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ADVERTISING

CONSUMER

Two recent federal district court rulings impose a high hurdle for a consumer plaintiff challenging advertising claims that assert tests or studies prove a certain fact under state consumer fraud statutes, attorneys Kenneth A. Plevan, Gregory S. Bailey, and Limor Robinson say in this BNA Insight. The authors analyze the plaintiff's pleading and proof requirements when the challenged advertising makes ''here's proof,'' or ''establishment,'' claims, and offer practical advice on what is needed to survive a motion to dismiss.

Consumer Fraud Class Actions: What Does a Plaintiff Need To Plead and Prove to Challenge 'Here's Proof' Claims?

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It is now generally well-accepted, based on decisions in a number of key jurisdictions, that a private party challenging advertising under state consumer protection/fraud statutes does not state a legally sufficient cause of action by simply alleging that the challenged advertising lacks proper substantiation.

In a thorough article published in 2011, the authors pointed out that, while the Federal Trade Commission and Food and Drug Administration expect an advertiser to have a ''reasonable basis'' for its advertising claims prior to dissemination, courts have refused to impose this ''prior substantiation'' principle in private lawsuits under state law[1]—even though many state statutes are considered ''mini-FTC statutes.''[2]

Since the publication of that article two years ago, other court decisions have confirmed the refusal to place the substantiation burden of proof on an advertiser/defendant, for example, in *Greifenstein v. Es-*

[1] Dana Rosenfeld & Daniel Blyn, *The ''Prior Substantiation'' Doctrine: An Important Check On the Piggyback Class Action*, 26 Antitrust 68 (2011).

[2] *See, e.g., People v. Applied Card Sys., Inc.*, 863 N.Y.S.2d 615, 624 (2008) (referring to the New York Consumer Protection Act as a ''mini-FTC act'').

 ISSN 1529-0115

tée Lauder Corp.,[3] a July 2013 decision from the Northern District of Illinois. In *Johns v. Bayer Corp.*,[4] an April 2013 decision from the Southern District of California, the court held on summary judgment that, in the absence of affirmative scientific evidence that the challenged advertising claims are false, ''the strength of [the defendant's] evidence is irrelevant and Plaintiffs' claims are based on 'lack of substantiation' rather than proof of falsity.''[5]

The court noted further that in California, ''[p]rivate individuals may not bring an action demanding substantiation for advertising claims . . . only prosecuting authorities [such as the attorney general[6]] may require an advertiser to substantiate its advertising claims.''[7] Earlier this year, in *Gaul v. Bayer Healthcare LLC*,[8] a New Jersey district court not only reaffirmed the inadequacy of plaintiff's prior substantiation theory on defendant's motion to dismiss, but further held that a decision by the National Advertising Division (''NAD'') finding the defendant's supporting study to be unreliable would not be sufficient to allege that the advertising claims were false.

Within the past 18 months, federal decisions under state consumer fraud statutes have also addressed a closely related issue—a plaintiff's pleading and proof requirements when the challenged advertising makes ''here's proof,'' or ''establishment,'' claims. Two noteworthy decisions directly addressing this topic are discussed below.

By way of background, a marketer makes an establishment advertising claim when it represents, in effect, that ''tests or studies prove'' a certain fact, for example, that scientific tests establish that a product will achieve a certain level of performance.[9] Such claims can be made expressly or by implication.[10]

The standard for a competitor challenging ''here's proof'' claims under the Lanham Act[11] is well-established: a challenger need only demonstrate that the defendant's substantiation is not sufficiently reliable to permit one to conclude with reasonable certainty that it establishes the claim being made.[12] Courts have stated that a ''plaintiff may meet this burden either by attacking the validity of the defendant's tests directly or by showing that the defendant's tests are contradicted or unsupported by other scientific tests.''[13]

Recent Guidance on Lanham Act Standards

Until recently, there was little guidance as to whether this Lanham Act standard applied when a consumer makes a comparable challenge to a ''here's proof'' claim under a state consumer protection/fraud statute. One early decision addressing this issue, citing a Lanham Act case, suggested (in dicta) that a claim could be asserted under a state consumer protection/fraud statute based on lack of prior substantiation if (and only if) the challenged advertising claim implied a level of substantiation—i.e., was an establishment claim.[14]

This ''here's proof'' issue was addressed head-on in *Scheuerman v. Nestle Healthcare Nutrition, Inc.*[15] There, a New Jersey federal court judge in July 2012 granted summary judgment in favor of Nestle, dismissing claims under the New Jersey and California consumer fraud statutes, and holding that mere allegations that a ''clinically shown'' claim is not as strongly substantiated as it could have been are ''insufficient to demonstrate entitlement to relief under the consumer fraud statutes.''[16]

