

Advertiser Self-Regulation And Class Actions: Part 1

By **John Villafranco, Glenn Graham and Lauren Myers**
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When an advertiser agrees to voluntarily participate in industry self-regulation before the National Advertising Division, it does so expecting to avoid litigation. Yet there has been a consistent concern among advertisers that NAD participation may actually make consumer class action litigation more, rather than less, likely.

In 2012, the Advertising Self-Regulatory Council amended NAD procedures to provide that “[a]n advertiser’s voluntary modification of advertising, in cooperation with NAD ... self-regulatory efforts, is not to be construed as an admission of impropriety.”[1] This amendment was, in part, a response to those who claimed that NAD decisions provide “fodder” to plaintiffs class action attorneys.[2] But is that a valid concern? Are attorneys really scouring NAD decisions for their next litigation target?

The answer is probably not. Let’s look at the numbers.

Correlating NAD and Class Action Filings

There have been 474 cases closed at the National Advertising Division since January of 2013. Of those filings, 384 resulted in an adverse NAD decision, defined as either (1) a finding that the challenged claim or claims should be discontinued or modified, or (2) referral of the matter to the Federal Trade Commission.

In this same time period, there were 57 false advertising complaints filed against companies whose advertising was challenged before the NAD.[3] We note that these 57 post-2013 actions are fewer than the 63 we found when we first analyzed this issue in 2013. However, there were 32 more adverse NAD decisions in our current analysis than in 2013.[4]

These numbers suggest that an adverse NAD decision is not likely to lead to the filing of a consumer class action, or at least that the likelihood is trending downward. A look at the cases in more detail strengthens this conclusion.

Of the 57 false advertising complaints filed subsequent to an adverse NAD decision, one was not a



John Villafranco



Glenn Graham



Lauren Myers

consumer class action, but rather was brought by an NAD challenger against its competitor.[5] We can therefore eliminate that complaint from our analysis.

Moreover, many of the 56 remaining consumer class action complaints were duplicated in other jurisdictions. In other words, there were multiple copycat class actions across jurisdictions involving the same advertisers, the same products and the same advertising claims. Indeed, removing duplicates, there were only 20 unique products or services that were the subject of class action complaints following an adverse NAD decision filed since Jan. 1, 2013.

At first blush, it appears that FanDuel Inc. and DraftKings Inc. were, by far, the most impacted by an adverse NAD decision. FanDuel and DraftKings are competitors operating daily fantasy sports websites.[6] In an NAD proceeding, FanDuel challenged the express claims made by DraftKings declaring itself the “largest U.S.-based destination for daily fantasy sports” and “the largest U.S.-based online gaming destination where players engage in daily fantasy sports competitions across fantasy professional football, baseball, golf, basketball, hockey, soccer and college football and basketball.”[7]

FanDuel also argued that DraftKings’ claims implied that FanDuel is not a U.S.-based fantasy sports website.[8] The NAD decision focused on whether FanDuel was based in Scotland, where it maintained certain of its offices and departments. Because DraftKings’ claims appeared to suggest that FanDuel, the larger entity, “had no appreciable presence in the United States — a message that is not truthful or accurate,” the NAD recommended DraftKings discontinue its claims.[9]

In the months following the NAD’s decision, issued in March 2015, there were at least 20 class actions filed against DraftKings, FanDuel or both. This would seem to indicate the NAD decision had something to do with these filings. Upon closer examination, however, it appears unlikely.

Despite the timing of the filings, a review of the FanDuel/DraftKings complaints illustrates that those class actions did not focus on the advertising subject to the NAD decision, but rather centered on allegations that the daily fantasy sports websites’ competitions were “rigged.”[10] Indeed, none of the FanDuel/DraftKings class actions that we were able to locate during our research mentioned the NAD, the NAD’s decision or even the advertisements that were the subject matter of the NAD proceeding.

The DraftKings and FanDuel class action lawsuits, therefore, do not appear to stem from the NAD decision, but, rather, most likely resulted from subsequent negative media attention surrounding the companies and/or government investigations into the entities’ business practices. Because there are no FanDuel/DraftKings class actions based on the topic of the NAD decision, we exclude them from our analysis.

