Legal Backgrounder

Vol. 29 No. 21 August 1, 2014

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Effective Tactics for Opposing Certification from Recent Food Labeling Class Actions

by Philip M. Busman, Robert E. Johnston, and Julia R. Milewski

In the past few years, the trickle of labeling-fraud suits has become a torrent. Plaintiff-friendly jurisdictions like California and New Jersey are inundated with near daily filings of new cases blasting the labels for consumer products from cereal to cosmetics to cooking spray.[1] Standing alone, an individual claim for labeling fraud is hardly worth a second look from a plaintiffs' attorney. But there is money in numbers. Grouped claims can lead to potentially huge verdicts or multimillion dollar settlements.[2] For defendants in these cases, the real fight is over class certification, where a win can effectively end the case.[3] Below, we discuss recent trends in class certification of labeling-fraud cases, and offer key strategies for fighting aggregation of these claims.

Splitting the Difference: Bifurcating Merits and Class-Certification Discovery

At the outset of a labeling-fraud class-action lawsuit, defendants should press the certification issue by requesting bifurcation of class-certification discovery and merits discovery. Class-certification discovery addresses only whether the class certification requirements (numerosity, commonality, adequacy, typicality) are met. In *Conner v. Perdue Farms, Inc.*,[4] for example, a New Jersey district court granted defendant's motion to bifurcate discovery in a case alleging that a label stating that chickens were "Humanely Raised" and "USDA Process Verified" was false and misleading. The court concluded fairness and efficiency favored bifurcating discovery of class issues from discovery on the merits because "proceeding with merits discovery at this early stage may involve the production and review of large numbers of documents not directly related to the issues of class certification."[5] The court found judicial economy favored bifurcation as well because "[d]efendant is being asked to bear the cost of producing this extensive discovery" and "these costs will be expended needlessly" if a class is not certified.[6]

---

[1] Cary Silverman, *The New Lawsuit Ecosystem: Trends, Targets & Players*, U.S. Chamber Institute for Legal Reform, 96-98 (Oct. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-Report-Oct2013_2.pdf (listing products subject to consumer class action litigation).

[2] *See* Glenn G. Lammi, *Update: Two Food Labeling Suits Settle After Judge Certified Narrowed Classes*, Forbes.com (May 12, 2014), http://www.forbes.com/sites/wlf/2014/05/12/update-two-food-labeling-suits-settle-after-judge-certified-narrowed-classes/ ("*Update*") (discussing the *de minimis* recovery and potential for fraud in Kashi and Bear Naked class action suits).

[3] Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry*, Bloomberg Business Week (Aug. 22, 2013), http://www.businessweek.com/articles/2013-08-22/californias-food-court-where-lawyers-never-go-hungry (noting a pretrial dispute over class certification can "take 18 months to two years and cost a company $500,000 to $2 million").

[4] CIV.A. No. 11-888 (MAS)(LHG), 2013 WL 5977361 (D.N.J. Nov. 7, 2013).

[5] *Id.* at *4.

[6] *Id.*

Philip M. Busman and **Robert E. Johnston** are partners and **Julia R. Milewski** is an associate at Hollingsworth LLP in Washington, D.C. The opinions expressed herein are solely those of the authors and do not reflect any opinions of the firm or its clients.

In *Reid v. Unilever United States, Inc.*,[7] plaintiffs brought a class-action lawsuit alleging that keratin hair treatments caused hair loss and damages. The court granted the motion to bifurcate class certification and merits discovery and explained that class certification discovery should be tailored to address Rule 23(a) questions.[8] Early class certification discovery can change the playing field by denying plaintiffs leverage at a critical time in a labeling-fraud class action and deferring costly merits discovery.

Rule 23: Certifying A Class

Rule 23 provides a variety of legal hooks for fighting class certification claims.

A party seeking class certification must establish that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[9] Ascertainability is an additional, judicially-created doctrine that requires as a threshold matter that the party seeking class certification demonstrate that an "identifiable and ascertainable class exists."[10] Federal Rule of Civil Procedure 23(b)(3) further requires that "[q]uestions of law or fact common to the class members predominate over any questions affecting only individual members . . . and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In *Comcast Corp. v. Behrend*,[11] the Supreme Court strengthened the predominance requirement for certifying a damages class under Rule 23(b)(3) by requiring a "rigorous analysis" at the class certification phase, which provides a strong basis for discovery. These requirements—imposed both under the federal rules and judicially created doctrine—provide numerous grounds for defeating class certification.

