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## The Increase In Deceptive Trade Practices Claims

Law360, New York (October 06, 2008) -- A group of consumers sues a bottled water manufacturer because its water came from purified municipal sources and not the snow-topped mountains featured on its label. Another seeks damages because a guacamole dip doesn't contain enough avocados. A third sues a satellite radio network for not providing entirely commercial-free programming.

Plotlines from a new legal sitcom? Jokes from a late night monologue? Neither. Each of these cases was actually filed in state or federal court, seeking damages on behalf of a class of consumers purportedly aggrieved as the result of a deceptive trade practice.

The recent rise and popularity of deceptive trade practice claims is the product of a perfect storm of plaintiff-friendly state consumer protection statutes, heightened public concern over the distribution of defective products and myriad factors making them attractive to plaintiffs and their lawyers.

Accordingly, it behooves any company providing consumer products or services to understand the universe of claims that can give rise to a deceptive trade practice action, the theories under which plaintiffs typically seek recovery, and the reasons such actions may ultimately succeed or fail.

Not only does such information provide an invaluable knowledge base from which to evaluate and plan a response if a deceptive trade practice action is filed, it also identifies ways in which companies may minimize their vulnerability to such claims and more efficiently allocate resources to plan for such eventualities.

### *Deceptive Practice Claims And The "No-Injury" Lawsuit*

In the products liability context, deceptive trade practice claims usually take the form of a breach of warranty action alleging that a seller's product was different than advertised. They

seek to recover as economic damages the differences in value between what was promised and what was received.

Some cases may also employ tort theories, such as fraud or misrepresentation. Deceptive practice claims are sometimes referred to as a variety of the "no-injury" lawsuit, so-called because they assert traditional products liability theories of recovery in the absence of any physical injury or property damage.

#### *What's So Great About The No-Injury Lawsuit?*

Whatever common law theories they allege, most no-injury actions include as their centerpiece a claim under the consumer protection statutes of one or more states. Every state and the District of Columbia has enacted some form of such legislation, which generally makes it easier for allegedly aggrieved consumers to bring no-injury claims and recover increased damages for them.

For example, many statutes relax the requirements of common law causes of action such as fraud, misrepresentation and breach of warranty by dispensing with or requiring a lesser showing of reliance, causation, intent, standing or injury.

Most statutes set forth an explicitly broad and expansive definition of proscribed deceptive conduct or authorize borrowing standards of conduct from other regulations or statutes to increase their reach.

Many heighten the financial incentive for bringing such suits by providing some type of enhanced damages, in the form of punitive or treble damages, statutory alternative minimum damage awards and/or attorney's fees. Nearly all provide for a private right of action and authorize class action treatment.

Many courts have interpreted the broad scope and filing incentives woven into such legislation as invitations to view plaintiffs and attorneys prosecuting such actions as "private attorneys general," charged with protecting and vindicating consumers' rights through the vigorous enforcement of consumer protection laws.

The recent rash of high-profile product recalls has led to heightened public concern over product safety, feeding a public perception that cases addressing such matters further an important public safety interest and creating an environment conducive to products liability litigation, including no-injury suits.

All types of no-injury actions are attractive to plaintiff's lawyers. In many cases, any average consumer is a potential plaintiff and a class action lawyer's ticket to a possible settlement or jury award, which sometimes results in friends, relatives or employees of the filing attorney being drafted to serve as plaintiffs.

Plaintiffs' lawyers may also be attracted to the broad and wide-ranging discovery typically available in deceptive practices suits. Such suits often provide an easy way to pressure defendants into quick and favorable settlements by threatening the substantial costs associated with broad discovery and disclosure of sensitive corporate information, such as personnel files, site visits and sales and marketing data.

The threat of broad disclosure often forces defendants into ancillary battles (discovery disputes and fights over confidentiality agreements, for example) that divert resources from defending class certification or the merits of the action.

No-injury suits lend themselves to class action treatment more easily than cases involving claims of personal injury or property damage. This is primarily a function of the individual issues inherent in personal injury or property damage claims.

Claims of personal injury are typically accompanied by any and all manner of individualized issues, including the nature and scope of the injury, causation and damages. These individualized concerns often preclude a finding that issues common to the class predominate, and the class representative's claims are typical of those of the class, both requirements for certification under federal and virtually all states' class action rules.

Deceptive trade practice suits derive further popularity from the fact that their viability does not depend on the existence or potential manifestation of a physical injury or product defect, only an arguably inaccurate product representation. As a result, they have proven easiest to adapt to a broad range of circumstances.

#### *Why It Matters*

Notwithstanding the advantages and benefits that have made them attractive to plaintiffs and their attorneys, deceptive trade practice suits do have vulnerabilities and limitations that can be anticipated and planned for, often more so than other types of no injury actions.

Although increased supply chain vigilance and quality control efforts can limit exposure from entirely defect-based claims, some production factors will always remain beyond a

company's immediate control, thus ensuring the risk of such claims will never vanish entirely.

