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District Court Rejects Class of Pop Warner Football Parents for Lack of Common Misrepresentations

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Takeaway: In a false advertising case, one of the key issues for certifying a class is establishing that all putative class members were exposed to the same representations. Where there are no uniform channels through which a defendant communicates with putative class members, a plaintiff faces an uphill battle. This is what happened in *Archie v. Pop Warner Little Scholars, Inc.*, where the Central District of California concluded there was too much variability in how and what kind of information Pop Warner communicated to parents about the safety of youth tackle football, and as a result, the court denied plaintiffs' motion for class certification. No. CV-16-6603-PSG (PLAx), 2019 WL 4439493 (C.D. Cal. Sept. 11, 2019).

In *Archie*, plaintiffs sought to certify a class of all persons who enrolled their minor children in Pop Warner Little Scholars' tackle football program from 1997 to present. The proposed class representative enrolled her son, Tyler, in Pop Warner football beginning in 1997. After sustaining injuries to his head while playing football, Tyler began experiencing behavioral issues and depression and eventually committed suicide in 2014. It was later discovered that Tyler had suffered from the brain disease Chronic Traumatic Encephalopathy ("CTE").

Plaintiffs alleged claims under California's Unfair Competition Law and False Advertising Law. At bottom, plaintiffs alleged that Pop Warner made misleading statements and omissions regarding the program's safety to induce parents to enroll their children in the program. As for specific content, plaintiffs pointed to alleged misrepresentations in a number of documents and media, including Pop Warner's website, coaches' handbooks, rule books, and administrative manuals. Plaintiffs also alleged that Pop Warner misrepresented the safety of its football helmets by including a label on each helmet which suggested compliance with a nonexistent safety standard.

Over 400,000 children participate in Pop Warner football each year. Various independent organizations, including youth football leagues and associations, participate in Pop Warner. As a result, there is "inherent variability among the volunteer-driven organizations participating in Pop Warner football, as to how they arrange games, how they interact with parents and guardians, frequency of such contact, extent and nature of such contact, and how they manage communications with parents and youth athletes." *Id*. at *6 n.1.

In denying plaintiffs' motion for class certification, the district court reasoned that this variability precluded certification for several reasons.

First, "[i]n a case of this nature, one based upon product labeling, advertising, and the like, it is critical that the misrepresentation in question be made to all of the class members." *Id*. at *3 (quoting *Rogers v. Epson America, Inc*., 648 Fed. Appx. 717, 719 (9th Cir. 2016)). Pop Warner produced evidence that it "never paid for and does not advertise on television, radio, or in newspaper," and plaintiffs failed to produce any evidence of a "uniform advertisement or advertising campaign." *Id*. at *4, *6. On the contrary, Pop Warner established that independent organizations participate in the Pop Warner program, so "any advertising material that a putative class member saw would vary depending on year, locality, league, and individual." *Id*. at *4.

Second, for many of the advertisements – such as rule books, coaches' handbooks, administrator's manuals, and Pop Warner's website – plaintiffs failed to allege that "putative class members accessed or viewed any of these materials prior to enrolling their children in Defendants' program." *Id*. (emphasis added). The same was true for the allegedly misleading label on each Pop Warner helmet: plaintiffs failed to "provide evidence that all putative class members were exposed to the misleading helmets prior to enrolling their children in Defendants' program, or that members knew about the . . . label in making the decision to enroll – they may have enrolled their children based on their own experience or word of mouth." *Id*. at *5 (emphasis in original).

Third, Pop Warner manuals and handbooks contained statements "designed to be used by local officials in speaking with parents of program participants." *Id*. at *4. However, Pop Warner established these script statements were "optional exemplars, and thus the actual statements made to putative class members would vary among coaches or officials." *Id*. Plaintiffs likewise failed to present any evidence "linking these script materials with what was actually said to parents or guardians prior to enrollment." *Id*. at *5. As a result, the court observed that "[c]ourts have refused to certify a consumer protection class where the statements made to consumers by a defendant's representatives varied." *Id*.

Finally, the court rejected Pop Warner's alleged omissions about the safety of its program to putative class members as a basis for class certification. In a case alleging fraudulent omissions, the court held "there must be some method to conclude that there was exposure of some materials containing representations to the class, in order to establish that 'had the omitted information been disclosed, one would have been aware of it and behaved differently'." *Id*. (citation omitted) (emphasis in original). But here, plaintiffs failed to provide any evidence "of exposure of all putative class members to some representations." *Id*. at *6. As a result, there were "individualized issues of whether any individual member would have been exposed to Defendants' disclosure if one had been made vary." *Id*.

"In conclusion," the court observed that plaintiffs failed to provide evidence that "all putative class members were exposed to alleged misrepresentations." *Id*. at *6 (emphasis added). Because of variability in the form of the allegedly deceptive information and "whether and in what way it was presented," fact-based determinations would be required "to resolve whether the particular information given to the parent would likely deceive them into enrolling their children in Defendants' program." *Id*. Consequently, plaintiffs failed to establish that

common questions would predominate over questions affecting only individual class members under Rule 23(b)(3).