

# BAA's 37th Marketing Law Conference



## Product Testing Design for Claims Substantiation and Advertising Challenges

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# Summary of Discussion

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- I. Venues and Burdens
- II. Types of Advertising Claims
- III. Key Testing Principles
- IV. Some Specific Test Design Considerations
- V. Case Studies

# Venues and Burdens

## National Advertising Division (NAD)

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- **Burden on Advertiser**

- The burden is on the advertiser to come forward with testing to substantiate **all** express and implied claims.
  - “It is well established that ... the advertiser has the initial burden of providing a reasonable basis for its claims.”
  - “If NAD finds that an advertiser has provided a reasonable basis for its claims, the burden shifts to the challenger” to identify fatal flaws in the advertiser’s testing or offer more persuasive results.
    - *S.C. Johnson & Son, Inc. (Scrubbing Bubbles)*, NAD Case #5779, at 9 (2014)

# Venues and Burdens

## Courts: Lanham Act and State Laws

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- **Burden on Challenger**

- Generally, the plaintiff (or challenger) has the burden of proving the advertising claims are false
  - “Where the defendant's advertisement claims that its product is superior, plaintiff must affirmatively prove defendant's product equal or inferior...”
    - *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1992)

# Venues and Burdens

## Courts: Lanham Act and State Laws (cont'd)

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- **However**, the burden of proof shifts to the defendant (or advertiser) for “establishment claims”
  - “Where . . . defendant's ad explicitly or implicitly represents that tests or studies prove its product superior, plaintiff satisfies its burden by **showing that the tests did not establish the proposition for which they were cited.**”
  - “We have held that a plaintiff can meet this burden by demonstrating that the **tests were not sufficiently reliable** to permit a conclusion that the product was superior.”
    - *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1992)

# Venues and Burdens

## Courts: Lanham Act and State Laws (cont'd)

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- Examples of express Establishment Claims
  - “**Tests/Studies prove** that product x outperforms product y”;
  - “Clinically proven to ...”
- Establishment Claims can be **implied**
  - The specific numerical claim, “allowing seven times more air and sweat vapor to pass through the rain suit,” indicated the defendant ran independent tests
    - *W.L. Gore & Assocs. v. Totes, Inc.*, 788 F. Supp. 800, 809-10 (D. Del. 1992)
- Establishment claims can be made by indirect reference to testing, even in a super
  - “**\*Based on test results**” or a reference to a particular study

# Venues and Burdens

## Federal Trade Commission

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- **Burden on the Advertiser**

- The burden is on the advertiser to substantiate advertising claims **before** making them.
  - “[A]s a matter of law, firms lacking a reasonable basis before an ad is disseminated violate Section 5 of the FTC Act...”
  - “[W]e reaffirm our commitment to the underlying legal requirement of advertising substantiation – that advertisers and ad agencies have a **reasonable basis** for advertising claims before they are disseminated.”
    - FTC Policy Statement Regarding Advertising Substantiation

# Venues and Burdens

## Federal Trade Commission (cont'd)

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- **Higher Burden on Advertiser for Establishment Claims**
  - For establishment claims, “the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers”
  - Where establishment claim is:
    - **Specific**, advertiser must possess that specific testing/study
    - **Non-specific**, e.g., “medically proven,” advertiser “must possess evidence sufficient to satisfy the relevant scientific community of the claim’s truth.”



# Types of Advertising Claims

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- **Superiority Claims**
  - **Product Differences:** “Product x is better than product y”
  - **Count-Based Claim:** “4 out of 5 doctors recommend...”
  - **Ratio Claim:** “Product x cleans 2x as well as product y”
    - Strict guidelines apply to ratio claims



# Types of Advertising Claims

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- Parity Claims

- **Equivalence Claim:** “Performs just as well for half the price”
- **No Difference Claim:** “Same cleaning power as bleach”
- **Unsurpassed Claim:** “No product cleans better...”

