

Is It Time to Rethink Establishment Claims?

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The decision in *Kwan v. Sanmedica International*, 854 F.3d 1088 (9th Cir. 2017) in April, has occasioned a lot of discussion about the apparent demise of the establishment claim “standard” in California. What the *Kwan* decision should have done, but did not, is provoke some hard thinking about what this “standard” is and how we use it. From the *Kwan* decision, it is apparent that the Ninth Circuit does not understand where the establishment claim principle came from and what it means. But its error is understandable, because attorneys and judges have been careless with the principle and arguably have made much more of it than it should be.

Kwan has been accepted as standing for two propositions. The first, which should be non-controversial and unsurprising, is that in private suits brought under California’s Unfair Competition Law (UCL) and Consumer Legal Remedies Act (CLRA), a plaintiff must allege and ultimately prove that the offending advertising claim is false, not merely unsubstantiated. There has been no serious dispute about this since the California Court of Appeal (Second District) decision in *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, 107 Cal. App. 4th 1336, 133 Cal. Rptr. 2d 207 (2003). What made *Kwan* news was that the court also rejected plaintiff’s allegations that defendant’s dietary supplements were “clinically tested to boost [human growth hormone] by a mean of 682%,” is provably false, and in so doing refused to “incorporate Lanham Act provisions into California’s unfair competition and consumer protection law by distinguishing between ‘establishment’ and ‘non-establishment’ claims.” 854 F.3d at 1097.

Setting aside that there are no establishment claim “provisions” and the concept is not confined to the Lanham Act, having been acknowledged also by the FTC, NAD and other courts, the Ninth Circuit’s discussion treated establishment claims as if they were a doctrine that whenever an advertiser cites some level of evidence for the efficacy or other traits of its product, this shifts the burden of proof as to the underlying traits, such that the advertiser must now substantiate them rather than requiring a plaintiff to prove them false. There is plenty of dictum in court decisions and secondary writings that suggests this is how establishment claims work, but it really is not – or at least, should not be.

The establishment claim “standard” is really no standard at all. It is the observation that an advertising claim about the level of support for some other claim about a product can potentially be false, just like any other advertising claim. There is no shifting of burdens, and really no need to distinguish between establishment and non-establishment claims. It’s just a matter of noticing that claims about the testing or evidence supporting a product are also claims. Like any other claim, an establishment claim can be puffery. A claim of “proven to be the most reliable” might be so vague as to the type of proof that it is empty of meaning. Or, an establishment claim can be non-material. Adding “tests prove” to a product claim does not necessarily have a material impact, over and above the underlying claim, on consumers’ purchase decisions.

So what happens when a plaintiff successfully challenges an establishment claim by proving that the

indicated level of evidence for the product's qualities does not exist? Obviously this does *not* necessarily disprove the underlying product qualities. It simply invalidates the establishment portion of the claim. Under Lanham Act or state false-advertising laws, the advertiser should be able to delete the "tests prove" language from its claims and continue touting the benefits of its product, even without substantiation. And what of the injury and damages to the plaintiff? Whether the plaintiff is a competing advertiser or a consumer class, it should only be entitled to the incremental damages resulting from the "tests prove" language, parsed from whatever product qualities supposedly were proven. That difference – effectively the difference in persuasiveness or materiality of adding "tests prove" to a claim – may not be much at all, and would be plaintiff's burden to prove.

In the *Kwan* case, the district court should have allowed the lawsuit to proceed against the "clinically tested to boost [human growth hormone] by a mean of 682%," but it should have ruled that the underlying claim, "boosts human growth hormone by 682%," was a separate claim whose impact, if not disproven separately, would have to be deducted from any injury caused by the "clinically tested" claim. What would then be left of potential damages in the class action? Likely not enough to bother pursuing. This approach would knock out actions, like *Kwan*'s, that seek to bootstrap an establishment claim into an end-run around the burden to disprove the underlying product benefits, while still permitting suits in the instances where the establishment claim language is a powerful driver of the product's sales. My intuition is that these latter cases will be rare.

Instead, the *Kwan* decision could be read to immunize "tests prove" claims from any legal challenge, effectively doing what the Ninth Circuit said it is *not* doing: distinguishing between establishment and non-establishment claims, but to confer immunity on the former. Establishment claims should still be open to challenge, but only for what they are worth.