The Case of the Piggyback Class Action

In a "piggyback" class action lawsuit, who bears the burden of proving falsity?

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Piggybacking was fun when you were a kid. But, these days, the concept of piggybacking is not so enjoyable—at least, not when faced with a class action. What does *piggybacking* refer to in this context? Simply speaking, *piggybacking* refers to a class action lawsuit filed by a private litigant against an advertiser or manufacturer after a federal agency, such as the FTC, has already taken regulatory action against the same company on behalf of the public.

In fact, in recent years, there has been an increasing number of these types of "follow-on" or "piggyback" class actions filed, usually asserting state consumer protection and/or false advertising law violations. Advertisers in the food and dietary supplement industries in particular have been a primary target of recent filings. But, although there has been an increase in the number of these piggyback cases, in a series of decisions over the past three years, federal courts in California,[1] New Jersey,[2] and Florida[3] have dismissed such cases. Why? We'll discuss more ahead.

The FTC's Role in Advertising Substantiation

The FTC is the federal consumer protection agency charged with safeguarding consumers. The notion that an advertising claim is false if there was no substantiation to support the claim at the time the claim was made is a concept developed in the context of the Federal Trade Commission Act (the FTC Act). The FTC Act makes false advertising a "deceptive" act or practice.[4] As the FTC reaffirmed in its Policy Statement Regarding Advertising Substantiation, for an advertising claim to be considered substantiated, the advertiser must have had a "reasonable basis"—often in the form of "competent and reliable scientific evidence"—for the claim before it was disseminated.[5]

The FTC Act gives the FTC the power to seek substantiation for advertising claims during an FTC investigation. If, after an investigation, the FTC concludes that an advertiser in fact had a reasonable basis for making an advertising claim, the FTC may then administratively close the investigation. If, on the other hand, following an investigation, the FTC determines that there is "reason to believe" that a violation of the FTC Act has occurred, the FTC may either issue an administrative complaint or file a complaint in federal court. Note that an FTC complaint, like any other complaint, is not, in fact, a factual finding or legal conclusion that the complaint allegations are true or that any law has been violated; an FTC complaint is simply the FTC's charges against a company.

A Lack of Substantiation Does Not Necessarily Mean Falsity

At this point, it is important to understand that an advertising claim is not necessarily false even though there are no studies or tests supporting it. Stated differently, a claim may be true even though it is unsubstantiated.[6]

A highly respected federal court judge provided the following example: "Think about the seller of an adhesive bandage treated with a disinfectant such as iodine. The seller does not need to conduct tests before asserting that this product reduces the risk of infection from cuts. The bandage keeps foreign materials out of the cuts and kills some bacteria.... [T]he claim could not be condemned as false."[7] In short, an advertising claim, even one that does not have readily available scientific support, is not necessarily false until it is proven so by a plaintiff.

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Piggyback Class Actions

It is also important to understand that there is no private right of action under the FTC Act. This means that while the FTC can enforce the terms of the FTC Act in cases brought against advertisers, private litigants cannot.[8] Thus, any class action case brought by a private litigant that solely relies on allegations made by the FTC under the FTC Act in the agency's earlier action against a company, or that attempts to shoehorn an alleged violation of the FTC Act into a private cause of action, cannot stand.

Despite this basic legal premise, private plaintiffs have continued to file piggyback class actions that mirror FTC complaints, often arguing that advertising claims are false and misleading simply because they lack substantiation. Many of these recent false advertising class action complaints are virtually verbatim of earlier FTC complaints.

But, as noted at the beginning of this article, in recent years, federal courts in California, New Jersey, and Florida have dismissed and criticized such piggyback class action cases. The courts have stated that in such private false advertising actions, it is the plaintiff's burden to prove that a claim is actually false—*false,* and not simply unsubstantiated. Otherwise, the courts reason, it would inappropriately shift the burden of proof from plaintiffs to defendants.[9]

Basically, the courts have concluded that plaintiffs cannot simply assume that an advertising claim is automatically false simply because the defendant has not offered substantiation to prove it true. Rather, plaintiffs must prove that the claim is false—that it is a *"false* advertising" action, not an *"unsubstantiated* advertising" action.

