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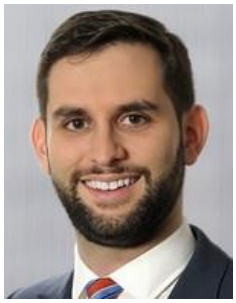
Challenging Class Cert. When Plaintiffs Missed 'False' Ad

By **Michael Schwartz and Maren Messing** (May 12, 2021, 6:35 PM EDT)



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In putative class actions alleging false advertising, plaintiffs often argue that class certification is appropriate because the language being challenged appeared on the defendant's marketing materials or product label, thereby making the class members' experience — and the question or questions to be resolved — susceptible of common proof.

These plaintiffs invariably claim that individualized questions of deception and reliance do not defeat certification, because consumer protection statutes employ an objective "reasonable consumer" test, that does not turn on what each individual class member actually thought or believed.

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Plaintiffs sometimes carry the day on this point. For example, on March 24, U.S. District Judge William H. Pauley III of the U.S. District Court for the Southern District of New York granted class certification in In re: Kind LLC,[1] rejecting Kind's argument that class certification was inappropriate because the product labels had changed throughout the class period.

But unlike in Kind, there is often evidence that many of the purported class members did not see the challenged statement or statements in the first place. And courts have generally held that, objective test or no, class certification is not appropriate in cases where it cannot be assumed that all or nearly all class members actually viewed the challenged statement — for example, where the challenged statement was written in small type or placed on the product's back label, or was not present on some label versions at all.

In this article, we discuss three circumstances in which this defense has been used successfully to defeat class certification.

Background: Rule 23 and Statutory Reliance and Causation Requirements

To obtain certification of a damages class pursuant to Rule 23(b)(3), plaintiffs must prove that the elements of Rule 23 are satisfied, including the rule's commonality, typicality and predominance requirements.

In consumer class actions, courts' analyses of these criteria often turn on whether plaintiffs can prove the deception, reliance and/or causation elements of their state law causes of action through common evidence. To make that showing, plaintiffs must establish, as a threshold matter, that every class member was exposed to the challenged advertising claim.

However, if a potential class member did not see the challenged advertisement, she necessarily was not deceived by that statement, she necessarily did not rely on that statement, and the statement necessarily could not have caused her to purchase the product.

Therefore, defendants often argue — and courts routinely agree — that class certification is inappropriate if resolution of plaintiffs' claims would require individualized inquiries into whether each class member actually saw the challenged statement. Courts recognize that hundreds or thousands of such individual inquiries would predominate over any common questions, thereby making adjudication by class action inferior to other methods.

This outcome commonly arises in three circumstances: (1) where the challenged statement appears in a print, television or online advertisement, rather than on a product label; (2) where the challenged statement appeared for just a limited time in the product's lifespan, on only one of multiple label versions; and (3) where the challenged statement appeared in small type or an inconspicuous location on the label.

Challenges to Print, Television or Online Advertising

In some instances, purported class actions may take aim at statements — or omissions — in places other than a product's label, such as in print, on a website or in television advertisements. In these cases, many, or even most, consumers who bought a particular product may never have seen the particular advertising statement at issue.

While some statutory consumer protection claims permit a presumption of classwide reliance or causation when a uniform advertising statement is at issue, the presumption is readily overcome when the evidence shows that many consumers did not view the challenged advertisement. For example, in Mazza v. American Honda Motor Co., the plaintiffs alleged that Honda failed to disclose issues with its braking system in television and magazine advertisements and on its website.[2]

The plaintiffs contended that uniform reliance could be presumed, because the challenged advertising was directed to consumers. The U.S. Court of Appeals for the Ninth Circuit disagreed, and in 2012, it reversed the U.S. District Court for the Central District of California's order granting class certification, explaining that it would be improper to apply a "presumption of reliance … because it is likely that many class members were never exposed to the allegedly misleading advertisements" at all.

In 2016, the Central District of California reached the same conclusion in Zakaria v. Gerber Products Co.[3] The plaintiffs there claimed that Gerber falsely stated in print advertisements and television commercials, and on its website, that Gerber baby formula reduced the risk of allergic reactions.

