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ARTICLE

Examining Subjective Damages In The Class Action Context

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In a recent lawsuit, a putative class action was filed against Nature's Way Products LLC. At the heart of the complaint was Nature's Way's representation that its product, Alive! Women's Energy Supplements, was "Made in the U.S." However, the supplement contained an ingredient that was manufactured outside of the United States. Among the class claims was a consumer fraud allegation, stating that there was a common value across the class for purchasing a product manufactured in the United States. Despite Nature's Way's argument that the class had failed to show an actual injury, the court found that the plaintiffs' allegation that the class paid more than the product was actually worth and would not have bought the product had they known it contained foreign-source ingredients was sufficient to allege actual harm.

This case is in line with a number of recent class action consumer fraud decisions premised on subjective and potentially individualized valuations of a product. For example, if a hypothetical product is marketed, among other things, as being "healthy," it seems logical that each purchaser likely places a different value on the attribute of the good being "healthy." Some people may have even purchased the product for any number of other reasons, placing no value at all on the fact it was said to be "healthy." This potential variation in individualized valuations of products based on their claims has posed a challenge for courts in various jurisdictions when encountered in the class action context.

Despite the above complications, many plaintiffs have been successful in having their class action claims proceed in the early stages of litigation based solely on subjective values used to support theories of injury and/or damages. This article summarizes several recent consumer class actions where subjective proof formed the basis for class-wide consumer fraud allegations.

In the early stages of litigation, the defendants typically argue about the capability of any model or theory that plaintiffs might put forward to establish actual loss. However, courts tend to be hesitant to dismiss plaintiffs' lawsuits based on assertions about a model the court potentially has yet to see or review evidence on, so the cases survive. In later stages of litigation, such as a motion for class decertification, after discovery has been taken, defendants shift strategy to attack the plaintiffs' specific models as incapable of showing class-wide damages because of the inherently individualized nature of the harm based on subjective consumer valuations.

Because of the fact that courts ultimately resolve these consumer fraud class actions based on the ability to account for individualized damages across the class, defendants may be better served to focus on these issues during early stages — instead of waiting until the later stages of litigation — rather than asserting arguments about potential models that have yet to be proffered by experts or subjected to discovery.

Survey of the Case Law

Early Stages of Litigation

Several recent court decisions made in the early stages of litigation highlight a trend in consumer fraud class actions. In these cases, courts permit cases to proceed even when damages involve subjective valuations of class members. These decisions focus on whether the plaintiffs can put forward a method to show injury and/or harm, instead of focusing on the subjective and individualized nature of the claim.

Smajlaj v. Campbell Soup Co.

This case regarded a consumer class action alleging that Campbell's labels on their less-sodium tomato soup cans were misleading. Those labels, as well as claims on Campbell's website and other forms of marketing, stated that "Campbell's 25% Less Sodium Tomato Soup" and "Campbell's 30% Less Sodium Healthy Request Tomato Soup" had a sodium content that was less than "OUR REGULAR PRODUCT." The consumers alleged that the reference to "our regular product" misled them into believing that they were purchasing a can of soup that had lower sodium than Campbell's tomato soup. However, during the class period, "Campbell's regular tomato soup contained 480 mg of sodium per serving, which is the same amount of sodium that was contained in its 25% Less Sodium Tomato Soup, and only 2 percent more than the amount contained in the Healthy Request Soup." In small print on the label, Campbell stated that the 25 percent comparison was in relation to Campbell's "regular condensed soup" rather than in comparison to Campbell's standard tomato soup. Campbell filed a motion to dismiss.

Among Campbell's defenses was that the "Plaintiffs received a product worth its price and therefore suffered no loss." The court evaluated the claims under the New Jersey Consumer Fraud Act (the act), N.J. Stat. Ann. § 56:8–2. As relevant here, one element of the act required that the plaintiffs show an ascertainable loss. In this case, the court approached "ascertainable" as a question of whether the damages could be quantified.

Following the New Jersey Supreme Court, the court endorsed a benefit-of-the-bargain theory, which measures the difference between the promised product and the product actually received. In this case, the plaintiffs based their comparison between the price they paid for the soup as represented (as being lower sodium) to the price of a "product that is the equivalent … of the product actually received." Importantly, the court stated that the valuation also did not need to be perfect, rather it just needed to provide a reasonable basis that was not speculative. Therefore, the court stated that "the misrepresentation thus caused ascertainable loss of the difference in retail price between what they paid for (less-sodium soup) and what they got (soup equivalent for their purposes to regular tomato soup)."

The court provided only a cursory discussion as to the possible different values each class member might place on the value of the injury. The court reasoned that because the plaintiffs did not need to show how much the market valued certain amounts of sodium, but rather "the values to Plaintiffs of the product promised and product received," the court accepted a possible range in valuations between 20 to 80 cents a can. Thus, in the early stages of litigation, without the benefit of discovery and seeing the theory implemented, the court was hesitant to dismiss the lawsuit and was flexible with respect to the possibility of variable damages.

