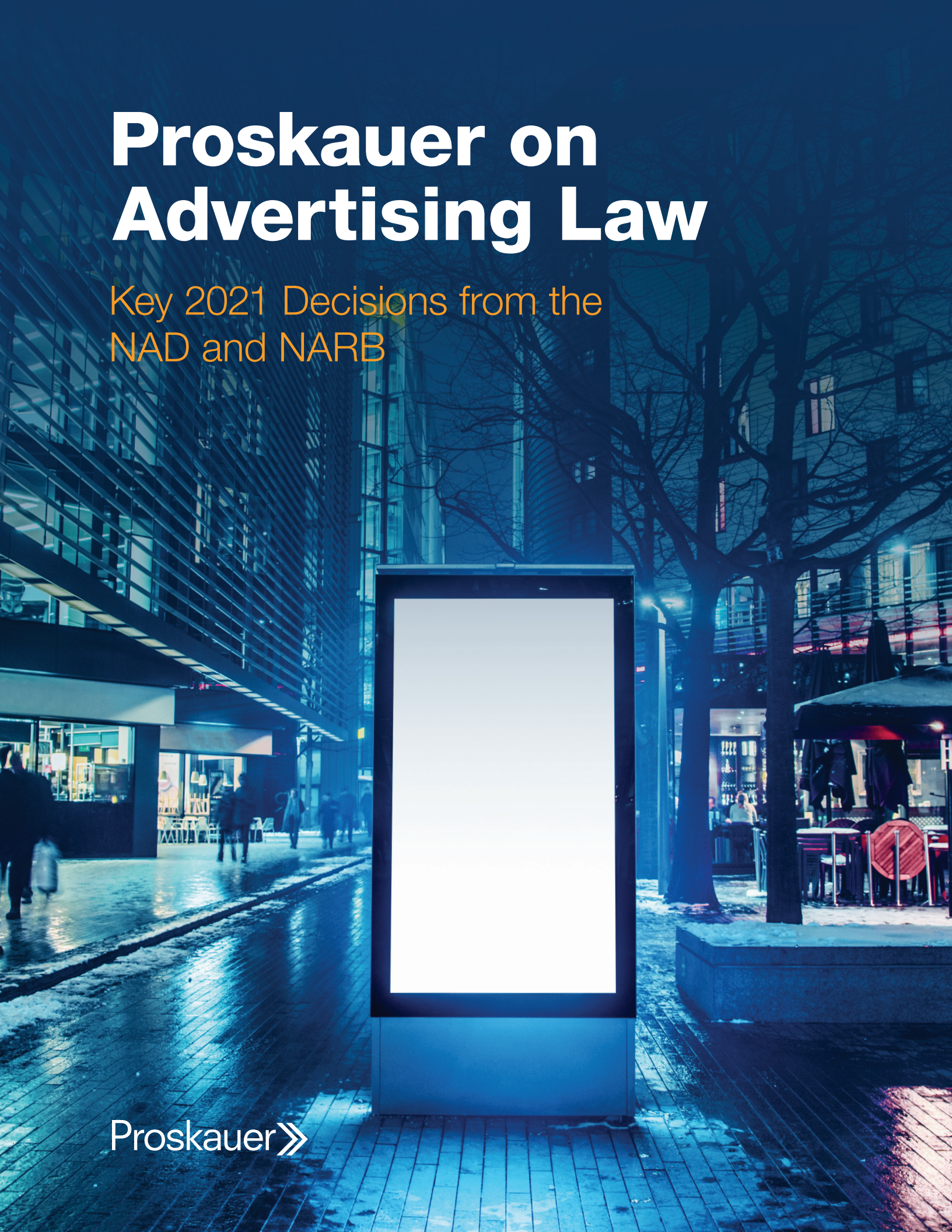
Proskauer on Advertising Law

Key 2021 Decisions from the NAD and NARB



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With another "unprecedented" year gone by, at least one thing remains predictable: there will always be advertising challenges. On that subject, we are excited to share with you once again our perspectives on notable decisions and trends from the past year at the National Advertising Division and its appellate body, the National Advertising Review Board.

In 2021, NAD issued over 80 decisions, with competitor challenges making up the bulk of these decisions. These competitor challenges placed a heavy emphasis on environmental claims, claims that a product is "healthy," and issues involving the disclosure of material connections – particularly involving social media "influencer" advertising.

12 of NAD's decisions last year were monitoring cases NAD initiated. While NAD remained interested in COVID-related claims, its 2021 monitoring efforts tackled a much wider range of industries, including consumer products, food and beverage, dietary supplements, medical devices, and apparel. These monitoring cases echoed the focus of competitor challenges with a particular emphasis on environmental claims and advertising on social media.

2021 continued NAD's track record as a challenger-friendly forum. Challengers won, in whole or in substantial part, in over 90% of cases decided this year. This reflects the heavy burden of proof facing the advertiser in NAD proceedings, as compared to litigation. In NAD proceedings, the advertiser must substantiate all reasonable takeaways from its advertising, not just the messages the advertiser intends to convey or contends are the most reasonable takeaways. And unlike in Lanham Act lawsuits or consumer class actions, a challenger need not establish that the advertiser's claims are affirmatively false; it is the advertiser's burden to substantiate all challenged claims.

There were twelve NARB decisions published in 2021. Hot areas included telecommunications and personal care. As in 2020, we continue to see the trend of NARB's consistent deference to NAD's findings. In nearly all published decisions (ten out of twelve), the NARB panel affirmed all or substantially all aspects of NAD's decisions. In the other two cases, NARB reversed a core part of NAD's decision and allowed an advertiser to continue making claims NAD had recommended be modified or discontinued.

2021 brought several procedural developments at NAD and NARB. First, following the launch of SWIFT last year, NAD introduced in November of this year "extra-SWIFT" (referred to more formally in NAD's procedures as "Fast-Track SWIFT-Disclosure"). This is a new, simplified procedure that can be used to challenge disclosures (or the lack thereof) in influencer marketing, consumer reviews, and dark patterns. This new lane will use existing SWIFT procedures, but challengers do not need to submit a letter with their challenge (although they have the option to do so). Instead, they can submit the entire challenge online by filling out a form on NAD's portal. The filing fee is also lower than for other SWIFT cases. This new procedure is intended to allow for quicker and more cost-efficient challenges to the adequacy of disclosures in endorsements and testimonials, and dark patterns.

Second, we discussed in last year's report of Key 2020 Decisions from NAD and NARB that NARB historically has declined to review procedural and jurisdictional issues on appeal, and has instead afforded NAD complete deference on such issues. This had resulted in effectively no avenue for appellate review of NAD's interpretation and application of its procedures and jurisdiction. In late 2021, NAD/NARB published updated procedures to address this concern. Under Section 2.1(O) of the new procedures, issues relating to compliance with NAD procedures or the exercise of NAD's jurisdiction should be appealed directly to the NARB Chair via email, who will then review these non-merits disputes under a "clearly erroneous" standard. The procedure is brand new and it remains to be seen whether there will be any kinks to be worked out, but this certainly seems like a move in the right direction for parties looking to file an appeal on procedural or jurisdictional grounds.

