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False Advertising Class Action Update

SEVENTH CIRCUIT'S AFFIRMANCE OF DENIAL OF CLASS CERTIFICATION OF CONSUMER FALSE ADVERTISING CLAIM REDUCES THE LIKELIHOOD OF FUTURE CERTIFICATION OF SUCH CLAIMS

On December 29, 2006, the United States Court of Appeals for the Seventh Circuit, in affirming denial of class certification, made two significant holdings with respect to class action claims for false advertising that will make it difficult for anyone seeking to have a consumer false advertising claim certified as a class action. First, the Court held that the district court correctly denied class certification of plaintiff's claim under the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA") on the ground that the class definition included consumers who "ha[ve] no grievance under the ICFA" because they were not deceived by the challenged advertising and their alleged injury was not proximately caused by any deception. *Oshana v. Coca-Cola Co.*, 2006 U.S. App. LEXIS 32036, *17 (7th Cir. Dec. 29, 2006). Second, the Court held that certification of the unjust enrichment claim was also properly denied because an unjust enrichment claim requires individual proof of deception.

At issue in *Oshana* was plaintiff's allegation, asserted on behalf of a putative class of purchasers of Diet Coke, that Coca-Cola violated the ICFA and was unjustly enriched by failing to disclose that fountain Diet Coke and bottled Diet Coke are not the same product. Specifically, plaintiff alleged that Coca-Cola deceptively advertised that Diet Coke is sweetened with 100% Nutrasweet® aspartame, when in fact fountain Diet Coke contains a blend of aspartame and saccharin.

On appeal pursuant to Rule 23(f), Fed. R. Civ. P., the Seventh Circuit affirmed the district court's denial of class certification. Relying on the Illinois Supreme Court's seminal decisions in *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), and *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151 (Ill. 2002), the Court explained that a damages claim under the ICFA requires "that the plaintiff was deceived in some manner and damaged by the deception." 2006 U.S. App. LEXIS 32036, at *17.

Applying this settled law, the Court held that the proposed class, comprised of all purchasers of Diet Coke from March 1999 to date, was indefinite and not sufficiently ascertainable because it could "include millions who were not deceived and thus have no grievance under the ICFA." *Id.* at *17. In particular, "[s]ome people may have bought Diet Coke *because* it contained saccharin," and others "may have bought fountain Diet Coke *even though* it contained saccharin." *Id.* at *17-18 (emphasis by the Court). Thus, countless members of the proposed class could not show that they were deceived or suffered any injury or damage from the advertised claim, "let alone damage proximately caused by Coke's alleged deception." *Id.* at *18.

"For the same reasons," the Court held that the plaintiff's claims were not typical of the claims of the putative class. *Id.* at *18. Thus, the proposed class "includes people who knew fountain Diet Coke contains saccharin and bought it anyway." *Id.* at *18-19. By contrast, although plaintiff "claims [that] she was deceived and injured," she had "admitted [that] she did not see any Coke advertisements during the relevant period and that she knew fountain and bottled Diet Coke were different." *Id.* at *19.

The Court also rejected plaintiff's argument that a class should have been certified on her "'per se' ICFA violation claim," holding that "[t]here is no per se violation that automatically makes Coke liable to" plaintiff and putative class members. *Id*. at *19-21. Rather, unlike in actions brought by the Illinois attorney general, every "private cause of action under the ICFA requires a showing of proximate causation" and "actual damage." *Id* at *20-21.

Finally, the Court held that, although unjust enrichment claims "do not necessarily require wrongdoing on the part of the defendant," here, "Coke cannot have been unjustly enriched without proof of deception." *Id*. at *21. Accordingly, for the same reasons that the district court properly denied certification of the ICFA claim, it properly denied certification of the unjust enrichment claim.

The Seventh Circuit's decision in *Oshana* is significant because it is one of the few federal appellate decisions that addresses the certifiability of consumer false advertising claims as class actions and, even more significantly, takes into account in its class certification analysis the fact that consumers often are *not* misled by allegedly false advertisements and that many consumers buy, or continue to buy, a product *knowing* that the challenged advertising claim is allegedly not true. With the adoption of Fed. R. Civ. P. 23(f), permitting interlocutory appeal of class certification decisions with the appellate court's approval, and with the enactment of the Class Action Fairness Act, permitting most class actions to be removed to federal court, it is likely that other federal courts of appeal increasingly will be called upon to determine the certifiability of consumer false advertising claims. *Oshana* will stand as an important precedent that the requirements of establishing deception, injury and causation on a false advertising claim are a bar to class certification because each is an inherently individual issue of fact, which cannot be established on a class-wide basis, and which makes any class member's claim atypical of the claims of other class members.

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