing factor for a class action than participating in an NAD proceeding.

The analysis above seems to indicate that the risk of being subject to a follow-on consumer class action after participation in an NAD proceeding that results in an adverse decision is relatively low. It also appears to be trending downward, despite the class action litigation boom. For one, an analysis of the timing supports this conclusion.

Moreover, other factors, such as media attention and the existence of previously filed similar class actions, are more likely to contribute to a company being subject to a consumer class action than any recommendation the NAD makes. There may be one caveat, however — which will be discussed in the final installment of this article.

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[1] For purposes of this calculation, if a product was subject to multiple class actions, we used the earlier filed date as the date it was filed following the adverse NAD decision.

[2] NAD Case #5866 (July 17, 2015).

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Franjul v. Kimberly-Clark Corp., No. 1:15-cv-06200 (S.D.N.Y. Aug. 6, 2015).

[8] Id.

[9] Id.

[10] Id.

[11] NAD Case #6103 (Aug. 3, 2017).

[12] Id.

[13] Id.

[14] Id.

[15] See Organic Consumers Ass'n v. Sanderson Farms Inc., No. 3:17-cv-03592-RS (N.D. Cal. June 22, 2017) (Dkt. No. 1).

[16] See Organic Consumers Ass'n v. Sanderson Farms Inc., No. 3:17-cv-03592-RS (N.D. Cal. Aug. 23, 2017).

[17] Id.

[18] See also NAD Case #5660 (Dec. 10, 2013); NAD Case #5620 (Aug. 8, 2013); NAD Case #5576 (April 25, 2013).

[19] NAD Case #5576 (April 25, 2013); see CRN, https://www.crnusa.org/.

[20] See Basque v. NourishLife LLC, No. 4:15-cv-00025-RH-CAS (N.D. Fla. Jan. 22, 2015).

[21] See Velazquez v. USPLabs LLC, No. 4:13-cv-00627-RH-CAS (N.D. Fla. Sept. 8, 2014).

[22] NAD Case #6001 (Sept. 15, 2016). We note that Kelley Drye & Warren LLP represented Unilever United States Inc. in this proceeding.

[23] Id.

[24] Id.

[25] Id.

[26] See De LaCour v. Colgate-Palmolive Co., No. 1:16-cv-08634 (S.D.N.Y. Oct. 27, 2016). A few weeks later another similar class action was filed in the Southern District of California. See White v. Colgate-Palmolive Co, No. 3:16-cv-02808-L-NLS (S.D. Cal. Nov. 15, 2016). The White class action complaint was voluntarily dismissed. See Order, White v. Colgate-Palmolive Co., No. 3:16-cv-02808-L-MDD (S.D.N.Y. Oct. 18, 2017). As of the date of this writing, the De LaCour class action remains pending.

[27] See, e.g., Class Action Reporter, Toms of Maine Natural Class Action Lawsuit, http://www.classactionsreporter.com/consumer/toms-maine-natural-class-action-lawsuit.

[28] Id.

[29] Id.

[30] See, e.g., Chris Isidore and Evan Perez, CNN, DraftKings, FanDuel Face Federal Investigation (Oct. 16, 2015), http://money.cnn.com/2015/10/15/news/companies/draftkings-fanduel-federal-investigation/index.html.