And this has become the basis for a successful defense in consumer false advertising class actions, especially those seeking to piggyback off of FTC actions.

Recent Cases

As discussed in the two examples below, courts have dismissed or awarded summary judgment to the defendants in piggyback class actions. In each case, the class action was filed after an earlier FTC action.

Scheuerman v. Nestlé Healthcare Nutrition, Inc.

On July 16, 2012, in *Scheuerman v. Nestlé Healthcare Nutrition, Inc.*,[10] a putative nationwide class action challenging Nestlé's advertising and marketing campaign for its BOOST Kid Essentials drink, the U.S. District Court for the District of New Jersey awarded summary judgment to Nestlé.

The plaintiffs filed their action just over a week after the FTC concurrently filed and settled a lawsuit against Nestlé relating to the advertising and marketing of BOOST Kid Essentials—a nutritional supplement formerly sold in a carton with a straw containing a probiotic. The plaintiffs argued that Nestlé made express and implied claims that BOOST Kid Essentials provided a number of health benefits, including a strengthened immune system, reduced absences from daycare or school due to illness, reduced duration of diarrhea, and protection against cold and flu viruses. The plaintiffs also claimed that Nestlé advertised that those challenged health benefits were "clinically shown." They argued that Nestlé's advertising claims were false under state law because the claims were unsubstantiated at the time they were made.

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But, in a detailed 21-page decision, the court held that the plaintiffs could not expect to win simply on the theory that Nestlé lacked substantiation, under the New Jersey Consumer Fraud Act,[11] or California's Unfair Competition Law,[12] False Advertising Law, [13] or Consumer Legal Remedies Act.[14] Rather, the court stated that the burden was on the plaintiffs to present affirmative evidence that the advertising claims were actually false or misleading.

In the end, the court determined that the plaintiffs failed to meet this burden of proof, and it granted summary judgment.[15] More specifically, the court explained that the testimony of the plaintiffs' two scientific experts, both of whom criticized the strength and significance of Nestlé's scientific evidence and its "clinically shown" claim, had not adequately explained why Nestlé's claims were actually false or how the advertising statements might mislead a reasonable consumer.[16] Rather, the experts had merely opined that Nestlé's scientific substantiation was not strong and could be better. The court concluded that the plaintiffs were required to come forward with evidence demonstrating that the challenged advertising claims were actually false—not just that they were not supported by competent and reliable scientific evidence.

Fraker v. Bayer Corp.

Similarly, in *Fraker v. Bayer Corp.*,[17] another false advertising class action that followed an FTC complaint and settlement, the U.S. District Court for the Eastern District of California dismissed the plaintiff's allegations that Bayer lacked substantiation for its One-A-Day Weight-Smart vitamin supplement advertising claims, holding that a purported failure to possess prior substantiation for the challenged claims is not in and of itself a violation of law.

In the class action, which followed a concurrent FTC complaint and consent decree filed two years earlier, the plaintiff challenged Bayer's weight-control advertising claims for Weight-Smart. The plaintiff alleged that the advertising statements violated California law because they were not substantiated. Bayer moved to strike a number of allegations in the plaintiff's complaint on grounds that they were "lifted" directly from the FTC complaint and consent decree. Bayer also moved to dismiss on grounds that the plaintiff failed to allege any facts regarding the purported falsity of the advertising claims other than those derived solely from the FTC filings. The court granted both motions.

In its analysis, the court called the plaintiff's complaint an impermissible "attempt to shoehorn an allegation of violation of [the FTC Act]...into a private cause of action."[18] The court further elaborated that, simply by styling the complaint as one for unsubstantiated advertising, a private plaintiff cannot avoid the obligation to plead and prove that an advertisement is affirmatively false or misleading.[19] *Fraker* holds that false advertising

plaintiffs bear the burden to present facts—independent of FTC complaint allegations or settlement terms memorialized in a consent decree—that show that challenged advertising claims are false or misleading. Plaintiffs cannot simply allege that defendants' claims lack substantiation.

