

5 Tips For Targeting Pleadings In Consumer Class Actions

Law360, New York (July 16, 2014, 11:22 AM ET) -- The legal standard applicable to motions to dismiss is notoriously low (and plaintiff-friendly). However, particularly in the context of fraud and the resulting heightened pleading standard, courts are becoming more willing to require plaintiffs to articulate with specificity the alleged facts purportedly supporting their claims, including class allegations. Success on motions to dismiss — even partial success — can have significant benefits, because costs and exposure tend to increase as the case proceeds through discovery and the class certification stage. In some cases, more experienced class action attorneys will be added as lead class counsel if a complaint survives the pleading stage.

In the consumer fraud class action context, defendants have had mixed results on such motions. However, recent decisions demonstrate that defendants should continue to pursue motions to dismiss and press plaintiffs to sufficiently articulate facts relating to all elements of their purported claims.

Here are five arguments to consider raising on a motion to dismiss a putative consumer fraud class action.

Challenge the Sufficiency of Fraud-Based Claims on Federal Rule 9's Heightened Pleading Standard

The Federal Rules of Civil Procedure set forth the heightened pleading standard applicable to fraud-based claims. Requiring that “a party must state with particularity the circumstances constituting fraud or mistake,” the rule compels plaintiff to specify the “who, what, when, where and how” of the alleged fraudulent conduct. Many complaints pay lip service to this requirement, with conclusory allegations that purport to comply with the letter of the rule and attempt to mask noncompliance with the spirit of the rule. As the Southern District of California recently observed in *Macedo v. [Deutsche Bank National Trust Company](#)*, to truly satisfy the rule “[p]laintiffs must plead enough facts to give defendants notice of the time, place and nature of the alleged fraud together with an explanation of the statement and why it was false or misleading.” This should be a significant requirement.

The heightened pleading standard, therefore, can be a substantial tool at the motion to dismiss stage, and one that courts can take quite seriously. In another recent decision out of the Southern District, Judge Cynthia Bashant relied on Rule 9 as one ground for dismissing the complaint with leave to amend in *Cortina v. [Wal-Mart](#)*. Cortina challenged certain statements on the label for the Wal-Mart brand Coenzyme Q10 dietary supplement, Equate CoQ10. Among other things, the label states that Equate CoQ10 provides “[three] times better absorption” than competing products, which plaintiff contends is false and misleading. The product packaging represents that Equate CoQ10 “Helps Support Heart Health” and is “Beneficial to Statin Drug Users,” statements which plaintiff conceded are literally true, but contended are nonetheless misleading because the product provides less benefit than advertised, or than consumers would reasonably expect. Based on these allegations, plaintiff asserted claims for unfair competition, false advertising, violation of the California Consumers Legal Remedies Act and express and implied breaches of warranty.

Relying on Rule 9, the Cortina court dismissed the fraud-based claims. Despite the fact that plaintiff had identified the purportedly misleading labels and explained why it contended the statements were false or misleading, the court found such allegations insufficient because they were not supported by specific facts in the complaint. In other words, it was not sufficient for the conclusory allegations to be detailed. They had to be supported by separate specific facts alleged in the complaint and they were not.

For example, with respect to defendant's claim that Equate CoQ10 compared favorably to competing products, which comparison plaintiff alleged was false, the court held that it was plaintiff's burden and responsibility to provide facts showing a "concrete comparison" between Equate CoQ10 and competing products and that plaintiff failed to carry that burden. Accordingly, the court dismissed the allegations under Rule 9.

Challenge the Sufficiency of Allegations Generally and Hold Plaintiff to the 'Facial Plausibility' Standard of Federal Rule 8

Rule 8 requires all pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although Rule 8 may sound like a relatively low standard, in a pair of high-profile decisions, the [U.S. Supreme Court](#) interpreted Rule 8 to require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." (See *Bell Atlantic Corp. v. Twombly*.) The Supreme Court characterized this as the "facial plausibility" standard. (See *Ashcroft v. Iqbal*.) It is not enough under Rule 8 for a complaint to plead facts that are "merely consistent with" a defendant's liability (i.e., that might show a possible claim for relief but not a plausible claim). The factual allegations must cross the "plausibility" threshold to survive a motion to dismiss.

In the Cortina decision, Judge Bashant also relied on Rule 8 in dismissing the fraud-based claims, specifically plaintiff's allegations regarding "reasonable consumer expectations." Rejecting plaintiff's argument that her claims were sufficiently pled, the court held that "[i]t is conclusory to state simply that consumers reasonably expect a certain degree of benefit, and that Equate CoQ-10 fails to meet these expectations." The court held that under Rule 8, plaintiff must allege additional facts in the complaint (or provide evidence in exhibits to the complaint) showing what a reasonable consumer expected.

The Cortina court also reaffirmed that private plaintiffs must continue to meet Rule 8 and Rule 9 standards when trying to plead around California's prohibition on lack of substantiation claims. Thus, to allege defendant's claim that its product has "[three] times better absorption" than a competing product, plaintiff would have to allege "evidence" showing the absorption rate for competing products and contradicting defendant's claim. As a result, the court held plaintiff's conclusory allegation regarding the falsity of defendant's claim to be insufficient.

