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PERSPECTIVE

‘Prior substantiation’ theory no good in consumer actions

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The 9th U.S. Circuit Court of Appeals heard oral argument this month in *Arleen Cabral v. Supple LLC*, a case accusing supplement maker Supple of falsely advertising its beverage product as clinically proven to “provide fast relief from joint suffering caused by ailments such as arthritis.”

The issue presented on appeal was whether the district court erred in certifying a class where Supple did not uniformly advertise its products as “clinically proven” and presented uncontroverted evidence of satisfied customers. However, questions arose as to whether plaintiff’s claims were inherently premised on a lack of prior substantiation theory, which is not cognizable under California law. Our courts have been flooded in recent years with similar consumer product class actions. The 9th Circuit has an opportunity to reaffirm that private plaintiffs cannot premise a consumer product class action on an overt or disguised theory of lack of prior substantiation for claims made.

Cabral alleged that she purchased Supple in reliance on the purportedly false claim that its “key ingredients are ‘clinically proven’ effective to treat the pain and immobility associated with arthritis.” Supple moved to dismiss the case as an inactionable lack of prior substantiation claim. The court rejected that argument, finding Cabral had adequately alleged that “Supple’s statements that the Beverage is composed of ‘clinically proven effective ingredients’ is false and misleading because Supple’s purported ‘clinical proof’ relies exclusively on studies of glucosamine sulfate, which is not an ingredient in the Beverage.”

Cabral moved to certify a class. Supple argued that individual issues predominated because a substantial number of proposed class members were repeat purchasers satisfied with Supple. Cabral countered that Supple’s evidence was attributable to a placebo effect or unintentional automatic shipment renewals and, in any event, went to the merits of the case that could be decided later. The court agreed, reasoning that “[t]he truth or falsity of Supple’s advertising will be determined on the basis of common proof — i.e., scientific evidence that the Beverage is ‘clinically proven effective’ (or not).”

Supple argued that the district court erred in certifying the class because of the evidence showing repeat satisfied purchasers and the lack of evidence supporting the court’s finding that the “uniform message” of Supple’s ads was that the product was “clinically proven” to treat arthritis pain. Supple argued that “legally, the court was not entitled to interpret how consumers would perceive the ads, and factually, the ads do not say Supple is ‘clinically proven effective to treat joint pain.’”

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Cabral countered that the district court correctly determined that Supple’s efficacy is a question for the merits, not class certification, and that, despite the particular wording thereof, Supple’s advertising formed a sufficiently common course of conduct to warrant class treatment because Supple “claims that its product *does something* to alleviate joint pain” when “the product is true snake oil” that lacks “its claimed efficacy (short of the placebo effect) as a pain reliever.”

Supple seized upon Cabral’s claim that Supple “*does something* to alleviate joint pain,” accusing Cabral of retreating from her position in the district court that the “uniform message” is that Supple is “clinically proven as an arthritis treatment” and, instead, “advanc[ing] an entirely new theory, arguing that the ‘uniform message’ is that Supple has ‘some efficacy.’” Supple reminded the 9th Circuit that Cabral had relied upon the “clinically proven to treat arthritis” version of the purported “uniform message” to survive Supple’s motion to dismiss and satisfy the requirements for class certification. Supple argued that since its ads do not actually say that the product is “clinically proven to treat arthritis” and Cabral cannot show that Supple’s ads falsely convey this message, thus Cabral was seeking to redefine the “uniform message” conveyed by the ads to be that Supple does something for joint pain when it actually does nothing. Because California law precludes a consumer class action plaintiff from stating a false advertising claim based on the theory that the defendant lacks substantiation for its claims, Supple urged the court to conclude that Cabral’s claim is non-actionable and to overrule the class certification.

At oral argument, the panel questioned whether Cabral had shifted its theory regarding the “uniform message” conveyed by Supple’s advertising. Judge Carlos Bea asked whether the evidence of satisfied customers would tend to rebut Cabral’s position on appeal that Supple does nothing. Supple’s counsel responded that it would, and further stated that the studies produced by Cabral do not show that the product does nothing, and thus do not support Cabral’s new position.

Cabral’s counsel explained that her characterization of Supple’s advertisements as conveying that “Supple *does something*” was simply shorthand and not a retreat from her prior position. Bea asked Cabral’s counsel to point to the specific place in the record where Supple’s advertising states that the product is “clinically proven for the treatment of joint pain.” Cabral’s counsel argued that the specific phrase “clinically proven to treat joint pain” is unnecessary to support the district’s court finding regarding Supple’s “uniform message” because the context of the advertisements conveyed this message and showed a pattern of deception. Bea interjected that, under Rule 23(b), the district court did need to locate these specific statements to identify the issues of fact and law that were common to the class. In response, Cabral’s counsel maintained that case law supports the finding where there is an underlying scheme of deceptive advertising. Judge Rosemary Marquez then asked what misrepresentation Cabral was alleging Supple conveyed in its advertising, and Cabral responded that, although the advertising is worded in slightly different ways, Supple conveyed the message that its product is clinically proven to alleviate joint pain.

The panel’s decision likely will turn in part on its determination of whether Cabral has reframed her theory and whether it matters that Supple’s advertising never explicitly claimed that the product was “clinically proven to treat joint pain.” Regardless of how the court rules, companies facing similar claims should consider bringing a motion for summary judgment at the same time as plaintiff’s motion for class certification to emphasize to the trial court that the plaintiff lacks sufficient evidence to meet his burden of showing that the company’s advertising claims are actually false, as required by California law.

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