

Blog Entry: New Win for Old Spice

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Procter & Gamble was sued this March in the Southern District of Ohio by about 180 persons claiming they had bought and were injured by applying thirteen different Old Spice deodorant products manufactured and sold by P&G. They contended that by using those deodorants, they “suffered severe burning, rashes, irritation, discoloration, scarring, peeling of skin, and/or other injury requiring them to immediately cease using the product.” Their 180-page, 66-count, 840-paragraph amended complaint includes breach of warranty, Magnusson-Moss, negligence, unjust enrichment, products liability and state statutory claims and seeks injunctive relief and damages, both compensatory and punitive. On top of that, their pleading is adorned with any array of color photos of body parts, mostly armpits, and identifies their owners and their addresses. *Editor’s note: view with caution.*

Plaintiffs sought certification of a nationwide class - “persons in the United States who purchased for their own use Old Spice deodorant which was manufactured, produced, or supplied by Defendant between 2012 to the present” - and of 40-plus state subclasses - such as “[a]ll persons in the state of Ohio who purchased for their own use Old Spice deodorant which was manufactured, produced, or supplied by Defendant between 2012 to the present.” P&G moved to strike the class action allegations and to dismiss several counts for failure to state a claim. On October 4, 2016, the court granted the motion, with leave to amend.

The court determined that plaintiffs’ personal-injury and medical related claims were not suitable for class treatment because they “are by their nature fact intensive and state law-specific. A multitude of individual factual and legal issues preclude findings of commonality, predominance, cohesiveness, typicality, and superiority. These impediments to class certification are multiplied because plaintiffs seek to assert these already fact intensive claims under the substantive law of many different states.” The court also noted that “one district court” - the Southern District of Indiana - “recently observed that ‘no federal appellate court has approved a nationwide personal injury, product liability or medical monitoring class;’” that the classes sought to be certified were “fail-safe” classes; and that individual mini-trials would be required to establish class membership. From the court:

The liability of individual class members will turn on the litany of specific factual inquiries, including whether and how class members were physically injured, how putative class members applied the product, the frequency of use, whether they use other products, individual medical issues and sensitivities, conditions such as previously broken or irritated skin, armpit shaving habits, and other factors unique to each individual.

The court also deemed the proposed classes overbroad because, “[w]hile possibly tens of millions of consumers fit plaintiffs’ class definitions, plaintiffs allege that there are only hundreds, if not

thousands, of consumers damage[d] by Defendant's actions and product." And as for Rule 23's commonality, typicality and adequacy requirements, the court found against plaintiffs on them all. This, on adequacy:

Class actions involving personal injury claims generally do not meet the adequacy requirement. ... Here, Plaintiffs are not adequate representatives because they do not 'possess the same interest and suffer the same injury' as the varied individual members of the class. ... The named plaintiffs with 'diverse medical conditions' cannot act 'on behalf of a single giant class' because they are not 'aligned' with the individual class members ... and lack 'incentives' to vindicate the disparate claims and injuries of other differently-situated class members.

In short, a sweeping dismissal order, but not necessarily a determinative one. The court granted plaintiffs 21 days to amend to afford them "the opportunity to cure their deficiencies." We'll keep you posted. The case is *Colley v. Procter & Gamble Co.*, Southern District of Ohio, case no. 1:16-cv-918.