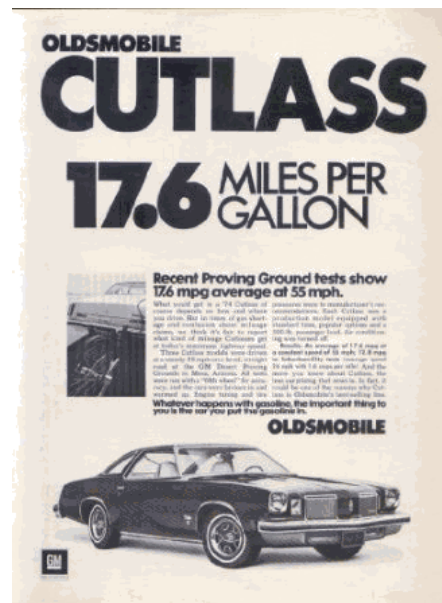


# Types of Advertising Claims

- **Non-Comparative/Monadic Claims**

- Standard **efficacy** claims

- “**Up To**” Claim: “... up to 47% savings”; “up to 5 hours battery life on a single charge”



# Key NAD Testing Principles

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- **The Five Questions**
  1. **Is there an industry standard test?**
  2. **Is the testing methodology sound?**
  3. **Is the study testing the actual product(s) at issue?**
  4. **Is there a correlation between the test results and the challenged claims?**
  5. **Are the test parameters consumer relevant?**
- Same principles generally apply in courts and at the FTC

# Key NAD Testing Principles

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## 1. Is there an Industry Standard Test?

- “When an advertiser wishes to use its own proprietary standard in lieu of an industry standard to support a superiority claim, it must show that its proprietary standard is a superior alternative to the industry standard.”
  - *Toto USA, Inc.* (Toto Prominence Toilets), NAD Case #3402 (1997)
  - “Although the industry standard does not use ‘real world’ material in its testing, Toto has not shown that its [proprietary] miso testing material offers a superior alternative to polypropylene and sponges by performing more closely to human waste in plumbing fixtures”

# Key NAD Testing Principles

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## 1. Industry Standard Test (cont'd)

- Courts occasionally permit deviations from the industry standard:

- *L&F Products v. Procter & Gamble Co.*, 845 F. Supp. 984 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 709 (2d Cir. 1995):

“Although P&G bakes its soap scum composition at a higher temperature than that mentioned in the ASTM guidelines, L&F failed to demonstrate that baking at this higher temperature creates an unrealistically tenacious composition.”

# Key NAD Testing Principles

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## 1. Industry Standard Test (cont'd)

- ASTM provides tests for specific industries and products
- ASTM Guide for Sensory Claim Substantiation:
  - “NAD considered, but was not persuaded by, the advertiser’s argument that the ASTM Guideline is simply a guideline, not a rule. The ASTM standard for unqualified preference claims is well-recognized, endorsed by industry and routinely relied upon by NAD.”
    - *Procter & Gamble* (Olay Ultra Moisture Beauty Bar), NAD Case #5830 (2015)
    - *MOM Brands Company* (Malt-O-Meal Cereals), NAD Case #5782 (2014): Strict adherence to ASTM Guide in preference test design

# Key NAD Testing Principles

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## 2. Is the testing methodology sound?

- This can cover many aspects of test design and implementation
- Repeatability and reliability
  - Repeatability: Will the test be consistent each time it is performed?
  - Reliability: Is the methodology reliable?
- Bias comes in many forms and is a key concern



# Key NAD Testing Principles

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## 3. Is the study testing the actual product(s) at issue?

- Are the products tested the ones in the advertisement?
- Are you testing the current formulation?
- If not, are you certain the active ingredient is the same and at the same concentration?

