Podcast Transcript

AD Nauseam Ep 39 – Food Glorious Food Pt. 2 – NAD Analysis

Date: January 7, 2025

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Run Time: 22:34

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Rubenking: Thank you for joining us for another episode of BakerHosts' AD Nauseum, a podcast series focusing on new and trending advertising issues, with an emphasis on the FTC and the NAD. I'm Randall Rubenking, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel are back to discuss more advertising cases related to food marketing for Part 2 of their episode, Food, Glorious Food. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Kaufman: Welcome back here to AD Nauseam. Today we are turning again to one of our favorite topics: food. And last time we talked about FTC cases involving food health claims but made us a bit hungry for more. So, we thought we would offer you a second course, reviewing the NAD guidance this time, on supporting taste preference claims. After all, we all know foods can be good for you and all that, but if they don't taste good, you can just forget about it. And we always like to give our listeners a steady but varied diet looking at both FTC and NAD learnings.

Mudge: There is so much to chew on in this area, Daniel. I think that two podcasts will give our listeners a good sense about how some claims tend to get reviewed by enforcers and others handled directly between competitors. Because self-regulation and regulation are complementary, and I think together they give advertisers a complete, balanced menu of options in terms of where their claims might be reviewed.

Kaufman: Before we dive into the topic du jour, there is so much more we can do and talk about on food and pop culture. Last time, it was our favorite food themed shows. How about favorite pop songs with food overtones or undertones?

Mudge: Oh, easy. Eighties. Eighties all the way. I Want Candy.

Kaufman: It is so tempting to start singing, but it is the last thing we want to do.

Mudge: It is going to be, it is an ear worm. I challenge all of our listeners not to be hearing that song, and if they don't know it, they should be Googling it now.

Kaufman: I'm going to surprise you by starting off with a completely current song, but I really do love that Espresso song. Love it, love it. I will say, and then I'm going to go back 40, 50 years. The Piña Colada Song, Escape, is also another one of my favorites. Finally, I don't know if it is a food song, because I think they're vegetarians and they're very anti-eating lobsters, but Rock Lobster.

Mudge: Oh, you had me, okay. Oh, Kiss My Grits, which is a reference to your favorite TV show with food last time. It only took me a whole episode to come up with the tagline from that show, but Rock Lobster, you're right. I, yeah, that is up there too.

Kaufman: I think the B-52s have done a lot of work against the consuming of lobsters. They've done some PSAs on that I believe, but still a great song of course.

Mudge: Still a great song. Still an awesome band. Piña Colada, I don't know about, but Espresso, I hope, of course you, I'm sure everyone saw the Saturday Night Live reference when Maya Rudolph was playing Kamala Harris and herself referenced Espresso. And if not, that is something else folks should Google. But let's, all this stuff makes me hungry and what are, let's talk about actual food. What are your favorite snacks when you're bingeing your favorite shows, Daniel?

Kaufman: So, I'm going to be slightly specific. So, I adore, totally love these pretzels that are filled with peanut butter on the inside.

Mudge: Oh, I love those too.

Kaufman: And Trader Joe's sells these almond windmill cookies that I'm completely obsessed with right now and I'm eating far too many of them. About how about you?

Mudge: I was just going to go popcorn. But yeah, now you got me. You're, I'm a big chocolate-covered pretzel person as well. And last but not least, let's combine. What are your favorite childhood comfort food favorites?

Kaufman: So, I'll give you two there. The first is of course, spaghetti and meatballs, and number two is Mom's macaroni and cheese. And I will say, like decades ago I wanted the recipe. I got the recipe from my mom. I am convinced she gave me an invalid recipe because I tried making it multiple times, did not come out the same, and now that recipe is just lost. I may have to try it again at some point, but…

Mudge: She withheld? Alright, Daniel, you've had my macaroni and cheese, which is really Barefoot Contessa's macaroni and cheese. I know what a fan you are of the Barefoot. So, I would encourage you to try that one at home because Ina holds back nothing from her beloved fans. And for me, mine is any kind of casserole with cream of something soup. Alright? That is how I grew up. I still love it. I still crave it.

