COMPARED TO WHAT? THE CONTINUING ROLE OF COMPARATOR PRODUCTS IN CONSUMER FRAUD FALSE ADVERTISING CLASS ACTIONS: "HAND-MADE VODKA"

By Kevin J. O'Connor*

In recent years product manufacturers have faced an onslaught of class actions alleging false advertising in the marketing of consumer products. Courts in the Third Circuit applying New Jersey's consumer fraud act have held plaintiffs' feet to the fire, dismissing such claims at the outset when a plaintiff is unable to plead an ascertainable loss. Judge Wigenton's recent decision in *McBrearty v. Fifth Generation, Inc.*, 2:14-CV-07667, offers another example of the critical role comparator products at the pre-answer dismissal stage in stating a plausible theory of recovery.

False advertising claims in the Third Circuit are often brought under New Jersey's Consumer Fraud Act ("NJCFA"). In order to have standing to pursue a claim under the NJCFA and many other state consumer protection statutes, a plaintiff must allege an "ascertainable loss." *See Thiedemann v. Mercedes Benz USA, LLC*, 183 N.J. 234, 246 (2005); *Laufer v. U.S. Life Ins. Co.*, 385 N.J. Super. 172, 186 (App. Div. 2006).

This requirement offers the key to dismissing a NJCFA case at its inception, and the Achilles heel for any new consumer fraud class action. In *McBrearty v. Fifth Generation, Inc.*, Defendant Fifth Generation filed a motion to dismiss plaintiff's purported class action complaint and moved to strike the class allegations. Defendant is a Texas company that manufactures, distributes, markets, and sells "Tito's Handmade Vodka." Defendant makes various claims regarding its award-winning vodka on its product labels. Plaintiffs Marc McBrearty and Paul Cantilina, New Jersey residents, alleged that they bought the vodka in reliance on the information on the product labels,

which led them to genuinely believe that they were paying for a "handmade product" distilled in an "old-fashioned pot in a microdistillery". Plaintiffs alleged that the vodka is in fact mass-produced and commercially manufactured by machines, and not by human hands.

As proof of this "fraud," Plaintiffs pointed to a Forbes article from 2013 that noted that defendant steered a Forbes photographer away from "massive buildings containing ten floor-to-ceiling stills [which were] bottling 500 cases an hour." Allegedly, Defendant instead directed the photographer to a "shack" that housed Defendant's "original still." According to Plaintiffs, the original still was "cobbled from two Dr. Pepper kegs and a turkey-frying rig" used "to cook bushels of corn into booze."

The Complaint therefore alleged that, since the vodka is not handmade, it is not worth its purchase price. The Complaint, however, failed to identify a purchase price for the vodka or its competitors at the time of purchase. Plaintiffs alleged that records of their purchases may be ascertained through retailers' or consumers' records, which include the statements for the credit cards that they used to purchase the vodka. The putative class was described as all New Jersey end-user purchasers of defendant's vodka, potentially thousands in number.

Plaintiffs alleged a violation of the New Jersey Consumer Fraud Act, fraud and intentional misrepresentation and fraudulent concealment and non-disclosure. Plaintiffs alleged that, as named plaintiffs, their claims are typical class-wide and that they will fairly and adequately protect the interests of the class. The court granted defendant's

motion to dismiss, but permitted Plaintiffs 30 days to amend the complaint and denied as moot Defendant's motion to strike.

The Court in *McBrearty* is not alone, and Judge Wigenton's decision is part of a trend among federal courts in this circuit to scrutinize false advertising claims of this sort. In *Parker v. Howmedica Osteonics Corp.*, 2008 WL 141628, at *4 (D.N.J. Jan. 14, 2008), for instance, the court held that simply pleading the "purchase price of a product does not constitute an ascertainable loss." Likewise, in *Stewart v. Smart Balance, Inc.*, 2012 WL 4168584, at *9 (D.N.J. June 26, 2012) the court held that where the substance of the claim is that plaintiff would have bought a different product if she had known the truth about the product, the purchase price does not reflect the amount of the loss with reasonable certainty.

The ascertainable loss requirement enables the court to "objectively quantify" the difference in value between the product expected and the product received. *In re Cheerios Mktg. & Sales Practices Litig.*, 2012 WL 3952069, at *14 (D.N.J. Sept. 10, 2012) (finding that plaintiffs failed to meet this standard by not, *inter alia*, estimating a loss amount or differentiation of price between the product purchased and a comparative product). To satisfy this requirement, a plaintiff must identify a specific comparable product that costs less and that plaintiff might purchase instead. *See Stewart*, 2012 WL 4168584, at *10 (requiring plaintiffs to allege the price of an "appropriate comparative product" to the allegedly fat-free milk that plaintiffs purchased and rejecting plaintiffs' attempt to rely on a type of milk that was not actually comparable); *Lieberson v. Johnson & Johnson Consumer Cos., Inc.*, 865 F. Supp.2d 529, 541-42 (D.N.J. Sept. 21,

2011) (rejecting assertion that comparable products cost 25% less than the product in question without identifying the comparable products).

In *McBrearty* and numerous other false advertising matters, plaintiffs seek to overcome dismissal by alleging that the class representatives "paid a premium," without explaining why that is so. The courts have held that this is insufficient to establish that what the plaintiff received was worth less than what was promised. *See, e.g., Solo v. Bed Bath & Beyond, Inc.*, 2007 WL 1237825, at *3 (D.N.J. Apr. 26, 2007) (holding that plaintiffs failed to sufficiently allege ascertainable loss where they claimed to have received linens that were "lower quality and less valuable than the linens they were promised"). In *Mason v. Coca-Cola Co.*, 774 F. Supp.2d 699, 701 (D.N.J. 2011), plaintiffs alleged that they purchased "Diet Coke Plus" because the labeling led them to believe it was nutritious and healthy. The court held that the mere allegation that plaintiffs paid "money for a product that was of lesser value than what was represented" was "insufficient to state an ascertainable loss" because they did not allege facts demonstrating that the "soda they bought was worth an amount of money less than the soda they consumed." *Id*. at 704.

While the Plaintiffs in *McBrearty* have tried again with an amended complaint, the same stumbling block will stand in the way of recovery there and in other false advertising cases—plaintiffs must sufficiently allege a plausible theory that they paid an actual premium for the product, which seems hard to do unless there are comparator products in the relevant industry to which they can point the Court under a plausible theory of recovery.

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