LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, DECEMBER 13, 2011

PERSPECTIVE

Pre-purchase exposure: Defeating class certification in false advertising cases

By Gregory J. Sater

How can defendants in California defeat class certification in class actions that allege false advertising under either the "fraudulent" prong of the unfair-competition law or the Consumer Legal Remedies Act? There is at least one good way to do so, and that is by demonstrating variability of consumer exposure to the challenged advertising claim.

While there are differences between these two statutes, both require the plaintiff to prove that the challenged advertising claim was likely to deceive consumers, and that the plaintiff actually relied on the truth of the claim in deciding to purchase the product.

If the case is brought as a class action, does everyone in the class need to prove their reliance? Under the unfair-competition law, the answer is no. Only the named class representative needs to prove reliance. So long as the challenged advertising claim is a material claim, the rest of the class' reliance may be presumed. *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), a material claim is one to which a reasonable person "would attach importance [as] to its existence or nonexistence in determining his choice of action in the transaction." *McAdams v. Moonier Inc.*, 182 Cal.App.4th 174, 183 (2010).

This "presumption of reliance" is a real problem for a defendant in a case of this kind.

What if a defendant can show that its advertising campaign in content or messaging was so varied, or that people's exposure to the campaign was so varied, that many consumers must have purchased the product without ever seeing or hearing the challenged advertising claim? How could a consumer who was never exposed to the advertising claim in the first place possibly have relied on it, even if it is deemed a material claim for those who did see or hear it? Can class certification be defeated based upon such a showing?

Yes, but it isn't easy.

The optimal fact pattern for a defendant in this situation arises when it has advertised, marketed, and promoted its product using a variety of different messages in a variety of different types of media, or when it can show that factors other than its advertising claims have led to product sales. The point is to show that not every purchaser was exposed to the same message prior to their purchase.

If the product was in stores, were there differences in what was said on the retail packaging or labeling? Were different messages disseminated in different types of media? This can happen when a company uses a variety of means to get the word out about its product. It might use a combination of print ads, TV commercials, catalog ads, direct mail ads, online banner ads, Facebook ads, Twitter tweets, kiosks, press releases, mobile phone ads, radio ads, contests, sweepstakes, call center scripts, emails, and retail packaging and labeling. In addition, today's consumer also is likely to seek out and review substantial pre-purchase information from available social media sources, such as mommy blogger websites, product review websites, Facebook, etc, much of which may influence or lead to the product's purchase without making any mention of the challenged advertising claim.

The greater the variability of consumer exposure to the advertising claim and to other readily available messaging about the product before purchase is made, the better the defense argument against class certification.

In one such case, *Pfizer v. Superior Court*, 182 Cal. App. 4th 622 (2010), the plaintiff claimed that Pfizer had run ads misrepresenting that the use of Listerine could replace the need for dental floss. The state court held that even though class-wide relief is available without individualized proof of reliance, "one who was not exposed to the alleged misrepresentations...could not possibly have lost money or property as a result of the unfair competition[.]" The court noted that even though Pfizer had run TV commercials containing the challenged advertising claim, those commercials had not run continuously during the time when consumers had purchased the product in retail stores. Also, the retail product packaging did not always include the challenged claim. Thus, it was logical to conclude that many consumers "who purchased Listerine...did so not because of any exposure to Pfizer's allegedly deceptive conduct, but rather because they were brand-loyal customers or for other reasons."

Similarly, in *Cohen v. DirectTV*, 178 Cal.App.4th 966 (2009), the plaintiff alleged that a false claim by DirectTV had induced him to subscribe to their service. The court denied class certification because some people had subscribed without having seen the challenged advertising claim; people may have subscribed due to other factors such as word of mouth or from viewing DirectTV at a friend's house.

Likewise, in *Kaldenbach v. Mutual of Omaha Life Insurance Co.*, 178 Cal. App. 4th 830 (2009), the plaintiff sued a life insurance company for making a misrepresentation to life insurance applicants. However, agents selling the policies did not follow the same script with each customer, making consumer exposure was too variable for class treatment.

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In *O'Shea v. Epson American Inc.* (C.D. Cal. Case No. 2:09-cv-08063), a federal court case, the plaintiff alleged that the defendant's retail box contained a misleading statement. The court denied class certification based on the standing requirement of the U.S. Constitution, citing evidence of variability of exposure. It determined that in federal court, everyone in a class must have suffered an injury caused by the defendant's conduct in order to establish standing. The court denied class certification because there was evidence that at least some consumers had purchased the product from online retailers with websites that did not display the deceptive representations that were on the box.

Obviously, every advertising campaign and thus every case will be different. Recently, in both *Johnson v. General Mills Inc.*, 8:10-cv-00061-CJC-AN (C.D. Cal. Sept. 12, 2011), involving the claimed digestive benefits of YoPlus, and *In re Ferrero Litigation* (S.D. Cal. 11-cv-00205), involving the claimed health benefits of Nutella, two federal courts granted class certification and rejected defense arguments to the effect that not all of the defendants' customers were exposed to the same (allegedly deceptive) advertising message. The courts in those cases viewed the advertising claims as having been uniformly communicated to everyone.

Today's advertisers are reaching consumers through different and multi-faceted touch points that go far beyond those that existed before. There's much more content, and it's much more diverse. At the same time, social media is exploding. Consumers are getting more and more of their pre-purchase information about a product not from the marketer, but from other consumers online. These two trends should make for some very interesting class certification rulings in the future as variability of consumer exposure becomes easier and easier to prove.

Gregory J. Sater, *a partner in Venable's Los Angeles office, is an attorney who has built an intellectual property and false advertising litigation practice in advertising, trademark, copyright, patent, trade dress, trade secret and other IP issues to demonstrate. He represents direct response television advertisers, online marketers and other direct marketers.*