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Charting A Course Across Calif.'s Class Action Landscape

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It is no secret that companies doing business in California are facing a marked uptick in consumer class action litigation. Plaintiffs in these cases typically allege that advertising on popular everyday household items, such as food and beverage products, dupes consumers into paying too much. The plaintiffs' lawyers filing these lawsuits — almost always on a contingency fee basis — seek to recoup the money spent by consumers, as well as injunctions to stop companies from continuing to use the same advertising. While food and beverage companies have borne the brunt of recent consumer class actions, all consumer product companies, including cosmetics skin care brands, are potential targets in light of this growing trend.

Unfortunately, the quick escalation of consumer class actions in California has led to widely inconsistent decisions on critical class certification issues at the district court level — which the Ninth Circuit has not yet addressed — leaving general counsels guessing as to how to defend against these suits.

As discussed in this article, recent cases demonstrate that the best way for general counsels to cope with this uncertainty is to have a well-stocked arsenal of defense arguments that challenge plaintiffs' claims from an array of angles, including at later stages of litigation (e.g., decertification and summary judgment), as well as on appeal.

While mounting a defense to a consumer class action can sometimes feel like throwing darts just to see what sticks, a multipronged and strong defense strategy has proven to be successful for many companies. Below, we discuss the most important emerging district court splits in California consumer class action litigation and advise companies on how to most effectively cope with the resulting uncertainty. We conclude by highlighting the recent successes of companies that fought these cases into later stages of the litigation, including at trial.

Standing to Pursue Injunctive Relief

To establish standing to seek injunctive relief in federal court under Article III, a plaintiff must demonstrate a "real and immediate" threat that she will be wronged again in the future. Adopting a common-sense approach, many district courts have recognized this is impossible to do where plaintiffs

file complaints detailing how the defendant's advertising deceived them. In other words, if plaintiffs can detail the manner in which they were purportedly deceived in the past, they cannot plausibly allege they will be misled the same way in the future.

Other courts, however, have refused to follow this logic, holding that it would undermine the purpose of California's consumer protection laws by preventing many potentially meritorious suits from being brought. While this alternate line of cases has been criticized as creating an improper public policy exception to the constitutional standing requirement, that provides little solace to a company who draws a judge following this minority view. The reality is that, until the Ninth Circuit steps in, companies will have a hard time assessing whether requests for injunctive relief have any legs, because the district judge drawn will largely determine whether those requests will remain in the case.

Fortunately, there is a pending appeal before the Ninth Circuit that could bring clarity to this issue. In Jones v. ConAgra Foods Inc., the lower court recently declined to certify an injunctive relief class on the ground that the named plaintiffs lacked standing to seek injunctive relief. The plaintiffs appealed, arguing that the district court's approach was incorrect and effectively prevents consumers from ever seeking to enjoin false advertising in federal court. With briefing now complete, the case represents a prime opportunity for the Ninth Circuit to decide this hotly disputed issue.

Materiality: California's "Reasonable Consumer" Standard

While it is clear that plaintiffs bringing consumer false advertising claims under California law must show that a "reasonable consumer" would likely be misled by the contested advertising, district courts have taken widely divergent approaches in describing the burden plaintiffs must meet to make this showing. For example, some require plaintiffs to "demonstrate by extrinsic evidence, such as consumer survey evidence, that the challenged statements tend to mislead consumers," while others have endorsed a nondata-driven approach. This divergence is critical, because it leaves parties unclear as to the evidence they should develop to prevail in the litigation. Plaintiffs' lawyers may be reluctant to pay for expensive consumer surveys in cases with contingent fee agreements, but their failure to do so could doom their case.

Given the state of the law, a company should use every weapon in its arsenal to show the court, with concrete evidence, that real-world consumers are not nearly as concerned with the statements on a product's labels as the plaintiffs' bar claims they are. This strategy has proven successful in multiple cases, including Algarin v. Maybelline LLC,[1] where the defendant defeated class certification with its own consumer survey, showing a substantial number of consumers were not, in fact, misled by the advertising at issue.

Adequacy

Courts are also mixed in their approach to Rule 23(a)(4)'s requirement that a class representative can fairly and adequately protect the interests of the class. Some give teeth to the requirement, viewing it to be of vital importance to class certification. These courts rigorously examine the representative's familiarity with the litigation to ensure she can serve the necessary role of "checking the otherwise unfettered discretion of counsel."[2] In such cases, a plaintiff's ignorance of the case and her duties as a class representative can alone defeat class certification.

