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American Conference Institute's Resolving & Litigating Advertising Disputes

Strategies for Defeating False Advertising Class Action Claims

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Neal H. Klausner

Partner
(212) 468-4992
nklausner@dglaw.com

STRATEGIES FOR DEFEATING FALSE ADVERTISING CLASS ACTION CLAIMS

- Early Attacks (Motions to Dismiss, Motions to Strike Class Allegations)
- Rule 68 Offers of Judgment
- Challenging Ascertainability of the Class
- Lack of Commonality
- Predominance of Individualized Issues Over Common Ones
- Plaintiff's Lack of Standing
- Contesting the Typicality of Plaintiff's Claims or the Plaintiff's Adequacy as a Class Representative

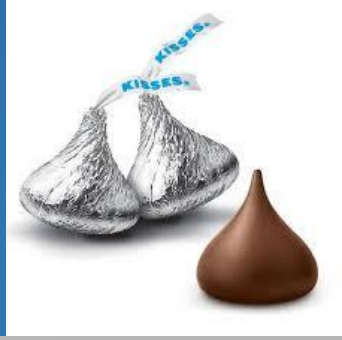
EARLY ATTACKS ON THE CLASS ACTION

- Like any civil litigation, a class action can be subject to a motion to dismiss on the pleadings, under Rule 12(b)(6) or analogous state rules
- In some situations, courts will entertain an early summary judgment motion as well
- Summary judgment prior to certification will have only *stare decisis* effect on other class members' potential claims, not *res judicata*/collateral estoppel effect

EARLY ATTACKS ON THE CLASS ACTION

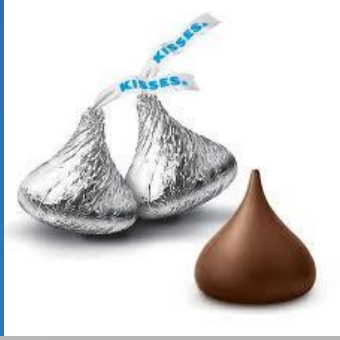
- Counsel must weigh costs and benefits
  - Motion based on central common issue (such as falsity of statement) and based on strong evidence (such as a conclusive consumer perception study) might be worthwhile
  - Motion based on potentially individualized issue (such as reliance) might be best fought on class certification

EARLY ATTACKS ON THE CLASS ACTION – SUMMARY JUDGMENT



- *Khasin v. The Hershey Co.*, 2014 U.S. Dist. LEXIS 62070 (N.D. Cal. May 5, 2014)
- Putative class action alleging misrepresentations in website and advertising materials, and on packaging for numerous Hershey's products

EARLY ATTACKS ON THE CLASS ACTION – SUMMARY JUDGMENT

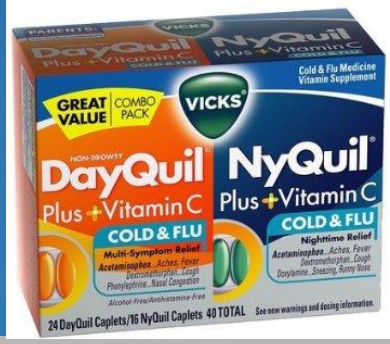


- Plaintiff admitted in deposition that he did not view the website or other off-label advertising
- Plaintiff also testified that he did not buy Hershey's products in reliance on any of the alleged misrepresentations except for one
- District court granted summary judgment on all but one of the claims – noting that other putative class members could still bring their own claims despite the ruling

EARLY ATTACKS ON THE CLASS ACTION – MOTIONS TO STRIKE

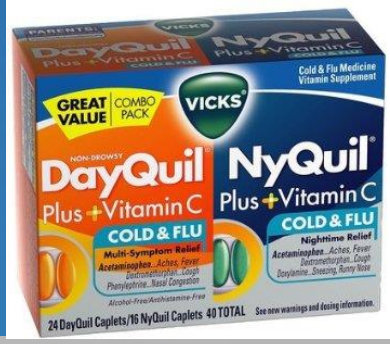
- Under some circumstances, defendant can move to strike the class allegations well before any class certification motion
- Such motions tend to be disfavored in many jurisdictions, but can be effective under proper circumstances

