

Client Alert

A report
for clients
and friends
of the Firm July 2009

Recent Notable NAD Case Reports

In the summaries that follow, we discuss four recent National Advertising Division Case Reports which we thought would be of particular interest to the advertising community. Two of the challenges involved OTC pharmaceutical products, one involved “green-marketed” tableware and one involved popular soups. The decisions concern: (1) an advertiser’s ability to make claims for one product based on testing of a closely related but not identical product; (2) NAD’s close scrutiny of environmental advertising claims; (3) the perils of overstating the superiority of an advertiser’s product in a comparative setting; and (4) the risk of overstating the consumer relevance of a test that demonstrates a statistically significant performance difference between a drug and a placebo. We hope that these summaries prove useful in informing your future product advertising.

Matrixx Initiatives, Inc., Zicam Cold Remedy Products NAD Case # 5008 (May 1, 2009)

In this challenge, NAD held that an advertiser must exercise care when advertising a medical product that is similar but not identical to another medical product, and may not assume that tests done on one product will apply to the other. The advertiser, Matrixx, is the maker of Zicam, a popular brand of products advertised to shorten the duration of the common cold. In 2005, in a decision that garnered unusual publicity, NAD reviewed Matrixx’s advertising for Zicam nasal gel in spray form, and concluded that the studies relied upon substantiated Matrixx’s claim that, when taken at the onset of a cold, Zicam nasal gel is clinically proven to shorten the duration of a cold. NAD also concluded that those studies also supported Matrixx’s claims about Zicam nasal gel in swab form.

In the current challenge, a competitor, Quigley Corporation, challenged new Matrixx advertising about the efficacy of Zicam when taken orally. The new advertisements stated: “Taking Zicam Cold Remedy at the first sign of a cold: Reduces the duration of the common cold,” “Numerous physicians, including ear, nose, and throat specialists, general practitioners and internists have come forward in support of the science behind Zicam cold remedy,” and “Get over your cold faster with Zicam Cold Remedy!”. These new claims were based on the same studies on which Matrixx relied in the 2005 challenge. Here, however, the challenger argued that none of those studies tested the efficacy of the oral version of Zicam. The challenger also contended that Matrixx’s “doctors have come forward” claim was the equivalent of a “Doctors Recommend” claim which, in this case, was inadequately substantiated.

NAD sided with the challenger, concluding that a consumer viewing the advertiser’s website could reasonably believe that the challenged advertising statements applied to all of the Zicam products, including the oral products. NAD also noted that even though Zicam is a homeopathic remedy, the specific performance claims about Zicam’s efficacy must be supported by competent and reliable scientific evidence.

NAD concluded that Matrixx had offered no evidence to suggest that the Zicam oral products work the same way as, or are as effective as the products sprayed or dabbed in the consumer’s nose, and thus the studies Matrixx relied on in the 2005 challenge did not support Matrixx’s new claims. Similarly, NAD determined that an additional study of the cold-fighting efficacy of various oral zinc formulations advanced by Matrixx did not support its new claims because there was no evidence that the zinc formulations used in the study were the same as Matrixx’s oral Zicam formulations.

NAD made several recommendations to change the advertising. First, NAD recommended that when making claims about the ability of the Zicam oral products to reduce the severity of cold symptoms, Matrixx should add the qualifier “may”. NAD also recommended that in making any advertising in reliance on clinical studies, Matrixx should make clear which product, the oral or nasal, it is referring to. Finally, NAD concluded that the advertiser’s truthful claim that numerous physicians have supported the products was not equivalent to a “Doctors Recommend” claim and therefore did not have to meet the substantiation standards for such a claim.

Dispoz-o Products, Enviroware Plastic Utensils and Tableware NAD Case # 4990 (March 27, 2009)

In this “green advertising” challenge, NAD held that in order to make advertising claims about the environmental impact of a product, an advertiser must use the actual product in its substantiation testing and must comply with FTC standards. The advertiser was Dispoz-o Products, a manufacturer of disposable foodservice products. A competitor, Solo Cup Operating Corporation, challenged the advertiser’s biodegradability claims including: “Enviroware is formulated to degrade in months when buried or discarded in a landfill,” “Enviroware will degrade in as little as 9 months,” and “Enviroware cutlery, straws, hinged containers, plates, bowls and trays are 100% biodegradable and come with a certificate of biodegradability.” These claims were challenged on the basis that they misled environmentally conscious consumers to believe that the products fully degrade in a short amount of time, when there is no evidence that they do. Notably, the challenger also asserted that Dispoz-o did not meet the FTC’s standards for making environmental claims in advertising, in that Dispoz-o did not provide “competent and reliable scientific evidence” to substantiate its biodegradability claims.