Ascertainability: Who's In The Class?

Courts have denied class certification where the consumer class was not ascertainable. In *Karhu v. Vital Pharmaceuticals, Inc.*[12], plaintiffs alleged that dietary supplement VPX Meltdown Fat Incinerator was falsely advertised for "burn[ing] fat" and achieving rapid fat loss. A Florida district court correctly denied class certification based on a lack of certainty where plaintiff "failed to propose a realistic method of identifying the individuals who purchased Meltdown" and therefore the proposed class was not "sufficiently ascertainable." The court recognized there was no "practical method of verifying membership in the Proposed Classes of Meltdown purchasers" where a bottle of Meltdown is a relatively small purchase and consumers are unlikely to keep receipts or proofs of purchase.[13] In *Sethavanish v. ZonePerfect Nutrition Co.,*[14] plaintiffs claimed ZonePerfect "All Natural" Nutrition Bars contained non-natural ingredients like xanthan gum, glycerine, and calcium phosphates and therefore were misleadingly labeled as "all natural." A California federal district court denied class certification after finding a class was not ascertainable where "Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method. It is unclear how Plaintiff intends to determine who purchased ZonePerfect bars during the proposed class period or

[7] 964 F. Supp. 2d 893 (N.D. Ill. 2013).
[8] *Id.* at 933 (noting "the commonality prong will likely turn on whether potential class members experienced hair loss after using the Hair Treatment," "the typicality prong here is likely to turn on whether [plaintiffs'] alleged injuries are similar to those of the potential class members," and "the adequacy prong turns on whether the named Plaintiffs 'will fairly and adequately protect the interests of the class members who are not personally involved in the litigation'").
[9] FED. R. CIV. P. 23(a).
[10] *Wolph v. Acer Am. Corp.,* 272 F.R.D. 477, 482 (N.D. Cal. 2011).
[11] 133 S. Ct. 1426 (2013).
[12] No. 13-60768-CIV, 2014 WL 815253 (S.D. Fla. Mar. 3, 2014).
[13] *Id.* at *2.
[14] No. 12-2907-SC, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014).

how many ZonePerfect bars each of these putative class members purchased. It is also unclear how Plaintiff intends to weed out inaccurate or fraudulent claims."[15] Challenging the ascertainability of the class in consumer products suits is an increasingly viable defense to class certification. But it is not available in certain types of suits involving products, like prescription medicines, for which purchase records may be more readily available.

Typicality: Differing Consumer Motivations

Courts have denied class certification where the named class representative was not "typical" in representing the interests of the rest of the class members. In *Rapcinsky v. Skinnygirl Cocktails, L.L.C.*,[16] plaintiffs alleged that Skinnygirl falsely represented that its pre-mixed "SkinnyGirl Margarita" was "all natural" when in fact it contained the preservative sodium benzoate and a tequila byproduct. A New York federal district court denied class certification because "the typicality requirement concerns the fairness of allowing an entire class's claim to rise or fall with the fate of the named representative's claims; thus, that representative's claims must be typical of the class so as to prevent a false prophet from bearing the standard for an entire class of claims."[17] In that case, the named representative's claims regarding reliance and causation were "plagued" by "atypical issues and defenses" where he claimed he would not have purchased Skinnygirl Margarita if he had known it was not "all natural" yet testified at his deposition that "he would have purchased the Skinnygirl bottle whatever the price, given his home situation, and given his desire to please his wife."[18] Pursuing early discovery of class representatives is, therefore, critical to build defenses to class certification based on the typicality prong.