Alright, we got to stop. I'm literally drooling. Let's dive into the, some of the cases that we see at NAD on a regular basis involving the food category. I know we're going to focus on taste test, but I'd also like to sneak in some disparagement as well. But, Daniel, first I want to ask, we don't see these kinds of cases often at the FTC. And why is that?

Kaufman: I mean, look, I'll put it simply. When I was a staff attorney, if I had walked into my boss's office and said, hey, there is this case I want to investigate involving taste preferences, I would have been laughed at. It just is not something the FTC focuses on. And it is interesting. They issued, back in 1979, the Comparative Advertising Policy Statement. And that really set the record straight. There were some concerns that the FTC was against comparative advertising and in '79 they make it very clear, we like comparative advertising. It is pro-consumer. It is pro-innovation. It has to be accurate, can't be deceptive. But the reality is that the FTC probably rightly believes that truthful comparative advertising is good for consumers, but also as a matter of enforcement discretion, they tend to think that the Cokes and Pepsis of the world can take care of their own beefs, and the FTC doesn't need to spend their limited enforcement time there. Largely they are right. Look, given how many NAD cases are brought over the years with respect to taste claims, certainly a valid point. Now, Amy, when is a taste claim simply presenting a subjective opinion versus when does an advertiser really need that head-to-head substantiation that we talk about a lot?

Mudge: Another excellent question, right back at me, Daniel. Thank you for that. Well, look, the norm for any kind of tastes better or favorite tasting claim most definitely

is head-to-head taste test. Sometimes the NAD has found if there is a post that something is best I've ever had, and the context in which it is presented is very clear that it is one person's opinion, that is probably where you can get away with saying, hey, I'm just presenting an isolated sensory impression. But that is the exception. That is not the rule.

There was one case we were actually involved in. It involved ketchup, the condiment wars, and I had a testimonial that was the best ketchup I've ever tried. And this testimonial actually appeared in ads on retail shelves. There was a asterisk and there was a disclaimer that it was attributed to a consumer named Niecy B. with the disclaimer that the review was based on a free product sample. And the NAD said look, taste can be subjective. It can be a matter of personal opinion. And if, normally, advertisers, when they tout taste preference claims, do it in a way that probably suggests there is a measurable level of performance that is backed by support, but here, in that particular case, they said it was a single review. They really leaned into those words, best I've ever tried, and NAD found this case, it was clear that it was an individual's opinion and so, didn't convey a typicality message that would require support. But I would definitely say that is the exception again, not the rule.

Kaufman: Yeah, that is fascinating. You can see the FTC approaching something like that a little differently if they were to focus on these areas. So, while taste is subjective, it is also something that is, of course, and can be measurable, and usually claims that something is the best tasting or certainly, consumers prefer the taste of our product, do need to be backed by sound substantiation. Now, can you walk us through the elements of what makes a good taste test?

Mudge: Sure, sure. Lots of stuff going on here. I do want to refer folks to an oldie but goodie. It is a case about 10 years ago involving Malt-O-Meal, or MOM brand cereals. I still think that is one of the best decisions that I've seen that really lay out the requirements and walk through them. But the claim there was clear, okay. The claim was that MOM were National Taste Test winners. The NAD relies on the ASTM Guide for Sensory Claims Substantiation for the fundamentals, and that ASTM guide can relate to smell tests, field tests, taste tests, but it really is the place you start. And, in a nutshell, you need double-blinding, you need use of paired comparisons, a geographically representative sample size, one that makes sense, similarly purchased products, and the ability to cleanse the palette before tasting each product.

Kaufman: Yeah, I am a big fan of cleansing palettes, Amy, and that is a lot you have given us to unpack. It sounds like a lot of science. Double-blinding we know, and it always makes sense to control for bias of the tasters and the folks given the test as well. And paired comparisons, that is also make a lot of sense for taste, giving people the ability to compare A to B. Tell me more about sample size in this context.

Mudge: Yeah. Before we get to size, first you need to pick that right test population, and here, it needs to be who actually eats the food or is likely to buy and eat the food. So, it is not just a focus on the target audience or who might buy the food. So, a

little bit different than we see in some other tests of consumers. Now, if most people who eat the food are say under the age of 20, you might want more people in that age group to do your test. Alright. The ASTM Guide requires geographical diversity for any kind of national taste claim, and they get real specific here. So, taste test needs to be conducted in at least two markets in each of the four major census regions, and then at least 300 people total need to be tested. Often folks will do more, because of course you've got to get results that are statistically significant and sometimes doing more will hedge your bet. Those are the minimums.

