Published by *Class Action Law360*. Also ran in *Consumer Protection Law360, Food & Beverage Law360,* and *Product Liability Law360.*

Consumer Class Actions Can't Stand On Moral Injury Alone

— By David Kouba, Arnold & Porter LLP

Law360, New York (October 29, 2015, 11:42 AM ET) -- Plaintiffs have recently filed several consumer fraud class actions claiming that they suffered economic injury when purchasing a product, because the product included raw materials that were obtained in a manner that violated principles of social justice. Plaintiffs, for example, have sought refunds for seafood and cat food purchases based on the manner in which fishermen in Thailand allegedly are treated[1] and refunds for candy bar purchases based on the conditions in which cocoa is harvested in the Ivory Coast.[2]

This article does not address the humanitarian issues that underlie these lawsuits — indeed, one can hardly dispute that child labor and slave labor practices are terrible. Instead, it questions the notion that third-party misconduct — far removed from the manufacturer's operations — can form the basis for consumer fraud claims in the first place. There are good reasons to believe it cannot. The consumer protection statutes relied upon in these lawsuits were enacted to protect consumers and not to remedy immoral conduct in foreign countries, giving these lawsuits a "square peg-round hole" feeling, and plaintiffs will face several legal obstacles that should foreclose any recovery.

Background on "Moral Injury" Theory

Ten years ago, in *Animal Legal Defense Fund v. Mendes*, the purchasers of milk and other dairy products sought to certify a class action against California calf ranchers based on allegations of animal cruelty by third-party contractors.[3] In particular, the defendants in *Mendes* would contract with dairy farms to raise the dairy farms' calves before returning those calves to be used by the dairy farms. Plaintiffs alleged that these third parties mistreated the calves during that process by confining them to small cages that were not properly cleaned. Plaintiffs thus claimed that the milk they had purchased was unlawfully produced and, as a result, consumers suffered harm and lost money.

The trial court dismissed these claims, and the California court of appeal affirmed. The court explained that plaintiffs "do not allege that respondents' treatment of the young calves has any negative effect on the milk produced by these calves months and years later, when they are in a dairy herd. And they do not allege that anyone made express representations about the milk ..." Thus, the court rejected plaintiffs' attempt to use a consumer fraud theory to recover for mere "moral injury." After *Mendes*, it appears that plaintiffs did not frequently rely on moral injury theories in consumer fraud litigation.

Return of "Moral Injury" Theory and the Obstacles It Faces

Recently, however, plaintiffs filed several class actions based on a moral injury theory not unlike the theory in *Mendes*, although these plaintiffs' theory is based on foreign conduct that is even further removed from the defendant's activities. These cases each use the same basic formula. Plaintiffs identify a humanitarian principle or principle of social justice, such as child labor, slave labor, work conditions or animal cruelty. They next allege that this principle was violated when a certain commodity was obtained or prepared, such as harvesting crops or catching seafood in a

foreign country. Plaintiffs then claim that they were financially harmed by purchasing a final product, such as a candy bar, that included the materials obtained through those questionable means and are therefore entitled to a refund.

On the surface, these claims fail for the same basic reason that the claims in *Mendes* did. Plaintiffs do not allege that the conduct at issue had any "negative effect" on the goods in question or "that anyone made express representations" that were not true. Upon closer review, it is even more apparent that this theory of consumer fraud liability is riddled with problems and unlikely to gain any traction.

For starters, these plaintiffs will have difficulty proving a false representation, since there is nothing on the labels or in the advertising for the products that appears to be untrue. Plaintiffs will therefore have to rely primarily upon omission theories, but those theories too will prove difficult, since it is unclear how plaintiffs will establish that defendants had a duty to provide the allegedly omitted information.

Moral injury plaintiffs also will have problems proving injury, as necessary to state a claim under state consumer fraud acts and to establish standing. Plaintiffs in these cases have not, and likely cannot, allege that every single item sold by defendants included raw materials that was obtained through improper means. Nor can they claim that the specific item they purchased necessarily included such materials. Indeed, because the materials were obtained in foreign countries, using practices far-removed from the defendant's own operations, there likely is no way to determine exactly how the raw materials used in any specific item were obtained. Plaintiffs thus can argue, at most, that the products they purchased *might* have contained materials obtained through improper means — a speculative theory of injury that courts have frequently rejected.

Plaintiffs also will struggle to prove an economic injury. Many consumers would have purchased the products in question even if they knew that these products might contain materials acquired through improper means. In addition, plaintiffs' allegations suggest that the products cost less because of the improper conduct, undermining claims that consumers suffered financial harm.

Furthermore, even if plaintiffs could show an injury, they still must prove that some action or inaction by the defendant caused that injury. This too is likely to be difficult, since any injury arguably was caused by a third party's objectionable conduct and not the defendants'. Moreover, defendants can argue that proof of causation depends in part on each consumer's beliefs about the product and how it was produced and that person's reasons for purchasing it, and each plaintiff must therefore prove that he or she would not have bought the item if he or she had known of the alleged misconduct.

The problems for plaintiffs bringing moral injury claims do not end there. These claims essentially ask the court to regulate commercial speech by requiring additional disclosures, raising significant First Amendment concerns, particularly given the lack of any allegations that defendant made a statement that was inherently false. Likewise, some defendants have return policies that allow the merchandise to be exchanged and present a defense to liability. And some plaintiffs' claims might not be actionable under a particular state law if there are provisions exempting certain conduct from liability or if other statutes or regulations govern the content of the product's label.

Moreover, obtaining class certification in these cases — as each plaintiff purports to seek — would be extremely difficult. Again, there does not appear to be a common duty to disclose

additional information in these cases or any common misrepresentation. This alone should foreclose certification. In addition, even if an individual could somehow show that she purchased a product that included materials obtained through improper means, or that she would not have otherwise purchased the product and thus suffered economic injury, that proof would not establish the same was true for the entire class. The need for individual proof on these questions would further defeat certification. There also are likely to be individual defenses, and although there is a split in authority, courts have repeatedly ruled that certification should be denied where class membership cannot be determined without individual proof, as would likely be true in these cases.

At the end of the day, consumer fraud statutes were never intended to redress social problems in foreign countries. Accordingly, it should come as little surprise that recently filed lawsuits that attempt to do so are fraught with problems, and courts may quickly close the door on the revival of this attenuated theory.

David Kouba is counsel in Arnold & Porter's Washington, D.C., office.

[1] *See*, *e.g.*, *Barber v. Nestle USA Inc.*, No. 8:15-cv-1364 (C.D. Cal.); *Sud v. Costco Wholesale Corp.*, No. 3:15-cv-03783 (N.D. Cal.).

[2] *Hodson v. Mars Inc.*, No. 3:15-cv-04450 (N.D. Cal.).

[3] 160 Cal. App. 4th 136 (2008).