New Jersey Federal Court Dismisses False Advertising Class Action Alleging a Lack of Substantiation

John E. Villafranco

March 6, 2013

Last month, in *Gaul v. Bayer Healthcare LLC*,[1] the U.S. District Court for the District of New Jersey dismissed a class action lawsuit predicated on a National Advertising Division ("NAD") decision that found that substantiation for Bayer Healthcare's labeling claims was unreliable. The District Court relied heavily on a 2010 Third Circuit decision – *Franulovic v. Coca Cola Co.*,[2] – which held that allegations that a defendant lacks substantiation are insufficient to satisfy the "falsity" element of a New Jersey Consumer Fraud Act ("NJCFA") claim.

Nothing prevents a private litigant from filing a lawsuit against an advertiser or manufacturer after a federal regulatory agency, such as the Federal Trade Commission ("FTC"), or a self-regulatory agency, such as the NAD, takes action against the same company. In fact, in recent years, these types of "piggyback" class actions have been filed in increasing numbers. Many recent false advertising class action complaints have come on the heels of, rely heavily on, and, in some cases, are virtually verbatim to FTC complaints and NAD decisions.

The *Gaul* decision, however, is the latest in a series of decisions over the past three years, in which federal courts have dismissed class actions brought under state consumer protection and false advertising laws premised on the theory that a claim is false simply because the defendant has not offered adequate substantiation. While these decisions are no doubt a welcome relief to advertisers, it remains to be seen whether they will slow down the pace of follow-on class action filings or merely signal to the plaintiffs' bar that something more than an FTC complaint or NAD case decision will be needed to overcome a motion to dismiss.

Gaul v. Bayer Healthcare LLC and *Franulovic v. Coca-Cola Co.*

In *Gaul*, the plaintiffs alleged that the advertising for Bayer's calcium supplement product, "Citrical Slow Release 1200" ("Citrical SR"), was false in violation of the NJCFA, and based their allegation solely on a June 29, 2012 NAD decision in an advertising challenge brought by Pfizer. Pfizer had challenged the express and implied claims that consumers absorb the equivalent amount of calcium from a single dose of Citrical SR (1200 mg) as from two daily doses (600 mg) of competing calcium supplements. The NAD decision held that the sole study offered to support Citrical SR's claims – concluding that a single dose of Citrical SR was equivalent to competing supplements that require two doses – was unreliable, and recommended, therefore, that Bayer discontinue the labeling claims at issue.

The *Gaul* court held that the plaintiff's claim that the NAD decision supported a finding of falsity was

infirm and dismissed the complaint. The court based its dismissal primarily on the Third Circuit's decision in *Franulovic*, which distinguished false advertising from inadequate substantiation.

More specifically, in *Franulovic*, the plaintiff asserted an NJCFA claim against Coca Cola on behalf of a class of consumers, alleging that the company engaged in fraudulent and deceptive marketing of its "Enviga" green tea soft drink. Specifically, the plaintiff challenged the veracity of Coca Cola's advertisements, which stated that drinking three cans of Enviga daily would lead to weight loss. The District of New Jersey granted Coca Cola's motion for summary judgment and denied the plaintiff's motion for leave to file a fourth amended complaint, which, among other things, asserted that Coca Cola advertised Enviga as a calorie-burning drink without prior substantiation. Specifically, the proposed fourth amended complaint alleged that "Coke made [the challenged weight loss claims] without adequate prior substantiation," and that the "weight-loss representations for the product (whether express or implied) cannot be substantiated because the small number of studies that exist are conflicting and inadequate to substantiate the representations."

Coca Cola argued that the plaintiff bears the burden under the NJCFA to affirmatively prove that the challenged representation is false; the plaintiff cannot shift the burden to the defendant to prove that the claim, in fact, is true and substantiated. The District of New Jersey held that the proposed amendment to include a claim that Coca Cola did not have substantiation to support the challenged weight loss claims would be futile because "the [NJCFA] does not recognize this theory of liability." The Third Circuit affirmed, holding that "[n]o New Jersey or Third Circuit decision has applied the prior substantiation theory to the [NJCFA], and we, therefore, decline to do so here."

In its decision, the *Gaul* court applied *Franulovic* and held that the plaintiffs had failed to allege facts supporting the argument that Bayer's representations were false or misleading, determining "[t]hat a research study may be unreliable does not mean that is conclusions are necessarily incorrect. . . . It is a very big leap from [the] assertion [of unreliability] to the conclusion that Bayer's labeling claims are false – too great a leap for the Complaint to pass muster."

