



## NAD Decisions: A Roadmap To Class Action Litigation?

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Law360, New York (July 18, 2011) -- No sizable consumer products or services company is unfamiliar with what seems an increasing number of putative class actions claiming harm suffered as a result of allegedly false or misleading advertising. Advertising class actions based on state consumer protection and deceptive practices statutes have gathered steam in recent years with larger and more frequent settlements.

Unremarked has been a disturbing trend in several of these cases — a growing relationship between decisions issued by a nationally regarded, voluntary dispute resolution forum and the appearance of the same claims in consumer class actions some time thereafter. Failure to address this emerging trend risks impairing the utility of what both the business community and government universally regard as an important public service.

### The National Advertising Division: How It Operates

The National Advertising Division of the Council of Better Business Bureaus (“NAD”) was created in 1971 and offers a voluntary dispute resolution vehicle in advertising disputes. Consumers are able to submit complaints asking NAD to review advertising of concern, but the NAD process is most visibly and widely used by competitors to initiate challenges.

NAD is industry-funded and is widely regarded as an effective self-regulatory body able to resolve issues that the U.S. [Federal Trade Commission](#) and state attorneys general with their limited resources might never address. On several occasions, FTC staff and even commissioners have noted NAD’s important role.

The benefits of NAD proceedings are well recognized.

- Filing a complaint with NAD helps competitors resolve advertising disputes without resort to costly litigation.
- Companies avoid intrusive and time-intensive discovery. Parties submit only what they want to be considered, and cases are decided on briefs, with separate meetings between NAD and each party.
- The timetable to resolution is comparatively quick, and experienced attorneys well versed in advertising law adjudicate the disputes.
- Parties must maintain the confidentiality of each other’s submissions and are not permitted to tout NAD decisions in their own advertising.

Although the process is voluntary, and damages are not awarded, it is not toothless. Failure to comply with NAD's recommendations will result in referral of the matter to the FTC. NAD estimates that it achieves 95-percent compliance with its recommendations.

Practitioners and advertisers are no doubt appreciative of the thoughtful decisions published by NAD after the dispute is resolved. In addition to enunciating basic legal principles underlying its decisions, NAD generally sets out in painstaking detail the positions of the parties (often verbatim from their submissions) and the bases for its final decision — a level of detail almost never found in agency consent orders or warning letters.

That level of detail has increased over time. For example, a randomly selected but unscientific sampling by the authors of 10 decisions each from 1990, 2000 and 2010 indicates that decisions were typically one or two pages in length in 1990, an average of four pages 10 years later and six pages by 2010. It is not unusual for decisions to reach 20 to 30 pages in particularly complex disputes.

### **The Use of NAD Decisions in Consumer Class Actions**

With the benefits of more detailed and clearer decisions come risk. Although, as noted, NAD imposes confidentiality obligations on participants, NAD itself publishes its decisions online and in a print publication and releases a press statement when a decision is issued.

NAD's tendency to spell out the bases for its decisions in increasing detail, coupled with plaintiffs' counsels' apparent discovery of NAD as a resource for potential claims, has resulted in an increasing trend toward the use of NAD decisions as road maps to consumer class claims. A stark example of this phenomenon is the recent NAD proceeding and consumer class action filed against the Wm. Wrigley Jr. Company ("Wrigley") in connection with advertising claims for Wrigley's Eclipse chewing gum.

On April 1, 2009, NAD released its decision in a competitor-initiated challenge. In it, the challenger took issue with a variety of Wrigley's claims, including print ads that claimed that Eclipse gum "contains a natural ingredient, scientifically proven to help kill the germs that cause bad breath" and television ads that stated, "New germ-killing Eclipse Gum. Advanced fresh breath, when you need it."

NAD's 13-page decision chronicled the scientific evidence presented by Wrigley in support of its advertising claims — and the challenger's attacks on that scientific evidence — in great detail. The decision named and cited to the studies submitted to NAD during the course of the proceeding and summarized the major findings and conclusions of those references. The final six pages set forth NAD's interpretation of the data presented and its critique of Wrigley's position.