Deceptive practice claims, on the other hand, even those associated with latent defects or nonconformances outside of a company's control, still require a representation on which a plaintiff may base his or her claim. By assessing what products or representations may be most susceptible to a deceptive practice action, a company may not only reduce the risks within its control, but plan for contingencies with respect to those factors outside of its control.

Some degree of injury or loss is required to confer standing upon the plaintiff bringing a deceptive practices claim. In any such action, injury is a function of the relationship of the product's alleged nonconformance (in other words, the nature of the alleged breach, misrepresentation or fraud) to the value of the whole product. The more attenuated the connection, the stronger the argument that no loss or injury has occurred.

For example, a New Jersey federal court recently dismissed a putative class action complaint on the grounds that it did not allege an injury sufficient to confer standing. In *Koronthaly v. L'Oreal USA, Inc.*, No. 07-CV-5588, slip. op. (D.N.J. July 29, 2008), the plaintiff, who alleged no physical injury, claimed that after purchasing and using lipstick sold by the defendant, learned that it contained lead levels in excess of those established by the FDA for candy and sought damages for, among other things, the purchase price of the lipstick.

In finding that the plaintiff lacked standing, the court focused on the fact that she "bought and used the lipstick [and] only complain[ed] that the lipstick's levels of lead were unsatisfactory to her." The court also noted that the FDA does not regulate any aspect of lipstick, further suggesting the attenuated relationship between the claimed misrepresentation and the value of the product.

In a similar case, *Chavez v. Blue Sky Natural Bev. Co.*, 503 F.Supp.2d 1370 (N.D.Ca. 2007), a federal court in California dismissed for lack of standing a consumers' claim that a soft drink manufacturer falsely represented that it was manufactured in New Mexico.

The court found that the promise concerning geographic origin had no value and the plaintiff had accordingly suffered no damages in purchasing the product, mistakenly believing that it was manufactured in New Mexico.

Implicit in both opinions is a determination that the relationship between the subject of the

alleged misrepresentation (omission of lead levels and geographical origin) shared a negligible connection to, and therefore did not contribute to, the total value of the product.

The purchaser suffered no ascertainable injury as a result of the misrepresentation. One imagines that the result might be different had the misrepresentations involved the lead content of an infant teething ring or the geographical origin of a vintage Bordeaux.

Thus, in evaluating a product's labeling or advertising, and in devoting resources to verifying the accuracy of such statements, a company is best served by focusing on those that share a closer connection to total product value.

Another aspect of the deceptive trade practice claim from which companies may derive a degree of insight is the issue of reliance. As with the ascertainable injury issue, the consumer protection statutes of many states have deemphasized or eliminated the need to establish this common-law requirement of breach of contract and fraud actions. A defendant, however, may generally still assert the lack of rel

iance as a defense to class certification.

Regardless of its context, the role of reliance in the deceptive trade practice action can provide insight to a company assessing its potential exposure to a deceptive trade practice claim. For example, in *Elias v. Ungar's Food Prods.*, No. 06-2448, 2008 U.S. Dist. Lexis 49729 (D.N.J. June 30, 2008), class certification has been granted to a group of consumers who claim to have been misled by the allegedly false nutrition facts contained on packages of frozen health food items.

In electing to apply a presumption that class members relied on the subject representations when purchasing the product, the court focused on the fact that it was "marketed to a specific type of consumer that will likely rely on the presentation of the product as healthy."

By contrast, a California appellate court refused to certify a consumer class related to allegations that a manufacturer misrepresented its juice products as "fresh" and "100 percent" pure. In *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644 (Cal. Ct. App. 4th 1993), the court determined that certification was not warranted, by focusing on the individualized nature of consumers' interpretation of such representations.

Based on preconceived definitions of the subject terms and exposure to other information on the product label, the court held, individual consumers had different understandings of

the qualities and characteristics of the products they thought they were purchasing, and therefore could not be said as a class to have relied on the subject misrepresentations.

Both opinions provide direction to companies evaluating the vulnerability of advertising or package claims to a deceptive practice claim. A product representation that reinforces the tone of its overall marketing message is more likely to be seen as the factor responsible for having motivated consumers to buy, thereby allowing reliance to be presumed.

A representation that is reasonably susceptible to a variety of interpretations inherently involves individual issues of definition and interpretation that may preclude application of a reliance presumption.

In evaluating vulnerability to a deceptive practice action, therefore, a company should focus its resources on those labeling or advertising statements that reinforce the overall marketing message of the product or convey a claim subject to standardized definition or interpretation.

The qualities that have made deceptive trade practice actions so popular—relaxed pleading requirements, adaptability and attractiveness to plaintiffs' lawyers—are similarly what makes them such a potent threat to virtually any company involved in selling to consumers.

Nothing suggests a lessening of this popularity or the severity of the threat. By understanding the types of claims that may be brought and, most importantly, the advertising and labeling claims most susceptible, it is possible to learn to live with this threat.

--By Richard Fama (pictured) and Russell Wheeler, Cozen O'Connor LLP

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