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False advertising class actions: Tennessee federal court invalidates survey and denies certification for dental providers in class action against SmileDirect

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The Middle District of Tennessee recently denied a motion for class certification for a group of dental providers in a suit against SmileDirectClub (“SmileDirect”). *Ciccio v. SmileDirectClub, LLC*, No. 3:19-CV-00845, 2024 WL 559235 (M.D. Tenn. Feb. 12, 2024).

The plaintiffs in *Ciccio* consist of two groups: (1) dental care providers who objected to SmileDirect’s marketing practices; and (2) consumers who were allegedly harmed by relying on SmileDirect for dental care. 2024 WL 559235, at *1. The plaintiffs alleged claims for false advertising, consumer protection violations, and fraud. *Id.* In June 2023, the dental care providers moved for certification of a nationwide provider class and two Florida and New York provider subclasses. *Id.* at *4.

Under the Lanham Act, plaintiffs suing for false advertising must show direct economic or reputational harm caused by the defendant’s advertising deception. *Id.* at *6 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)). The district court determined that while there were common issues among the group of dental providers, it was too difficult to connect a single misleading statement by SmileDirect to an actual economic injury suffered by the dental provider class. *Id.* *7. (The district court’s order did not address the consumer class.)

The dental providers relied on a survey in an effort to connect SmileDirect’s advertising statement to their alleged economic injuries. *Id.* The survey was of a group of individuals accessing a replica of SmileDirect’s website who were then asked to imagine coming across the website while researching treatment options. *Id.* at *8. The district court found the survey inadequate because it instructed the participants to follow a specific link directing them to focus solely either on the language challenged in the lawsuit or on a non-misleading alternative. *Id.* at *8-9. This prevented the participants from exploring the website freely and providing an unbiased response, because the survey “relied on an artificially created situation that was plainly designed to induce the survey respondents to place particular weight on the statement or omission at issue.” *Id.* at *9. The district court reasoned that the survey’s setup could not accurately gauge the actual rate of patient diversion or persuasion because “the allegedly misleading statements by SmileDirect would be only a handful of the potentially numerous messages that the plaintiffs received while ‘shopping.’” *Id.*

The plaintiffs also proffered an expert damages report, which relied on the problematic survey to prove their injury and allocation of damages. *Id.* at *9. The district court found that the damages expert report was unreliable because it (1) failed to bridge the gap between the survey results and the dental providers' damages; (2) failed to account for the individual variations between different dental practices and patient populations allegedly affected by SmileDirect's statements; and (3) could not estimate how many customers were actually exposed to SmileDirect's statements. *Id.* at *9-10.

The district court acknowledged that "[a]bsolute precision may be impossible when thousands of claims are involved . . . and some degree of statistical approximation is acceptable in false advertising damages models." *Id.* at *10. But it nonetheless found that there is "a point at which approximation eclipses the truth so fully that the numbers produced cannot serve the purpose they were intended to serve." *Id.* The district court concluded that the plaintiffs' damages expert failed to produce a model that sufficiently allocated injury or damages to advance a class-wide resolution. *Id.*

Analyzing Rule 23(a), the district court explained it had "no confidence that any one plaintiff could be considered to have a 'typical' claim." *Id.* Additionally, there was insufficient evidence that the plaintiffs could adequately represent the other class members. *Id.* As a result, the dental care providers failed to satisfy the requirements of Rule 23(a)(3) and Rule 23(a)(4). *Id.*

Turning to Rule 23(b), the district court found that the variations between dental providers prevented the plaintiffs from satisfying Rule 23(b)(3) because those variations would create individual issues that predominated over shared issues. *Id.* The plaintiffs also failed to satisfy Rule 23(b)(2) because money damages were central to the case. *Id.* at *11.

The plaintiffs asked the district court to certify the class in the alternative under Rule 23(c)(4), which would limit certification "to issues for which shared questions predominate, while leaving aspects of the class members' cases in which unshared issues predominate to be decided separately." *Id.* at *11. The court denied Plaintiffs' request to certify a Rule 23(c)(4) issue class because the plaintiffs' inability to prove a class-wide injury extended not only to damages but also to the liability determination itself. *Id.*

Takeaways: The decision in *Ciccio v. SmileDirectClub, LLC* demonstrates that a proposed false advertising class must take seriously the requirement that injury and damages for each class member must be directly linked to the defendant's allegedly false advertising.