However, the defendants were able to show that most of the advertisements and promotions in question occurred for short periods of time, such as a television commercial that ran for five weeks and a magazine article that ran intermittently for approximately 14 months. Accordingly, the court refused to certify a class based on the alleged misstatements in the print, television and online advertisements.

One notable case where the court reached the opposite conclusion is In re: Tobacco II Cases.[4] There, the plaintiffs challenged advertisements for cigarettes in print and other media as falsely disputing the link between smoking and lung cancer. The trial court granted class certification, rejecting the defendants' argument that certification was improper because proving causation required individualized inquiries.

In 2009, the Supreme Court of California affirmed, explaining that because the record showed that the defendants had engaged in a extensive, decadeslong advertising campaign, it was reasonable to presume that the challenged advertising was viewed by each class member and caused his or her alleged injury — thereby avoiding the need for individualized causation inquiries.

Later cases have made clear that Tobacco II is largely confined to its facts, given the exceptionally lengthy and widespread nature of the advertising campaign at issue in that particular case.[5]

Challenges to Language That Appeared on a Subset of Many Label Versions

Courts have also denied certification where the challenged language did not appear on every version of the product's label, leading to nonuniform reliance or causation across class members.

For example, in In re: Clorox Consumer Litigation, the plaintiffs challenged a claim on Fresh Step cat litter stating that the product was more effective at eliminating cat odors than other similar products.[6] However, The Clorox Co. showed that the product packaging had changed many times during the class period, and that 10 versions of the packaging did not include the challenged statement.

Based on this evidence, the U.S. District Court for the Northern District of California concluded in 2014 that the plaintiffs had not proven that "many, or even most, members of the proposed classes [saw], much less rel[ied] upon" the challenged statement. The court denied class certification on this basis, because individualized inquiries into reliance and causation would predominate over common questions.

Similarly, in Pfizer Inc. v. Superior Court, the plaintiffs claimed that Listerine mouthwash product labels misleadingly suggested that the product could replace the use of dental floss in reducing plaque and gingivitis.[7] The trial court granted class certification, but the California Court of Appeal reversed in 2010.

The appellate court pointed to evidence showing that over half of Listerine bottles sold during the class period had labels that did not contain the challenged floss-comparison statement, and therefore, the majority of class members who purchased Listerine necessarily did so for reasons unrelated to the challenged statement.

As that court explained, however far the so-called presumption of reliance may reach, "one who was not exposed to the alleged misrepresentations and therefore could not possibly have lost money or property as a result of the [challenged conduct] is not entitled to restitution." This warranted reversal of the class certification order.

As noted above, the Southern District of New York recently reached the opposite conclusion in In re: Kind LLC. The plaintiffs there alleged that labeling statements "All Natural," "Non-GMO" and "No Genetically Engineered Ingredients" on Kind bars were false and misleading, because the products contained synthetic and genetically modified ingredients.

Kind opposed class certification, on the ground that the plaintiffs were not exposed to the same marketing, because the labeling statements differed over time and across challenged products. The court rejected this argument, finding that at least one of the challenged statements, or a close variation thereof, appeared prominently on every version of the product labels.

Thus, in the court's view, all consumers were exposed to "some form of allegedly misleading advertising, albeit in slight" — and in the court's view, immaterial — "variations."

Challenges to Labeling Statements in Small Print or Inconspicuous Placement

Finally, a presumption of uniform reliance and causation may not apply when the challenged statement appeared in small print on a product label, or in an obscure location where many consumers might not have noticed it.

For example, in Hadley v. Kellogg Sales Co., the plaintiffs alleged that Kellogg's falsely touted the health benefits of several products by using the phrase "wholesome goodness" on the product label.[8] The phrase appeared on a back panel of the product packaging, in a small font and in the middle of a block of text.

This was enough for the U.S. District Court for the Northern District of California to conclude in 2018 that the statement was not "prominently displayed," such that an inference of classwide exposure was not warranted. The court distinguished another challenged statement, "lightly sweetened," that appeared in the center of the front panel of the product packaging, which it found was sufficiently prominent to infer classwide exposure.