NAD found in favor of the challenger. NAD explained that consumers are not usually capable of verifying the truthfulness of advertising claims about a product’s environmental impact, and therefore it is particularly important for this type of advertising to be carefully regulated. NAD emphasized that in reviewing environmental advertising claims, it will rely heavily on the FTC standards set forth in that agency’s Green Guides.

NAD noted that the advertiser’s products were not subject to clinical testing. Instead, the report on which the advertiser relied for substantiation only tested concentrated pellets, which NAD explained were structurally different from the utensils and tableware being advertised. Furthermore, NAD noted that it was unclear whether the report on which the advertiser relied adequately simulated landfill conditions. NAD explained that the testing used heavily controlled conditions that are not typical of most landfills, and therefore

would cause the products to degrade differently than they would in natural landfill conditions. NAD further noted that even though the advertiser provided a certification from a supplier that the products are biodegradable, this does not serve as a substitute for scientific testing sufficient to substantiate environmental claims.

NAD concluded that the advertiser did not establish by competent and reliable scientific evidence that its products would completely break down within a short period of time after customary disposal. NAD also concluded that the advertiser did not provide competent and reliable scientific evidence that the products would biodegrade when disposed of in landfill conditions. NAD recommended that the advertiser should discontinue its claims that the products are formulated to degrade in months when buried or discarded in a landfill, and that the products are 100 percent biodegradable. NAD further recommended that the advertiser should “significantly” qualify its other statements about the products’ ability to degrade in order to prevent misleading consumers about the rate and extent of degradation.

Campbell Soup Company, Campbell’s Select Harvest Soups NAD Case # 4981 (March 09, 2009)

This dispute demonstrates that while an advertiser may have an accurate point of comparison between its product and a competitor’s, not every potential depiction of that comparison is valid. In the advertisements in question, Campbell Soup Company attempted to differentiate its Select Harvest line of soups from General Mills’ Progresso Soups by highlighting that unlike Progresso, Select Harvest contained no added MSG. Campbell’s commercials featured a simulated “blind tasting” where both soup brands were tasted by two blindfolded women. The woman tasting the Progresso brand soup stated that she tasted “MSG” and other chemicals, while the woman tasting Campbell’s soup tasted natural ingredients. Campbell’s print advertisements depicted a comparison of the labels of the soup brands, where for Progresso, the “chemical-sounding” ingredients, including Monosodium Glutamate (“MSG”), were highlighted, while for Select Harvest, the natural ingredients were highlighted. Above the Select Harvest product appeared the statement “Bring your Appetite,” while above the Progresso product appeared the statement “Bring Your Dictionary.”

General Mills alleged that Campbell’s “No MSG” advertisements misled consumers, because while Select Harvest soups did not contain added MSG, they did contain naturally occurring glutamates, which the USDA requires to be prominently noted on the product label. General Mills also argued that Campbell’s advertisements imply a “grossly exaggerated” level of MSG and other chemical-sounding ingredients in Progresso soups compared to the actual

amounts. Finally, General Mills alleged that the advertisements impliedly claimed that Campbell's soups are more healthful and better tasting than Progresso brand soups due to the chemical-sounding ingredients. In support of its claims, General Mills submitted a consumer perception survey which allegedly found that 47% to 62% of those surveyed believed that Campbell's advertisements communicated health superiority.

NAD stated that while consumer perception surveys can be useful in determining whether an advertisement unfairly disparages a competitor's product, the validity of their methodology must be assessed. NAD held that General Mills' survey was highly suggestive and materially flawed. NAD noted that proper surveys generally ask open-ended questions followed by "filter questions" aimed at gently narrowing and focusing the participants' answers, while eliminating any possible suggestiveness that would result from leading questions. NAD found General Mills' survey to be unreliable because of the leading nature of its close-ended questions.

