

Recent Decision Applies Prior Substantiation Doctrine to Bar False Advertising Claims Based on Lack of Substantiation

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Continuing with the recent trend of dismissing false advertising complaints premised on a "prior substantiation" theory or granting summary judgment to defendants in such cases where the plaintiff fails to demonstrate affirmatively that a challenged advertising statement is false, in *Stanley v. Bayer Healthcare, LLC*, No. 3:11-cv-00862, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012), the Southern District of California held that an alleged lack of substantiation for an advertising representation is not sufficient to state a claim for violation of the California Unfair Competition Law ("UCL") or Consumer Legal Remedies Act ("CLRA"), or for breach of express warranty.

In *Stanley*, the plaintiff asserted that Bayer's advertising claims for its "Phillips' Colon Health Probiotic" ("PCH") line of supplements, including that the products supported a healthy immune system, violated the UCL and CLRA because the health benefit claims "are not substantiated by the vast majority of generally accepted scientific literature currently available relating to probiotics." The plaintiff also alleged that PCH labeling and advertising constituted express warranties and that Bayer breached those warranties. Bayer moved for summary judgment, arguing that "Plaintiff has not offered any evidence supporting her claim that [Bayer's] advertising and packaging of [PCH] is deceptive, untrue, or misleading." Bayer also argued that the plaintiff's complaint was based entirely upon an alleged failure to substantiate, which is not actionable under California law. The Southern District of California agreed with Bayer and granted summary judgment on all of the plaintiff's claims.

Chief Judge Gonzalez held that "a Plaintiff may not pursue a claim under the UCL or CLRA based upon a lack of substantiation." Rather, the court confirmed that the burden was on the plaintiff to present affirmative evidence that the advertising claims are actually false or misleading, and because the plaintiff failed to meet her burden, summary judgment was appropriate. More specifically, the court explained that the plaintiff's two scientific experts, who concluded that the current body of science did not support Bayer's advertising claims, could not save the plaintiff from summary judgment because neither explained why Bayer's claims "[were] actually false, or . . . how those statements might mislead a reasonable consumer." Rather, they "repeatedly assert[ed] the statements are rendered false or misleading due to a lack of substantiation." Nor did the plaintiff's experts opine "that probiotics, or PCH in particular, are ineffective" for providing the promised health benefits. Finally, the court found that the plaintiff had failed to provide evidence that the product did not work for her or that the product did not work for the purposes for which it was advertised. The court concluded that, absent affirmative evidence demonstrating that the advertising claims were false and misleading, or that Bayer's probiotic supplement did not provide

the advertised health benefits, the plaintiff had failed to meet her burden under California law and that summary judgment on the UCL, CLRA, and breach of express warranty claims was warranted.

The recent *Stanley* decision underscores the importance for defendants in consumer class actions and false advertising litigation to inform the courts of the prior substantiation doctrine and take advantage of its strong defense. For more on this issue, reference the article, "[The 'Prior Substantiation' Doctrine: An Important Check on the Piggyback Class Action.](#)"