CLIENT ALERTS & INSIGHTS

Nobody-Not Even Einstein-Has Figured Out What Causes Gravity, but You Need to if You Are Facing a Putative Consumer Class Action in the 9th Circuit

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Key Takeaways

- The common argument made by plaintiffs that differences in alleged misrepresentations are transcended by the center of the gravity of the alleged fraud should not be addressed through the typical approach of just comparing the level of variance of the representations in the case at issue with that in the relevant precedent.
- In addition, it should also be emphasized both that some alleged frauds have stronger gravity and that alleged consumer frauds often have weaker gravity because consumer products frequently have value independent of the challenged representations.
- It should also be made clear that this consideration is distinct from materiality and reliance. Further, if properly framed, it not only supplies one potential means of negating improper certification of a class but also provides an opportunity to tell the story of your product in its best light.

"Nobody knows what gravity is".[i] Further, "almost nobody knows that nobody knows what gravity is." "The exception is scientists. They know that nobody knows what gravity is, because they know that *they* don't know what gravity is."[ii] Even Isaac Newton, who famously discovered gravity, readily admitted that "the cause of gravity is what I do not pretend to know". Einstein didn't know either. Nor did he pretend to. Objects fall to earth, and we all say that it's because of gravity (i.e., we can see what gravity does and how it operates), but there is not a single person in the history of the world who knows what causes gravity.

Yet if you are defending a putative class action in the Ninth Circuit and you don't know what causes gravity, that could be a problem for your case. That is because in the Ninth Circuit the outcome of a motion for class certification may depend on whether "the center of gravity of the fraud transcends the specific details of" the alleged misrepresentations. *See In re First Alliance Mortgage Co.*, 471 F.3d 977, 991 (9th Cir. 2006).

Plaintiffs' attorneys often try to use this and related propositions from *In re First Alliance* and its progeny to attempt to certify classes where there are significant differences in alleged misrepresentations. In such cases where class certification is on the line, the battleground often becomes whether the representations in the case at issue vary less than the representations in *First Alliance* or other cases following it, such as *Jensen*.[iii] On the surface, this can appear to set a difficult and unfair standard for defendants. In *Jensen*, for example, class certification was upheld notwithstanding that the representations were as different as promising one individual that his money would be used to make loans to medical companies while another was told that his money would be used to invest in Quizno's Subs. Plaintiffs point to this and essentially argue that under Ninth Circuit law even variance as great as the difference between a medical company and Quizno's Subs doesn't preclude certification because "the 'center of gravity' of the [alleged] fraud predominates over details of individual communications."[iv]

Such a view of gravity attempts to grant it almost mystical powers. In the words of Stephen Hawking, "Because there is a law such as gravity, the universe can and will create itself from nothing."[v] What is more, if left unchecked, gravity can even create a class from nothing.

That is why the cause of gravity in the Ninth Circuit must be understood.

What Causes Gravity?

Like Mother Nature, the courts have not been particularly explicit about what causes gravity. The clues, however, are there. In the beginning, the first decision to use the "center of gravity" formulation was *Lincoln Savings*, an opinion by the District Court of Arizona whose reasoning the Ninth Circuit adopted in *First Alliance*.[vi] In *Lincoln Savings*, the fraud that had enough "gravity" to transcend differences in representations involved the cover up of "sham transactions in which ACC/Lincoln recorded phantom profits".[vii] *First Alliance*, in turn, addressed a fraud concealing "unconscionable loan terms" that was so serious it was investigated by "the United States Department of Justice and the attorneys general of seven states" and drove the company into liquidation.[viii] And in *Jenson*, in which the gravity of the fraud transcended the difference between medical companies and Quiznos, the fraud was a literal "Ponzi scheme."[ix]

Each of these seminal cases, in which the gravity of the fraud was strong enough to transcend differences in representations, have one thing in common. They all involve products that are inherently undesirable, if known for what they are. In *Lincoln Savings*, the details of what was said to cover up that the transactions were a "sham" did not meaningfully change anything because people would probably not want to buy the bonds of a company if they knew it was propped up by sham transactions and phantom profits. Likewise, as in *First Alliance*, people would probably not want "unconscionable loan terms." Nor, as in *Jenson*, would people likely desire shares in a "Ponzi scheme" if they knew it was a Ponzi scheme.

In other words, if the alleged fraud is such that people would likely not want the product at all if they knew the truth, the gravity of that fraud is particularly strong. Embedded in this concept is the principle that the gravity of some frauds are stronger than that of others, the same way that gravity is stronger on Jupiter than Earth (such that a 200-pound earthling will weigh roughly 450 pounds on Jupiter).