The plaintiffs in *Scheuerman* had taken issue with Nestle's claims that its BOOST Kids Essentials (''BKE'') product was ''clinically shown'' to have a variety of health benefits, alleging that Nestle ''did not possess or rely upon any reasonable basis that substantiated these purported health benefits.''[17] The court noted that the plaintiffs ''neither plead nor attempt to prove that BKE failed to provide any promised nutrition or health benefits; rather, they claim only that Nestle's advertising claim that BKE was 'clinically shown' to confer certain health benefits was false because insufficient clinical support existed to substantiate that claim.''[18] Plaintiffs had apparently conceded that the lawsuit was an effort to ''piggyback'' on an FTC consent order.[19]

In granting summary judgment in favor of Nestle, the *Scheuerman* court reaffirmed that ''the case law is clear . . . that prior substantiation claims are not cognizable under the [New Jersey and California statutes].''[20] It then went on to find that plaintiffs' core allegations of fraud were ''clearly grounded in a prior substantiation theory of liability,''[21] and rejected plaintiffs' contention that use of the term ''clinically shown'' in an advertisement, in the absence of adequate substantiation, was false and misleading in and of itself. The court further noted that Nestle had produced over 40 scientific articles and studies that it contended provided the required substantiation for its advertising claims,[22] and

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[3] No. 12-cv-09235, slip op. (N.D. Ill. July 26, 2013), ECF No. 50. The authors represented the defendants in the *Greifenstein* lawsuit.

[4] No. 09cv1935 AJB (DHB), slip op. at 1-5 (S.D. Cal. Apr. 10, 2013), ECF No. 231.

[5] *Id.* at 69-70.

[6] Cal. Bus. & Prof. Code § 17508 (West 2008).

[7] *Johns v. Bayer Corp.*, No. 09cv1935 AJB (DHB), slip op. at 52 (S.D. Cal. Apr. 10, 2013), ECF No. 231.

[8] No. 12-5110 (SRC), slip op. at 2-3 (D.N.J. Feb. 11, 2013), ECF No. 27.

[9] *See, e.g.*, *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1492 (1st Cir. 1989); *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 121 (D. Mass. 1996).

[10] *FTC Policy Statement Regarding Advertising Substantiation* (appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984)).

[11] Pub. L. 79-489, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

[12] *E.g.*, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991); *Procter & Gamble Co. v. Chesebrough-Pond's, Inc.*, 747 F.2d 114, 119 (2d Cir. 1984).

[13] *Southland Sod Farms*, 108 F.3d at 1139.

[14] *See Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 939 n.2 (7th Cir. 2001) (observing that ''lack of substantiation is deceptive only when the comparative claim at issue implies that there is substantiation for the claim made'' (citing Lanham Act decision)).

[15] Nos. 10-3684 (FSH)(PS), 10-5628 (FSH)(PS), slip op. (D.N.J. July 17, 2012), ECF No. 232.

[16] *Id.* at 15.

[17] *Id.* at 3.

[18] *Id.* at 4 n.5.

[19] *Id.* at 5 n.6.

[20] *Id.* at 12.

[21] *Id.* at 13.

[22] *Id.* at 15.

  CLASS ISSN 1529-0115

that plaintiffs' mere offering of criticisms of the strength and significance of those studies was not sufficient to satisfy plaintiffs' burden under the state statutes:

> Plaintiffs' experts and its other facts all boil down to a claim that Nestle's scientific support underlying its claim of 'clinically shown' health benefits *is not as strong as it should be and do not substantiate those claims*. . . . At best, Plaintiffs can prove that Nestle's studies were not sufficiently strong; while this may be enough to make out an ordinary claim not premised on a theory of fraud, it is insufficient to demonstrate entitlement to relief under the consumer fraud statutes cited above.[23]

Thus, because plaintiffs' case was solely based on criticisms of Nestle's substantiation, they could not meet their burden in a consumer fraud case of proving actual falsity.[24]

The July 2013 *Greifenstein* decision in the Northern District of Illinois made similar observations regarding plaintiffs' burden of proof with respect to establishment claims asserted as fraudulent under the Illinois consumer protection statute. There, plaintiff challenged the competency of the clinical studies allegedly used by defendants in support of their establishment claims, with plaintiff specifically alleging that defendants ''failed to disclose the study's methodology and that [defendants themselves] funded the study.''[25]

In granting defendants' motion to dismiss, the court cited *Bober* for the proposition that ''an advertisement may be fraudulent if the ad lacks substantiation, but only when the claim at issue implies that support—any support—exists for the claim *when there is none*.''[26] Given that the complaint itself had acknowledged the existence of a study, it had been effectively conceded that substantiation did exist for defendants' claims, ''[d]espite [plaintiff's] dissatisfaction with [defendants'] testing methods and funding.''[27] Accordingly, ''the mere existence of the study alone defeats her argument that [defendants'] wrinkle-repair claims lack substantiation.''[28]

In sum, on this point, the court in *Greifenstein* interpreted the Seventh Circuit's comments in *Bober* to mean that an advertising claim challenged as false for not having the supporting substantiation it stated or implied it possessed was not sustainable if the cited support existed—even if said support could be the subject of valid criticism.