Looking forward to 2022, we expect to see more procedural developments as NAD continues to solicit feedback from the industry and outside counsel. In particular, NAD has announced that it will soon be amending its procedures to add diversity and inclusion standards, which will make clear that its mission and jurisdiction includes the review of complaints regarding misleading and inaccurate use of harmful social stereotypes in advertising. We expect NAD will turn some of its monitoring focus to these diversity and inclusion issues in the coming year, as these new procedures are rolled out.

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We hope you will find this report interesting and informative. Please reach out with any questions or comments, and subscribe to our blog, Proskauer on Advertising, for updates throughout the year on NAD and all things advertising law-related.

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Table of Contents

Social Media & Reviews

The Coldest Water Bottle – NAD Case #7023 (October 2021)

TikTok has become the fastest-growing social media platform on the internet, and is widely used by influencers. In 2021, NAD initiated a monitoring challenge regarding videos by TikTok influencers featuring the Coldest Water Bottle. Even though the influencers never mentioned the Coldest Water Bottle in their videos, NAD still considered them endorsements since the Coldest Water Bottle appeared in each video with visible branding, and the video captions included the hashtag #thecoldestwater and tagged the advertiser's TikTok@thecoldestwater. NAD expressed concern that some of these videos did not adequately disclose material connections with the Coldest Water Bottle.

Initially, the advertiser failed to respond to NAD's inquiry but, following a referral to the FTC, chose to participate in the NAD process. To address NAD's concerns, the advertiser provided excerpts from its standard influencer contract intended to address the FTC Endorsement Guides, and informed NAD that its sponsorship program is "invite-only" and that it directs any influencers who promote the company in exchange for money or free product to disclose the relationship. The advertiser also explained that it has seven "touchpoints" with its influencers to make sure they are responsibly promoting the product, as well as a team of employees to monitor influencers' compliance with the influencer contract. NAD determined these efforts to ensure adequate disclosure of material connections were sufficient.

Takeaway »

NAD (and the FTC) take a broad view of what constitutes an endorsement and are making the enforcement of the FTC Endorsement Guides a priority, as evidenced by the new Fast-Track SWIFT lane. Advertisers should make sure their influencer practices are in tip-top shape for 2022.

BodyArmor Sports Drink – NAD SWIFT Case #7047 (October 2021)

In 2020, NAD opened its Fast-Track SWIFT process for cases that present a single, well-defined issue that does not require complex substantiation. NAD resolves SWIFT cases on an expedited basis, issuing its decision within 20 business days of filing. With the fast-paced nature of social media advertising, SWIFT is an increasingly important tool for companies concerned about the veracity or transparency of a competitor's social posts.

In this case, NAD recommended BodyArmor discontinue a social media post in which its spokesperson, NFL quarterback Baker Mayfield, appeared to conduct a "blind" taste test of BodyArmor and Gatorade. In the post, Mayfield correctly identified three BodyArmor flavors while blindfolded. Then he tried Gatorade and spat out the drink, saying "Yo, that is not cool. That's awful," while shaking his head. At the same time, the "Nauseated Face" and "Tears of Joy" emojis appeared on screen. Gatorade challenged the post, arguing it contained express claims that falsely disparaged its products.

BodyArmor responded that the video was merely a "social media joke" and not truly an advertisement. NAD rejected that argument, and found the post reasonably conveyed disparaging messages about Gatorade, including through the use of emojis. NAD disagreed with BodyArmor that emojis are inherently subjective, finding that emojis "frequently substitute for the written word in contemporary communications" and the Nauseated Face emoji used here "communicates a clear message that something is gross." That message was reinforced by Mayfield's palpable disgust and comment that the beverage was "awful."

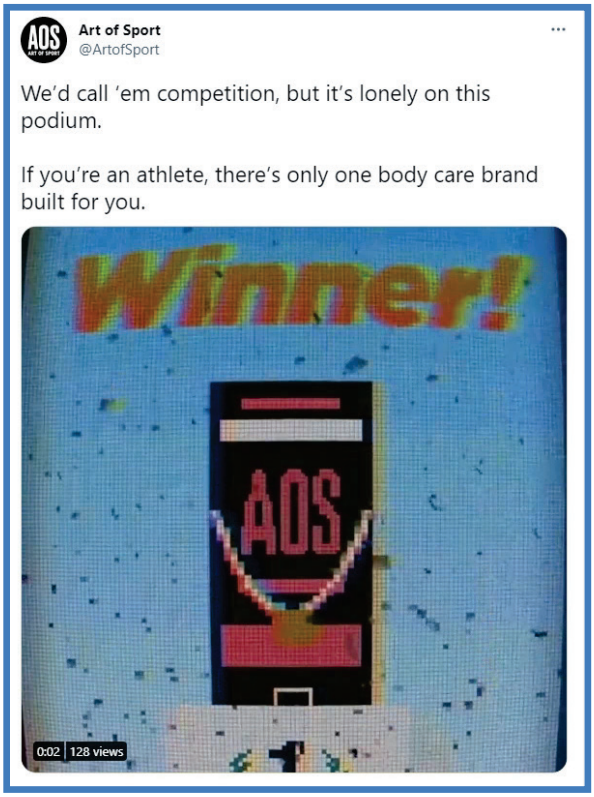
NAD also rejected the advertiser's argument that the video was mere puffery. While exaggerated images and humor are fair game in advertising, an ad crosses the line when it reasonably conveys unsupported messages, as NAD found here.

Takeaway »

Emojis have become a part of how we all communicate. Advertisers are on notice that NAD will treat them accordingly. If an emoji has a commonly understood meaning, advertisers should take that into account when assessing what messages their advertising reasonably conveys.

Art of Sport Deodorant – NAD SWIFT Case #7057 (October 2021)

Art of Sport (AOS) sells grooming and body care products designed for athletes. In this SWIFT challenge, P&G took issue with two express claims AOS made in short Instagram video ads for its deodorants: (1) "We'd call 'em competition, but it's lonely on this podium"; and (2) "AOS is the only body care brand built by winners, for winners, don't flop with ****."



The videos depicted AOS's deodorant canister winning in various sporting events against a red deodorant canister with a diagonal turquoise banner and a white medallion in the center. One of the videos closes with an AOS canister wearing a gold medal, standing on a podium marked "No. 1" and under the word "Winner!"

P&G argued the red canister was clearly a depiction of its Old Spice trade dress, and that the videos falsely conveyed that AOS's products are superior to Old Spice, or that Old Spice cannot compete with AOS. P&G noted that Nielsen ranked Old Spice as the number one deodorant brand for the 52 weeks preceding the challenge.

AOS defended its advertising, arguing that the videos were "fanciful cartoon depictions . . . posted as a way to playfully market around consumer interest in the Olympic Games." AOS further argued that since it is unrealistic for canisters to compete in athletic competitions, the videos did not convey a message to consumers about actual deodorant performance. Nevertheless, AOS voluntarily took down both of its challenged advertisements, so NAD did not review the claims on their merits.

Takeaway »

While not a "decision," this case is a reminder that many claims challenged at NAD are voluntarily discontinued without NAD weighing in on their merits. However, NAD will identify those claims in a published decision and treat them, for compliance purposes, as though NAD recommended they be discontinued.

Ads need not specifically name a competitor to reasonably identify them as the subject of a comparison.