NAD ultimately concluded that Wrigley should discontinue or modify its advertising. NAD recommended that the print advertising be modified in order to avoid communicating, expressly or by implication, "that there is credible scientific evidence that the gum has been proven to kill the germs that cause bad breath or provides fresh breath based on any germ-killing capability." NAD recommended that the television commercials be discontinued because the claims "are not supported by the evidence in the record."

Exactly one month later, a plaintiff filed a consumer class action lawsuit in the Southern District of Florida alleging that Wrigley violated the Florida Deceptive and Unfair Trade Practice Act and breached express warranties for its product through its advertising for Eclipse.

The plaintiff raised the identical claims at issue in the NAD proceeding and expressly referred to the NAD proceeding in the complaint — describing NAD, “whose purpose is to foster truth and accuracy in national advertising,” and quoting NAD’s final conclusions regarding the claims at issue. In turn, the district court referred to NAD’s decision when describing the background of the case in its decision denying Wrigley’s motion to dismiss. See *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1337-38 (S.D. Fla. 2009).

The parties subsequently settled for approximately \$6 million (with a \$1 million “additional settlement fund” should the amount of total claims exceed that sum).

Wrigley is not the only company to face a consumer class action that appears to have grown out of an NAD proceeding. Four consumer class actions have been filed against [General Mills Inc.](#) for its advertising of Yoplait yogurt — the first shortly after NAD recommended that the company modify or discontinue its claims. And late last year, a consumer class action complaint was filed against Sunny Delight Beverages Co. in the Northern District of California. The factual allegations against Sunny Delight largely consist of a recitation of the NAD decision issued in May of that year.

NAD decisions are not binding on the courts, but the moral authority of NAD can carry great weight with judges and juries — and, perhaps more importantly, can provide additional settlement leverage to plaintiffs.

Many observers have noted the dramatic increase in consumer class actions and, with it, the increased focus on consumer protection and false advertising. Left unaddressed has been NAD’s inadvertent role in helping plaintiffs’ counsel identify potentially viable claims, anticipate the advertiser’s defenses and focus on areas of potential advertiser vulnerability. In short, NAD can make a plaintiffs’ lawyer’s job in identifying, preparing and filing a case that much easier.

### **Risk to NAD and the Public Interest**

Advertisers have begun to recognize this new category of risk associated with the NAD process. What once seemed a relatively low-cost and attractive alternative to resolve disputes increasingly is viewed as a potential “Pandora’s box” to future claims. Absent change, advertisers soon may start deciding to “take their chances” and defend against competitors’ claims in court, since in many cases a competitor will elect not to pursue that more costly venue.

Although NAD can refer a recalcitrant advertiser to the FTC, that agency simply lacks the capacity to pursue all of the matters in which it otherwise might have interest. Moreover, many cases that now go to NAD may not rise to a level that warrants the expenditure of scarce governmental resources. In addition, companies might decide to move away from NAD and toward a fully private, confidential arbitration process.

In any of these scenarios, the harm to the public interest would be substantial. Lost would be the valuable role NAD plays in helping to correct false or misleading advertising and in establishing “rules of the road” to help well-intentioned advertisers avoid future missteps.

## **A Proposed Solution**

What to do? There are no easy answers. An important benefit of NAD proceedings is precisely the level of detailed analysis included in NAD decisions. Nonetheless, the NAD at least should consider potential changes.

We do not pretend to have all of the answers but want to propose at least one possible solution. NAD might “anonymize” its decisions by removing participants’ names and identifying details while preserving the legal discussion intended to help guide the development of future advertising claims.

NAD could describe scientific studies and consumer perception surveys without including specific details that link the studies to a particular product or service. NAD’s “Case Category” identifiers — which identify the general subject matter of the proceeding (e.g., “consumer electronics” or “financial services”) — would continue to provide context to its decisions for future reference and searching purposes.

Such a solution would not represent a radical or unprecedented approach. Lawyers already are familiar with anonymized “advisory opinions” issued by state attorneys general and federal and state regulators. Those opinions are typically far less substantial than any model we would propose for NAD but nevertheless provide important instruction to the public.

At the same time, this approach would lend greater meaning to NAD’s already articulated value of confidentiality. An “anonymized” decision would preserve the most important precedential aspects of NAD’s jurisprudence while helping to ameliorate the factors that, if left unaddressed, may lead increasingly to companies “opting out” of this valuable dispute resolution forum.

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