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Defending Class Actions: Using Absent Class Member Discovery

Today, companies that advertise consumer products are at significant risk that they will be hauled into court by enterprising plaintiffs' class action lawyers purporting to represent consumers who purchased products that allegedly did not perform as advertised. They assert that their clients would not have purchased the product but for the false or misleading advertising, and/or that the product was not worth the amount their clients paid for it, or, in certain jurisdictions, that their clients did not receive the full benefit of their bargain. The range of products subject to this type of lawsuit is limited only by our imaginations. Class actions have been brought regarding energy drinks, yogurt, "all natural" food products, eye drops, diet soda, automobiles, "low tar" cigarettes, contraceptive devices and others. Recent news stories make it appear likely that we soon will see class actions regarding artificial sweeteners and liquid soap.

Often, these consumer fraud lawsuits lack merit. Yet, the uncertainty inherent in defending against the claims often creates pressure to settle. In our view, companies need not be quick to devalue the opportunity to defend. The trick is to identify, analyze and utilize tools available that permit the presentation of a truthful, compelling defense. One such tool that we believe is underutilized is discovery of putative or absent class members.

In a typical class action, the complaint identifies one or a small group of "named plaintiffs." The named plaintiffs serve as the class representatives, if the court agrees that these individuals have claims that are "typical" of all other class members. Everyone else in the class is an "absent class member" (or, prior to class certification, a "putative class member").

The named plaintiffs must participate in pre-trial discovery, such as testifying at a deposition and at trial. However, our experience in consumer fraud cases is that plaintiffs' counsel seek to keep the named plaintiffs' testimony brief. Plaintiffs' counsel prefer to focus on the defendant's advertising and conduct, as well as expert testimony regarding the likelihood that a

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A version of this article originally appeared in *Corporate Counsel* on February 11, 2014.

"reasonable consumer" would be influenced by the advertising. Plaintiffs' counsel also tender expert testimony regarding the diminished value of the deceptively-advertised product.

On the other side of the case, the defense's presentation of evidence about class members is not limited to the testimony of the named plaintiffs. The defense has the right to demonstrate to the court or jury that class members vary in how they interpreted and reacted to the alleged misinformation, and later reacted to the correct information. This evidence will serve many purposes. *First*, it can be used to defeat class certification. In federal courts, for example, the plaintiffs must prove, by a preponderance of the evidence, that they satisfy the requirements for class certification. Defense counsel can use evidence of differences between actual class members to show: (i) the named plaintiffs are not "typical" of other class members; (ii) class membership is not ascertainable because it depends on matters that are subjective to, and vary between, class members; and (iii) the class action is neither manageable nor superior to individual trials because a court or jury cannot determine liability, injury, or damages on a uniform, class-wide basis.

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Second, evidence of actual class member beliefs and conduct can be used to defeat the merits of the case — both on summary judgment and at trial. Suppose, for example, plaintiffs have put forward a theory that a particular type of artificial sweetener used in a food or beverage product may carry health risks (such as increasing the risk of type 2 diabetes) or fail to promote anticipated weight loss, making the product less valuable. Plaintiffs may try to prove their theory of economic loss through expert testimony purporting to place an economic value (or price differential) on the "attribute" that plaintiffs allegedly paid for, but did not receive. Regardless of the plaintiffs' approach, the defense can put forward a powerful case backed up by real world evidence. One form of such evidence is to show that neither market share nor market prices were impacted by the disclosure of the information at issue. Defense can supplement that aggregate evidence with real world evidence: actual class members who testify that the information was irrelevant to their purchasing choices and that, once apprised about the alleged misinformation, they did not change their purchasing decisions. Some class members likely will testify that they received exactly what they were looking for (*e.g.*, a diet soda with a particular taste; perhaps some did lose weight compared to a time when they were drinking soda sweetened with sugar; etc.). This type of evidence affirmatively disproves materiality and the existence and extent of injury. It also serves to continue to demonstrate the impropriety of proceeding with the case as a class action, because individual issues predominate.

The evidence is powerful. Judges and juries are moved when they see (by video recording) the testimony of real class members talking about what actually goes on with respect to the product. Although this article focuses on consumer products class actions, courts across the country have

permitted discovery of putative and absent class members in a wide range of cases, including cases with product liability claims, consumer fraud claims, discrimination claims, price fixing claims, and wages-and-hours claims.

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Below are five tips to consider when deciding whether and how to pursue absent class member discovery.

1. ***Consider when to seek putative/absent class member discovery.*** It may be easiest to convince the court to permit such discovery before class certification. At that stage in the litigation, the putative class members are not yet formally represented by plaintiffs' counsel, making the discovery more palatable to some judges. Defense counsel also might try pursuing putative or absent class member discovery in phases. A phased approach allows defense counsel to show the court that the discovery is producing valuable evidence that the defense likely could not obtain through other means, and that the discovery process is workable.

2. ***Consider what type of putative/absent class member discovery to request.*** The most common types of putative/absent class member discovery are document requests, interrogatories and surveys. Our thesis is to consider seeking depositions. Depositions provide the greatest upside for a defendant, because of the powerful impact of having a court or jury watch putative or absent class members testify about the product and advertising at issue.

3. ***Consider how many putative/absent class members from whom you need discovery.*** The answer to this question depends on whether the defense would be best served by using the discovery responses to draw inferences about the class as a whole, in which case defense will need a sample large enough to make statistically valid estimates, or if the defense will use the evidence anecdotally. For the former, defense counsel should work with an expert witness to determine how many depositions (or written discovery responses) the expert needs to run the proper analysis. If the defense intends to use the evidence anecdotally, there is no magic number.

4. ***Consider using a putative/absent class member discovery protocol.*** A specified protocol can help convince the court to permit putative/absent class member depositions and prevent the process from being polluted by interference from plaintiffs' counsel. Considerations for the discovery protocol include: (a) how deponents are selected; (b) whether there should be a third party administrator who implements the selection process;

(c) whether there should be a prohibition on counsel from any party contacting deponents prior to the deposition; (d) whether the depositions should have a time limit, and, if so, how the time should be allocated between the parties; (e) the order of questioning by the parties; and (f) how much deponents should be paid for their time.

5. ***Consider the risks.*** Prior to requesting such discovery, defense counsel should consider taking mock depositions (akin to focus groups) as a test. Not all deposition testimony will be favorable. To minimize risk, it is important to make sure that the attorneys taking the depositions have a well-defined set of goals and questions for the depositions. Defense counsel also may want to work with an expert witness before requesting or taking putative/absent class member depositions, especially if the defense thinks it may be beneficial to seek discovery from a sample large enough to draw inferences and conclusions that are statistically significant and projectable.

Conclusion

We have seen the benefits of absent class member discovery in motion practice and at trial. If your company finds itself named as a defendant in a class action lawsuit, we recommend that you give strong, full consideration to the merits of taking putative/absent class member depositions as part of your defense strategy.