EARLY ATTACKS ON THE CLASS ACTION – MOTIONS TO STRIKE



- *Loreto v. The Proctor & Gamble Co.,* 2013 U.S. Dist. LEXIS 162752 (S.D. Ohio November 15, 2013) – Putative class action alleging false advertising by P&G in connection with Vick's DayQuil/NyQuil Plus Vitamin C
- P&G first successfully moved to dismiss all but one of the plaintiff's claims, concerning the suggestion that the added Vitamin C was effective in treating the symptoms of the common cold

EARLY ATTACKS ON THE CLASS ACTION – MOTIONS TO STRIKE



- P&G then moved to strike the class allegations, arguing that the allegedly misleading statement – that Vitamin C could help "blunt" the effects of a cold – did not appear in any packaging or advertising, and was only displayed for a few months in one section of its website
- The district court granted this motion, holding that the class included significant numbers of people who could not have been induced to purchase based on the single remaining statement in the case
- No longer a putative class action, the case settled soon thereafter

EARLY ATTACKS ON THE CLASS ACTION – RULE 68 OFFER OF JUDGMENT

- Fed. R. Civ. P. 68 allows defendants to make an offer of judgment in a specified amount at least 14 days before trial
  - If plaintiff does not accept, and later recovers less than the offered amount, plaintiff must pay defendant's costs incurred after the offer
- Some courts have held that a rule 68 offer, tendered before plaintiff has moved for class certification, that encompasses all relief available to plaintiff moots the putative class action
  - Other courts have rejected this approach

EARLY ATTACKS ON THE CLASS ACTION – RULE 68 OFFER OF JUDGMENT

- *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) – Plaintiff filed action under Telephone Consumer Protection Act (TCPA) based on unsolicited text messages
  - Prior to any motion to certify a class, Defendant made a settlement offer:
    - $1,500 to plaintiff (and up to ten others) – maximum available for a violation of the TCPA, plus
    - Defendant to cease sending any texts to mobile subscribers
  - Court held that the offer mooted the case

EARLY ATTACKS ON THE CLASS ACTION – RULE 68 OFFER OF JUDGMENT

- *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-91 (9th Cir. 2011) – Plaintiff brought a putative class action based on wage and overtime violations
  - Plaintiff failed to move for class certification by the court's initially set deadline (though the Court of Appeal later found that this deadline had been extended)

EARLY ATTACKS ON THE CLASS ACTION – RULE 68 OFFER OF JUDGMENT

- Defendant tendered a Rule 68 offer far in excess of plaintiff's individual demand for damages, and then defendant moved to dismiss
- District court granted motion to dismiss, finding plaintiff's claim moot because plaintiff had failed to move for class certification in timely fashion
- Court of Appeals reversed, holding that a Rule 68 offer prior to motion for class certification does not moot the entire class action

DEFEATING CLASS CERTIFICATION - FED. R. CIV. P. 23(a)

- For class certification, the plaintiff must meet four requirements:
- (1) Numerosity
- (2) Commonality
- (3) Typicality
- (4) Adequacy of Representation

DEFEATING CLASS CERTIFICATION - FED. R. CIV. P. 23(b)

- Plaintiff must also satisfy at least one of three criteria:
- (1) Separate actions would risk:
  - (A) inconsistent or varying adjudications that would establish incompatible standards of conduct, or
  - (B) disposition of interests of other class members not parties to the individual adjudications

DEFEATING CLASS CERTIFICATION - FED. R. CIV. P. 23(b)

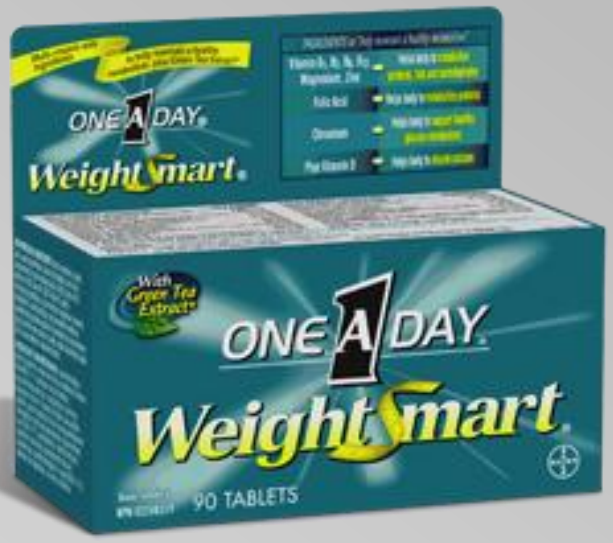
- (2) Party opposing certification has acted/refused to act on grounds that apply generally to the class, making injunctive relief appropriate
- (3) Common questions of fact or law predominate over individual issues, and a class action is the superior method for fair and efficient adjudication

ASCERTAINABILITY: CAN PLAINTIFF IDENTIFY THE CLASS MEMBERS?

