

**Attachment  
One**

Case #3470 (06/01/98)

**TOM'S OF MAINE**

**Tom's of Maine Natural Mouthwash**

*Principal/New York, NY*

- Advertisers of "natural" products should be very specific when describing ingredients that may be inconsistent with consumers expectations because of the target market's significant interest in the naturalness of a product's ingredients

**Basis of Inquiry:** Advertising claims for Tom's of Maine Natural Mouthwash appearing in radio advertisements, on the company web site and on product labeling, were brought to the attention of NAD by Woodstock Natural Products, Inc. ("Woodstock"), manufacturer of competing oral hygiene products.

Tom's of Maine labeling states that its mouthwash is "pure and natural" and that it contains "Pure, simple ingredients from nature". The radio advertisement and online web site include claims that Tom's of Maine's "Natural mouthwash" is made of "ingredients that are in nature".

**Challenger's Position:** Woodstock disputed the advertiser's claim that its mouthwash was "natural", primarily because it contains poloxamer 335, a nonionic surfactant, generally used as a anti-foaming and defoaming agent. According to the challenger, Tom's of Maine uses poloxamer 335 in its "Natural Mouthwash" as an emulsifier to keep the mouthwash's flavoring oils evenly dispersed throughout the water base of the product.

According to Woodstock, "given the presence of poloxamer 335, Tom's 'natural' claims are clearly false and misleading" because any reasonable definition of the word "natural" would exclude a manufactured chemical like poloxamer 335. The challenger argued that if a product containing poloxamer 335 can be labeled "natural", the word will have lost its meaning, and, essentially, everything becomes natural. The challenger also posited that it is irrelevant that the source of poloxamer 335 is natural gas because surfactants manufactured from natural gas are no longer "natural" substances. Woodstock noted that "While it is possible that the poloxamer 335 in Tom's of Maine's 'Natural Mouthwash' is made from natural gas, it is more common to use other hydrocarbon feed-stocks to produce the chemical components of poloxamer 335. But regardless of whether the poloxamer 335 in Tom's of Maine's product is made from natural gas or hydrocarbon feed-stocks, after manufacturing and processing, it is no longer, according to Woodstock, a "natural substance."

The challenger also argued that Tom's of Maine's use of the word "natural" was inconsistent with past NAD determinations on use of the term,<sup>1</sup> as well as the Food and Drug Administration's policy. FDA takes the position that a food that is labeled "natural" should contain "nothing artificial or synthetic",<sup>2</sup> and has issued a number of warning letters challenging false and misleading "natural" claims.

Woodstock also charged that Tom's of Maine's use of the term "natural" is inconsistent throughout its advertising. For example, while the advertiser's radio commercial states that it uses "ingredients that are in nature", Tom's of Maine's web site states that its "natural" ingredients are "sourced in nature" and "minimally processed". In addition, the challenger argued, although a claim that poloxamer 335 is "sourced in nature" may be literally truthful (i.e., because every chemical substance is, in a sense, "sourced in nature"), Tom's of Maine's characterization of "natural" was misleading because it attempted to use the term as a means of distinguishing its product from the competition.<sup>3</sup>

Woodstock contended that Tom's of Maine has essentially conceded (in its responsive documentation) that its description of poloxamer 335 as a "natural" ingredient is not accurate because it noted that commercial surfactants like poloxamer 335 "typically require many processing steps between the original feed-stock (i.e., natural gas) and the finished ingredient". However, despite Tom's of Maine's recognition that poloxamer 335 is not "minimally processed" or a "simple ingredient from nature"—its advertising communicates an "all natural" message to

consumers. Although the advertiser argued that, in the context of the advertisement, the term "natural" really just means alcohol and saccharin free, the challenger maintained that these additional disclosures cannot turn a literally false claim into a true term.

The challenger stated that the NAD decisions relied on by Tom's of Maine, as support for its use of the term natural, were distinguishable from the subject challenge<sup>4</sup> and argued that the fact that there is no government regulations defining the term "natural" is irrelevant. Woodstock stated that a determination of whether the use of a particular term in a promotional communication is deceptive is not dependent on the presence or absence of an official government definition of the term.

As support for its interpretation of the term "natural", Woodstock submitted an article from the May-June issue of FDA Consumer ("Clearing Up Cosmetic Confusion"). The article refers to a 1994 survey conducted by FDA about the use of cosmetics by consumers ages 14 and older. Nearly half of those surveyed felt that a product claiming to be "natural" should contain *all* natural ingredients. The article also defined the term "natural" as meaning those ingredients that are extracted directly from plant or animal products as opposed no those than are produced synthetically.