Excluding the DraftKings decision, of the 19 remaining NAD decisions that potentially had subsequent class actions, two were not decisions on the merits and can be discounted. One case featured an advertiser that refused to participate and was referred to the FTC.[11] The other was administratively closed and referred to the FTC because it involved advertising claims that were subject to an FTC consent order from 2004 — nearly a decade earlier.[12]

With respect to the former, after declining to participate, the advertiser at issue, Obesity Research Institute, was then faced with a consumer class action regarding its advertising.[13] However, it should be noted that Obesity Research Institute was already facing at least two other similar class actions concerning advertising statements made about its Lipozene dietary supplement that were filed well over a year before the NAD decision.[14]

The class action at issue was subsequently consolidated with the previously-filed federal action.[15] Since an adverse NAD decision, regardless of whether the advertiser participated in the NAD proceeding, cannot have possibly influenced a class action that was filed before the NAD proceeding, we exclude this case from our calculus.[16]

With respect to the case that was administratively closed, during the course of the NAD proceeding, “it came to NAD’s attention that Bremmen Clinical [the advertiser] is associated with Basic Research LLC[,]” which had entered into a 20-year consent order with the FTC “regarding advertising weight-loss claims for several of its dietary supplements,” similar to the claims challenged in the NAD proceeding.[17] Because the advertising claims were subject to an FTC consent order entered into nearly a decade before the NAD decision, we find it necessary to exclude this decision from our calculus as well, as it is highly unlikely that this NAD decision influenced a follow-on class action.

Indeed, we note that, while the subsequent class action (filed nearly two and a half years after the NAD referral) briefly references the NAD’s decision, the complaint extensively discusses the permanent injunction entered by the FTC that prohibits the marketing of the weight loss products at issue without competent and reliable scientific evidence to support the advertising statements.[18]

When we remove these two cases, we are left with 17 adverse NAD decisions during this five-year period that were followed by consumer class actions. Those cases are listed in the table below.[19] We note again that this number is smaller than the 27 NAD decisions followed by consumer class actions identified in our 2013 analysis, supporting the conclusion that the fear of a consumer class action resulting from participation in an NAD proceeding is greatly overstated, and diminishing.

Case Caption	Product
Organic Consumers Association et al. v. Sanderson Farms Inc., No. 3:17-cv-03592 (N.D. Cal.)	Sanderson Farms Chicken
Weeks et al. v. Google Inc., No. 5:18-cv-00801 (N.D. Cal.)	Pixel phone
De Lacour v. Colgate-Palmolive Co. et al., No. 1:16-cv-08364 (S.D.N.Y.)	Tom’s of Maine “Naturally Dry” Antiperspirant
Leggett et al. v. Rust-Oleum Corporation, No. 1:17-cv-01449 (N.D. Ill.)	Painter’s Touch Ultra Cover 2X Spray Paint
Franjul et al. v. Kimberly-Clark Corporation et al., No. 1:15-cv-06200 (S.D.N.Y.)	Huggies Natural Care Wipes
Dapeer v. Neutrogena Corp., No. 1:14-cv-22113 (S.D. Fla.)	Neutrogena Beach Defense Sunscreen
Basque et al. v. NourishLife LLC, No. 4:15-cv-00025 (N.D. Fla.)	Speak dietary supplements
Darisse v. Nest Labs Inc., No. 3:14-cv-01363 (N.D. Cal.)	Nest Learning Thermostat

Melgar v. Zicam LLC et al., No. 2:14-cv-00405 (C.D. Cal.)	Zicam
Velasquez et al. v. USPLabs LLC et al., No. 4:13-cv-00627 (N.D. Fla.)	Jack3d supplements
Weisblum et al. v. Prophase Labs Inc. et al., No. 1:14-cv-03587 (S.D.N.Y.)	Cold-EEZE
Forrest v. Innovation Ventures LLC et al., No. 4:13-cv-00172 (E.D. Mo.)	5 Hour Energy
Dean v. Colgate-Palmolive Co., No. 5:15-cv-00107 (C.D. Cal.)	Colgate Optic White Toothpaste
Muir v. Playtex Products LLC, No. 1:13-cv-03570 (N.D. Ill.)	Diaper Genie
Tsan et al. v. Seventh Generation Inc., No. 3:15-cv-00205 (N.D. Cal.)	Seventh Generation natural labeled products
Delre v. The Blue Buffalo Company Ltd., No. 5:14-cv-00768 (D. Conn.)	Blue Buffalo pet food products
Karhu v. Vital Pharmaceuticals Inc., No. 0:13-cv-60768 (S.D. Fla.)	VPX Meltdown Fat Incinerator

The second installment of this article will examine the timing of specific class action filings to get a better sense of whether adverse NAD decisions may have been substantial contributing factors. The third installment will consider which firms are filing class actions, and whether an NAD decision can have any impact on a federal court's analysis of a cause of action.