- *Meliorra LLC (Avotone Wrinkle Relaxant Cream), ESRP Case #65 (2012):*

“Lipotec study conducted on the 10% acetyl hexapeptide-3 solution, **the same concentration** as found in Avotone **does provide** substantiation for the claim ‘The active ingredient in Avotone, Acetyl Hexapeptide-3 (Argireline), has been proven to reduce the depth of the wrinkles in the face.....’”

# Key NAD Testing Principles

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## 4. Is there a correlation between the test results and the challenged claims?

- Does the test conducted support the claim being made?
- Without such correlation, even the most robust and reliable test results cannot be used to support (or challenge) the advertising claim

# Key NAD Testing Principles

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## 5. Are the test parameters consumer relevant?

- Product must be used by test subjects **in accordance with usage instructions**.
- Product must be tested using **typical users** of the product.
- Test must show a **consumer meaningful difference**
  - Reported difference should be perceptible to consumers.
    - (As opposed to a “statistically significant” difference.)
    - *Johnson & Johnson Healthcare Products (Reach Total Care), NAD Case #5366 (2011):*

Advertiser provided evidence showing “difference in whitening/stain removal was a consumer meaningful (perceptible) difference”
  - Particularly critical where claim is “visible” improvement.

# Some Specific Test Design Considerations

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- **Test Types/Locations**
  - Home Use (consumer judging)
    - Best replicates actual product use in setting
    - More expensive to field
  - Central Location (consumer judging)
    - Easier to facilitate
    - Less expensive
  - Laboratory/Instrumental
    - Least expensive
    - Less indicative of real world usage

# Some Specific Test Design Considerations

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- **Geographic Diversity and Quotas**

- National claim should represent all major regions

- Northeast

- Southeast

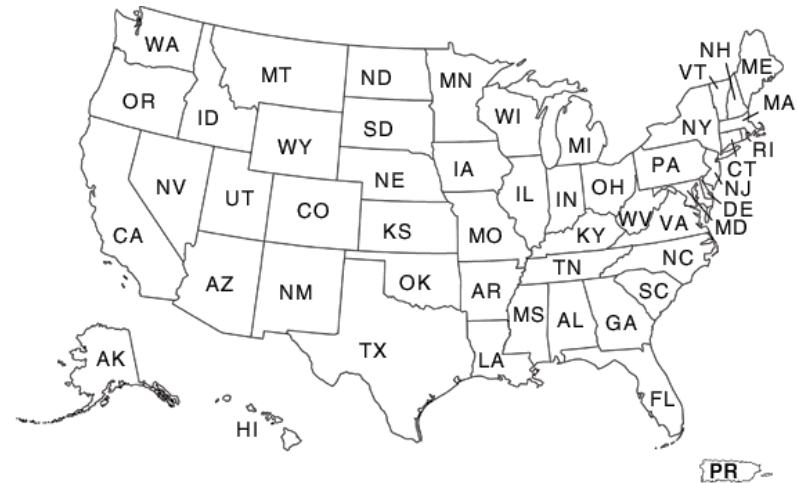
- Central

- West

- Test two locations per region

- Quotas: Matching users tested to demographics of actual users of the products.

- E.g., Gender, Age, Race/ethnicity



# Some Specific Test Design Considerations

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- **Bias**
  - Critical danger and often overlooked

Forms of Bias	Ways to Address Bias
Position (product first shown tends to be preferred)	Rotate choices
Response (tendency to say yes)	Control/Placebo (for efficacy, not comparative, claims)
Codes	Random, rotated 3 digit # for codes
Design	Blinding; Use of independent test subjects and judges

# Some Specific Test Design Considerations

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- **Consumer Surveys**

- Used to substantiate preference claims
  - E.g., best tasting, 9 out of 10 dentists recommend..., 1st Choice of Doctors
  - Different from surveys used to prove consumer confusion
  - Identifying the universe is key – wrong universe generally makes survey inadmissible/useless
  - Make sure the overall preference question is one of the first questions – if not the first question – in the survey

# Some Specific Test Design Considerations

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- **Preference Questions**

- Options:

- **Product A**

- **Product B**

- **No preference**

- No preference option:

- Legal community tends to prefer it

- Science community prefers to avoid it; wants forced choice

- ASTM says: offer no preference option and split results equally

- Thurstonian model available (Don't ask!)