The Online Customizable Hair Products Battle of 2021 – Function and Prose Haircare Products Reviews

In a pair of SWIFT cases, NAD recommended that two competing purveyors of customizable hair products, PerSe Beauty (seller of Prose Haircare products) and Function, narrow advertising claims related to online consumer reviews.

In the first challenge brought against Function (NAD SWIFT Case # 6938), PerSe took issue with Function's claim that its products in totality have "over 110,000 5-star product reviews." The challenger pointed out that the total number of 5-star reviews for all of Function's products at the time the challenge was filed was under 64,000. Function did not dispute that fact, but nonetheless maintained that its claim was literally true. How does that math work out?

Function noted that its shampoo and conditioner are generally sold as a set, are designed to work in tandem, and reviewers are asked to assess both at the same time under a review category titled "shampoo and conditioner." Therefore when a user gives Function's shampoo and conditioner products a 5-star rating, it's really two products that have received that rating. So, counting most of the 5-star reviews in the shampoo and conditioner category as two 5-star product reviews, Function argued it did have "over 110,000 5-star product reviews."

NAD was unconvinced for several reasons. First, NAD determined that at least one reasonable interpretation of the claim was that consumers have submitted 110,000 distinct reviews. Even though the claim refers to "product" reviews, NAD found that consumers do not parse advertising claims that finely, and could reasonably conclude that the total number of product reviews is the same as the total number of reviews submitted. And in any event, NAD determined Function did not provide adequate support for the claim that it had over 110,000 five-star "product" reviews either, since reviewers are unable to rate the shampoo and conditioner products separately, and many of the reviews themselves were unclear as to whether the reviewer was rating their experience with the shampoo, the conditioner, or both. NAD therefore recommended that Function discontinue the challenged claim, or modify it to tout only the number of 5-star reviews it could reliably support.

In a classic case of advertiser-turned-challenger, Function then challenged PerSe's claim that it has "over 192,000 5-star product reviews!" (NAD SWIFT Case #6992). PerSe does not make all of its product reviews publicly available on its website, and Function expressed skepticism that PerSe could have so many 5-star reviews given the size of its social media presence and sales. Function also took issue with the fact that PerSe does not make its other (lower) star-count reviews public, arguing that consumers lack context for understanding the "192,000" claim as a result.

While PerSe made representations to NAD about the basis for its claim, it did not provide the consumer review form itself or evidence of how the reviews were collected and maintained. NAD therefore was unable to assess the reliability of the substantiation, and recommended that PerSe discontinue its "192,000" claim. However, NAD noted that its decision did not prevent PerSe from making a claim based on aggregated 5-star product reviews if those reviews were

reliably solicited from verified purchasers who are asked a neutral question about their experience with the product, and if the claim discloses PerSe's unique review process.

Takeaway »

Advertisers are entitled to tout their positive reviews and, in doing so, need not disclose their negative reviews. However, they must be able to demonstrate that their reviews were reliably solicited from verified purchasers, and should not "double-count" reviews for multiple products, even if the advertising claim purports to disclose that it is referring to "product" reviews.

Byte Clear Aligner Products – NAD Case #6998 (November 2021)

Byte Clear Aligners are a line of invisible braces designed to straighten consumers' teeth at home using high frequency vibration. Competitor SmileDirectClub challenged a number of Byte's advertising claims, including its failure to adequately disclose incentivized reviews on Byte's website, and failure to adequately disclose material connections on third-party website BestCompany.com.

Byte's website includes reviews and testimonials from consumers. At the top of the page is a video testimonial, and under that video Byte includes a disclosure that states: "We've asked our reviewers to share the good, the bad, and the ugly with us. These reviews may include ones where known purchasers were given free product in exchange for their honest opinions."

The challenger argued this blanket disclosure that the reviews may include ones where purchasers were given free product was insufficient, and that Byte should have to include an individual disclosure with each review. NAD agreed.

Citing the FTC's 2017 business education guidance, NAD determined that "a blanket disclosure is not effective in putting consumers on notice that a review has been incentivized." In particular, NAD expressed concerns that consumers may not see the disclosure or, even if they do see it, may not realize that it applies to a particular review they are reading. In NAD's view, this blanket disclosure "tells consumers only that there may be some reviews that were incentivized and gives

the consumer no way to ascertain the credibility of each review." NAD therefore recommended that the advertiser take reasonable measures to provide clear and conspicuous disclosures for each incentivized review to inform consumers that the review was incentivized.

This recommendation extended to consumer reviews posted on third-party website BestCompany.com. The advertiser argued that it was not responsible for content on this third-party website, including how the website chooses to disclose incentivized reviews. However, NAD rejected this argument, noting that Byte pays Best Company to solicit reviews, has a relationship with Best Company to promote its products, and had instructed Best Company to remove other advertising claims challenged in this case. NAD therefore recommended that Byte take reasonable measures to clearly and conspicuously disclose incentivized reviews on the Best Company website also.

BestCompany.com also rates and ranks companies within their industries, and ranks Byte the best invisible braces compared to the challenger and another competitor. However, NAD determined that these rankings were influenced by the website's material connection with Byte, since that relationship increases the metrics (number and recency of reviews) that form the basis of the ranking. NAD also found that the website failed to clearly and conspicuously disclose its relationship with Byte. Therefore, NAD recommended that Byte either discontinue its advertised ranking on BestCompany.com or modify that advertising to ensure consumers "clearly understand that Best Company's ranking is advertising for Byte and not an honest review from an independent third party."

Takeaway »

Advertisers cannot satisfy their obligation to disclose material connections with a blanket disclosure. Instead, they should take reasonable measures to provide individualized, clear and conspicuous disclosures for each incentivized review.

Where an advertiser has a relationship with a third-party website, including a financial relationship, it may also be responsible for advertising on that website.

Advertisers should be careful to determine whether their relationship with third-party ranking, rating, and review websites has any impact on how the third-party evaluates products or services. If so, that endorsement is no longer considered an honest review from an independent third party, and should be modified to ensure consumers will understand that it is advertising.

Food & Beverage

SlimFast Food Products & Weight Loss Plans – NAD Case #6952 (August 2021)

The owner of the Atkins diet brand challenged advertising that SlimFast's products are "clinically proven" to help customers "lose weight & keep it off" "when used as part of the SlimFast plan." NAD recommended SlimFast discontinue this claim.

First, with respect to SlimFast's packaged food and beverages, NAD expressed concern that none of the products had been individually evaluated. Absent such testing, SlimFast could not support a claim that each was clinically proven to provide the stated weight loss benefits, a message that NAD found the challenged advertising reasonably conveyed.

Second, regarding SlimFast's weight loss plans, NAD pointed out that SlimFast's studies focused on prior versions of the plans that are discontinued. SlimFast argued that the discontinued plans assessed in the studies contained the "same core components" as its current plans. NAD found that while the past studies could support general weight loss claims, they are "not a good fit" for SlimFast's specific "clinically proven" claims about its current plans. Citing to previous decisions, NAD explained that "clinically proven" claims about a specific product are not supported by studies showing that a category of products provides the advertised benefit.