ASCERTAINABILITY

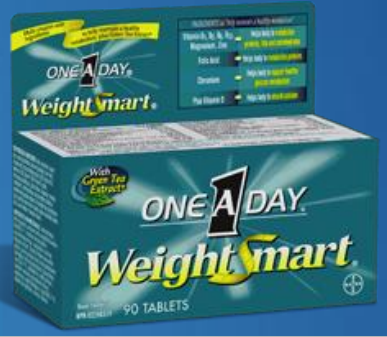
- Ascertainability: In order to pursue a class action plaintiff must establish that the members of the class can be identified
- Plaintiff must offer a method by which class members will be identified, and evidence that the method will be effective and consistent with the class action's purpose of efficiency
- This requirement is not explicit in Rule 23, and is often overlooked or taken for granted by defense counsel

ASCERTAINABILITY: *CARRERA v. BAYER CORP.*



Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013)

ASCERTAINABILITY: *CARRERA v. BAYER CORP.*



- Putative consumer fraud class action by purchasers of One-A-Day WeightSmart dietary supplement, concerning claims that the product had metabolism-enhancing effects
- Originally a nationwide class under NJ law; Later, a class of Florida consumers under Florida law
- Class defined as “All persons who purchased Weight Smart in Florida”
- To identify class members, plaintiff planned to rely on (1) retailer records of sales, and (2) affidavits of putative class members

ASCERTAINABILITY: *CARRERA v. BAYER CORP.*

- "[A]n essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria."
- Plaintiff must prove ascertainability by preponderance of the evidence
- It is not enough to assure the court that the plaintiff "intends or plans to meet the requirements" of Rule 23
- Court remanded to give plaintiff one more chance to satisfy ascertainability

ASCERTAINABILITY: *CARRERA v. BAYER CORP.*

» Court rejected plaintiff's approach

- Ascertainability requirement protects "efficiency" aspect of class actions; protects absent class members to ensure they get the best practicable notice; and protects defendants, and their rights to challenge the class
- Plaintiff offered no evidence that retailer records – if they existed – would properly identify the right purchasers
- Proof of class membership by affidavit posed too great a risk of fraudulent claims -- Bayer, would lose the full benefits of collateral estoppel, and true class members could see their individual recovery reduced