This issue also arose in Zakaria, the baby formula case discussed above. The court found that the challenged statements regarding a lower risk of allergies appeared in "small font and [were] sometimes located on the back or inside cover" of the product.[9] For this reason too, the court rejected an inference that all consumers in the proposed class would have seen — let alone relied on — the challenged statement.

In some cases, defendants are able to go beyond inferences from text placement and font size, and proffer actual empirical evidence demonstrating that the vast majority of class members did not see the challenged statement.

For example, in Clorox, the cat litter case discussed above, the defendant produced a survey showing that just 11% of consumers read the back panel of the packaging, where the challenged statement appeared.[10] The court described this as "powerful evidence," which further supported its conclusion that most members of the proposed classes did not see the challenged statements.

Even more direct evidence was proffered in Sevidal v. Target Corp., in which the plaintiffs challenged the accuracy of a "Made in USA" claim for certain products listed on Target's website.[11] The "Made in USA" statement was visible only if the viewer clicked an "Additional Info" link on the main product page.

In litigation, Target submitted historical click-through data showing that the vast majority of actual members of the putative class did not click the "Additional Info" link before making the purchases at issue in the case. Based on this evidence, the California Appellate Division affirmed the denial of class certification in 2014, because individualized inquiries would be required to determine whether each

class member had been exposed to the "Made in USA" statement by clicking the "Additional Info" link.

Similarly, in 2020, the Ninth Circuit in Moorer v. StemGenex Medical Group Inc. rejected a class definition that included consumers who did not see a challenged statement on the defendant's website.[12] The plaintiffs claimed that StemGenex misleadingly marketed its stem cell treatment by posting allegedly deceptive "Patient Satisfaction Ratings" on its website.

The Ninth Circuit explained that the proposed class was overbroad to the extent it included those who viewed the website but did not scroll down and view the patient satisfaction ratings at the bottom of the relevant page. The appeals court remanded, with instruction to the U.S. District Court for the Southern District of California to limit the class definition to only those consumers who saw the patient satisfaction ratings.

Of course, determining who actually scrolled down and saw those ratings is an individualized question, so this narrowing of the class definition may ultimately require decertification of the class altogether.

Predominance and superiority are good targets for defendants looking to defeat class certification in false advertising cases — and defendants have fared well in doing so where the record suggests or shows that a significant portion of the proposed class did not even see the challenged advertising statement. Defendants should carefully consider what evidence can be gathered from their records, or developed through surveys or expert testimony, in anticipation of opposing a class certification motion.

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Disclosure: The authors' law firm has represented Clorox and Pfizer in matters unrelated to those discussed in this article.

[1] In re: Kind LLC "Healthy and All Natural" Litigation, 2021 U.S. Dist. LEXIS 55823 (S.D.N.Y. March 24, 2021).

[2] Mazza v. American Honda Motor Co., 666 F.3d 581, 585-86 (9th Cir. 2012).

[3] Zakaria v. Gerber Products Co., 2016 U.S. Dist. LEXIS 184861 (C.D. Cal. March 23, 2016).

[4] In re: Tobacco II Cases, 46 Cal. 4th 298, 308 (Cal. 2009).

[5] See, e.g., Mazza, 666 F.3d at 586.

[6] In re: Clorox Consumer Litigation, 301 F.R.D. 436, 439 (N.D. Cal. 2014).

[7] Pfizer Inc. v. Superior Court, 182 Cal. App. 4th 622, 625 (Cal. App. Div. 2010).

[8] Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1091 (N.D. Cal. 2018).

[9] Zakaria, 2016 U.S. Dist. LEXIS 184861, at * 22.

[10] In re Clorox, 301 F.R.D. at 444.

[11] Sevidal v. Target Corp., 189 Cal. App. 4th 905 (Cal. App. Div. 2010).

[12] Moorer v. StemGenex Medical Group Inc., 830 Fed. App'x 218 (9th Cir. 2020).