

The "Prior Substantiation" Doctrine: An Important Check On the Piggyback Class Action

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A disturbing trend has emerged in false advertising litigation: plaintiffs are filing class action complaints that are virtually identical to or rely heavily on FTC complaints or FDA warning letters. Those complaints allege that certain advertising claims are false, deceptive, and/or misleading because the defendants do not possess "prior substantiation" for the claims, i.e., the advertisers do not have a reasonable basis for making the challenged claims in the first instance.

Recently, however, both federal and state courts have dismissed cases that do little more than echo FTC complaints or FDA warning letters, and have simply alleged that the defendants lacked substantiation for the challenged advertising claims, on grounds that those allegations fail to state a claim. More specifically, courts have explained that the allegations in those cases impermissibly attempt to shift the plaintiffs' burden of proving falsity onto the defendants to show that the challenged claims, in fact, are substantiated.

A new article authored by Dana Rosenfeld which appears in the ABA's *Antitrust* magazine, "[The 'Prior Substantiation' Doctrine: An Important Check On the Piggyback Class Action](#)," discusses the "prior substantiation" defense to class-action lawsuits, which attempt to piggyback off of FTC pleadings and FDA warning letters.