SlimFast appealed NAD's decision to NARB. NARB agreed with NAD that SlimFast should discontinue its "clinically proven" claims on the front panels of its food products. NARB shared NAD's view that one message this claim reasonably conveyed in context was that each individual food product had been clinically tested and shown to result in weight loss, which was not true.

NARB disagreed with NAD, however, when it came to SlimFast's weight loss plans. NARB recognized that the SlimFast plan has undergone "significant changes" from the version that was clinically tested. But NARB was persuaded that these changes did not undercut the applicability of that testing to the current plans. The core elements of the plan are, each day, "one sensible meal, two meals replaced with shakes, smoothies or bars, and three snacks

between meals to satisfy hunger." SlimFast's experts explained that meal replacements are effective for weight loss in ways that "do not depend on macronutrient contents." Persuaded by the expert opinions, NARB concluded that SlimFast could extrapolate its clinical studies of older versions of its plan to the current version. But, to avoid consumer confusion, NARB recommended that SlimFast include, in the body of the claim, an express reference to the SlimFast plan (to avoid an implication that any particular product is clinically proven) and an explanation of the plan's three core components.

Takeaway »

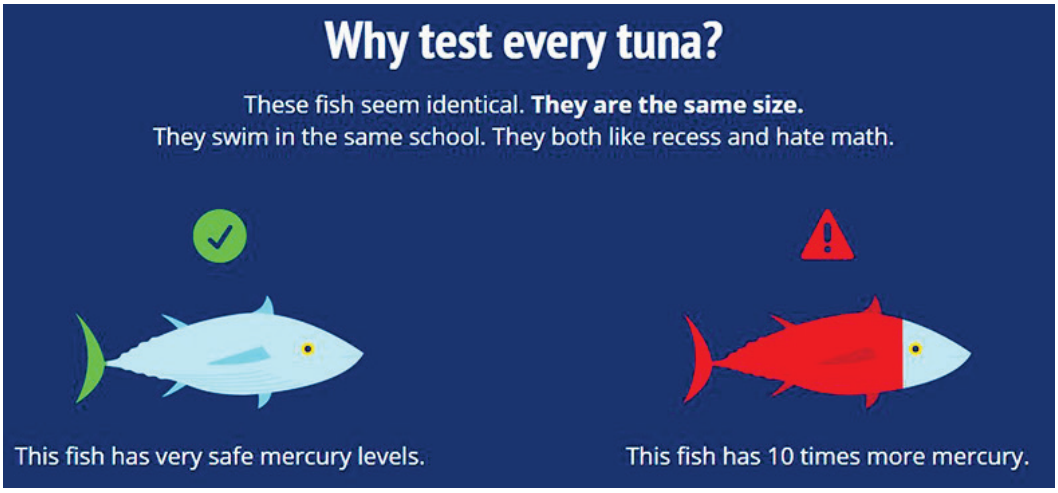
"Clinically proven" claims tend to draw attention from competitors, regulators, and the class action plaintiffs' bar. They are held to the highest evidentiary standard, including at NAD and NARB. Advertisers making such claims need to be careful not to overstate the breadth of clinical support for their products and, when relying on prior studies, should consider whether they have a scientifically sound basis to extrapolate their substantiation to new or modified products. NARB's decision illustrates one way an advertiser may make that showing—namely, through persuasive expert opinion that any differences between the studied product and the advertised product are immaterial.

Safe Catch Pouched and Canned Tuna – NAD Case #6911 (July 2021)

To warn consumers of the risks of mercury in certain tuna products, and to set apart its own packaged tuna, Safe Catch claims it is "The Only Brand to Test Every Tuna for Mercury." The National Fisheries Institute ("NFI"), a non-profit trade association, challenged this claim and other related claims, contending Safe Catch's advertising conveys competitors who do *not* use Safe Catch's mercury testing methods are producing an unsafe end product, even though, according to NFI, there are no significant differences in mercury levels among the leading tuna brands and Safe Catch.

NAD found that, in context, Safe Catch's "tests every tuna for mercury" claim did not reasonably imply that the only way consumers can guarantee themselves a "safe" tuna product is to buy Safe Catch products. NAD noted that no statements in the challenged advertising connect mercury levels to specific health risks, nor do the claims denigrate competitors' products in any way. NAD found that, "[i]n context, the claims do not characterize competing products as dangerous, but merely speak to the advertiser's own procedures for testing every fish for mercury." And NAD found Safe Catch had provided a reasonable basis that its selection process, methodology, and testing protocols support the claim that Safe Catch tests every tuna for mercury.

However, NAD recommended that Safe Catch discontinue a graphic in its advertising titled "Why test every tuna?" that featured a blue fish with a green checkmark depicted as having "very low mercury levels," and a red fish with the warning that "this fish has 10 times more mercury."



NAD found this graphic, in context, falsely implied that other commercially available brands of canned or pouched tuna use fish that fall into the "red fish" category and that such fish are dangerous because of their mercury level and/or that they are impure. Safe Catch lacked support for this implied message.

Takeaway »

Safety claims have been a hot area at NAD (and in class actions) over the last several years. Broad safety claims can be difficult to support, particularly if comparative. Narrowly-drawn, non-comparative claims are more likely to withstand NAD scrutiny. Advertisers should also watch out for unintended messages conveyed by imagery and context, such as the implied message NAD found in the "red fish" in this case.

Ninja Foodi NeverStick Cookware – NAD Case #6939 (August 2021)

Sunbeam Products challenged claims by SharkNinja about its Ninja Foodi NeverStick cookware that allegedly convey the cookware never chips, sticks, or flakes, and that the advertiser provides a "lifetime" guarantee.

Sunbeam contended the NeverStick name itself conveys that food literally will "never" stick to the cookware. NAD noted that it generally will not require an advertiser to change the name of a product unless the product name is itself expressly false or a challenger presents extrinsic evidence that consumers are confused or misled by the name.

Both parties proffered consumer surveys with very different results. In SunBeam's survey, respondents in the control group saw advertising where the product was called "NonStick" instead of "NeverStick." The survey found that a net of 60% of respondents in the test group took away the message the product never sticks. But NAD declined to credit the challenger's survey, including because it did not isolate the product's name from other challenged claims. In contrast, NAD generally credited the advertiser's survey showing just 6% net deception.

In evaluating the product name's meaning, NAD also recognized that "consumers appreciate the hyperbolic nature of product names." NAD found that reasonable consumers would not expect the non-stick coating to work unconditionally or to last literally forever. Instead, NAD found consumers would take away the message that the product will not stick and will last a reasonably long time when used as intended.

SunBeam also challenged SharkNinja's claims that it offers a "lifetime guarantee" for NeverStick cookware. The advertiser noted (and the challenger did not dispute) that the industry standard lifespan of a non-stick pan is only five years. But NAD found it was unclear whether consumers would understand the lifespan of a non-stick pan is only five years. Viewed from the perspective of the consumer,

NAD determined the net impression of the lifetime guarantee claims is that the product is "guaranteed for a long time, longer than a consumer might typically expect to use a non-stick pan." NAD also found that, in context, the lifetime guarantee claim conveys that consumers will be able to take action on the guarantee if the pan does not continue to perform for as long as or longer than typical nonstick pans.