John E. Villafranco is a partner, Glenn T. Graham is a senior associate and Lauren F. Myers is an associate at Kelley Drye & Warren LLP.

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[1] Rule 2.1 F(1), Rules of the Advertising Self-Regulatory Council (ARSC), available at: <http://www.ascreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Effective-2-1-16.pdf>.

[2] See, e.g., Jack Neff, NAD Decisions Become Fodder For Class-Action Lawyers, AdAge (Apr. 23, 2012), <http://adage.com/article/news/nad-decisions-fodder-class-action-lawyers/234273/>.

[3] To identify the complaints, we first pulled all NAD decisions since 2013 where the NAD either recommended that an advertising claim be discontinued or modified or referred the matter to the FTC. We then compiled a list of companies and products involved in the adverse NAD decision. We conducted searches to determine whether these products or companies were subject to class action complaints

filed after Jan. 1, 2013, based on similar false advertising allegations, regardless of whether these complaints referenced the NAD decision. We also used Lexis Advance to research class actions filed since 2013 that referenced the NAD or an NAD decision. We note that our analysis does not include demand letters that plaintiffs class actions attorneys may have sent threatening litigation in response to an NAD action. Because those letters are nonpublic, they cannot be tracked.

[4] See John E. Villafranco and Donnelly L. McDowell, *The National Advertising Division, Class Actions and Federal Courts: The Increasingly Busy Intersection of Advertising Self-regulation and Litigation* (Fall 2013), *What's In Store: Newsletter of the Section of Antitrust Law's Consumer Protection Committee, Privacy and Information Security Committee and Advertising Disputes and Litigation Committee*, American Bar Association, Volume 19, No. 1, Spring 2014. We note that since our starting point for this analysis is January 2013, there may be some overlap in the actions.

[5] *Dyson Inc. v. Euro-Pro Operating LLC*, No. 1:14-cv-09442 (N.D. Ill. Nov. 25, 2014).

[6] NAD Case #5816 (Mar. 10, 2015).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] See, e.g., *Belton v. FanDuel Inc.*, No. 1:15-cv-08234 (S.D.N.Y. Oct. 19, 2015); *Berg v. FanDuel Inc.*, No. 1:15-cv-08612 (S.D.N.Y. Nov. 2 2015); *Martin v. DraftKings Inc.*, No. 1:16-cv-10232 (C.D. Cal. Oct. 20, 2015).

[11] NAD Case #5786 (Nov. 21, 2014).

[12] NAD Case #5660 (Dec. 10, 2013).

[13] *Bozic v. Uijl, et al.*, No. 3:16-cv-00733-BTM-RBB (S.D. Cal. Mar. 29, 2016).

[14] See *Duran v. Obesity Research Inst. LLC*, No. 37-2013-00048664-CU-BT-CTL (Cal. Super. Ct. May 13, 2013); *Fernandez v. Obesity Research Inst. LLC*, No. 13-cv-00975-MCE-KJN (E.D. Cal. May 16, 2013).

[15] *Bozic v. Uijl*, No. 3:16-cv-00733-BTM-RBB (Dkt. No. 42).

[16] As of the date of this writing, it appears that the litigation is ongoing. The Bozic plaintiff appealed the transfer and consolidation to the Eastern District of California, but ultimately was not successful in that endeavor.

[17] NAD Case #5660 (Dec. 10, 2013); see also *In the Matter of Basic Research*, F.T.C. Docket No. 9318, available at: <https://www.ftc.gov/sites/default/files/documents/cases/2006/06/060619decisionandorder.pdf>.

[18] See *Spence v. Basic Research LLC*, No. 2:16-cv-00925-CW (S.D.N.Y. June 24, 2015).

[19] Where a product was involved in duplicate lawsuits, we have listed only the earlier filed action.

Advertiser Self-Regulation And Class Actions: Part 2

By John Villafranco, Glenn Graham and Lauren Myers

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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.



