

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

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Last month, in *Gaul v. Bayer Healthcare LLC*, 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.* – 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.

In another recent New Jersey decision, *Scheuerman v. Nestlé Healthcare Nutrition, Inc.*, 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. The court held that the plaintiffs could not prevail 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.

These are two 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.

For more on these cases, see the Kelley Drye [client advisory](#).