

New Hope For Challenging Putative Consumer Fraud Class Actions At The Pleading Stage

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There are many good reasons to move to dismiss a consumer class action. 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 associate in as lead class counsel if a complaint survives the pleading stage. In the consumer fraud class action context, the heightened pleading standard applicable to fraud-based claims is another good reason to bring a motion to dismiss. Unfortunately, defendants have had mixed results on such motions.

The decision this week in *Cortina v. Wal-Mart*, USDC S.D. Cal. Case No. 13-cv-2054 BAS (DHB), is a reminder that defendants should continue to pursue motions to dismiss and press plaintiffs to sufficiently articulate facts relating to all elements, including those related to falsity and reasonable consumer expectations. On June 23, 2014, Judge Cynthia Bashant, in the Southern District of California, granted defendant's motion to dismiss with leave to amend on several grounds, including that the complaint failed to allege sufficient facts to support its fraud-based claims.

In *Cortina*, plaintiff challenged certain statements on the label for the Wal-Mart brand Coenzyme Q10 dietary supplement, Equate CoQ10. The label states that Equate CoQ10 provides "clinical strength," "high absorption" and "3 times better absorption" than competing products, statements which plaintiff contends are false and misleading. Plaintiff also contends the product packaging allegedly misleads consumers by representing that Equate CoQ10 "Helps support Heart Health" and is "Beneficial to Statin Drug Users." Plaintiff contends those representations, although literally true, allegedly are misleading because the product "supports heart health to a lesser degree, and provides less benefit to statin users 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.

The court found that plaintiff's assertion of falsity was unsupported by any factual allegations in the complaint. The court also found that plaintiff's allegations regarding the reasonableness of consumer expectations regarding the claimed benefits of the supplements were similarly insufficient. "There are no facts alleged supporting the reasonableness of consumer expectations regarding the claimed benefits of the supplement... Nothing in the Complaint or supporting exhibits alleges what consumers reasonably expect when presented with the challenged claims." Rejecting plaintiff's argument that her claims were sufficient 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 without some support for that inference..."

The court also found plaintiff's fraud-based claims insufficient because plaintiff "fails to allege any evidence showing that competing products provide better than 13.8% absorption" and, thus "reliance on this calculation fails to support a cause of action without alleging additional facts." As a result, the court held that "Plaintiff's Complaint fails to give notice of the nature of the fraud or how it misleads,

and as such fails to meet the pleading standards of Rule 9(b) [of the Federal Rules of Civil Procedure]."

This decision is a departure from a plethora of opinions allowing cases to proceed past the pleading stage and deferring until class certification (after much time and money have been spent) resolution of the basic issues of whether plaintiff's interpretation of the advertising was idiosyncratic and whether any reasonable consumer was actually deceived.

For example, in *In re Hain Celestial Seasonings Product Consumer Litigation*, Judge Andrew J. Guilford, in the Central District, recently denied defendant's motion to dismiss a case based on Plaintiff's bald assertion that tea labeled "all natural" cannot contain any trace elements of pesticides used in farming or other contaminants. Notably, the court rejected defendant's argument that plaintiff had failed to plead with sufficient particularity whether plaintiff's definition of "all natural" (essentially equating "all natural" with "organic") was shared by the class and whether a reasonable consumer was likely to be deceived. For more information on the Hain Celestial decision, read Amy Lally and Jen Ratner's article, "California's unremitting food fight takes on the farm," Daily Journal (June 18, 2014).

The Cortina decision provides new hope to defendants as they continue to press courts to hold plaintiffs to the heightened pleading standard with respect to all elements of fraud-based claims. It remains to be seen whether the Cortinaplaintiff can sufficiently allege facts to withstand a second motion to dismiss. Regardless, 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.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.