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Why Celebrity Sponsors Aren't Liable For False Advertising

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Brand ambassadors are seldom the target of class actions when the products they promote are alleged not to work as advertised. While most consumers recognize that celebrity endorsers are just that, two purchasers of a dietary supplement decided to test the waters by bringing a false advertising class action case against former NFL quarterback and Super Bowl champion Joe Theismann concerning his endorsement of the product. Fortunately for celebrity endorsers, on April 8, 2016, the Ninth Circuit determined that Theismann could not held liable for false advertising because he was not a "seller" of the product at issue, as defined under the law.

Background


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The lawsuit was brought by two plaintiffs on behalf of a putative class against Theismann and NAC Marketing Company LLC, the manufacturer and distributor of the dietary supplement, SuperBetaProstate, who filed claims for breach of warranties and false advertising under federal and state law in the Eastern District of California.

The case represented a rare attempt to impose liability not just on a product's manufacturer but also its celebrity spokesperson. Although Theismann spoke primarily about his personal experience with the product in television commercials, the putative class asserted claims against the "sellers" of the product, which they alleged included Theismann.

U.S. District Court Judge Kimberly J. Mueller dismissed the case for lack of jurisdiction given that the manufacturer had refunded the plaintiffs for their purchases, thus rendering their claims moot. One plaintiff, Floyd Luman, received a credit back on his charge card nearly two months before he filed the original complaint; the second plaintiff, Joel Amkraut, received a credit back after he joined the lawsuit. Additionally, the district court held the plaintiffs had no standing to seek injunctive relief since they had no intention to purchase the product again and thus could not demonstrate likelihood of future injury.

Claims Against Theismann

Although the district court summarily dismissed the claims against both NAC and Theismann, the unprecedented nature of the claims against Theismann in his individual capacity are noteworthy. The plaintiffs attempted to hold him liable for purely endorsing the dietary supplement by describing his

personal experiences with it.

This attempt found little support in existing case law. Indeed, accordingly to a leading treatise on California's false advertising law (which governed the majority of the claims), no celebrity spokesperson has ever been liable under the relevant state laws for simply discussing his or her personal experiences with a product and endorsing it based on those experiences. Stern, Bus. & Prof. Code 17200 Practice, 6:55.2 (The Rutter Group 2012).

The few lawsuits filed against celebrity endorsers to date have largely ended in settlement, before any adjudication of liability. For instance, class action plaintiffs named the Kardashian sisters, paid endorsers for QuickTrim's diet products, in a false advertising lawsuit. Plaintiffs, represented by the same lawyers as here, settled the suit for partial refunds or coupons for future purchases, and the defendants, including the Kardashians, did not have to defend against liability.

In the handful of instances where a celebrity spokesperson has challenged liability, courts have agreed that an endorsement, standing alone, does not form the basis of an actionable claim. In Davis v. Byers Volvo, No. 11CA817 (Ohio Ct. App. Feb. 24, 2012), the Ohio Court of Appeals rejected efforts to hold liable former college football quarterback and ESPN analyst Kirk Herbstreit under Ohio's consumer protection laws for appearing in a commercial for a car dealership. Similarly, in FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004), the Ninth Circuit affirmed a judgment that exonerated former professional baseball player Steve Garvey in an FTC action regarding his weight loss supplement infomercials, highlighting that Garvey was "merely a spokesperson."

Supreme Court's New Guidance On Settlement Offers

While the plaintiffs' appeal of the motion to dismiss was pending in the Ninth Circuit, the U.S. Supreme Court issued its opinion in Campbell-Ewald Co. v. Gomez, holding that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." 136 S. Ct. 663, 672 (2016).

At oral argument in front of the Ninth Circuit, the plaintiffs contended that having received a credit back to their respective charge cards — which they had not asked for and had not authorized — amounted to an unaccepted offer, which under the Supreme Court's new guidance, should not have mooted the case.

Ninth Circuit's Opinion

Ninth Circuit Judges Margaret McKeown, Kim Wardlaw and Richard Tallman, in an unpublished opinion, affirmed the district court's dismissal of the claim for injunctive relief and plaintiff Luman's claim for monetary relief given that he had received his money back two months before filing suit. But in light of Campbell-Ewald, the Ninth Circuit vacated the district court's opinion for plaintiff Amkraut's claim given that he had not received a refund at the time he joined the suit and remanded to the district court for further proceedings against NAC.

As to Theismann, however, the Ninth Circuit affirmed dismissal of all claims against him on alternate grounds. Although the district court had not decided the issue of whether a celebrity spokesperson could be held liable for false advertising, the Ninth Circuit determined that only "sellers" could be liable. The Ninth Circuit found that Theismann did not meet the statutory definition of "seller" because he "is merely the celebrity spokesperson for NAC."

Specifically, Theismann "never held title to [the dietary supplement] nor passed title to the plaintiffs."

The plaintiffs therefore failed to state cognizable claims for false advertising against Theismann. The Ninth Circuit's opinion adds to a body of case law which suggests that celebrities or other public figures who simply endorse a product, without more, will have a viable defense against claims for false advertising on the grounds that they are not "sellers."

—By Christina Guerola Sarchio and Emily Luken, Orrick Herrington & Sutcliffe LLP

Disclosure: The authors of this article represented Theismann in Lumen, et al. v. Theismann, et al., No. 14-15385 (9th Cir. April 8, 2016).