The lifetime guarantee claims were accompanied by a disclaimer stating "WHEN USED AS DIRECTED. LIFETIME BASED ON 5 YEARS OF USE." But NAD found this disclaimer contradicted the main message that NeverStick cookware is guaranteed for a longer period of time than traditional non-stick cookware. Thus, NAD recommended SharkNinja discontinue the lifetime guarantee claim altogether.

Takeaway »

NAD generally will not require an advertiser to change a product name unless the product name is itself expressly false, or the challenger presents extrinsic evidence of actual consumer confusion (e.g., a consumer survey). If you are considering such a challenge, keep in mind that consumer surveys are expensive and NAD is a tough critic of them.

Consumer Products

Quilted Northern Bathroom Tissue – NAD Case #7018 (September 2021)

Consumers are increasingly considering the environment and animal welfare when making purchasing decisions. Advertisers have responded by informing consumers how their products are made in ways that minimize the impact on the environment and/or treat animals more humanely. This has spurred a wave of litigation, brought by the plaintiffs' bar and by non-profits. NAD has also joined the fray, bringing a number of monitoring actions of its own in this space in addition to cases brought by competitors and non-profits. Several NAD decisions from 2021 provide a roadmap for advertisers to responsibly promote the environmental, sustainability, and animal welfare benefits of their products. This case is one of them.

In this monitoring case, NAD sought substantiation from Georgia-Pacific for environmental benefit claims for Quilted Northern Ultra Soft & Strong bath tissue, including:

- "Premium comfort made sustainably"
- "3 trees planted for every tree used"

NAD weighed whether, in context, these claims reasonably convey the product provides a significant environmental benefit and/or has minimal or net positive impact on the environment. NAD found these claims were not unqualified general environmental benefit claims because they specified the environmental benefit the product offers—namely, that for every tree used,

Georgia-Pacific plants three. NAD also found that the "Premium comfort made sustainably" claim on the product label, and similar language on the product's website, acted as a header for the tree planting claim. Thus, while "sustainable" claims can give rise to many different meanings and expectations, consumers would understand here that this refers to the tree planting initiative.

NAD found that Georgia-Pacific's tree planting claim was supported by evidence that it sources trees from "working forests" and evidence of how many trees it consumes and plants.

Takeaway »

Advertisers making environmental benefit claims should make sure to comply with the FTC Green Guides and NAD's decisions on this subject. Advertisers should make narrowly-drawn claims that tell consumers about the product's specific environmental benefits. To the extent advertisers use broad terms like "sustainable" or "environmentally friendly," they should tie those claims to specific explanations of the product's environmental benefits. Failure to do so may result in a finding that an ad conveys an unqualified general environmental benefit message, and such messages are difficult (if not impossible) to support.

Ford Motor Company – NAD Case #6881 (March 2021)

In 2020, Ford challenged claims by FCA that its Jeep Gladiator has the "Best-in-Class" payload and towing. In 2021, FCA returned the favor, challenging Ford's "Best-in-Class" and related claims for the Ford Bronco. An issue that often comes up with these types of claims is how the class is defined.

Here, NAD found that Ford provided a reasonable basis for its class definition of "medium traditional utilities," which included the 2021 Ford Bronco, the Toyota 4Runner, and the Jeep Wrangler. Ford demonstrated how the vehicles' architecture supports this definition, and showed that *Autotrader*, *Kelley Blue Book*, *MotorTrend*, and *Car and Driver* each placed the 2021 Bronco in the same class as the Toyota 4Runner and the Jeep Wrangler.

Another issue in this case was the timing of Ford's "best-in-class" claims. FCA contended that Ford's claims were premature because the 2021 Bronco was only a conceptual vehicle at the time the claims were made and was not actually available to consumers in the marketplace.

FCA argued that Ford should have given consumers notice that the claims were aspirational by styling them as “projected,” “anticipated,” or “designed” to hopefully achieve the stated goal.

NAD disagreed, however, finding that manufacturers routinely make claims—including “best-in-class” claims—as part of a vehicle’s “reveal,” as Ford did here, and that the ability to make claims about a vehicle is not tied to the vehicle’s availability, but rather whether the claims are properly supported at the time they are made. And here, they were.

Takeaway »

Challenges regarding “Best-in-Class” claims are often fought over definitions of the “class,” with performance testing sometimes taking a back seat. In product categories with shifting class definitions, advertisers should make sure they have a thoughtful justification for where their product fits. Industry practice and extrinsic evidence that third parties use the same definition can be compelling.

Colgate Optic White Renewal Toothpaste – NARB Panel #284 (May 2021)

In a challenge brought by Procter & Gamble, NAD recommended that Colgate discontinue its claim that Optic White Renewal toothpaste “Removes 10 years of yellow stains.” In rejecting one of Colgate’s proffered studies, a half-page abstract presented at a professional conference, NAD stated that it “has consistently held that abstracts generally do not impart enough information for NAD to properly evaluate whether they constitute competent and reliable scientific evidence.”

NARB agreed that the abstract did not provide sufficient information to properly evaluate the study methodology. It also expressly noted that it did not consider the fact that the abstract was presented at a professional conference to be an endorsement of the study methodology, “but rather only an indication that the study could, when published in full, provide information of interest to the relevant professional community.”

Colgate raised several procedural arguments on appeal related to NAD’s rejection of the study abstract. First, Colgate argued that NAD ignored information presented during its meeting with Colgate and failed to ask Colgate’s experts sufficient questions to elicit information about the study to satisfy NAD’s concerns. But NARB rejected this argument, noting that it was the advertiser’s responsibility to present its substantiation, “not the NAD’s obligation to seek it out.”

Second, Colgate argued that, since the challenger did not submit any expert reports or statements, by reaching its own conclusions and rejecting the positions of Colgate's experts, NAD stepped into the shoes of a scientific expert and thus violated principles of industry self-regulation. Once again, NARB was not convinced. NARB found that NAD properly exercised its responsibility to evaluate the record evidence and reach an independent judgment, Colgate's substantiation was not entitled to any presumption that it is persuasive, and a challenger is not obligated to submit expert reports or its own independent studies.

Takeaway »

NAD and NARB take seriously the axiom that it is the advertiser's burden to substantiate its claims. Advertisers must provide sufficient information about their claim support to allow NAD to assess its reliability, and should be particularly careful when relying solely on abstracts, which tend to contain limited information about the study methodology. Advertisers should not expect NAD to solicit additional information that it believes necessary to evaluate the claim, or expect its burden to be any lower where the challenger chooses not to submit its own expert statements or studies.

Crest Whitening Emulsions – NAD Case #6906 (May 2021)

Continuing the tooth whitening theme, SmileDirectClub challenged a number of advertising claims P&G made for its new Crest Whitening Emulsions, including that the product resulted in "100% Whiter Teeth," offered "Best in Class Results," and "Starts Working Instantly." While finding that P&G provided a reasonable basis for some of its other claims, NAD recommended P&G modify or discontinue each of these three claims.

First, as to the "100% Whiter Teeth" claim, NAD found that the basis of the comparison was not adequately disclosed. For example, on the product package, the disclosure limiting the claim to a comparison to a single product—P&G's own ARC Pen—appeared on the bottom right corner on the back of pack, far removed from the main claim. In other media, the disclosure was similarly too far removed from the main claim or missing altogether. NAD therefore recommended P&G modify its advertising to clearly and conspicuously disclose the object of this comparative claim by either incorporating it into the main claim or through a disclosure in a similar font size and in immediate proximity to the main claim.

