

The Pleading Bar In False Advertising Cases Has Been Raised

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The Fourth Circuit recently issued a decision affirming a district court's order dismissing a false advertising claim against GNC and Rite Aid relating to several supplement products containing glucosamine and chondroitin, as well as other ingredients. This case raises the bar for plaintiffs at the pleading stage because they now must allege that "all reasonable experts in the field agree that the representations are false." Without such an allegation, they face dismissal of their false advertising claims.

In 2014, a federal district court in Maryland dismissed a consolidated complaint containing claims for false advertising brought under the consumer protection laws of six different states. The district court found that the plausibility standard established by *Iqbal* and *Twombly* required more than the conclusory allegations of falsity contained in the consolidated complaint. Rejecting plaintiffs' argument that the existence of a "battle of the experts" should permit their claims to survive, the district determined that, if one expert in the field would reasonably conclude glucosamine and chondroitin are effective for the treatment of non-arthritic consumers, plaintiffs' complaint should be dismissed at the pleading stage.

Following the district court's lead, the Fourth Circuit found that a plaintiff alleging false advertising must set forth a plausible claim for relief under the relevant state consumer protection statute and cannot simply recite the elements of the claim and then conclude that the representations are false. The Fourth Circuit's holding is worth noting: "[In order to state a false advertising claim on a theory that representations have been proven to be false, plaintiffs must allege that all reasonable experts in the field agree that the representations are false. If plaintiffs cannot do so because the scientific evidence is equivocal, they have failed to plead that the representations based on this disputed scientific evidence are false.]"