Harnish v. Widener University School of Law

The plaintiffs in this case were "eight Widener Law School alumni who graduated between 2008 and 2011." They alleged that Widener Law School engaged in consumer fraud in its marketing materials and reporting practices between 2005 and 2011 in violation of the New Jersey and Delaware Consumer Fraud Acts. The crux of the allegation was that Widener Law School misrepresented its employment statistics so that they appeared far more favorable than they really were. These inflated statistics then were alleged to have induced the plaintiffs to enroll. Widener Law School moved to dismiss the claims.

With respect to the ascertainable loss requirement, the plaintiffs' alleged loss was also based on a benefit-of-the-bargain theory. The loss was the difference between the tuition paid by class members based on the material misrepresentations about graduate employment statistics and the true value of a Widener Law School degree. The court's decision did not address the possible variations in subjective valuation of the Widener Law School degree promised; instead, the court deemed that the plaintiffs' general assertions that all class members would not have paid the amount in tuition had they known Widener's true job placement rate and salary statistics satisfied the New Jersey Consumer Fraud Act's standard for ascertainable loss.

Muir v. Playtex Products LLC

The product at issue in this case was the Playtex Diaper Genie II Elite. The class alleged that Playtex engaged in deceptive marketing because the Diaper Genie's packaging stated that it had been "Proven #1 in Odor Control." Despite the claims on the Diaper Genie II's packing, several tests concluded that the Diaper Genie II was "not superior to diaper disposal systems, that like the Diaper Genie II Elite, utilize proprietary film bags, as opposed to diaper disposal systems that use ordinary garbage bags or carbon refills." The action was brought under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA), 815 ILCS 505/1 et seq. Playtex moved to dismiss.

The ICFA requires that the plaintiff show actual damages. In this case, the court also found that a plaintiff could satisfy this requirement by showing damages under a benefit-of-the-bargain theory. Again, the court did not offer any discussion about how a benefit-of-the-bargain theory, based on subjective valuations, might be applied differently in a class action context rather than a typical case.

Later-Stage Litigation

The trend in recent cases shows that it is often the case that plaintiffs' lawsuits are dismissed after discovery is taken and courts have had the chance to evaluate the plaintiffs' model. After the plaintiffs' allegations have been examined more closely, the incompatibility of subjective harm to form the basis for a class action is harder to overlook, and courts are more willing to grant the defendant's motions.

Harnish v. Widener University School of Law

Later in this litigation, a previously certified class was decertified when the court found that individualized inquiries of damages predominated class-wide questions. Ultimately, the court stated that "the crucial overarching issue in this case — proving that each class member suffered damages as a result of Widener's actions — still must be shown to be susceptible to class-wide proof," which the plaintiffs failed to do.

The plaintiffs failed to show damages could be calculated on a class-wide level because the evidence showed each individual class member placed differing and variable meaning on the defendant's allegedly misleading statements and statistics. The case was decertified not because of any particular methodological issue in the plaintiffs' model but because of a fundamental issue of injury and damages inherent to such a claim.

Morales v. Kraft Foods Groups Inc.

This case involved a class action against Kraft Foods stemming from Kraft's use of the phrase "natural cheese" to describe its "Natural Cheese Fat Free Shredded Fat Free Cheddar Cheese." Brought under several California statutes regulating unfair competition and false and misleading statements, the plaintiffs alleged "they would not have made such purchases had they known the [cheese] contained artificial coloring."

In its motion for class decertification, Kraft highlighted the subjective nature of the plaintiffs' injuries and damages in a renewed motion to decertify. In Kraft's motion for class decertification, Kraft argued that the plaintiffs' expert's conjoint analysis measured "consumers' subjective willingness to pay, [which is] an academic and irrelevant exercise that is not consistent with Plaintiffs' theory of liability." Instead of measuring a "price premium," which takes into account both consumer preferences and the company's pricing strategy, Kraft claims that the plaintiff's expert's analysis is fatally flawed as it examines only a subjective "willingness to pay," which may be different from consumer to consumer.

On Friday, June 9, 2017, Kraft's motion to decertify was granted. Although the court found that the presence of individualized damages did not, by itself, defeat class certification, the court did find that the plaintiffs' damages expert's conjoint analysis only measured consumers' "willingness to pay" without considerations of the seller's willingness to sell. As such, the court found the analysis was incomplete and granted Kraft's motion to decertify, stating that the "evidence provided by Plaintiffs about their potential willingness to pay a premium due to the use of the 'natural cheese' label [was] insufficient to establish a basis for calculating restitution."

Therefore, by bringing to the forefront the inherent difficulties of using class actions as a vehicle for litigating consumer fraud allegations based on subjective valuations, the defendants have been more successful in later stages of litigation. Instead of attacking the sufficiency of the model, defendants have seen more success by showing that regardless of the model, individualized inquiries into subjective harms are not suitable for class-wide resolution.

Conclusion

Although it would seem difficult to use the class action mechanism to assert consumer fraud theories based on individualized subjective valuations of product attributes, at the early stages of litigation, there are several recent examples where courts have let the litigation proceed. As the litigation continues, however, and courts face motions to decertify classes or summary judgment after having the benefit of discovery, many courts often ultimately resolve the cases by concluding that the class action is inappropriate.

These courts focus on the inherently subjective valuations of class members and varied level of damages across the class rather than failings of any particular model. As such, defendants may be better served even early on in a case by advancing arguments regarding the inherent variation across a class' subjective impressions rather than potential methodological failings of potential models promised by the plaintiff.

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