Woodstock maintained than all of Tom's of Maine's advertising communicated one basic message, i.e., that Tom's of Maine's products are different from (and better than) the competing mouthwashes because they are all natural. This express message is communicated in the radio advertisement, which claims "It is both what is in Tom's of Maine products and what we leave out which makes them unique and natural". The simple fact is that poloxamer 335 is *not* a natural ingredient; rather in is a synthetic chemical. Thus, the challenger argues, the Tom's of Maine product is not unique but is, instead, like many commercial brands of mouthwash, which also contain one or more poloxamers.

**Advertiser's Position:** Tom's of Maine argued that its use of the term "natural" to describe its mouthwash is based on a number of product/formulation attributes that were carefully chosen to reflect the values of Tom's of Maine's target customers, and to provide a distinct alternative to conventional commercial/mass market mouthwash brands. More specifically, according to Tom's of Maine its Natural Mouthwash:

- Does not contain alcohol;
- Does not contain saccharin;
- Does not contain added color;
- Does not contain animal ingredients;
- Is flavored with natural oils;
- Is formulated using only those ingredients necessary for product function;
- Uses ingredients derived from natural sources with minimal processing necessary for safe and effective function; and
- Uses a recyclable container with minimal packaging.

The advertiser emphasized that one of the most important attributes of its mouthwash is that, unlike many commercial mouthwashes which contain a substantial proportion of ethyl alcohol, Tom's of Maine has eliminated alcohol from the formulation of its mouthwash, Consequently, in needed an alternative ingredient to maintain the dispersion of its flavor oils. In Tom's of Maine's formulation, naturally-derived witch hazel, ascorbic acid (Vitamin

C) and aloe vera juice combine to produce an astringent yet soothing mouth feel, while flavor dispersion is accomplished by including a small proportion (approximately 1%) of a nonionic surfactant, poloxamer 335.

The advertiser is satisfied that its selection of a single, food/drug grade surfactant ingredient, derived from a natural source material and processed as necessary to enable it to solubilize a simple natural flavoring system in an alcohol free vehicle, is fully in keeping with Tom's of Maine's commitment to provide products made with ingredients that are sourced in nature, pure, and minimally processed to perform a necessary function.<sup>5</sup> The advertiser additionally explained that the other aspects of its mouthwash formulation are also fully consistent with Tom's of Maine's "natural" formulation philosophy including the omission of saccharine, and other artificial additives commonly found in conventional, competitive mouthwashes.

The advertiser argued that the meaning of "natural" and related claims must be evaluated within the context of the advertising in which they appear. Notwithstanding the assertions of the challenger, the advertiser contended there is no generally accepted or officially binding definition governing "natural" claims for personal care products. Federal agencies have concluded that the term "natural" is too context-dependent to allow for the establishment and enforcement of any consensus definition unnatural/unatural products. The advertiser maintained that federal agencies have either expressly declined to prohibit the term as inherently confusing to consumers, or to adopt across-the-board definitions that would require all "natural" products to be no more than "minimally processed".

Tom's of Maine maintained that, in the past, NAD has been careful not to offer advertisers a definition of "natural" but, instead, has consistently recognized that "natural" claims are inherently context dependent and has evaluated them on a case-to-case basis within the context of the entire challenged advertisement. Further, Tom's of Maine contended that other major retailers of natural/health products explicitly recognize explicitly that "natural" personal care products may contain processed ingredients. Finally, the advertiser noted that it is well established NAD precedent that advertisers may limit the scope of their "natural" claims (and the substantiation needed to support them) by the use of qualifying language that clearly communicates to consumers what the term means in a particular case.<sup>6</sup>

Accordingly, the advertiser maintained, that given that the "Natural Mouthwash" name on the front panel of the product itself is closely juxtaposed to claims explaining that the product is "alcohol and saccharin free" and claims that it also contains aloe, vitamin C and spearmint, the advertising clearly communicates to consumers exactly what is meant by "natural". The back panel of the product elaborates further stating:

"Pure \* Natural \* Refreshing

Dear Customers and Old Friends,

Tom's of Maine Natural Mouthwash is a refreshing departure from the excessively sweet, alcohol based mouthwashes on the market today. Unlike most brands, our Natural Mouthwash has always been both alcohol and saccharin free. Instead, you'll find delicious natural spearmint oil for refreshing flavor. And in place of alcohol, we use natural witch hazel and soothing aloe vera juice..."

**Pure simple ingredients from nature:** Compare the ingredients in our Natural Mouthwash to your current brand. The artificial colors, alcohol and saccharin found in most commercial brands may be ingredients you wish to avoid." (The advertiser then goes on to list the nine ingredients used in its mouthwash with an explanation of their source and purpose.)