Kaufman: It is fascinating how specific it is. It is just not what I'm used to seeing, in the health context it is a very different thing. So, the *Malt-O-Meal* case or the *MOM* case, as you've been charmingly calling it, it also explains you need to buy the products from the shelves in order to mirror real purchasing conditions using products, of course, that are not expired and it sounds like it can be a fatal flaw if you buy the competitor's products but pull your own products fresh from the production line. And of course, if the food needs to be prepared, the directions need to be followed. And for something like cereal, if you are adding milk, it is important not to let one sample sit in the milk longer than the other sample, making it of course perhaps a little mushy. People need to be able to rinse their mouth or perhaps cleanse their palate by eating a cracker or something similar in between trying the samples.

Mudge: Daniel, you are becoming a pro here. I think it is key though, that almost all this stuff that we're talking through, it is pretty intuitive when you parse it down but there is a lot of detail and it is important, brands usually aren't going out and doing this themselves. They're typically aligning with a survey company. It is really important that you pick a partner that knows how to do these, that it is not their first time at the rodeo or their first time up to the buffet, if you will. And it is really ideal to have lawyers involved in the initial phases and the test design, or at least involved before the test is run, to check for things that after the fact could be fatal flaws. And then it is too late to fix them. But I think a key bottom here is there are a lot of different choices that need to be made, and hopefully the right choices.

Kaufman: So, and of course the way the questions are framed needs to control for bias as well. Indeed, rotating the order of which sample is tried first versus second. Of course, making sure to include the ever-important no preference option.

Mudge: Absolutely. And the ASTM Guide here even gives a little bit more detail on why that, what to do with that no preference and why it is important. Not just to control for bias. The ASTM Guide makes clear, if there are 20% or fewer no preference responses, you're not just supposed to set them aside. You're supposed to divide those responses up between the two groups, alright. But if there are a sizable number of no preference responses, I don't know. It tastes the same to me. I couldn't possibly pick. If there are significant number of those, you can't make, your claim has to be changed to we're preferred for taste among those with a preference. Sometimes you see that; that is the reason why.

Kaufman: Got it. So, for something like cereal or soup or yogurt where there can be tons and tons of different flavors, I guess companies even with good taste preference results can have a difficult time not overextending the claim to make line claims if the test might have been of just one specific variety.

Mudge: Daniel, you got it. Now, another great case to look for guidance is also another one from about 10 years ago. It involves yogurt. It was Chobani versus Yoplait, and there was a taste test and there was taste test evidence showing that consumers preferred the blueberry yogurt sold by Yoplait, but in the ads, there was also a national UGC taste test challenge. Okay, taste two yogurts and tell us what you think. Yoplait advertised the taste test results, but then showed the UGC post of people trying different yogurt flavors, not just the blueberry but other varieties, and saying they agree. NAD said that, in this, the way they were presenting it, it looked like all of the flavors of Yoplait had been taste tested and were preferred when that wasn't the case.

Kaufman: I really liked that case and there was also some real interesting discussion about how much food you ask people to eat to make sure they've had enough in order to make a taste preference determination, but not so much that they would get full, so they couldn't really appreciate the next sample. And there were also some real interesting discussions of how to direct people when comparing a yogurt with fruit on the bottom, for example, that should be stirred versus a yogurt that was premixed. And NAD seemed to be okay with the idea that once you screen for people who liked and ate blueberry yogurt for example, you can tell them to eat the sample like they normally would and leave it to them if they stir or not before diving in.

Mudge: Absolutely. And once again, I come back to the idea that there is a lot to process through here. A lot of choices to make that you got to go through. But hey, let's turn to food disparagement, our classic food fights. There are a lot of cases in this area as well and NAD has been pretty consistent over time with the guidelines it's given. And a lot of times a food marketer will want to convey when its product has a particularly desirable ingredient or maybe when its product is missing an ingredient that is less desirable, like maybe high-fructose corn syrup or artificial flavors, and the guard rails at NAD, easier said than executing, are that food marketers can highlight the differences in products or ingredients but they should prevent these things as a choice and not crossover into vilifying the competing product.