Unlike in *Scheuerman*, however, the plaintiff in *Greifenstein* had cited specific affirmative clinical evidence to support its position that certain advertising claims were false—defendants' own clinical studies, which had been analyzed at length in a decision by the NAD.[29]

That position was also rejected by the court, on several grounds. First, the court held that the study (as summarized in the NAD decision) relied upon by plaintiff did not even address one of the wrinkle repair claims challenged in the complaint, and thus with respect to that claim plaintiff had not pleaded her claim with sufficient particularity to satisfy the fraud pleading requirements set forth by Federal Rule of Civil Procedure 9(b) (''Rule 9(b)'').[30] Second, the NAD's analysis of the clinical study subsequently had been overturned on appeal by a panel of the National Advertising Review Board (''NARB''),[31] and the complaint thus failed to plead falsity with sufficient particularity in that respect as well.[32]

High Hurdle for Consumer Plaintiffs

In sum, *Scheuerman* and *Greifenstein* impose a high hurdle for a consumer plaintiff challenging establishment advertising claims under state consumer fraud statutes. Reading the two opinions in tandem, the state consumer fraud standard requires that a plaintiff have independent, affirmative evidence disproving a challenged ''here's proof'' claim, or be in a position to show that the advertiser's proof was completely non-existent. This standard derives directly from the principle that a lack-of-proper-substantiation argument is impermissible.

Although not discussed in either opinion, one rationale for not applying the less stringent Lanham Act standard for establishment claims to causes of action arising under the state consumer fraud statutes could be that Lanham Act false advertising claims do not require an allegation of fraud.[33] Therefore, Rule 9(b) pleading standards are not applicable, unless such allegations characterize the challenged conduct as fraudulent.[34] It remains to be seen whether the *Greifenstein*/*Scheuerman* formulation for establishment claims applies to state consumer false advertising claims *not* alleged to be fraudulent, i.e., where Rule 9(b) may not apply.[35]

Greifenstein is particularly noteworthy because it was decided on a motion to dismiss. While the court there, in granting the motion, relied on a failure to satisfy Rule (9)(b) standards, the federal ''plausible'' pleading standards under *Iqbal*[36] and *Twombly*[37] are also relevant on motions to dismiss consumer fraud claims. Under those standards, in order to survive a motion to dismiss, a complaint must contain sufficient fac-

[23] *Id.* at 14-15 (emphasis added).
[24] *Id.* at 15.
[25] *Greifenstein v. Estée Lauder Corp.*, No. 12-cv-09235, slip op. at 9 (N.D. Ill. July 26, 2013), ECF No. 50.
[26] *Id.* (emphasis added).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 11.
[30] *Id.*
[31] *Id.* at 12.
[32] *Id.* at 12-13.
[33] *See Vector Prods., Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005).
[34] *See Vanguard Prods. Grp. v. Merchandising Techs., Inc.*, No. 07-CV-1405-BR, slip op. at 11 (D. Or. Apr. 7, 2008), ECF No. 109.
[35] An action under Connecticut's statute, for instance, is not necessarily subject to the pleading-with-particularity requirements of Rule 9(b). *See, e.g.*, *Milo v. Galante*, No. 3:09cv1389 (JBA), slip op. at 15 (D. Conn. Mar. 28, 2011), ECF No. 77. Of course, a number of courts have held that Rule 9(b) does apply where such claims are grounded in fraud. *See, e.g.*, *Allstate Ins. Co. v. Advanced Health Professionals, P.C.*, 256 F.R.D. 49, 52 n.3 (D. Conn. 2008); *see also Aviamax Aviation Ltd. v. Bombardier Aerospace Corp.*, No. 3:08-cv-1958 (CFD), slip op. at 17 (D. Conn. May 10, 2010), ECF No. 42 (dismissing Connecticut claim alleging fraudulent misrepresentations in the context of a contractual breach because of plaintiff's failure to plead the claim with particularity).
[36] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[37] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

tual matter that, if true, states a claim for relief that is *plausible on its face*.[38]