The advertiser noted that its radio advertising is "equally scrupulous" in explaining why its mouthwash is "natural", and in placing "natural" ingredient claims in the context of clearly identified differences from conventional mass-marketed products.<sup>7</sup>

Moreover, Tom's of Maine's web site expressly states that the ingredients in its "natural" products are sourced in nature, minimally processed, free of artificial colors and sweeteners (like saccharin) and free of preservatives, synthetic flavors and fragrances—all of which are true for Tom's of Maine's Natural Mouthwash. In fact, the advertiser stated, the web page at issue makes no reference to Tom's of Maine's mouthwash, much less to poloxamer 335. The website simply provides "a truthful explanation of the company's overall philosophy of natural product formulation which is also fully consistent with the Natural Mouthwash..."

Tom's of Maine disputed the relevance of the FDA Consumer article submitted by Woodstock, which purported to offer a definition of "natural" as "ingredients extracted directly from plants or animal products, as opposed to being produced synthetically", and maintained that the "natural" statements made in the article are "purely anecdotal". The advertiser argued that Woodstock did not submit the protocol or draw data upon which the consumer survey cited in the article was based and, consequently, NAD cannot rely on it or reasonably assess its possible relevance to the subject at issue. Conversely, Tom's of Maine contended that the article supported *its* position that there simply is no single authoritative definition of the term "natural" for cosmetic products, and the term may have different meanings in different contexts.

The advertiser disagreed that consumers would understand the claim "Pure, simple ingredients from nature" as representing either that poloxamer 335 is chemically "simple" or that it is obtained "from nature" and produced without significant processing. Tom's of Maine pointed out that the text that immediately precedes and follows the "simple ingredients from nature" claim clearly makes reference to specific ingredients other than poloxamer 335—i.e., "artificial colors, alcohol and saccharin found in most commercial brands". The accompanying text also expands on the phrase "from nature" by offering information about ingredient "source[s]" ("where they come from"), while making no reference to the method or degree of processing involved in the transition from ultimate source to listed ingredient.<sup>8</sup>

The advertiser emphasized the veracity of all statements made on its product labeling and in its advertising, and maintained that "the challenger has provided no evidence that consumers are being misled by the nature of the poloxamer 335 ingredient which constitutes 1% of the overall product."

**DECISION:** The prevalence of the use of the term "natural" by advertisers in describing products and/or ingredients, and what that term means to consumers, has been the source of a great deal of uncertainty and ambiguity in the food and cosmetic industry. While some federal agencies have provided guidance for use of the term "natural", there is no uniformly accepted definition. As in the past, NAD's analysis of the advertiser's use of the term "natural" in the challenged advertisement, will be dependent on a number of factors including, but not limited to: a) the origin of the ingredients; b) how the term "natural" is presented in the context of the challenged advertising; and c) reasonable consumer expectation as to the meaning of the term.

Clearly, Tom's of Maine's focus in this advertising is to distinguish its product from its competitors as being "natural" by virtue of the fact that its mouthwash contains no alcohol or saccharin. This is evident from the language used on the label ("Tom's of Maine Natural Mouthwash is a refreshing departure from the excessively sweet, alcohol-based mouthwashes on the market today. Unlike most brands, our Natural Mouthwash has always been both alcohol and saccharin free. Instead, you'll find delicious natural spearmint oil for a refreshing flavor. And in place of alcohol, we use natural witch hazel and soothing aloe vera juice.")

The label further states that this mouthwash contains "Pure, simple ingredients from nature" and includes a chart listing the ingredients together with the "Purpose" and "Source" of each ingredient, including poloxamer 335—the ingredient at issue in this challenge. Tom's of Maine identifies the source of poloxamer 335 as "natural gas". On its face, this seems consistent with the advertiser's representation that it uses "pure ... ingredients from nature." However, NAD agreed with the challenger that this description of the source of poloxamer 335 could be misleading because, although it may be literally sourced in nature" (as is every chemical substance), it is, nevertheless subjected to extensive processing before metamorphosing into the emulsifying agent that is included in the final product. As

such, poloxamer 335 is not, NAD determined, a natural ingredient. Moreover, NAD concluded that the complexity involved in the synthesis of the poloxamer molecule which originates from either an ethylene or propylene feedstock, would preclude its unqualified description as a "simple ingredient from nature".

In reaching this conclusion, NAD also considered the fact that the target market for "natural" oral hygiene products is a small segment of consumers that have heightened concerns and expectations regarding the ingredients in the products they purchase. Although NAD recognizes that poloxamer 335 constitutes a minute (i.e., 1%) part of the overall mouthwash, NAD concluded that its presence in this product is likely to be material to the products target consumers. NAD determined that it would be reasonable for consumers to expect that this product is "all natural" based upon the name of the product ("Tom's of Maine Natural Mouthwash"), and the numerous references to "nature" and "natural" that appear on the labeling and in other advertising with respect to its ingredients. Given the target markets' significant interest in the naturalness of product ingredients, NAD believes that advertisers of "natural" products should be very specific when describing ingredients that may be inconsistent with their consumers expectations.