- Watch out for unqualified preference claims

- Watch out for statistical significance dropping off with higher multipliers



# Some Specific Test Design Considerations

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- **Preference Questions (cont'd)**

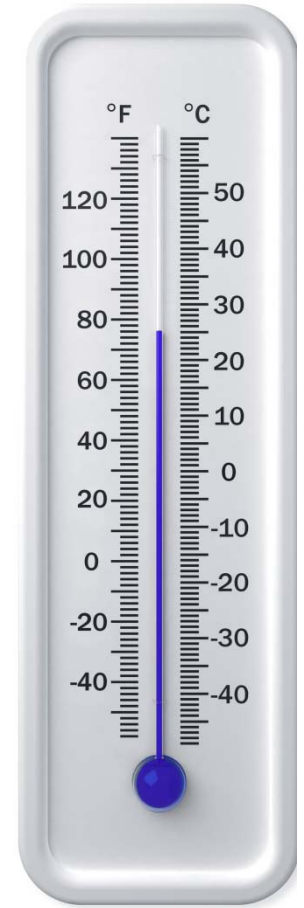
*Playtex Products, Inc.* (Playtex Beyond Tampons), NAD Case #4364 (2005):

- **NAD acknowledges that experts differ** as to whether a “no preference” option is integral to the methodology of a consumer use study comparing preference for different products. While federal courts have determined that the use of a forced choice option is problematic as concerns preference claims, they have not necessarily rejected studies outright based on the use of the forced choice option. Indeed, the ASTM Guidelines recognize that the issue of whether or not to afford such option is heavily debated. **For its part, NAD has held that the absence of a “no preference” option in a consumer survey is problematic** because it encourages survey participants to guess and thereby resulting in an inaccurate assessment of consumer preference which can undermine the survey’s reliability.

# Some Specific Test Design Considerations

- **Ratio Claims**

- Very popular but can be tricky to substantiate
- Difference between Interval scale and ratio scale
  - Interval scale:** has equal spacing between units (thermometer)
  - Ratio scale:** also requires an absolute zero (metric ruler)
- Sensory rating scales are problematic for ratio claims
  - The claim “twice the sugar” is not the same as “tastes twice as sweet”
  - Response bias is a problem with use of rating scales to make ratio claims



# Other Test Design Considerations

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- **Statistical Considerations**

- Statistical Significance

- 95% confidence level is the standard

- Very rarely are there exceptions

- “[A] lesser standard [than 95% significance] may be appropriate to support claims ... that are made to a limited audience capable of understanding levels of statistical significance.”

- *In re Bristol-Myers Co.*, 102 F.T.C. 21 (1973), *aff'd* 738 F.2d 554 (2d Cir. 1984)

- Pooling data is risky and only permissible under certain circumstances

# Other Test Design Considerations

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- **Use of Experts**
  - Qualified, independent expert
  - Used to design protocol, perform or supervise test, and analyze data
  - Increases costs, but often worth it
  - Helps to reduce bias
  - Provides widest range of testing options
  - Helpful when bringing case before NAD or a judicial body

# Case Studies

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- **Church & Dwight Co., Inc.** (OxiClean White Revive Laundry Stain Remover), NAD Case #5771 (2014)
  - Clorox challenged broadcast, print and internet advertising that allegedly implied OxiClean WR is superior to chlorine bleach when used through-the-wash.
  - Church & Dwight supported the advertising claims with stain testing conducted according to the ASTM procedure for assessing stain removal.