Finding an Adequate Representative

Courts have denied class certification where the plaintiff was not an adequate representative under Rule 23(a). In *Jovel v. Boiron, Inc.*,[19] plaintiffs alleged that advertisements claiming that flu remedy Oscillococcinum temporarily relieved and reduced the duration and severity of flu-like symptoms were false because the active ingredient was not effective. A California district court denied class certification after the deposition of the named plaintiff produced conflicting testimony. In that case, the named plaintiff flip-flopped, testifying initially that he had not read the flu remedy label until after he purchased the product and then—following a conversation with his counsel—claiming he read the box before purchasing the product. The court concluded that the named plaintiff's inconsistent statements "reduce[d] the likelihood of prevailing on the class claims." [20] A challenge to the adequacy of the named representative on the grounds that he or she will not "fairly and adequately protect the interests of the class" is another avenue for avoiding class certification in these labeling-fraud suits.[21]

The Legacy of *Comcast*: Damages as a Hurdle to Class Certification

The Supreme Court's *Comcast* decision gave teeth to Rule 23(b)(3)—a hurdle that plaintiffs must overcome to certify a damages class—by requiring that plaintiffs demonstrate both liability and damages with common proof. Courts have embraced *Comcast*'s "rigorous analysis" requirement by requiring plaintiffs to show "that class-wide damages [can] be tied to a legal theory" and provide a damages model that can

[15] *Id.* at *6; *see also Jones v. ConAgra Foods, Inc.,* C 12-01633 CRB, 2014 WL 2702726, at *10 (N.D. Cal. June 13, 2014) (denying class certification in part because "the variation in the Hunt's products and labels makes self-identification here unfeasible").
[16] No. 11Civ6546(JPO), 2013 WL 93636 (S.D.N.Y. Jan. 9, 2013).
[17] *Id.* at *5.
[18] *Id.* at *9.
[19] No. 11-CV-10803-SVW-SHX, 2014 WL 1027874 (C.D. Cal. Feb. 27, 2014).
[20] *Id.* at *5.
[21] *Id.*

ISBN 1056 3059

accurately measure classwide damages.[22] In *POM Wonderful*, the court granted a motion to decertify a class where plaintiffs' expert made "no attempt, let alone an attempt based upon a sound methodology, to explain how Defendant's alleged misrepresentations caused any amount of damages. Instead, [plaintiffs' expert] simply observed that Pom's juices were more expensive than certain other juices."[23] In *Caldera v. J.M. Smucker Co.*,[24] a California federal district court denied damages class certification under Rule 23(b)(3) because "[p]laintiff has failed to offer any evidence, let alone expert testimony, that damages can be calculated based on the difference between the market price and true value of the products. Without such evidence, Plaintiff has failed to satisfy her burden of proving that damages may be proven on a classwide basis." The court in *Caldera* emphasized that class-wide damages cannot be accurately measured based on defendant's sales data alone because "class members undeniably received some benefit from the products."[25] *Comcast* and its progeny provide another useful tool in a defendant's toolbox when defeating labeling-fraud class actions because a flawed individualized-damages analysis alone can be a basis for denying class certification.

Conclusion

Losing class certification can force companies to enter multimillion dollar settlements that leave consumers with coupons and plaintiffs' attorneys with millions in fees.[26] In turn, "settlements can feed the Food Court bar with even more suits"[27] by incentivizing plaintiffs' lawyers, many of whom were involved in big tobacco litigation, to take new cases and raise the stakes for companies facing future lawsuits. However, companies that arm themselves with these strategies for aggressively fighting class certification will be in a better position to withstand this wave of lawyer-driven litigation.

---

[22] *In re POM Wonderful LLC*, No. ML 10-02199 DDP(RZX), 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014).

[23] *Id.*; *see also Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at *3, 12 (N.D. Cal. Jan. 7, 2014) (denying class certification based on lack of ascertainability and an inability to show that common damages predominate because "[w]hichever way one approaches it, plaintiff has not met her burden of showing that there is a classwide method of awarding relief that is consistent with her theory of deceptive and fraudulent business practices, false advertising, or common law fraud (or the alternative theory of restitution based on quasi-contract)").

[24] No. CV 12-4936-GHK(VBKX), 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014).

[25] *Id.*

[26] For example, in a case alleging Naked Juice Company misled consumers about the "all natural" content of its products, a California court recently approved a $9 million settlement where consumers could receive as little as $5 depending on whether they had proof of purchase but plaintiffs' attorneys walked away with $3.1 million in attorneys' fees. Order, *Pappas v. Naked Juice Co. of Glendora, Inc.*, No. 2:11-cv-08276 (C.D. Cal. Jan. 2, 2014).

[27] Lammi, *Update* at 1.

  ISBN 1056 3059