Kaufman: I am so fascinated by this whole disparagement thing. It is really interesting, and NAD just issued a food disparagement case involving one of our favorite celebrity chefs, Gordon Ramsay. It was a swift case of probably not one of the more difficult ones, but Gordon highlighted the advertisers fruit snacks as having whole fruit content. He looks at competing fruit flavored snacks on the shelves and asks what is wrong with these people? There is barely any fruit in there. And he dropped kicks the competitor box into a lobster tank, not a rock lobster tank, just a plain old lobster tank. And another ad shows him spitting out a competing fruit snack. NAD, not shockingly, found that that was not only false disparagement,

but it was also ash canning and showing a competing product as totally worthless.

Mudge: Yeah, that is probably not a hard call but, Daniel, I'm just really disappointed you didn't attempt with the Gordon Ramsay British accent because he is a truly terrifying character in the best of circumstances, but certainly you need the accent, I think, to really bring it home.

Kaufman: I can do much better the Fred Schneider from the B-52s accent. That I can probably manage, but that is for another day.

Mudge: Oh, and we hope that day comes sooner rather than later. But I do love all the rock, I do love the multiple lobster references on this podcast. But you're 100% right. Look, the Gordon Ramsay, the fruit snacks case, it was probably not a hard call.

I'm going to grab another case, again, from about 10 years ago that I really think lays the lines out neatly, and this is a case involving Dole fruit bowls, okay. There was one fruit bowl where it had juice as its liquid and then one more, a competitor, had a sugared syrup. Alright? And a key NAD tenant is you can't say or imply that a competitor's product isn't suitable for consumption. And you shouldn't display disgust with your facial expressions or your body language or your tone of voice but expressing a preference and really focusing on the positive of your product will usually be okay. Alright? Also key not to refer to other ingredients as bad stuff or similar, but the Dole fruit bowls case was pretty interesting because it had a woman who was sipping the juice out of her canned fruit and her friend said, you drink it? You don't drain it? And she was like, no, I love it. It is juice. And the issue there was well, wait, is saying draining suggesting you should throw out this part of the competitors product? But NAD said no, they really did present it in a way that it is just a choice. It is a happy choice. Another issue that competitor raised was that the two women were shown enjoying their fruit bowls in a gym and is the idea there is some kind of implied message there that, oh, you're eating your fruit cup in a gym, therefore you're saying the fruit cup with juice is healthier. Again, NAD said, you know what? That is going too far. They really, this is where the line is, and Dole was comfortably on the right side of it by not not disparaging the other side's fruit cups.

Kaufman: Are we allowed to refer to cauliflower and liver as bad stuff?

Mudge: Bad stuff. Just because it tastes bad?

Kaufman: Just because it is nasty.

Mudge: I don't know, Daniel. You can go there. You can try it, but if somebody comes after you, I think NAD wants, in these food cases, take the high road, okay?

Kaufman: Okay.

Mudge: Emphasize the positive, not the negatives. Alright? But, Daniel, look, it looks like you got your arms around this stuff pretty quickly today. How about you give us, our listeners, key takeaways today from these NAD food taste test disparagement cases.

Kaufman: I will do that. Thank you, Amy. And food marketing friends, here is what we are leaving you with today. If you want to use a single testimonial and you don't want to convey a larger taste preference accidentally, choose endorsements in the first person that really make it clear that that is one individual's choice.

Second, taste tests are science and that is really clear. The solid guidance in NAD cases on what to do and what not to do. Follow this to the letter. How you buy the food, set up the test, pick your sample, layout the questions, analyze the data. That all needs to be carefully considered and make sure your marketers get the lawyers involved in the developmental stage and not only at the claim approval stage.

Third, even with a great taste preference claim, look at the context in which it is presented, not to be making a line claim if all you can support is a specific variety claim.

And finally, when highlighting a difference in your product ingredients or nutrient content, focus on the positive of your ingredients and why it is a great choice, and avoid running down a competitor's product. Use of humor will not make it okay to run-down a competitor's product.

And with that, I guess this was a two-parter we had on food, Amy.

Mudge: It was. We could go on and on. I'm sure I could talk about food all day long. But thank you so much again for joining us for another issue of AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law Blog at www.adventures-in-law.com and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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