**CONCLUSION:** NAD recognizes that Tom's of Maine has made a concerted effort to explain what is meant by "natural" in describing the attributes of its product in its labeling and other advertising. And this decision should not be construed as precluding the advertiser from calling its product "Natural Mouthwash". However, to prevent any potential for consumer confusion, NAD recommends that the advertiser: 1) avoid claiming, directly or by implication, that its product is 100% or completely natural; and 2) more accurately communicate on its label and in its other advertising that the product contains an ingredient (poloxamer 335) that is not inherently "natural" or "sourced from nature".

**Advertiser's Statement:** "Tom's of Maine welcomes the NAD's affirmation that it is truthful and accurate to call our mouthwash 'Natural Mouthwash'.

As the NAD rightly observes, usage of the term "natural" is highly dependent on the context in which it is used and on reasonable consumer expectations about what the term means in context. We are gratified that the NAD recognizes our 'concerted effort' to clearly explain what we mean when we use the term 'natural' in our product labeling and other advertising.

We respectfully disagree with the NAD's conclusion that consumers would understand the 'Natural Mouthwash' labeling and advertising in context as representing that poloxamer 335 is a 'natural' ingredient. Even so, in the spirit of self-regulation, the company accepts the NAD's decision and will modify its labeling and advertising accordingly.

Tom's of Maine is pleased to participate in the self-regulatory process and appreciates the NAD's thoughtful and objective analysis." (#3470 PCM, closed 7/1/98)

<sup>1</sup> See James River Corp., NAD Case Reports January 1989, which stated that "natural" products do not contain complex synthetic products".

<sup>2</sup> 56 Fed Reg 60421, 60466 (November 27, 1991).

<sup>3</sup> Woodstock noted that to disperse flavor oils in its Natural Dentist oral mouth rinse, consumers are directed to simply shake the product before using.

<sup>4</sup> In Walden Farms, 27 NAD Case Reports 26 (March 1997), NAD concluded that the advertiser's use of the term "natural" and "organic" to describe its salad dressing was not misleading because the language communicated the message that the product contained some organic ingredients and some non-organic (albeit) natural ingredients. In Melitta USA, 22 NAD Case Reports 29 (July 20, 1992), it was clear that the advertiser's use of the term "natural"

was limited to a description of the coffee filter in question. Lastly, in James River, NAD substantiated an "all natural ingredients" claim because the product did not contain alcohol or the complex synthetic ingredients that competitive products contained.

<sup>5</sup> The advertiser added that the American Dental Association's Council on Therapeutics reviewed and approved comparable "natural" and "minimally processed" claims for Tom's of Maine's toothpaste which contains the surfactant ingredient sodium lauryl sulfate and went on to award it the Council's seal of acceptance.

<sup>6</sup> Id at 3. Walden Farms (NAD will use its expertise to evaluate consumer understanding of a claim within its advertised context; claim "made with organic and natural ingredients" was effectively qualified so as not to imply that the product was 100% organic" or that the individual ingredients were both natural and organic) Melitta USA, Inc., ("natural" claim for coffee filters substantiated with qualification "made from bleached paper"; and, Beatrice Companies, Inc./Beatrice Grocery Group ("all natural" claim for highly processed cooking oil substantiated as qualified comparison to brands that require hydrogenation and additives.)

<sup>7</sup> For example, the radio advertisement states that "what makes the difference in Tom's of Maine's Natural Mouthwash is the product's use of recyclable packaging and the fact that it has the freshening capability of the commercial brands without using those ingredients like alcohol, preservatives, sweeteners and dyes, because we find ingredients that are in nature."

<sup>8</sup> In response to the challenger's question of whether natural gas is the source of the poloxamer 335 ingredient in Tom's of Maine mouthwash, the advertiser confirmed through its supplier that the intermediate feed-stocks used to produce poloxamer 335 are in turn produced from natural hydrocarbons. The hydrocarbon source of one feed-stock (ethylene oxide) has been further confirmed as natural gas. The other feed-stock, propylene oxide, may be made from either natural gas or oil. Tom's of Maine has attempted to clarify this point further and "intends to modify the 'source' statement for poloxamer 335 if and as necessary to reflect the suppliers actual practice."

<sup>9</sup> The United States Department of Agriculture permits the use of the term natural" on the labeling of meat and poultry products if: 1) it contains no artificial flavor or flavoring, color ingredient, chemical preservative, or any other artificial or synthetic ingredient, and 2) they and their ingredients are "minimally processed".