Second, NAD found that P&G's clinical study results did not support its "Best in Class Results" claim. NAD rejected P&G's argument that Whitening Emulsions

represents a “new [patented] technology without peer” that made it “a class unto themselves.” NAD noted that a “class” of products should be defined according to consumers’ reasonable understanding, and there was no evidence that P&G’s definition of this “class of one” is consistent with consumers’ understanding of the “class” of tooth whitening application products. Moreover, NAD expressed skepticism “that a product that is in a class by itself can claim to be ‘Best in Class’.”

Third, NAD rejected P&G’s contention that the immediate bioavailability of the product’s active ingredient supported its “Starts Working Instantly” claim. NAD found that consumers would reasonably expect this claim to mean that they will see noticeable benefits shortly after use, if not immediately. That message was not supported by the evidence.

Takeaway »

When making comparative claims, advertisers should ensure that the object of the comparison is clearly and conspicuously disclosed, either in the main claim or in an adequate font size and in proximity to the main claim.

Advertisers should be mindful of how they define the “class” when making “best in class” claims, and consider whether that definition will comport with how consumers view the “class.” Arguing that a product incorporates new technology and is therefore in a class of its own is likely not enough to support a “Best in Class” claim.

Advertisers generally must be able to substantiate a “Starts Working Instantly” claim with evidence that consumers will see noticeable benefits immediately or shortly after use.

Happy Mouth New Campaign – NAD Case #6917 (February 2021)

If you’ve read this far, you will have gathered that SmileDirectClub is a somewhat frequent flyer at NAD. So what do they actually do? SmileDirectClub provides orthodontic services through a direct-to-consumer teledentistry platform. With SmileDirectClub, consumers can receive a prescription for tooth aligners from the comfort of their home. When ready, the aligners are shipped to the patient, and the patient then consults remotely with a treating doctor (who contracts with SmileDirectClub) throughout the patient’s treatment.

The American Association of Orthodontists ("AAO") is the world's oldest and largest dental specialty organization, and represents nearly 19,000 accredited orthodontists. AAO launched a "Happy Mouth Now" advertising campaign that it stated was intended to "raise public awareness of the dangers posed by [direct-to-consumer] and DIY orthodontics" and uses "satire and humor to encourage patients to seek in-person professional orthodontic care rather than attempting to treat themselves through [direct-to-consumer] or DIY orthodontics." Unsurprisingly, SmileDirectClub took issue with this campaign, arguing that it falsely conveyed disparaging messages about SmileDirectClub's direct-to-consumer teledentistry platform.

In response, AAO raised two jurisdictional objections. First, AAO argued that NAD did not have jurisdiction over the challenge because NAD's Policies and Procedures provide that "[c]omplaints regarding...political and issue advertising" are "not within NAD's mandate." According to AAO, the Happy Mouth Now campaign was "issue advertising" that was not trying to sell products or services, but instead merely warn the public of the health dangers associated with direct-to-consumer and DIY orthodontics. AAO also asserted that its organization was rooted in advocacy, not profit.

NAD, however, disagreed with AAO's position, and found that the campaign was a paid commercial message for the purpose of promoting the demand for a product or service, which placed it within NAD's jurisdiction. In reaching this finding, NAD noted that the campaign encouraged patients to seek in-person professional orthodontic care, with taglines like "Some things are best left to the professionals" and "Your mouth's journey shouldn't start anywhere but at an orthodontist," and links to a search tool that locates member orthodontists. In response to AAO's contention that the motivation for the campaign was educational, NAD noted that speech can have multiple purposes, and the purpose of this campaign was also to encourage consumers to purchase in-person orthodontic services offered by the advertiser's members, making it commercial advertising.

AAO also argued the claims at issue were "without sufficient merit to warrant the expenditure of NAD's resources" since the challenger did not point to any specific express claim in the campaign. Instead, the challenger argued only that certain implied messages were false and

disparaging. NAD rejected AAO's argument on this point also, finding the challenged claims were not overly vague because they concerned only implied claims and not express claims.

Takeaway »

Advertising by trade organizations is also subject to an NAD challenge where it promotes the products or services of its members, either directly or by disparaging competing products or services.

An ad does not need to make express false claims to be subject to an NAD challenge. A challenger can bring a challenge on the basis of allegedly false implied claims alone.

Advertising Challenges Are a Diamond's Best Friend

The dental industry is not the only place where we saw trade organizations play a more active role at NAD in 2021. The diamond industry also took a shine to advertising challenges this year. Natural Diamond Council is an association of the world's leading diamond companies, who represent approximately 75% of the world's rough diamond production. Diamond Foundry is a manufacturer and retailer of laboratory-grown diamonds. In parallel cases filed against each other, these two entities looked to NAD to take on the question of what constitutes a "real" diamond.

In ***Diamond Foundry, Inc. (Diamond Foundry Laboratory-grown Diamonds)*, Report #6843 (March 2021)**, Natural Diamond Council argued that Diamond Foundry falsely described its lab-grown diamonds as "real" in violation of the FTC Guides for the Jewelry, Precious Metals, and Pewter Industries ("FTC Jewelry Guides"), and failed to adequately disclose that they were lab-created.

NAD recognized that Diamond Foundry's advertising was in significant part directed to jewelry distributors and retailers who were not at risk of being confused as to the origin of the diamonds, and that the advertiser's website was "replete with clear messaging as to the man-made nature of its diamonds." Nonetheless, NAD expressed concern that consumers not exposed to the advertiser's general brand messaging may misunderstand the diamonds' origins. NAD therefore recommended that Diamond Foundry modify its advertising to clearly and conspicuously disclose the origin of the lab-grown diamonds, and discontinue the use of certain claims such as "created diamonds," "sustainably created," and "world positive" that NAD found did not adequately distinguish the advertiser's diamonds from mined diamonds.

However, citing the FTC Jewelry Guides, which recognize that lab-grown and mined diamonds have "the same optical, chemical, thermal, and physical features," NAD did not require the

advertiser to discontinue its use of the word "real" to describe its lab-grown diamonds, provided that the advertiser at minimum modify those claims to more prominently disclose their man-made origins.

On the flip side, in ***Natural Diamond Council USA, Inc. (Mined & Man-mad Diamonds)*, Report #6901 (April 2021)**, Diamond Foundry challenged a number of National Diamond Council's advertising claims, including on the grounds that they falsely communicated that mined diamonds are better for the environment than man-made diamonds, and that man-made diamonds are not "real" diamonds.