Conclusion

The *Scheuerman* and *Fraker* decisions are not the only recent piggyback class actions in which state courts have ruled in favor of the defendant. There are a handful of other cases which, like the California, New Jersey, and Florida decisions, confirm that it generally is not the defendant's burden in a false advertising case to demonstrate that advertising claims are substantiated; rather, the burden is on the plaintiff to provide evidence affirmatively demonstrating falsity or deception.

Companies—especially dietary supplement companies, which have been defendants in an increasing number of piggyback class actions—should take heed. If a class action lawsuit comes your way on the heels of an FTC complaint and does little, if anything, more than lift allegations directly from those documents that advertising claims are not substantiated, remember: that is not enough for a false advertising plaintiff to prevail. Thus, it is incumbent upon defendants in consumer class actions and false advertising litigation to inform the courts of the prior substantiation doctrine and the plaintiff's burden to prove falsity. N

References

1. See *Stanley v. Bayer Healthcare LLC,* No. 11cv862, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012); *Chavez v. Nestlé USA, Inc.,* No. 09-9192, 2011 WL 2150128, at *5 (C.D. Cal. May 19, 2011); *Fraker v. Bayer Corp.,* No. 08-1564, 2009 WL 5865687, at *2, *7 (E.D. Cal. Oct. 6, 2009).
2. *Franulovic v. Coca Cola Co.,* 390 Fed. Appx. 125, 127-28 (3d Cir. 2010); *Scheuerman v. Nestlé Healthcare Nutrition, Inc.,* No. 10-3684, 2012 WL 2916827 (D.N.J. July 16, 2012).
3. *Pelkey v. McNeil Consumer Healthcare,* No. 10-61853, 2011 WL 677424, at *4 (S.D. Fla. Feb. 16, 2011).
4. 15 U.S.C. §§ 41, et seq. The concept of "prior substantiation" was identified by the FTC in *In re Pfizer, Inc.,* 81 F.T.C. 23 (1972).
5. *FTC Policy Statement Regarding Advertising Substantiation,* appended to *In re Thompson Medical Co.,* 104 F.T.C. 648, 839 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987). Available at http://www.ftc.gov/bcp/guides/ad3subst.htm.
6. *See* 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:61 (4th ed.) ("Advertising claims may be true even though the testing basis for the claims may not support them").
7. *FTC v. QT, Inc.,* 512 F.3d 858, 861 (7th Cir. 2008) (Easterbrook, J.).
8. *Holloway v. Bristol-Myers Corp.,* 485 F.2d 986, 997 (D.C. Cir. 1973); *Fraker,* 2009 WL 5865687, at *7.
9. *See, e.g., Stanley,* 2012 WL 1132920, at *4-9; *Chavez,* 2011 WL 2150128, at *6 ("the California Court of Appeal . . . [has] declined to shift the burden of to the defendant to prove the veracity of its claim [in a false advertising case]") (citing *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.,* 107 Cal. App. 4th 1336, 1342 (2003)); *Fraker,* 2009 WL 5865687, at *6-8.
10. No. 10-3684, 2012 WL 2916827 (D.N.J. July 16, 2012).
11. N.J.S.A. §§ 56:8-1, *et seq.*
12. Cal. Bus. & Prof. Code §§ 17200, *et seq.*
13. Cal. Bus. & Prof. Code §§ 17500, *et seq.*
14. Cal. Civ. Code §§ 1750, *et seq.*
15. *Scheuerman,* 2012 WL 2916827, at *7-9.
16. *Id.* at *8-9.
17. No. 08-1564, 2009 WL 5865687, at *2, *7 (E.D. Cal. Oct. 6, 2009).
18. Id. at *7.
19. Id. at *8.

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