

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

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As there is nothing to prevent a private litigant from filing suit against a consumer product advertiser or manufacturer after a regulatory agency takes action against the same company and obtains redress for consumers, there is a growing propensity towards follow-on or "double litigation." The number of consumer class action complaints asserting state consumer protection and/or false advertising law violations has significantly increased in the past decade. Many plaintiffs are filing class action complaints virtually identical to Federal Trade Commission (FTC) complaints or federal Food and Drug Administration warning letters.

This article discusses a recent series of decisions in these cases in which courts have dismissed consumer class actions premised on an "unsubstantiated advertising" theory of liability, finding the "prior substantiation doctrine" does not apply. Defendants in consumer class actions and false advertising litigation can avail themselves of the courts' refusal to apply the prior substantiation doctrine to claims brought by private plaintiffs and take advantage of this strong defense. Until plaintiffs are able to present facts rather than piggybacking off of the agency actions, this defense is likely to hold.