CLIENT ALERTS & INSIGHTS

Using the Funnel-Folgers' Decision Key To Avoiding Certified False-Advertising Classes

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Key Takeaways:

- The Eighth Circuit clarified that even when a state's false-advertising law does not require reliance, plaintiffs must still prove causation-and individualized consumer experiences can prevent claims from proceeding on a classwide basis.
- The decision reinforces the "advertising causation funnel," which recognizes that a consumer must see, perceive, understand and act on a challenged claim before any alleged harm can occur.
- Companies can use the funnel proactively by developing evidence about real consumer behavior early in litigation. Showing variation across these stages provides a strong basis to oppose class certification, even under state laws that omit reliance.

The Case: In re Folgers Coffee Marketing

Just before Thanksgiving, the Eighth Circuit reversed a district court's decision that certified a Missouri class of consumers that purchased Folgers' coffee products.

The proposed class alleged that Folgers misled them with on-label statements about the number of cups of coffee one container could brew-"up to 240 6 fl oz cups" for instance. The back of the container included two recommended brewing methods: the Single-Serving Method (one tablespoon of coffee per six fluid ounces of water) and the Pot Method (eight tablespoons of ground coffee per 60 fluid ounces of water).

The lead plaintiff, Mark Smith, alleged that the representation was false because if a consumer used only the Single-Serving Method-the method most consumers would naturally assume the claim referred to-they could brew only about 70% of the promised number of cups. Smith's case was one of many similar suits brought around the country, so the cases were consolidated into a multi-district litigation in Missouri federal court.

Smith sought to have his claims certified to proceed on a class basis. Plaintiffs seeking money damages on behalf of a class must show that common issues (issues that everyone in the class have) would predominate over individual issues (issues that cannot be attributed classwide).

The Missouri court certified Smith's class of Missouri consumers bringing claims under Missouri's false-advertising and unjust-enrichment laws. Folgers appealed.

The Eighth Circuit's Analysis: The Funnel Makes Causation an Individualized Question

The Eighth Circuit reversed the class-certification decision, holding that individual issues plagued the class. The Eighth Circuit based its analysis on how advertising actually works. Individuals could fall out of the advertising funnel at different stages, thus creating significant individual issues in proving that any alleged false representation ***caused*** harm.

- **Exposure:** The first part of the funnel is exposure; a consumer must be exposed to the allegedly false advertisement. Many class members likely weren't exposed to the statements on the Folgers cans, as many consumers purchase items without looking at the back of the package. If an individual did not see a representation, then that representation certainly could not cause the individual to act. And if the representation didn't cause her/him to act, it didn't cause any harm.
- **Perception:** Consumers who are exposed to the statement must actually perceive it for the statement to have any effect on their purchasing decision. Here, some people who looked at the back of the cans may not have read the statements at issue. The Eighth Circuit noted that "a significant proportion of the proposed class did not read those representations." And those people weren't harmed, either. Consumers who glance at a statement without reading it don't base their actions upon that unread statement. And again-if the statement doesn't cause a consumer to act, it can't cause that consumer any harm.
- **Understanding**: The next stage of the funnel is comprehending what the allegedly false statement means. Here, the Eighth Circuit noted that "a significant proportion likely did not interpret the representations in the manner Smith suggests." Consumers may have read the cup-number representation to mean that it could be achieved only some time under some conditions, or even by non-recommended brewing methods. Bottom line, if not everyone understood Folgers' cup-number representation the same way, then the representation could not cause harm to everyone.
- **Action**: The final stage of the funnel is acting on the allegedly false statement. Again, the Eighth Circuit noted that a significant part of the proposed class, even if they read or understood the representation, "did not care about them one way or the other." Indeed, one consumer testified that she kept buying Folgers despite the alleged false representation because "I like my coffee." If consumers buy the product for reasons unrelated to the alleged false statement, the statement could not have caused harm.

Through this funnel, the Eighth Circuit concluded that the plaintiffs could not prove causation on a class-wide basis: "What matters is that many class members weren't deceived, and figuring out who was and who wasn't will require consumer-by-consumer inquiries into each class member's individual tastes, interpretations, and circumstances, undermining the efficiencies class actions are intended to provide."

The Eighth Circuit also used this reasoning to reject Smith's theory that all consumers were injured because the alleged false advertising inflated the price of Folgers products. To allow this inflated-price theory to create an injury for the whole class would let uninjured consumers "piggyback" onto the injuries of others. Because Missouri requires that each consumer suffer an ascertainable loss, this piggybacking was not acceptable.

Leveraging the Funnel to Avoid False Advertising Classes

This decision has significant implications for litigating false-advertising class actions.

1. "**Use the Funnel"**: The steps of the advertising funnel-exposure, perception, understanding and action-are key bookmarks to use when crafting strategies to defeat class certification. These steps are the crucial areas where individual issues can take over common ones, making expensive class actions unattractive to courts.
2. "**No Reliance, No Problem**": The plaintiffs' bar has benefitted from state laws that do not require reliance as part of their false-advertising laws. Many courts have certified classes under these state laws because, those courts say, without reliance as an element, no individual issues of reliance can predominate. The Eighth Circuit, though, correctly recognized that even if the Missouri law did not require reliance, it still required causation. By using the funnel to show differences in causation among consumers, companies can find daylight to avoid class certification even when facing state laws that omit reliance.
3. **"The Burden on Plaintiffs is Real"**: Plaintiffs cannot simply argue that because a label appears on all packages, all purchasers were equally exposed and affected by an allegedly false claim. Consumer behavior matters and, crucially, varies.
4. **"Discovery Strategy Matters"**: Companies need cold, hard evidence that consumer behavior varies and that consumers can fall out of the funnel at different points in the consumer experience. The Eighth Circuit looked to this evidence, and courts can and will give it serious weight.
5. **"Avoid Hyper-Literal Claims**": Marketing claims should be interpreted in a way that a reasonable consumer-not a hyper-literal plaintiff-would understand them. The Eighth Circuit's willingness to recognize that consumers might interpret "up to 240 cups" to mean different things under different conditions is favorable to defendants.

This decision provides a roadmap for defending against false-advertising class actions and a strong foundation for opposing class certification. However, the decision should not be read as creating blanket immunity for false advertising. Rather, it establishes that plaintiffs cannot simply claim that a statement was false, but that it funneled them to the product. Using this funnel as a guide, companies can make the plaintiffs' bar's job harder.