To that end, a plaintiff must plead ''factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.''[39] Thus, a complaint must contain ''more than an unadorned, the-defendant-unlawfully-harmed-me accusation,'' and bare assertions that merely list the elements of a cause of action are insufficient when supported only by conclusory statements.[40]

Furthermore, in deciding a motion to dismiss, courts will not presume *conclusory* statements to be true.[41] A number of federal Circuit Court decisions have upheld the dismissal of complaints where plaintiffs have not alleged sufficient facts to render their claims ''plausible,'' as opposed to just ''possible.''[42] Many federal district courts have issued similar opinions.[43]

Given the *Iqbal*/*Twombly* and Rule 9(b) federal pleading standards applicable to complaints alleging state consumer fraud, a complaint challenging an establishment advertising claim without independent factual evidence tending to show that the underlying claim is false is not legally sufficient and should be dismissed. While the challenger might allege that the cited support did not exist, presumably that assertion would not immunize the complaint from dismissal unless the plaintiff has a plausible factual basis for asserting that the advertiser's support was non-existent.

What a Plaintiff Needs to Survive a Motion to Dismiss

Does this mean consumer class actions challenging science-based establishment claims are now foreclosed? A recent (July, 2013) California federal court decision illustrates what is needed to survive a motion to dismiss. In *Yacu v. All American Pharmaceutical & Natural Foods Inc.*,[44] the court addressed on a motion to dismiss plaintiff's allegations that published studies had shown defendant's advertising claims to be false. Plaintiff had challenged under California's consumer protection/fraud statutes several categories of advertising claims, including ones indisputably in the establishment category.[45]

Where plaintiff had cited in the complaint specific studies which, if accepted, would show defendant's claims to be false, the court held that plaintiff had not relied on a lack-of-prior-substantiation theory, and had thus plausibly alleged his claims.[46] However, where the complaint identified studies that did not directly address challenged advertising claims, the court dismissed plaintiff's allegations for lack of plausibility.[47]

Interestingly, where plaintiff's complaint itself cited studies that both supported and undercut certain advertising claims, the court found that ''the research on this . . . is inconclusive or unsubstantiated,'' and thus dismissed that portion of the complaint on the grounds that ''claims for lack of substantiation do not give rise to a private cause of action under the California consumer statutes.''[48] This further illustrates the hesitancy of federal court judges to permit consumer fraud cases to proceed past the pleading stage if it appears that the true thrust of plaintiff's argument is that the challenged advertising claims lack proper support of the type that the FTC might require from the advertiser.

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[38] *See, e.g.*, *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 128 (2d Cir. 2011) (plausibility standard requires '' 'more than a sheer possibility that a defendant has acted unlawfully' '' (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[39] *Iqbal*, 556 U.S. at 678.

[40] *Id.*

[41] *Id.* at 686.

[42] *See, e.g.*, *Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2008) (dismissing ''bare allegation'' that defendant, administrator of the Environmental Protection Agency, knowingly issued false press releases, ''in the absence of some supporting facts''); *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012) (''[T]he *Twombly*/*Iqbal* standard recognizes a plaintiff should have at least some relevant information to make the claims plausible on their face.''); *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 72 (3d Cir. 2011) (plausibility standard requires ''more than a sheer possibility that the defendant acted unlawfully'').

[43] *See, e.g.*, *Padilla v. Costco Wholesale Corp.*, No. 11 C 7686, slip op. at 7 (N.D. Ill. June 21, 2012), ECF No. 35 (while complaint alleged that '' 'numerous clinical studies' '' showed the statements were false, ''some level of detail of the fraud beyond what [was] pled is required,'' including '' 'how' Costco's product labels were fraudulent''); *Murphy v. Int'l Bus. Machs. Corp.*, No. 10 Civ. 6055(LAP), slip op. at 13 (S.D.N.Y. Feb. 21, 2012), ECF No. 21 (holding allegations that defendant made ''false and inaccurate'' statements to be insufficient under *Iqbal*); *Grimaldi v. Paggioli*, No. 3:08CV599 (SRU), slip op. at 5 (D. Conn. July 8, 2010), ECF No. 61 (''It is not enough to allege conduct alone, the factual allegations must be sufficient to raise the claim above the level of speculative and assert a cause of action that demonstrates an entitlement to relief.'').

[44] No. 2:13-cv-00508-SVW-JCG, Civil Minutes—General (C.D. Cal. July 24, 2013), ECF No. 20.

[45] *See id.* at 2-3 n.4 (''In just 60 days, the Kre-Alkalyn® group experienced an overall strength increase of 28.5% above those in the creatine monohydrate group.'').

[46] *See id.* at 5-6.

[47] *See id.* at 7.

[48] *Id.* at 9.

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