# Case Studies

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## *(OxiClean White Revive)*

- Clorox conducted two tests based on the ASTM guidelines, which supposedly refuted the superior stain removal claim:
  - **Test 1 – No pre-soak:** For most stains tested, Clorox's chlorine bleach product provided statistically significantly better stain removal than OxiClean WR, including on clay stains (which corresponds to the muddy puddle in the commercial).
  - **Test 2 – With pre-soak:** Clorox bleach performs statistically significantly better or at parity on 8 out of 16 stains tested.

# Case Studies

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## *(OxiClean White Revive)*

- NAD:
  - Church & Dwight’s testing substantiated the superiority claim.
  - Clorox’s testing did not refute Church & Dwight’s testing:
    - Clorox tested **only cotton swatches**, whereas ASTM requires testing of more than one type of fabric.
    - Clorox’s first test **did not pre-soak** the swatches, despite a reference to pre-soaking “tough stains” in the commercial and on packaging.
    - Neither of Clorox’s tests followed the OxiClean WR **usage instructions**, which require that, after pre-soaking, the product be added to the wash along with detergent.

# Case Studies

- **MOM Brands Company** (Malt-O-Meal Brand Cereals), NAD Case #5782 (2014)
  - Post Foods challenged express claims that Malt-O-Meal cereal was preferred over Post’s cereal
    - E.g., “National Taste Test WINNER Fruity Dyno-Bites preferred over Post Fruity Pebbles.”





# Case Studies

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## *(Malt-O-Meal Brand Cereals)*

- Post claimed that MOM's taste tests failed to meet ASTM standards, including by failing to provide for a geographically representative sample.
- MOM argued that its taste tests were conducted nationwide and each census region was reasonably represented. According to MOM, the Northeast region had only one location because its products have lower distribution in that area.

# Case Studies

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## *(Malt-O-Meal Brand Cereals)*

- NAD found the taste test universe was flawed:
  - ASTM Standard Guide for Sensory Claim Substantiation requires that “a national claim should be based on a sample representing major geographic regions . . . [a] minimum of two markets in each of the four regions should be included.”
  - MOM utilized only one testing center in the Northeast, which NAD found was “a significant deviation from the industry standard.”
  - “This affects the consumer relevance of the taste tests, as taste preferences can be significantly impacted by geographic variance.”

# Case Studies

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- ***Dyson, Inc. v. Bissell Homecare Inc.***, 951 F. Supp. 2d 1009 (N.D. Ill. 2013)
  - Bissell advertised inclusion of a “HEPA media filter” in its vacuum cleaners.
  - Bissell claimed its vacuum cleaner and filters captured 99.9% of certain allergens. Implicit establishment claim.
  - Bissell’s support was testing on its filters alone (i.e., not tested inside a vacuum cleaner).

dyson



# Case Studies



*(Dyson v. Bissell)*



# Case Studies

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## *(Dyson v. Bissell)*

- Dyson challenged, claiming that “HEPA,” standing for High Efficiency Particulate Air, is a defined term meaning that a filter or filtration system traps 99.97% of dust and other particles that are 0.3 microns in size.
- Dyson conducted testing purportedly showing that Bissell’s filters did not perform at HEPA level when tested in isolation, and tested far below HEPA level when tested in Bissell’s vacuums.

# Case Studies

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## *(Dyson v. Bissell)*

- On cross-motions for summary judgment, the court ruled for Dyson; Bissell's testing did not substantiate its HEPA advertising claims:
  - "Bissell used the [HEPA] Statements to advertise and sell vacuum cleaners, not filters."
    - Testing the filters in isolation did not substantiate claims as to the vacuum cleaners.
  - Further, Bissell tested the filters at a lower air flow than they are used in the vacuum cleaners.
    - So, even if the testing were relevant, it still would be inadequate to support the claim.

# Key Considerations, in Conclusion

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- What is your venue?
- What is your burden?
- What type of advertising claim are you substantiating or challenging?
- Have you complied with the five key testing principles?
- Have you examined the test methodology for all forms of bias?
- Is it feasible to consult an expert?

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