John Villafranco



Glenn Graham



Lauren Myers

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.

John E. Villafranco is a partner, Glenn T. Graham is a senior associate and Lauren F. Myers is an associate at Kelley Drye & Warren LLP.

Disclosure: Kelley Drye & Warren LLP represented Unilever United States Inc. in the September 2016 proceeding before the National Advertising Division referred to in 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>.

Advertiser Self-Regulation And Class Actions: Part 3

By **John Villafranco, Glenn Graham and Lauren Myers**
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Advertisers choose to take part in proceedings before the National Advertising Division as a form of industry self-regulation, but also as an alternative to potentially costly litigation. However, some companies have wondered whether NAD participation might actually make consumer class actions more, rather than less, likely.

The first installment of this article broadly examined correlations between NAD decisions and class action filings since the start of 2013. The second installment analyzed the timing of specific class action filings in relation to adverse NAD decisions. This third and final installment considers which firms are filing class actions, and whether an NAD decision can have any impact on a federal court's analysis of a cause of action.

Who Is Filing These Consumer Class Action Cases?

To this point we have focused on what class actions were filed following an adverse NAD decision. We have not discussed who has been involved with filing these actions. Our research shows that 42 different plaintiffs firms have filed the class actions discussed in this article, either on their own or with co-counsel.

The vast majority have only filed one such suit, although some have been involved with two. Only three plaintiffs firms have filed more than two such actions. The lack of repeat plaintiffs firms indicates that the plaintiffs class action bar is likely not reviewing NAD decisions with the intention of finding potential targets. There is, however, one glaring exception.

The law firm of Bursor & Fisher PA has been involved in nine class actions following an adverse NAD decision. These nine lawsuits involved eight different products. This is a pretty large number to be challenged by one law firm, especially given the fairly low number of unique products involved overall. Some of the products challenged, such as Tom's of Maine and FanDuel/DraftKings, were subject to massive media attention and may not be attributable to the firm's reviewing NAD decisions.



John Villafranco



Glenn Graham



Lauren Myers

We cannot say whether reviewing NAD decisions is something that the firm actually does (or did). But some of the firm's class actions could lead reasonable minds to believe its attorneys did review the NAD decisions at least at some point after January 2013 (we note that Bursor & Fisher was not one of the repeat players identified in our prior article). This is because those class actions were filed after January 2013, but reference and describe NAD decisions that occurred years earlier.[1]

Still, excluding this one exception, the data suggests that the vast majority of class actions are filed by different members of the plaintiffs bar, without any apparent correlation to an action before the NAD.

Do NAD Decisions Impact Federal Court Decisions?

We next turn to follow up our prior analysis concerning whether an NAD decision can have an impact on a federal court's substantive analysis of a cause of action. We noted that most courts tend to respectfully reject a party's overreliance on an NAD determination to substantively support their claims.[2] So has anything changed since 2013? The short answer is no.

In fact, our research reveals that there have been very few case decisions that even reference the NAD since 2013. What we did find is in step with our prior analysis. For example, in *Euro-Pro Operating LLC v. Dyson Inc.*, the court declined to consider an NAD decision when deciding a motion to dismiss.[3] Although the court noted that the complaint mentioned a prior NAD decision, the court did not consider it, in part because the NAD decision did not address whether the advertiser ceased the advertising campaign at issue, and because the NAD decision was "not relevant to the issue at hand." [4]

The lack of federal court decisions citing to NAD findings is not surprising. In fact, an opposite finding would be troubling for proponents of self-regulation. But what about the opposite scenario — does a federal court decision have an impact on an NAD proceeding?

In 2013, we argued that the NAD's administrative closure in light of a pending class action makes no sense because a judge will rarely get to the merits of a federal class action. This is true even though Advertising Self-Regulatory Council Rule 2.2(B)(1) provides that NAD is required to advise the challenger that a matter is no longer appropriate for formal investigation if the matter is the subject of a pending litigation or an order by a court.[5]

Recently, the National Advertising Review Board upheld the September 2016 NAD finding with respect to advertising statements concerning Tom's of Maine "Naturally Dry" antiperspirant, despite the fact that the claims were substantially similar to those subject to the 2015 class action settlement agreement previously discussed.[6] In doing so, the panel stated that it "recognizes that the ASRC Procedures were initially drafted long before [the] explosion of consumer class actions, and it is likely Section 2.2 (B)(1)(b) was created without consideration of whether settled consumer class actions should prevent the NAD from exercising jurisdiction over NAD challenges involving similar claims." [7]

The panel did recommend "that the ASRC Board consider clarifying Section 2.2(B)(1)(b) to more clearly state whether, or under what terms, a settled consumer class action should result in the NAD administratively closing a challenge that involves similar claims." [8] There have not been any rule changes since the panel's pronouncement. This is not a surprise, however, considering it is a rare occurrence for the ASRC board to approve a rule change.

