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Consumer class actions: 3 tips for in-house counsel to deter enterprising plaintiffs' lawyers

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A growing scourge of meritless class actions is targeting the labeling, packaging and advertising of consumer products.

Many, if not most, of these lawsuits are filed by lawyers and plaintiffs who are repeat players in search of a quick payout.[1] They cobble together complaints based on minimal to no research, send the defendant a demand letter that is largely a cut-and-paste of a prior letter, and then hope for an early settlement.

This commentary walks through some recent examples and offers three principles that should guide in-house counsel — especially those who are recurring targets — in defending their clients against such claims.

These principles are:

(1) Do not succumb to the pressure of settling early. Plaintiffs' lawyers look for soft targets, and a contrary reputation can be invaluable.

(2) Tell the whole story in your filings. Investigate the litigation history of plaintiffs and their counsel, who are often both repeat players, and give courts the full context of the case.

(3) Don't lose sight of the individualized issues, such as reliance and the various reasons why consumers buy products. Effective discovery regarding these subjects can often help defeat class certification and impeach the lead plaintiff.

A BOOMING INDUSTRY

Consumer class actions can be a windfall for plaintiffs' lawyers when they play out according to the lawyers' preferred script: File suit, settle quickly, collect the check and move on to the next one. And with plenty of cases going exactly that way, the court system is seeing more and more of them.

The number of new filings has steadily increased in the past decade, creating hundreds of ongoing cases in the federal and state courts.

Plaintiffs typically allege some form of misbranding or false advertising in violation of state consumer protection laws, and then tack on additional common law claims of fraud, breach of warranty and misrepresentation. As these lawsuits have swelled, so has the number of meritless claims.

Both sides have adjusted. Many plaintiffs' lawyers have become more aggressive. Defendants often face significant pressure to settle early regardless of the merits,[2] and there is even more pressure to settle if a class has been certified.[3] A nuisance settlement is often viewed as worthwhile.

But defendants should push back, as many claims are unsustainable — even those few that proceed to trial.

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In *Farar v. Bayer*, for example, plaintiffs challenged advertised claims relating to heart health, immunity and physical energy on the labels of One-A-Day-brand adult multivitamin products.[4]

The plaintiffs contended that because most Americans did not suffer from any biochemical deficiency, the supplementation offered by the One-A-Day products at issue provided no health benefits, rendering the challenged claims false and misleading.[5] Following a jury trial and verdict, the court entered judgment for the defendants on all claims.

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In 2018, for example, the U.S. District Court for the Northern District of California dismissed class actions against soft drink manufacturers where plaintiffs alleged that diet sodas were fraudulently advertised as healthier substitutes for regular soda.[6] The U.S. District Court for the Southern District of New York dismissed similar lawsuits.[7]

The U.S. District Court for the Northern District of California also dismissed claims against cereal and health bar companies alleging that a high sugar content misled consumers about health and wellness claims that appeared on their product labels.[8]

3 DEFENSE PRINCIPLES

Having litigated many consumer class actions, we offer three recommendations.

First, companies should avoid early settlements. Most of the time, settling early eliminates the immediate litigation in the short term but creates the wrong incentives going forward.

Plaintiffs' lawyers do not retreat permanently. On the contrary, having secured a paycheck with minimal effort, they and their brethren are encouraged to return with additional demand letters and lawsuits and are especially likely to target companies with a wide variety of consumer products.[9]

Moreover, forcing plaintiffs' lawyers to litigate beyond the pleading stage necessarily exposes them to much more significant financial risk, and makes them feel some of the financial pressure that their lawsuits seek to impose upon defendants from the get-go.

Between fact discovery, expert reports and discovery, and then summary judgment and class certification briefing, costs can add up quickly. If there is no early settlement, a case that had cost plaintiffs' attorneys next to nothing to file can force them to front hundreds of thousands of dollars in litigation expenses — which they will never get back if they wind up losing.

Because the business model of many repeat players in the industry depends on volume and quick settlement, refusing to settle and forcing discovery can encourage the plaintiffs' bar to look for other targets in the future.