Other courts do not take the adequacy requirement quite so seriously, finding there to be "a low bar for the level of knowledge required of class representatives."[3] These cases hold that a named plaintiff can

be an adequate representative so long as he "merely understands his duties and is currently willing and able to perform them."[4]

Given this split, developing evidence of a named plaintiff's inadequacy can be a very effective defense strategy. While success will depend upon the views of the judge drawn, companies are still well-advised to investigate how class representatives became involved in the litigation, especially given the frequency with which class representatives are discovered to be close friends with the lawyers bringing the case. Revelations of a potentially collusive relationship can sometimes put an end to the litigation altogether.

Ascertainability

Class members in false advertising cases routinely struggle to prove they purchased the product at issue. As such, companies often — and correctly — argue that such cases do not meet Rule 23's implicit "ascertainability" requirement that class membership "can be established by means of objective, verifiable criteria." Within the Ninth Circuit, however, these challenges produce mixed results as district courts disagree about whether a class can be ascertained when class members do not have records of their purchases.

Following the Third Circuit's Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013), some California district courts have held that receipts, sales records or some other reliable evidence of product purchases is necessary to ascertain a class. Others, however, have held that class members may be ascertained without such evidence, since class members can self-identify (i.e., submit affidavits saying they purchased the products at issue during the relevant time period). The cases reason "that to find otherwise would render a cast number of consumer class actions dead on arrival."[5] This self-identification approach has raised concerns, especially since affidavits are susceptible to memory problems and fraud.

This open issue impacts the majority of consumer product class actions, since most manufacturers do not sell their goods directly to consumers and often have no way of identifying purchasers.

The Jones appeal may also resolve this split among lower courts. In denying class certification, the lower court held that the three proposed classes were not ascertainable because the plaintiffs sought to ascertain class members only through self-identification. The court noted the split in California authority on the issue, but sided with those cases rejecting self-identification. This issue is now teed up in the briefing submitted to the Ninth Circuit, and companies who could face potential lawsuits in this area should hope the circuit court finally brings clarity to the subject.

Companies Should Not Automatically Settle Once a Class Is Certified

While settlement is sometimes a knee-jerk reaction after a class is certified, companies should rethink this conventional practice because settlement is often not the only (or even the best) answer. Some companies have benefited greatly from letting the discovery process play out and then moving for class decertification on the grounds that the plaintiffs failed to fulfill promises they made to the court to get the class certified early on.

Not all companies realize that, even on a motion for class decertification, the plaintiff carries the burden of demonstrating that class certification is proper. In fact, if anything, the burden on the plaintiff is greater at the decertification stage, because courts are often willing to give plaintiffs the benefit of the doubt when certifying classes at the early stages of litigation. Two recent cases highlight this. In both

Lambert v. Nutraceutical[6] and Werdebaugh v. Blue Diamond Growers,[7] the defendants successfully obtained decertification because, after the close of discovery, the plaintiffs failed to produce evidence they promised to make their damages models workable.

Other companies have succeeded at the summary judgment stage, and particularly in arguing that the innocuous label statements often challenged by plaintiffs were not deceptive. Relatedly, although these cases rarely go to trial, the decision to take a case all the way recently paid off for Green Pharmaceuticals, which successfully defeated a plaintiff's claims that its homeopathic product SnoreStop was deceptively marketed as an effective remedy to reduce snoring. The company prevailed at trial because the plaintiff failed to meet her burden of producing evidence "that the combined ingredients of SnoreStop failed to perform the function that is advertised on the package." [8]

Taken together, these cases illustrate that settlement is not always the best option for corporate defendants, even after a class is certified. Depending on the circumstances of the case, and after sizing up the attorneys on the other side, companies should strongly consider a defense that challenges the plaintiff's ability to follow through on their promises and to prove their case on the merits.

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[1] 300 F.R.D. 444 (S.D. Cal. 2014).

[2] See Simon v. Ashworth Inc., No. CV 07-1324 GHK (AJWx) (C.D. Cal. Sept. 28, 2007) (quotation marks omitted).

[3] Red v. Kraft Foods Inc., No. CV 10-1028-GW AGRX at *13 (C.D. Cal. April 12, 2012).

[4] Id. (quotation marks omitted).

[5] Jones, at *9.

[6] No. CV 13-05942-AB (Ex), Dkt. No. 175 (C.D. Cal. Feb. 20, 2015).

[7] Werdebaugh v. Blue Diamond Growers, No. 12-CV-02724-LHK (N.D. Cal.)

[8] Rosendez v. Green Pharmaceuticals, Case No. CIVDS 1108022 (Cal. Super. Ct., San Bernardino Nov. 25, 2014).
