‘Prior substantiation’ theory no good in consumer actions

By Amy Lally and Celia Spalding

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 uncontested 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.”

Supple 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 argued 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.’”

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 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.’”

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 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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