NAD found that Campbell's "No MSG" claims were substantiated because the USDA permits advertisers to make "No MSG" statements for products containing naturally occurring glutamates but no added MSG. However, NAD determined that Campbell's advertisements did not display the required USDA disclaimer identifying the presence of naturally occurring glutamates prominently enough. Next, NAD agreed with General Mills that the television advertisements exaggerated the levels of MSG and other artificially sounding ingredients because those ingredients were "the very first ingredients detected by the women tasting [General Mills'] soups." However, NAD found that Campbell's print advertisements were proper in this respect because they merely highlighted an actual label from a can of Progresso Soup. NAD held that while a competitor may not unfairly disparage the competing product, they are permitted to highlight actual differences, which is what the print advertisements did. NAD also determined that the television commercial should be modified because the mock "taste test" reasonably could be viewed to convey that the Select Harvest Soups tasted better than Progresso, a comparison for which Campbell's had no substantiation. Similarly, NAD also found that, in context, including through the use of taglines such as "Bring Your Appetite," misleadingly suggested that Progresso was less desirable in terms of flavor.

Finally, NAD noted that advertisements are allowed to convey "a high quality message," but may not disparage a competitor's product by falsely implying that it contains harmful chemicals or unwholesome ingredients. NAD found that the television commercial did not run afoul of this rule, but that the print advertisements unfairly questioned the wholesomeness of General Mills' ingredients by suggesting that consumers should limit their MSG intake. NAD

concluded that while Campbell's had an accurate point of comparison, it did not allow Campbell's to state it in every way that it wished.

Novartis, Extra Strength Excedrin NAD Case # 4973 (February 24, 2009)

This NAD matter concerned a television advertisement for Novartis' Extra Strength Excedrin, featuring a digital clock in the background with a woman seated at an outdoor café wincing in pain and rubbing her head due to a headache. The background and the time on the clock then warped ahead, after which a voiceover asks, "What's the only gel tab . . . to start relieving your headache in just fifteen minutes?" After the clock in the background reaches the fifteen-minute mark the woman exhales, smiles, and walks away from the table. Wyeth, the maker of Advil, challenged the advertisement, arguing that a reasonable person would interpret that Extra Strength Excedrin begins to work within fifteen-minutes for all people. Wyeth further alleged that based on the woman's demeanor during the simulated fifteen-minute sequence, the commercial implied a claim of total relief after fifteen minutes.

In defense of its commercial, Novartis submitted a "multi-center, double-blind, randomized, single-dose, placebo-controlled, confidential, proprietary clinical trial," which studied the speed and efficacy of Extra Strength Excedrin in relieving headaches *as compared to a placebo*. According to Novartis, the study showed that fifteen minutes after dosage "a statistically significant percentage" of people who took Extra Strength Excedrin began to feel relief from their headache, compared to those taking the placebo. Novartis argued that based on the clinical trial, it was accurate to inform consumers that Extra Strength Excedrin "start[s] relieving your headache in just fifteen minutes." Similarly, Novartis rejected the existence of the alleged implied claim, arguing that it was not reasonable to conclude that a consumer would ignore the commercial's clear audio message that Extra Strength Excedrin "*starts*" to relieve a headache after fifteen minutes.

NAD recognized that Novartis' clinical trial validly demonstrated that a statistically significant number of people began to feel relief while using Extra Strength Excedrin as compared to the placebo. However, NAD stated that "even when product testing is based on sound test methodologies and industry-recognized protocols," the claim must reflect the real world performance for the average consumer. Therefore, scientific substantiation must accurately fit and reflect the advertiser's claim.

NAD stated that while statistical significance is an important consideration in determining a product's efficacy, it often does not reflect the experience of the average consumer using the product. NAD noted that where the statistical comparison is

between an active product and a control, which by definition is not efficacious, a statistically significant result can be shown even when the percentage of people for whom the test product works at a particular point in time is small.

NAD determined that the commercial could reasonably be viewed as communicating that the average consumer would obtain some relief within fifteen minutes. However, Novartis' study actually showed that only a small (though statistically significant) percentage of the Extra Strength Excedrin users began to feel relief at fifteen minutes. Therefore, the challenged advertising claim that Extra Strength Excedrin "starts relieving" headaches within fifteen minutes did not closely match the product's "real world performances" in the Novartis study. NAD determined that Novartis should alter its commercial to reflect the actual result of the test for the average consumer, namely that "some people will experience relief in as little as fifteen minutes." Finally, NAD found an implied claim of complete relief, noting that despite the commercial's "starts relieving" audio message, reasonable consumers could view the woman's actions in the commercial as depicting complete relief within fifteen minutes.

Novartis stated its intention to appeal the decision to the NARB.

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The Trademark and False Advertising Practice Group litigates trademark and false advertising cases and provides expert counseling concerning the establishment and maintenance of trademarks and the propriety of contemplated advertising claims.

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