In support of its environmental claims, Natural Diamond Council proffered a report from Trucost, an independent environmental consulting firm, which purported to show that Natural Diamond Council's members averaged 160 kg of carbon dioxide equivalents ("CO2e") per polished carat, while lab-grown diamond manufacturers averaged 511 kg CO2e per polished carat. But NAD found this report had several flaws that affected its reliability, including:

- Trucost gathered primary data directly from Natural Diamond Council members about their carbon emissions, but relied on secondary sources and information in the public domain to determine man-made diamond manufacturer emissions. NAD noted "[t]here is a potentially significant imbalance in the accuracy between self-reported information from companies who may be motivated to present positive data and information collected from the public domain that is second or third-hand."
- Much of the data Trucost relied on was out of date and no longer representative of typical carbon emissions associated with man-made diamonds or mined diamonds. Per NAD, "[a]dvertisers must support superiority claims with the most reasonably current data, especially when evolving technology may be an important factor."
- The Trucost Report accounted for only approximately 52% of the mined-diamond industry, and did not include data from some man-made diamond manufacturers. This failed to meet NAD's requirement that, "[w]hen making industry-wide claims, an advertiser should typically consider at least 85% of the marketplace."
- Trucost's analysis omitted potentially significant stages of the diamond process, including the environmental impacts and benefits associated with exploration, mine closure, diamond cutting and polishing, and the retail and post-consumer phases of the diamond life cycle. These limitations were not adequately disclosed in Natural Diamond Council's advertising.

NAD therefore recommended that Natural Diamond Council discontinue its express and implied claims related to the environmental benefits of mined diamonds over man-made diamonds.

NAD also determined that, in the context in which it appeared, Natural Diamond Council's use of the word "real" to describe its mined diamonds reasonably conveyed the unsupported message that lab-grown diamonds have different physical and chemical properties than mined diamonds. NAD specifically expressed concern about the advertiser's use of "real" in a "pointed manner" to distinguish mined diamonds from lab-grown diamonds, which may cause consumers to incorrectly conflate lab-grown diamonds with imitation diamonds like moissanite and cubic zirconia, which do not share the same properties as mined diamonds. NAD therefore also recommended that Natural Diamond Council discontinue its claims that lab-made diamonds are not real.

Takeaway »

As environmental benefit claims become increasingly important to advertisers and consumers, NAD's decision in *Natural Diamond Council USA* provides important guidance on how to substantiate such claims, particularly related to carbon emissions. It is not enough to commission an independent third-party to gather data to substantiate these claims. The advertiser should ensure the data were gathered using a reliable methodology and, if the advertiser is making industry-wide claims, that the data include a significant portion of the relevant market, which is typically 85%.

Drugs & Supplements

Morning Recovery Dietary Supplements – NAD Case #6923 (July 2021)

Every generation has its own hangover cures. The ancient Romans used raw owl eggs and fried canary, while Ernest Hemingway favored tomato juice and beer. For the 21st century imbiber, More Labs sells a drinkable dietary supplement called Morning Recovery.

The Council for Responsible Nutrition challenged More Labs' claims that Morning Recovery is "[s]cientifically formulated to help you bounce back after drinking" and "[u]sers of Morning Recovery showed up to 80% improvement on specific hangover symptoms after drinking."

To support its claims, More Labs provided a double-blinded, randomized, placebo-controlled human clinical study in which participants consumed either a placebo product or Morning Recovery prior to consuming a pre-measured amount of alcohol and then completed a series of standardized surveys the following morning. The study demonstrated that users of Morning Recovery reported feeling up to 80% better than those who used a placebo across four symptoms, showed a statistically significant reduction in overall hangover severity, and demonstrated statistically significant improvements in several individual symptoms of a hangover.

Initially, NAD expressed concern that the study did not control for food intake and beverage consumption after subjects went home and before they completed the surveys. In response, the advertiser demonstrated to NAD's satisfaction that most alcohol-related studies do not control for such "post-study" activities. Also, the advertiser showed that in studies that do have such controls the researchers have not found a correlation between hangover symptoms and food and beverage consumption *after* the body has already metabolized the alcohol. Thus, NAD found the study was sufficiently reliable and that More Labs provided a reasonable basis for the claim that Morning Recovery is "scientifically formulated to help you bounce back after drinking."

NAD also considered More Labs' claims that Morning Recovery showed "up to 80% improvement on specific hangover symptoms after drinking." NAD noted that More Labs' study found statistically significant improvements for six of the twenty-four symptoms measured, but only four of the six symptoms achieved 78-81 percent improvements. NAD therefore recommended More Labs modify the claim to either specify the four symptoms that achieved nearly 80 percent improvement or remove the reference to "80% improvement" and refer to all of the symptoms for which there were statistically significant improvements.

Takeaway »

NAD sets a high bar for clinical studies intended to support health-related claims and is adept at identifying potential study biases. Evidence that a potential bias is not a concern for experts in the relevant field can help overcome NAD's concerns.

Zarbee's Cough Products – NAD Case #6883 (April 2021)

In 2020, Zarbee's challenged claims by its competitor, Maty's, about its cough syrups and cough soothers. *Maty's Healthy Products (Maty's Cough Products)*, NAD Case #6394 (July 2020). In that case, NAD determined that "when a product's efficacy is based on the efficacy of one ingredient, and not other ingredients in a product, consumers must be able to understand that from the claim and context in which the claim is made."

In 2021, Maty's turned around and argued that Zarbee's advertising ran afoul of that principle by failing to make clear that honey is responsible for the soothing benefits that Zarbee's claims for its cough remedies.

NAD found that where the Zarbee's product packages contained honeycomb and bumblebee imagery, expressly identified the products as "honey" products, and highlighted that the products were almost completely made of honey, the package labels reasonably conveyed that the soothing effects come from honey. In contrast, where honey imagery was blended with imagery of other ingredients and where honey was not highlighted, NAD recommended that Zarbee's modify the claims to make clear honey was responsible for the soothing effects.

NAD also distinguished between claims where Zarbee's directly identified different benefits provided by the other ingredients in the products and where the other ingredients were listed next to or in close proximity to honey and its associated benefits, finding that the latter should be modified to make clear that the soothing effects were attributable to honey alone.

Takeaway »

Where only certain ingredients are responsible for a product's beneficial effects, advertisers should clearly disclose that fact.

NerveRenew Dietary Supplement – NAD Case #6973 (June 2021)

The Council for Responsible Nutrition challenged claims by Neuropathy Treatment Group (NTG) for its NerveRenew dietary supplement, including:

- 100% Stabilized R-Alpha Lipoic Acid (R-ALA) is the most important ingredient in NerveRenew
- NerveRenew's ingredients are "clinically studied" and have a "synergistic effect"
- NerveRenew has "3X bioavailability"

NAD found the advertiser's support for its R-ALA claim was flawed. The clinical studies the advertiser cited assessed the impact of ALA, not R-ALA, on diabetic neuropathy. R-ALA is an isomer of ALA, but NTG failed to provide any evidence that ALA and R-ALA are interchangeable or have the same effects. Further, these studies tested ALA in amounts significantly higher than the amounts of R-ALA in NTG's product. NAD therefore recommended that NTG discontinue its claims relating to the importance of the R-ALA ingredient.

Likewise, NAD found the advertiser's "clinically studied" and "synergistic effect" claims were based on flawed studies. The studies failed to test specifically for non-diabetic neuropathy or other types of nerve pain, lacked a placebo group, used an inappropriate study population, and had other methodological flaws. NAD thus recommended the "clinically studied" and "synergistic effect" claims also be discontinued.

