Legal Opinion Letter

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 19 No. 21 September 16, 2010

JUDGE'S CONSUMER CLASS ACTION RULING INSTRUCTIVE ON CERTIFICATION ISSUES

by
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Consumer fraud lawsuits offer plaintiffs' lawyers a reasonably low-risk vehicle to pursue both lucrative fees and litigation-driven regulation of what they deem as objectionable business conduct. If a trial judge certifies the class of plaintiffs that the lawyer proposes, such fraud suits often settle, leading to millions in attorneys' fees and possibly promises from the targeted business or businesses to alter their market behavior. The class certification stage is thus the make-or-break moment in most consumer fraud cases, and for this reason, a recent U.S. District Court for the Southern District of New York ruling is required reading for those who must routinely oppose class certification.

In *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), Slip op. (S.D.N.Y. Aug. 5, 2010), Judge Denise Cote articulated the rigorous analysis standard and uses the *Daubert v. Merrell Dow* framework to exclude unreliable expert testimony on plaintiffs' damages and loss causation. The ruling also analyzed the predominance of common issues and discussed the class definition and the problem of ascertainability of class membership.

The plaintiffs sued Snapple for violation of New York's consumer fraud statute (General Business Law section 349), unjust enrichment, and breach of express and implied warranties. The plaintiffs' lawyers defined the class as "[a]ll persons or entities who, within the State of New York, purchased for personal consumption and not for resale or assignment, a Snapple beverage marketed, advertised, and promoted as 'All Natural,' but that contained [high fructose corn syrup (HFCS)] from October 10, 2001 to January 1, 2009." Plaintiffs argued that they were defrauded into paying a premium for Snapple beverages because they were represented as "All Natural," but contained HFCS, which plaintiffs argue is not natural, although it is derived from corn and contains the sugars found in table sugar and honey.

Judge Cote set forth the U.S. Court of Appeals for the Second Circuit authorities supporting the rigorous analysis standard, explaining that a district court may not avoid looking into the merits of plaintiffs' claim where they intersect with the class certification elements. *See* slip op. at 11-13. Then, rather than attacking the plaintiffs' fundamental premise that HFCS is not natural or the adequacy or typicality of the named plaintiffs, Judge Cote began her analysis by considering the element of predominance. As the court described it, the predominance requirement asks the court to "consider whether the putative class members 'could establish each of the . . . required elements of [their] claim[s] . . . using common evidence.'" *Id.* at 13 (citation omitted). Then, looking at GBL section 349, the court concludes that plaintiffs cannot establish the fact of injury or that such injury was caused by the challenged conduct on a class-wide basis.

Judge Cote acknowledged that section 349 has been held to apply an "objective" standard for whether conduct is misleading, but it still requires injury caused by the challenged conduct: "Only by

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showing that plaintiffs in fact paid more for Snapple beverages *as a result* of Snapple's 'All Natural' labeling can plaintiffs establish the requisite elements of causation and actual injury under section 349." *Id.* at 15. As Judge Cote noted, plaintiffs cannot do that on a class-wide basis. Even the named plaintiffs testified that they bought Snapple for reasons other than the "All Natural" representation, and that they would have bought Snapple regardless.

Plaintiffs proffered the testimony of an expert economist who testified that he could develop a model that would apply to all class members under one of two theories. But the expert had not yet developed the model, surveyed the literature, or even reviewed most of the relevant documents produced in the case. He did not consider that Snapple did not set retail prices, that class members had no documents to prove retail prices paid, and that Snapple did not vary the wholesale cost of its beverages based on whether the flavor was "All Natural" or not marked "All Natural." In short, his testimony was nothing more than a promise or prediction that he *could* come up with a valid model in the future. The court held that this was not enough under *Daubert*, and thus excluded his testimony as unreliable. *Id.* at 21. As the court explained:

> At a minimum, [the expert] would need to determine what 'standard economic methodologies' he will employ, identify the relevant 'class wide economic data' and 'studies and market research,' and build an actual algorithm before it could be determined whether [his] proposed methodology can reliably prove injury and causation on a classwide basis.

Id. at 23. Interestingly, the defense expert's testimony revealed that the price consumers paid for Snapple over the class period varied significantly based on a variety of factors, including where they bought it, the quantity they bought, when they bought it. *Id.* at 25-26.

In looking at the unjust enrichment claim, the court also questioned how plaintiffs would prove that they received less than what they had contractually bargained for. Especially troubling to the court was plaintiffs' testimony that they continued to buy Snapple even after they knew that it contained HFCS. *Id.* at 29. The same issues precluded a class-wide mode of proof for breach of express warranty, *id.* at 31, and New York law requires direct privity of contract with plaintiffs. *Id.* at 32.

The court went on to express serious doubts about the superiority requirement – in particular noting how unmanageable plaintiff's class definition was. It included people from around the world who bought Snapple in New York, regardless of where they live. And given that none of these people can be expected to have retained receipts, "Plaintiffs have failed to show how the potentially millions of putative class members could be ascertained using objective criteria that are administratively feasible." *Id.* at 34, 35-36.

High fructose corn syrup, and its health effects, is the subject of a high-profile national debate. Calls to ban it have intensified, and some in the food industry have responded to consumer perceptions by removing it as a sweetener in their products. The plaintiffs in *Cote*, perhaps motivated by the desire to change the food market, or by the hope that the hype surrounding HFCS would sway the judge, chose the consumer fraud class action route, which, as a byproduct, threatens to penalize the defendant financially for past lawful conduct in a way that new legislation or regulation would not. That is one of the real problems with lawyers who seek to change social policy through litigation. A number of courts have used the primary jurisdiction doctrine to stay litigations so that the FDA can make its own determination as to whether HFCS is a "natural" sweetener through its own regulatory process. *See Stacy Holk v. Snapple Bev. Corp.*, Civ. A. No. 07-3018 (MLC), slip op. (D.N.J. Aug. 10, 2010) (Lois A. Goodman, Mag. J.) (collecting cases).

Judge Cote's dispassionate and rigorous application of the federal rules and case law precedents should be instructive not only to litigants who must address similar consumer class actions, but also to judges who might like to dabble in policymaking at the urging of lawyers with broader agendas.

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ISBN 1056 3059