Second, defendants should carefully examine the litigation history of opposing counsel, and, where appropriate, apprise the court of noteworthy patterns.

It is well known that a relatively small number of lawyers has "effectively deputized themselves as the food police"[10] and files a majority of consumer class actions.

Named plaintiffs often have preexisting relationships with these lawyers and are recycled across multiple lawsuits, including ones that are readily dismissed.

Further, some of these dismissals may contain language confirming that the attorney brought implausible claims or did minimal diligence prior to filing the complaint. For example, the court in *In re Subway Footlong Sandwich Marketing & Sales Practices Litigation,* 869 F.3d 551 (7th Cir. 2017), recognized that litigation over the length of Subway's Footlong sandwiches was "no better than a racket," and was brought in "haste" with "the lawyers neglect[ing] to consider whether the claims had any merit."

Defendants who find themselves in the crosshairs of repeat actors should bring the salient facts to the court's attention, undercutting any erroneous presumption that the suit was brought to vindicate consumers.

In 2018 plaintiffs represented by the same team of lawyers brought separate lawsuits in California federal courts against two companies, both alleging the defendants had falsely labeled certain products as "natural" even though the products contained malic acid, a food additive.[11]

Meanwhile, the plaintiff in one of the malic acid lawsuits (represented by the same lawyers) filed a class action in California federal court against another company alleging packages of peanut butter cups contained excessive slack fill.[12]

Repeat plaintiffs in these types of actions can imply that the plaintiffs were not deceived and their lawyers were just seeking profit. There are many examples.[13]

Third, defendants should focus discovery on the individualized issues inherent in consumer class actions. Most courts evaluate these lawsuits through the lens of the "reasonable consumer."[14]

Defendants who find themselves in the crosshairs of repeat actors should bring the salient facts to the court's attention, undercutting any erroneous presumption that the suit was brought to vindicate consumers.

Defendants can use this fact to their advantage because consumers are generally heterogeneous and do not buy products for the same reasons, much less for the reason on which a given allegation is premised.

Showcasing individualized issues in discovery can be an effective way to prevent class certification and defeat claims.

Further, product-level marketing and consumer-insights data frequently reveal that consumers are idiosyncratic in their perceptions of which product attributes are most compelling and actually influence their purchasing decisions.

When materiality and reliance vary among consumers, claims are not subject to common proof, and the putative class should not be certified.[15] And when individual issues predominate, it should also be difficult for plaintiffs to articulate a damages model that can be linked to any classwide theory of liability.[16]

Strumlauf v. Starbucks Corp., No. 16-cv-1306, 2018 WL 306715 (N.D. Cal. Jan. 5, 2018), is a good example. There, plaintiffs accused Starbucks of overcharging customers for lattes and mochas by using milk foam to decrease the advertised amount of coffee per cup.

After extensive fact and expert discovery, the court granted summary judgment in favor of Starbucks because the evidence confirmed that a reasonable consumer would not be deceived.

In a similar vein, a well-executed deposition of the named plaintiffs can expose critical cracks in a case and limit the risk of class certification.

Eliciting testimony, for example, that the named plaintiff would have made the same purchasing decision irrespective of the challenged representation should defeat a claim of classwide harm.[17]

The same is true for admissions that the named plaintiff was a regular user of a particular product before and after the challenged representation.[18]

At some level, this is all intuitive. People behave differently, and they have different tastes and different reasons for buying different consumer products. Developing these facts through discovery and depositions is indispensable for building a robust defense against classwide claims.

Notes

[1] Cary Silverman & James Meuhlberger, U.S. Chamber Inst. for Legal Reform, *The Food Court: Trends in Food and Beverage Class Action Litigation* 1 (February 2017).

[2] *See, e.g., Iglesias v. Ferrara Candy Co.*, No. 17-cv-849 (N.D. Cal. Oct. 31, 2018) (order on motion for final approval of class action settlement); *In re Trader Joe's Tuna Litig.*, No. 16-cv-1371, 2019 WL 1436907 (C.D. Cal. Apr. 1, 2019) (order denying preliminary settlement approval on jurisdictional grounds).