NAD also assessed the advertiser's "3X bioavailability" claim. Bioavailability refers to "the proportion of the administered substance capable of being absorbed." The advertiser argued its claim was based on the product containing benfotiamine, a form of Vitamin B1 which has three times the bioavailability of thiamine hydrochloride, another form of B1. But the only study the

advertiser presented that compared these two forms of vitamin B1 used a population of only male subjects and issued only a single dose of each form of B1 to the study subjects. NAD found this study insufficient to support the advertiser's broad claim and recommended discontinuation of the "3X" claim.

Takeaway »

Under the "competent and reliable scientific evidence" standard, NAD imposes a high burden for health-related claims. That burden is elevated further for "clinically proven" and other equivalent claims. Advertisers making such claims should familiarize themselves with the types of study flaws NAD routinely finds, such as those discussed in this case. We also recommend giving a listen to NAD's podcast episode on health claims, available here.

Goli Apple Cider Vinegar Gummies – NAD Case #6894 (March 2021)

Goli sells a variety of dietary supplements, including Apple Cider Vinegar Gummies, and promotes them on its website and through social media ads. A competing seller of dietary supplements, Pharmavite, challenged Goli's advertising claims that its ACV Gummies provide an array of health benefits. Goli agreed to discontinue most of the challenged claims, including claims that its ACV Gummies support weight management, support heart health, improve digestion, strengthen the immune system, and detoxify the body.

However, Goli contended that it could support modified claims that its ACV Gummies support energy and skin health:

- "Vitamin B12 to help support energy production"
- "B9 [to] support[] healthy skin"
- "Folic acid [to] support[] skin health."

NAD disagreed, finding these claims were unsupported.

Although vitamin B12 has been shown to help convert food into cellular energy, NAD found that at least one reasonable consumer takeaway from Goli's advertising was that taking vitamin B12 to support energy production will make consumers feel a noticeable improvement in energy. But Goli's evidence merely showed that vitamin B12 supports metabolism and *cellular* energy, not that taking it results in a perceptible energy increase. Thus, NAD recommended Goli modify its "Vitamin B12 to help support energy production" claim to clarify that Goli is referring to cellular energy.

NAD similarly determined that Goli's evidence failed to support its skin health claims. NAD noted that, in general, health benefit claims must be supported with well-designed human clinical testing. This is particularly true for claims that a product can treat or prevent a disease or symptoms. But Goli's only proffered support for these claims was an NIH Folate Fact Sheet, various governmental websites, and two scientific articles. While NAD recognized NIH's expertise in dietary supplements, it found that passing references to undefined skin changes were not sufficient to support Goli's claims. NAD also was concerned that Goli relied on evidence regarding the relationship between *deficiencies* in folic acid and skin health. As NAD explained, "the fact that a deficiency in folate can generally cause changes in skin does not necessarily mean that supplementation with folate, in the form and dosage contained in the advertiser's product, will improve skin health in any meaningful way." Thus, NAD recommended Goli discontinue its skin health claims.

Takeaway »

Dietary supplement makers should not make affirmative structure-function claims based on evidence that a *deficiency* in a vitamin or mineral affects the body. Rather, NAD requires competent and reliable evidence, ideally clinical studies, showing that supplementation with the ingredient produces the stated benefit.

Internet & Telecom

AT&T Wireless Network – NARB Panel #277 (January 2021)

This case involved both an appeal by AT&T and a cross-appeal by the challenger. The challenger took issue with a series of commercials in which AT&T's spokesperson states "Just OK is not OK," following humorous vignettes depicting an unpleasant experience relating to wireless service. The challenger argued these ads reasonably convey that AT&T's 4G and 5G networks are superior to other wireless networks and that competing networks are "just ok." But like NAD, NARB was persuaded that the humorous vignettes did not convey that message because they avoided any reference to competing wireless services.

In the "Just OK is not OK" ads, AT&T also advertised that it was "Building 5G on America's Best Network." NAD agreed with the challenger that this claim reasonably conveyed that AT&T's 4G and 5G networks are superior to other networks. While AT&T had evidence showing the superiority of its 4G network, it was not able to show this for its still-in-progress 5G network.

According to AT&T, the term “building” informed consumers AT&T was working to build its 5G network, but it was not completed. NARB agreed that the term “building” was not misleading and was supported by AT&T’s investment to update its 4G network to 5G. But NARB was concerned that the claim failed to make clear that only AT&T’s 4G network has been judged the “best network.” Thus, NARB recommended AT&T discontinue this claim or modify it to specify that the “best network” claim refers only to AT&T’s 4G network.

Takeaway »

Advertisers who are able to substantiate a superiority claim for one product or service, but not another, should be careful to clearly draw that distinction in their advertising.

Xfinity Mobile 5G Wireless Service – NAD Case #6833 (March 2021)

When services are “more unavailable than available,” advertising should clearly and conspicuously disclose that fact to consumers. In this case, the challenger argued Comcast’s advertising for Xfinity Mobile reasonably conveyed that Xfinity’s 5G wireless service was widely available when in fact there were inadequately disclosed limitations on the service’s geographic availability.

In commercials for Xfinity featuring Amy Poehler, she stated, “Everyone gets 5G with our new data options at no extra cost,” with a small gray disclaimer appearing on the screen for 4-5 seconds that states, “5G capable device required. 5G available only in parts of select cities.”

Comcast submitted a consumer perception survey that purported to show that few respondents took away a message that its 5G services were widely available. However, NAD found this survey unreliable, primarily because of its use of a filter question that did not adequately account for consumers’ pre-existing beliefs or for the actual message being challenged.

The survey’s close-ended filter question asked respondents to select “which of the following subjects, if any, did the commercial say or suggest anything about relative to the advertiser’s 5G service?” One of the answer choices was “Locations where the advertiser’s 5G service is

available." NAD expressed two main concerns about this filter question. First, NAD noted there is a presumption that "consumers generally assume that if a service is being advertised to them, it is something that is available now." The filter question did not adequately address that assumption since consumers may take away that message even if the commercial did not say anything about location.

Second, NAD expressed concern that the filter question referred to "locations" where 5G is available, rather than "availability" more generally. The challenged message was about the widespread "availability" of the advertiser's 5G services, and NAD found that "locations" could reasonably be interpreted as referring to whether the commercial mentioned a specific city or region, which was not at issue in the challenge. Some respondents may have been improperly filtered out because they did not take away a message about "location," even if they did take away a message about 5G availability. In fact, the vast majority of respondents were filtered out by this question. And, bolstering these concerns, NAD noted that "the survey verbatims were rife with comments indicating that respondents were taking away a widespread availability message."

Having found the survey insufficiently reliable, NAD stepped into the role of the consumer to determine the messages reasonably conveyed by the commercial. NAD concluded the claim "Everyone gets 5G" could reasonably be interpreted to mean the advertiser's 5G service is more widely available than it is. NAD also found the commercial's disclosure regarding the limited availability of the advertiser's 5G service, which appeared in small gray font against a background with almost no contrast, was not conspicuous enough. Thus, NAD recommended the advertiser make that disclosure more conspicuous.

Takeaway »

Advertisers (or challengers) seeking to establish with a consumer survey that an ad does or does not imply a certain message must properly account for respondents' pre-existing beliefs—for example, the belief that a product or service is generally available unless otherwise stated. This can be tricky, but failure to do so can result in NAD disregarding the survey entirely. It is imperative to work with counsel and survey experts who will spot such issues and know how to design a survey to account for them.

Proskauer