

# Federal Court Awards Summary Judgment to Nestlé in False Advertising Class Action Involving Probiotic Supplement

July 17, 2012

On July 16, 2012, the United States District Court for the District of New Jersey granted summary judgment in favor of Nestlé Healthcare Nutrition, Inc. in *Scheuerman, et al. v. Nestlé Healthcare Nutrition, Inc.*, No. 2:10-cv-03684 (D.N.J.), a putative nationwide class action challenging Nestlé's advertising and marketing campaign for its BOOST® Kid Essentials Drink ("BKE") product. BKE is a nutritionally complete drink supplement for children, which formerly was sold in a carton attaching a separately-packaged straw containing the probiotic, *Lactobacillus reuteri*.

In *Scheuerman*, the plaintiffs alleged that Nestlé committed common law negligent misrepresentation and violated the New Jersey Consumer Fraud Act ("NJCFA"), California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"), and Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTCPL"). They argued that Nestlé made express and implied claims that BKE provided a number of health benefits, including, among other things, immunity protection; a strengthened immune system; reduced absences from daycare or school due to illness; reduced duration of diarrhea; and protection against cold and flu viruses. They also claimed that Nestlé advertised that those challenged health benefits were "clinically shown."

The court held that the plaintiffs could not prevail on their NJCFA, UCL, FAL, or CLRA claims on their theory of liability – that Nestlé lacked substantiation for the challenged advertising claims at the time the claims were made (sometimes referred to as the "prior substantiation doctrine"). Rather, the plaintiffs were required to come forward with evidence actually demonstrating that the challenged advertising claims were affirmatively false, not merely that the claims were not supported by competent and reliable scientific evidence.

This is an important decision with respect to "clinically proven" or "clinically shown" advertising claims, as the court's holding and detailed analysis sweeps those claims within the prior substantiation doctrine. The court found that substantiation, in fact, does exist for Nestlé's BKE health benefit claims and, at best, plaintiffs' arguments went to the quantum of that substantiation rather than its existence, which simply was not enough for a finding of false, deceptive, or misleading advertising.

With respect to the UTCPL claim, the court held that its prior choice of law ruling in the litigation – that New Jersey law applied to one of the plaintiff's claims – was the "law of the case," and, thus, that plaintiff could not assert a Pennsylvania statutory fraud claim. Finally, the court found that, because there was no evidence of falsity or deception, or that any consumers were misled by the challenged

advertising statements, the plaintiffs' negligent misrepresentation failed.

Nestlé is represented by partner [Jeff Castello](#) of Kelley Drye.