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Ninth Circuit to False Advertising Class Actions: Drop Dead

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On June 23, 2015, the Ninth Circuit in ***Cabral v. Supple LLC***, — Fed. Appx. –, 2015 WL 3855142 (9th Cir. June 23, 2015) placed a significant hurdle in the path of false advertising class actions. Specifically, the Court held that in class actions "based upon alleged misrepresentations in advertising and the like," in order for common questions to predominate—an essential Rule 23(b) inquiry—"it is critical that the misrepresentation in question be made to all of the class members."

The underlying action concerned advertisements of a beverage sold by Supple, LLC, which was advertised to contain certain key ingredients (*i.e.*, glucosamine, hydrochloride and chondroitin sulfate) to provide joint relief. Plaintiff Cabral alleged that she purchased the beverage after watching an infomercial, but subsequently discovered that the key ingredients have no measurable impact on joint problems. Cabral brought suit under California's Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act, and sought to certify a class of all persons in California that purchased the beverage.

The district court subsequently certified Cabral's requested class of "all persons residing in the State of California who purchased [the beverage] for personal use and not for resale since December 2, 2007." The district court found, in relevant part, that a common issue—whether Supple misrepresented that the beverage is clinically proven effective to treat joint pain—predominated.

In reversing the district court's grant of class certification, the Ninth Circuit began by reciting the standard for predominance under Rule 23(b): "in order for the issue to predominate, it must at least be common and there must be cohesion among the class members." And it was in meeting this standard that the Court determined the district court erred. The Ninth Circuit determined that record did not support the conclusion that "all of the class members saw or otherwise received the misrepresentation that the beverage was 'clinically proven effective in treating joint pain.'" The Court implied that consumers actually had to see advertisements that declared the beverage "clinically proven effective in treating joint pain," and held "that the misrepresentation in question [had to] be made to all of the class members" in order for common issues to predominate.

The Ninth Circuit's opinion is in line with its recent decision in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (discussed in greater detail here), in which it held that "the relevant class must be defined in such a way as to include only members who were exposed to advertising that is

alleged to be materially misleading." This line of authority has a significant practical impact on false advertising class actions. It is hard to imagine the false advertising case where the alleged advertisement and/or message at issue did not vary throughout the class period and particularly among the various advertising medium used. In conjunction with authority like *Mazza*, this opinion will provide strong ground to force plaintiffs' counsel to carve out an extremely narrow class (*i.e.*, a class drawn around one specific advertisement), if not defeat class certification outright.

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