Challenge Plaintiff's Definition of Advertising Language

Not every idiosyncratic interpretation of an advertising claim can (or should) support a cause of action and withstand scrutiny of the pleadings. Courts may dismiss a case based on plaintiff's

understanding of product labeling or advertising if no reasonable consumer would likely be deceived. Over the past few years, the Southern District of California, in *Rooney v. Cumberland Packing Corp.*, dismissed a complaint attacking “Sugar in the Raw” labeling because no reasonable consumer would believe that he or she is purchasing unprocessed or unrefined sugar. In *Werbel v. Pepsico Inc.*, the Northern District of California dismissed claims that advertising for “Cap’n Crunch’s Crunch Berries” cereal suggests it contains real fruit berries because no reasonable consumer would believe that, and in *Videtto v. Kellogg USA*, the Eastern District of California dismissed plaintiff’s interpretation that “Froot Loops” cereal contained “real, nutritious fruit” because the packaging accurately depicted cereal that bore no resemblance to any fruit.

Last year, the Central District of California, in *Pelayo v. Nestle USA Inc.*, dismissed plaintiff’s contention that the “all-natural” labeling on Buitoni Pastas was false and misleading because plaintiff failed to offer an objective or plausible definition of the phrase “all natural” that is shared by reasonable consumers. The court rejected plaintiff’s definition meaning “produced or existing in nature” and “not artificial or manufactured” because Buitoni Pastas are mass produced and reasonable consumers know that the pasta is not “springing fully formed from Ravioli trees and Tortellini bushes.” The court also rejected plaintiff’s attempt to argue that an “all-natural” product cannot contain “artificial” or “synthetic” ingredients as defined by federal programs that are inapplicable to the pasta at issue. Ultimately, the court found that the term “all natural” was not deceptive in the context of the pasta at issue given the product ingredient list and the court dismissed the complaint.

Combining a plaintiff’s obligation to allege an interpretation of the false advertising that reasonable consumers would share and the requirements of Federal Rules 8 and 9 that the interpretation be supported by additional facts in the complaint or in exhibits thereto could significantly raise the bar for marginal claims to survive the pleading stage. In the Northern District of California’s very recent ruling in *Alamilla v. Hain Celestial Group Inc.*, the court granted defendant’s motion to dismiss. Even though plaintiff alleged an interpretation of false advertising that reasonable consumers would share, the court found that the additional facts alleged to support that understanding (in the form of articles cited in the complaint) belied the proffered interpretation.

Challenge Class Allegations

In asserting claims on behalf of a class, the class definition must be “ascertainable.” In other words, it must be feasible to determine whether a particular person is or is not a class member. The class claims must also be typical, which means that all class members suffered the same or similar injury, caused by the same conduct of defendant.

Early this year, in *Sethavanish v. ZonePerfect Nutrition Co.*, the Northern District of California denied class certification in a case challenging the advertising on 20 different nutrition bars, because the defendant did not sell directly to consumers and plaintiff failed to present a method for identifying class members and how many bars they purchased. The same reasoning could be applied at the pleading stage where plaintiff fails to allege an ascertainable class.

While it can be difficult to challenge class allegations via a motion to dismiss, courts have been willing to strike (generally with leave to amend) class definitions that are overly broad and include purported members of the class that have no injury and no standing to sue. Last year in the Northern District of California, the plaintiff in *Trazo v. Nestle USA Inc.*, alleged that the advertising of numerous identified and unidentified Nestle products was violative of several state and federal consumer protection statutes. The court struck the class allegations because the claims were not typical under Federal Rule 23 and the class was not ascertainable.

With respect to typicality, the Trazo court noted that some of the challenged products might not have false or misleading advertising. The determination of that issue would be context specific and, therefore, plaintiff's claims were not limited to only those who suffered the same or similar injury, caused by the same conduct of Nestle. The court similarly found the class not ascertainable because, among other things, it was not evident from the complaint exactly what products were at issue and the legality of the advertising claims was highly dependent on the context in which they were presented.

Challenge Ascertainability of Damages

Under Federal Rule 23, a plaintiff seeking to certify a class action must establish that damages are capable of being measured on a classwide basis in order to show that classwide issues of fact predominate over individual issues.

In an oft-described opinion, the Supreme Court in [Comcast v. Behrend](#) made clear that to certify a class plaintiff must not only identify an injury that resulted from the challenged conduct, but also must be able to link the calculation of the damages arising from that injury to the theory of liability on a classwide basis. Relying on that decision, earlier this year the Central District of California decertified a class in *In re Pom Wonderful*, MDL No. 2199, holding that plaintiff could not measure damages by the "full purchase price" of the item because it was impossible to say that not a single class member received even a single benefit (hydration at the very least) from the product. The court further held that plaintiff could not measure damages by comparing the price of the product with an average comparable product because that model did not link the allegedly wrongful conduct of the defendant to the price difference.

No court has yet granted (or ruled on) a motion to dismiss on the grounds that plaintiff failed to plead a viable damages model capable of measuring relief on a classwide basis that links the damages calculation to the alleged wrongdoing. However, injury is an essential element of consumer fraud claims, and, under Federal Rules 8 and 9, it should be pled with both particularity and facial plausibility. It is not a stretch to envision courts striking class allegations in a complaint with hopelessly deficient damages allegations in the same way the courts have entertained motions to dismiss when the class definitions are woefully overbroad.

These decisions provide hope to defendants as they continue to attempt to persuade courts to hold plaintiffs to the heightened pleading standard with respect to all elements, including class allegations, for fraud-based claims. Even when granted leave to amend, holding plaintiff to the heightened pleading standard for fraud may provide key details that will assist (and hopefully

streamline) discovery and class certification.

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