Finding the Correct Cy Pres Recipient

For our last point, we briefly update our discussion as to whether the Ninth Circuit continues to follow *Dennis v. Kellogg Co.*[9] There, the defendants proposed a class action settlement arising out of allegedly false statements concerning Frosted Mini-Wheats that included a cy pres distribution to charities to feed the indigent.

In invalidating the proposal, the Ninth Circuit famously quipped that when settling a false advertising case, “appropriate cy pres recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from or redressing injuries caused by false advertising.”[10]

Given that other jurisdictions were not receptive to the *Dennis* holding, we wondered whether the decision would stand until our next update. It turns out that it seemingly has.

For example, in *Nigh v. Humphreys Pharmcal Inc.*, the court upheld a cy pres distribution in a consumer fraud case to Consumers Union.[11] Following *Dennis*, the court rejected an objection to the intended cy pres recipient, noting that Consumers Union “is an expert, independent nonprofit organization whose mission is to work for a fair, just and safe marketplace for all consumers and to empower consumers to protect themselves.”[12]

Thus, the court found “that this cy pres distribution to Consumers Union reflects the objectives” of the California consumer fraud statutes.[13] We note, however, that our research did not reveal any recent cases from outside the Ninth Circuit that explicitly relied on *Dennis*.

So What Does This All Mean?

While class actions may impede the self-regulatory process from time to time, our conclusion is that participating in an NAD proceeding does not appear to be correlated to class action filings. We reached a similar result in 2013, and new research suggests that there is even less of a correlation between follow-on class actions and an adverse NAD decision.

For now, companies interested in the self-regulatory process can take solace in the fact that such participation does not make the prospect of facing a consumer class action more likely than other factors.

John E. Villafranco is a partner, Glenn T. Graham is a senior associate and Lauren F. Myers is an associate at Kelley Drye & Warren LLP.

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[1] See *Karhu v. Vital Pharm. Inc.*, No. 0:13-cv-606768-JC (S.D. Fla. April 3, 2013); *Dean v. Colgate-Palmolive Co.*, No. 5:15-cv-00107 (C.D. Cal. Jan. 16, 2015).

[2] See *Gaul v. BayerHealthcare LLC*, No. 5110, 2013 U.S. Dist. LEXIS 22637 (D.N.J. Feb. 11, 2013) (requiring plaintiff to do more than point to the NAD report to adequately allege cause of action at the pleading stage); *Rexall Sundown Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 36 (E.D.N.Y. 2009) (explaining that NAD decisions “make no finding of consumer deception, nor do they make a finding of likelihood of consumer deception”).

[3] No. 14-cv-13720-ADB, 2015 U.S. Dist. LEXIS 62195 (D. Mass. May 12, 2015).

[4] *Euro-Pro Operating LLC v. Dyson Inc.*, No. 14-cv-13720-ADB, 2015 U.S. Dist. LEXIS 62195 (D. Mass. May 12, 2015).

[5] Rule 2.2 (B)(1)(b), Rules of the Advertising Self-Regulatory Council (ARSC), available at: <http://www.asrcreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Effective-2-1-16.pdf>.

[6] Report of NARB Panel #215 (Jan. 25, 2017). We note that Kelley Drye & Warren LLP represented Unilever United States Inc. in this proceeding.

[7] *Id.*

[8] *Id.*

[9] 697 F.3d 858 (9th Cir. 2012).

[10] *Id.* at 867.

[11] *Nigh v. Humphreys Pharmcal Inc.*, No. 12cv2714-MMA-DHB, 2013 U.S. Dist. LEXIS 161215, at *25 (S.D. Cal. Oct. 23, 2013).

[12] *Id.*

[13] *Id.*