[3] *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011).

[4] *Farar v. Bayer AG,* No. 14-cv-4601, 2017 WL 5952876 (N.D. Cal. Nov. 15, 2017) (order denying summary judgment and partially granting class certification).

[5] *Id.*

[6] *Becerra v. Dr Pepper/Seven Up Inc.*, No. 17-cv-5921, 2018 WL 1569697 (N.D. Cal. Mar. 30, 2018); *Becerra v. Coca-Cola Co.*, No. 17-cv-5916, 2018 WL 1070823 (N.D. Cal. Feb. 27, 2018).

[7] *Manuel v. Pepsi-Cola Co.*, No. 17-cv-7955, 2018 WL 2269247, at *8 (S.D.N.Y. May 17, 2018); *Geffner v. Coca-Cola Co.*, 343 F. Supp. 3d 246, 254 (S.D.N.Y. 2018).

[8] *Truxel v. Gen. Mills Sales Inc.*, No. 16-cv-4957, 2019 WL 3940956, at *4 (N.D. Cal. Aug. 13, 2019); *Clark v. Perfect Bar LLC*, No. 18-cv-6006, 2018 WL 7048788, at *1 (N.D. Cal. Dec. 21, 2018).

[9] Silverman & Meuhlberger, *supra* note 1, at 38-39.

[10] *Id.* at 12.

[11] *See Morris v. Mott's LLP*, No. 18-1799 (C.D. Cal., filed Oct. 4, 2018); *Clark v. Hershey Co.*, No. 18-6113 (N.D. Cal., filed Oct. 4, 2018).

[12] *See Clark v. Justin's Nut Butter LLC*, No. 18-6193 (N.D. Cal., filed Oct. 10, 2018).

[13] Silverman & Meuhlberger, *supra* note 1, at 13-14.

[14] *See, e.g., Ebner v. Fresh*, 838 F.3d 958, 965 (9th Cir. 2016); *Critcher v. L'Oreal USA Inc.*, No. 18-cv-5639, 2019 WL 3066394, at *4-5 (S.D.N.Y. Aug. 12, 2019); *Axon v. Citrus World Inc.*, 354 F. Supp. 3d 170, 182-83 (E.D.N.Y. 2018).

[15] *See, e.g., In re Vioxx Class Cases,* 180 Cal. App. 4th 116, 133-34 (Cal. Ct. App., 2d Dist. 2009); *see also In re Tropicana Orange Juice Mktg. & Sales Practices Litig.*, No. 11-cv-07382, 2019 WL 2521958, at *12-13 (D.N.J. June 18, 2019); *Chow v. Neutrogena Corp.*, No. 12-cv-4624, 2013 WL 5629777, at *2 (C.D. Cal. Jan. 22, 2013); *In re Yasmin and Yas (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 09-md-2100, 2012 WL 865041, at *24-25 (S.D. Ill. Mar. 13, 2012).

[16] *White v. Just Born Inc.*, No. 17-cv-4025, 2018 WL 3748405, at *5-7 (W.D. Mo. Aug. 7, 2018); *Brazil v. Dole Packaged Foods Inc.*, No. 12-cv-1831, 2014 WL 5794873, at *14 (N.D. Cal. Nov. 6, 2014) (order de-certifying damages class), *aff'd,* 660 F. App'x 531(9th Cir. 2016); *see also Werdebaugh v. Blue Diamond Growers,* No. 12-cv-2724, 2014 WL 7148923, at *15 (N.D. Cal. Dec. 15, 2014) (same); *Lanovaz v. Twinings N. Am. Inc.*, No. 12-cv-2646, 2014 WL 1652338, *5-7 (N.D. Cal. Apr. 24, 2014) (order denying certification of damages class).

[17] *Strumlauf v. Starbucks Corp.*, No. 16-cv-1306, 2018 WL 306715, at *9 (N.D. Cal. Jan. 5, 2018).

[18] *Id.*

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