

## CrossFit Rival Can't End Insurer's Escape Bid In False Ad Suit

By Ryan Boysen

*Law360 (February 11, 2019, 10:22 PM EST)* -- The National Strength and Conditioning Association can't shut down a suit by its insurer seeking to dodge coverage for an underlying false advertising suit brought by CrossFit Inc. just yet, a California federal court ruled Monday, rejecting the NSCA's argument that the insurer's suit would require the same set of facts to be litigated simultaneously.

Insurer National Casualty Co.'s suit hinges on two separate sanctions orders issued against the NSCA in 2017 in its battle with CrossFit. Among other things, the court handed down so-called issue and adverse inference sanctions, essentially a finding that it would be taken as a given that the NSCA intentionally published a controversial report knowing that it was false and that it was doing so with the intention to harm CrossFit.

In its bid to dismiss National Casualty's suit in July, the NSCA said its insurer had put it in an impossible position where it would be required to litigate the same facts over whether or not it intentionally published the report in order to harm CrossFit in two parallel suits.

In Monday's motion denying the NSCA's bid to dismiss the suit, however, U.S. District Judge Janis L. Sammartino said there wasn't much chance of that happening, since National Casualty's complaint "makes clear that it is seeking a determination based only on the issue sanctions imposed by the court in the federal lawsuit."

"Consequently, should the federal lawsuit proceed to trial, the NSCA will not be litigating these issues, which are now 'taken as established,'" Judge Sammartino added.

National Casualty insures the NSCA under a commercial general liability policy and an excess policy.

The NSCA is currently embroiled in a bitter legal battle with CrossFit over claims that it published a since-debunked 2013 study portraying CrossFit's exercise regimen as unsafe, despite knowing the study's findings were bogus.

CrossFit accused the NSCA in a suit in California federal court of publishing the study to dissuade consumers from using the company's products and to instead steer them toward strength coaches and personal trainers, whom the NSCA certifies and trains for hefty fees.

The NSCA hit back with its own defamation suit in California state court, but moved to voluntarily

dismiss that suit late last year, citing the "unusual and extraordinary" expenses caused by an order that forced the organization to hire a forensic accounting firm in the wake of several discovery violations.

Those same discovery violations led the federal court to hand down the issue and adverse inference sanctions, alongside nearly \$500,000 in attorneys' fees, in instances in which the NSCA allegedly withheld documents and lied to the court.

National Casualty has been defending the NSCA since the first suit was filed in 2014, but in June the insurer sued its policyholder, arguing that the federal court's finding of intent on the NSCA's part should allow it to wash its hands of the dispute.

The NSCA said National Casualty's suit should be dismissed since it would turn on the exact same questions of fact and law as the ongoing CrossFit suits, meaning the NSCA will be forced to fight a "two front war" against both its legal adversary and its insurer at the same time.

In Monday's order, Judge Sammartino applied the framework laid out in the Supreme Court's 1976 Colorado River Water Conservation District v. U.S. decision, which determines when federal courts should abstain from a case to prevent overlapping issues in state and federal court from becoming too entangled.

The present case hinges primarily on the question of whether "piecemeal litigation" will occur, due to "different tribunals [considering] the same issue, thereby duplicating efforts and possibly reaching different results."

"Here, the court concludes that there is minimal risk of piecemeal litigation," Judge Sammartino said, because the federal court will not be issuing any more rulings on its adverse inference sanctions, and the state court suit is likely to be dismissed soon.

"The court therefore agrees with National Casualty that, 'by relying on the determinations already made by the district court, National Casualty does not seek to prove (and in fact cannot impact or change) CrossFit's claims against the NSCA,'" Judge Sammartino said.

Neither party responded Monday to requests for comment.

The NSCA is represented by Mary Craig Calkins, Daniel H. Rylaarsdam and Nancy L. Stagg of Kilpatrick Townsend & Stockton LLP.

National Casualty is represented by Neil Selman and Lisa M. Lampkin of Selman Breitman LLP.

The case is National Casualty Co. v. National Strength and Conditioning Association, case number 3:18-cv-01292, in the U.S. District Court for the Southern District of California.

--Additional reporting by Adam Rhodes and Matthew Guarnaccia. Editing by Michael Watanabe.