Has the Ninth Circuit expressly stated this? No. But the Ninth Circuit has indicated, albeit implicitly, that gravity is perhaps not quite so Jupiter-level strong when it comes to alleged fraud involving typical consumer products. Such products can be desirable and provide value even if certain of the statements made about them in advertising are not entirely true. In this regard, the Ninth Circuit has repeatedly specified that in "a case of this nature, one based upon product labeling, advertising, and the like, it is critical that the misrepresentation in question be made to all of the class members."[x]

Further, the Ninth Circuit has also suggested that in some consumer fraud cases, gravity can be especially weak. In *Reitman v. Champion Petfoods USA, Inc.*, the district court addressed whether the "center of gravity" of an alleged fraud containing a common message about certain dog food for sale outweighed differences in contextual information. The district court found that "every package contains the phrase 'biologically appropriate,' 'never outsourced' and 'fresh regional ingredients.'" Yet, the district court ruled that a class was inappropriate because "each package's labeling provides additional context that will require individualized analysis".[xi] The Ninth Circuit affirmed, holding that notwithstanding that "all dog food packages may have a common message" it was necessary to review each package for the individual context of that message.[xii]

As contrasted with bonds propped up by sham transactions, unconscionable loan terms and shares in Ponzi schemes, it is not so clear that dog food would lose all value if its ingredients were not biologically appropriate, outsourced or fresh and regional. In any event, it is apparent that in the Ninth Circuit the gravity of an alleged consumer fraud may be so weak that despite uniform phrasing it cannot even transcend differences in mere contextual information.

What to Do

When facing a putative consumer fraud class action where there is a question of whether the representations are sufficiently uniform to support certification, there are three primary steps to take in responding to arguments based on *First Alliance* and its lineage.[xiii]

First, do not take the common path of only making arguments regarding the extent to which the representations in your case vary in comparison to those in the line of cases discussed above. Rather, also emphasize the crucial elements in the case law reflecting that some frauds have stronger (and some weaker) gravity than others. Relatedly, explain that not only has the Ninth Circuit repeatedly called out consumer fraud cases based on advertising and labeling as receiving distinct treatment, but that this also reflects a recognition that such alleged frauds often have relatively weaker gravity and that the reason for this is inherent in the nature of consumer products.

Second, drive home all the reasons your product has substantial value, which means that the supposed fraud has little (or at least not strong) gravity.

- Has your product received any awards?
- Has it been highly ranked by industry publications or consumers?
- Does it have a high rate of repeat buyers?
- What sets your product apart?
- What are the many reasons that people buy it?

This legal consideration concerning gravity is not only significant in its own right as one potential means to avoid improper certification, but it also provides you with an opportunity to tell the story of your product in its best light.

Third, make clear that these points are not an attempt to require the plaintiffs to prove materiality or reliance at the class certification stage. Arguments regarding a lack of materiality or reliance should of course be made if you have them. Such arguments, however, are often subject to a number of challenges at the class certification stage. *See Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 871 (9th Cir. 2025) ("The existence of positive reviews or other product attributes that purchasers found desirable is … insufficient to defeat materiality or the inference of reliance."). Therefore, it is important to spell out that the details regarding the value and desirability of your product are pertinent to the separate legal question of whether the gravity of the supposed fraud transcends the differences in the representations at issue.

In the end, scientists believe that finding a "solution to gravity is a key-perhaps *the* key-to understanding the universe on the most fundamental level."[xiv] Beyond that, it may also help avoid improper certification of a class action.

Benesch's Consumer Protection and Class Actions team is actively tracking these trends and is recognized for innovative, results-driven litigation strategies. We stand ready to defend clients against putative class actions at every stage.

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[i] Richard Panek, The Trouble With Gravity 5 (2019).

[ii] *Id.*

[iii] *Jenson v. Fiserv Trust Co.*, 256 F. App'x 924 (9th Cir. 2007).

[iv] *Id.*

[v] Stephen Hawking & Leonard Mlodinow, The Grand Design 180 (2010).

[vi] *First Alliance*, 471 F.3d at 991 (quoting *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D 425, 430 (D. Ariz. 1992)).

[vii] 140 F.R.D. at 427.

[viii] 471 F.3d at 985 & 992.

[ix] *Jenson*, 256 F. App'x at 926.

[x] *Rogers v. Epson Am., Inc.*, 648 F. App'x 717, 719 (9th Cir. 2016); *see also Cabral v. Supple*, 608 F. App'x 482, 483 (9th Cir. 2015) ("In a case of this nature, based upon alleged misrepresentations in advertising and the like, it is critical that the misrepresentation in question be made to all of the class members.") (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2021), *overruled in part on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (*Mazza* court stating "it is necessary for everyone in the class to have viewed the allegedly misleading advertising").

[xi] *Id.* at *10.

[xii] *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880, 881 (9th Cir. 2020).

[xiii] Included in that lineage is *DZ Reserve v. Meta Platforms, Inc.*, 96 F. 4th 1223, 1234-37 (9th Cir. 2024) (discussing *First Alliance*), among others that employ the concept that differences in representations do not defeat certification where there is a sufficient common course of conduct.

[xiv] Everything you thought you knew about gravity is wrong - The Washington Post