

Blog Entry: Cat Breeders, Fancy Feast, and Gravity: Seventh Circuit Vacates Certification of Classes of Dissatisfied Buyers

MARCH 7, 2017

Source: *Array*

On March 6, 2017, the Seventh Circuit Court of Appeals vacated a district court's certification of eight separate classes against Allergan and other defendants under an Illinois and Missouri statute. *Eike v. Allergan, Inc.*, No. 16-3334 (7th Cir. March 6, 2017). Equating the plaintiffs' allegations to that of cat breeders and Fancy Feast, Judge Posner and the Seventh Circuit held that the plaintiffs' case amounted to mere buyer dissatisfaction and they failed to allege a cognizable misrepresentation.

In *Eike*, the plaintiffs brought suit against Allergan under the Illinois Consumer Fraud Act and the Missouri Merchandising Practices Act, alleging that Allergan and other defendants' eye drops were "unnecessarily large." Specifically, the plaintiffs alleged that defendants' eye drops exceed 16 microliters, which is the "optimal size" of an eye drop used to treat glaucoma. Because of their size, the plaintiffs contended that the eye drops were wasteful and overpriced. The plaintiffs sought the difference between the price per drop of the eye drops at their present size and the "presumably" lower price of smaller drops, multiplied by the number of drops purchased by the class.

On appeal and after the district court certified the classes, the Seventh Circuit reversed. In its five-page opinion, the Seventh Circuit stated that the plaintiffs' case was "not an antitrust case" and there was no allegation of a misrepresentation - the argument was only that smaller drops would presumably cost less. However, absent a "suggestion of collusion by the defendants," or a misrepresentation about product quality, the case was simply about product dissatisfaction. Indeed, Judge Posner and the Seventh Circuit equated the plaintiffs' allegations to that of cat breeders, Fancy Feast, and gravity:

Suppose the class members all happened to own pedigree cats, and the breeders who had sold the cats to the class members had told them that as responsible cat owners they would have to feed the cats kibbles during the day and Fancy Feast at night and buy a fountain for each cat because cats prefer to drink out of a fountain (where gravity works for them) rather than out of a bowl (where gravity works against them) and they don't like to share a fountain with another cat. And suppose the buyers do as told, buying what they are told to buy from pet stores, but it turns out that the cats have large appetites, the cat food is quite expensive, and the fountains are expensive and not wholly reliable. The breeders had made no misrepresentations, concealed no information, answered all questions of prospective buyers truthfully. Nevertheless many of the buyers are dissatisfied. They think-maybe correctly-that the cat food is needlessly expensive and the fountain a fragile luxury. Yet would anyone think they could successfully sue the breeders? For what? The breeders had made no misrepresentations. Had a prospective buyer asked one of the breeders what the annual cost of

maintaining the cat would be, the breeder would, let's assume, have given him a realistic estimate. There would be disappointment in the example given, but no cause of action.

Going further, the Seventh Circuit noted that the plaintiffs likely did not have standing to sue, because "[t]he fact that a seller does not sell the product that you want, or at the price you'd like to pay, is not an actionable injury; it is just a regret or disappointment - which is all we have here[.]" In vacating class certification, the Seventh Circuit remanded with instructions to dismiss the lawsuit with prejudice.

The case is *Eike v. Allergan, Inc.*, No. 16-3334 (7th Cir. March 6, 2017).