Scheuerman v. Nestle Healthcare Nutrition, Inc.

In another recent New Jersey decision, *Scheuerman v. Nestlé Healthcare Nutrition, Inc.*,[3] the District of New Jersey granted Nestlé Healthcare Nutrition's motion for summary judgment in a false advertising class action alleging that Nestlé lacked substantiation for express and implied claims made in conjunction with its "BOOST Kid Essentials" probiotic drink product ("BKE"). The plaintiffs alleged violations of, among other things, the NJCFA and California's Consumer Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"), as well as common law negligent misrepresentation.

The *Scheuerman* plaintiffs argued that Nestlé made express and implied claims that BKE, a nutritionally complete drink supplement for children, 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 plaintiffs based their allegations on Nestlé's July 2010 settlement with the FTC, which resolved allegations that Nestlé's clinical studies provided insufficient support for the claimed health benefits of BKE. Specifically, the plaintiffs alleged that the FTC complaint ***concluded*** that Nestlé's representations "were, and are, false and misleading." The court agreed with Nestlé that the plaintiffs' assertions were disingenuous because "the FTC does not come to any actual conclusions in

a complaint."

With respect to the merits, 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. The *Gaul* decision is consistent.

Scheuerman 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.

The court also 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 claim failed.

California Litigation

Several decisions from California federal courts have detailed the interplay between the prior substantiation doctrine and false advertising actions brought under state law and reached the same conclusion as the *Gaul* court.[4] For example, in *Fraker v. Bayer Corp.*,[5] a 2009 class action brought under California's CLRA, UCL, and FAL, the Eastern District of California dismissed the plaintiff's allegations that Bayer lacked substantiation for its "One-A-Day WeightSmart" vitamin supplement advertising claims, holding that the failure to possess a reasonable basis consisting of prior substantiation is not in and of itself a cognizable claim under California law.

The plaintiff filed her class action complaint against Bayer a little less than two years after the FTC concurrently filed and settled a lawsuit against Bayer alleging violations of the FTC Act. The FTC settlement, which was memorialized in a consent decree, prohibited Bayer from advertising unsubstantiated claims regarding One-A-Day WeightSmart's ability to enhance metabolism or promote weight loss. The class action challenged advertising disseminated after the FTC consent decree, stating that the product increased metabolism and helped prevent weight gain associated with age-related metabolism decline, and alleged that those claims violated the consent decree because they were not substantiated by reliable scientific evidence and, consequently, violated the CLRA, UCL, and FAL. Bayer moved to dismiss, and the court granted the motion, calling the plaintiff's complaint an "attempt to shoehorn an allegation of the [FTC Act] . . . into a private cause of action" and recognizing the that the FTC, not private plaintiffs, retains exclusive jurisdiction over ensuring that advertising claims are substantiated. Additionally, the court explained that a private plaintiff cannot avoid her obligations to plead and prove that an advertisement is false or misleading by styling the claim as one of unsubstantiated advertising.

These cases all demonstrate that plaintiffs must affirmatively prove, or at least allege (to get beyond the dismissal stage), falsity, and that alleging a lack of substantiation alone is not sufficient to survive a motion to dismiss under New Jersey or California consumer protection and false advertising laws. Further, as *Scheuerman* demonstrates, plaintiffs must do more than pick apart an advertiser's

scientific proof; rather, they must affirmatively show that a product's touted benefits are not provided in order to prevail.

Kelley Drye & Warren LLP

The attorneys in Kelley Drye & Warren's Advertising and Marketing practice group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

For more information about this Client Advisory, please contact:

John E. Villafranco
(202) 342-8423
jvillafranco@kelleydrye.com

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[1] No. 12-05110, 2013 U.S. Dist. LEXIS 22637 (D.N.J. Feb. 11, 2013).
[2] No. 07-0539, 2009 WL 1025541 (D.N.J. Apr. 16, 2009), *aff'd*, 390 Fed. App'x 125 (3d Cir. 2010).
[3] No. 10-3684, 2012 WL 2916827 (D.N.J. July 17, 2012).
[4] *See, e.g.*, *Stanley v. Bayer Healthcare LLC*, No. 11-862, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012); *Chavez v. Nestlé USA, Inc.*, No. 09-9192, 2011 WL 2150128 (C.D. Cal. May 19, 2011).
[5] No. 08-1564, 2009 WL 5865687 (E.D. Cal. Oct. 6, 2009).