ASCERTAINABILITY: *CARRERA v. BAYER CORP.*

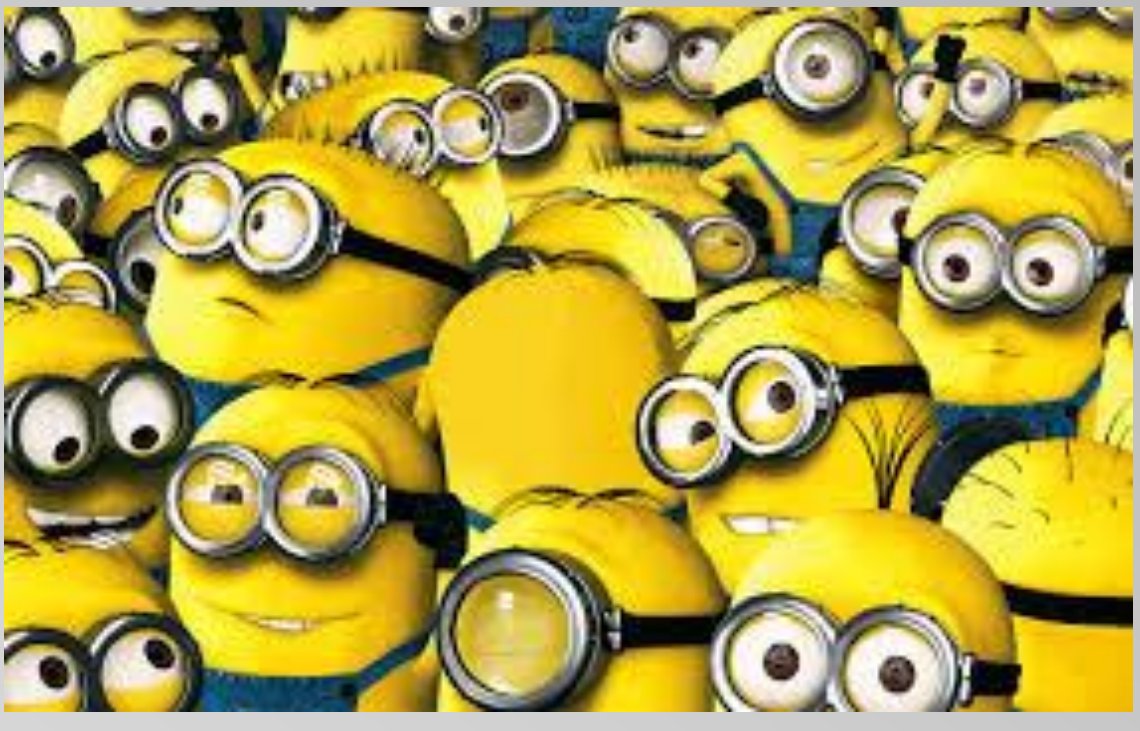
- Other courts have agreed with the Third Circuit's approach, although not with complete consistency
- *In re: Pom Wonderful LLC Marketing and Sales Practices Lit.* (C.D. Cal. March 25, 2014)
- Plaintiffs alleged misleading advertising statements about the health benefits of Pom products

ASCERTAINABILITY: *CARRERA v. BAYER CORP.*

- "In situations where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible."

» But under similar circumstances, the same court found a class sufficiently ascertainable in *Forcellati v. Hyland's, Inc.*, 2014 U.S. Dist. LEXIS 50600 (C.D. Cal. Apr. 9, 2014), as did a sister court in *Lilly v. Jamba Juice Co.*, 2014 U.S. Dist. LEXIS 131997 (N.D. Cal. Sep. 18, 2014)

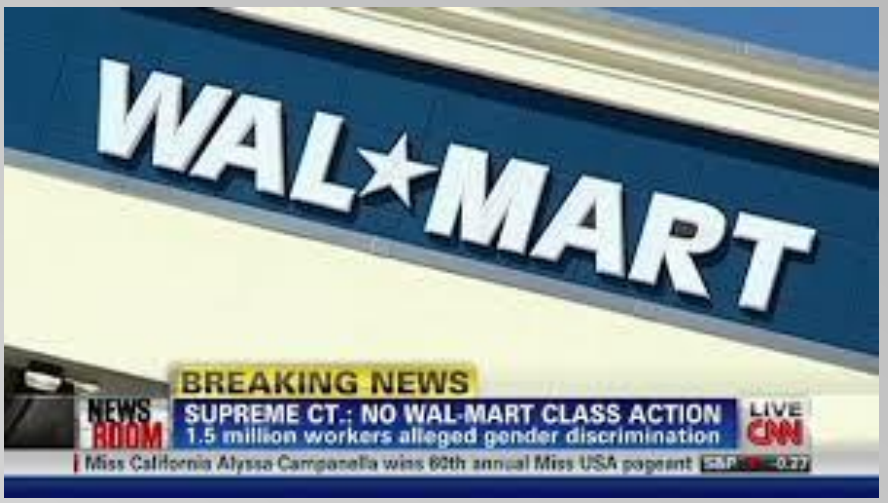
LACK OF COMMONALITY



LACK OF COMMONALITY

- Rule 23(a)'s requirement of commonality is often conflated with Rule 23(b)(3)'s requirement that common issues predominate over individualized issues
- Even courts sometimes examine these two distinct elements in overlapping fashion
- Often, defense counsel discuss commonality – which is easier for plaintiff to satisfy – when they are really attacking predominance
- Nonetheless, recent decisions suggest commonality could be a significant hurdle under certain circumstances

LACK OF COMMONALITY: *WAL-MART v. DUKES*



Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)

LACK OF COMMONALITY: *WAL-MART v. DUKES*

- Putative sex discrimination class action on behalf of over 1.5 million female Wal-Mart employees
- Allegation: Wal-Mart's corporate policy, which allows managers discretion over pay and promotions, results in disparate treatment of female employees

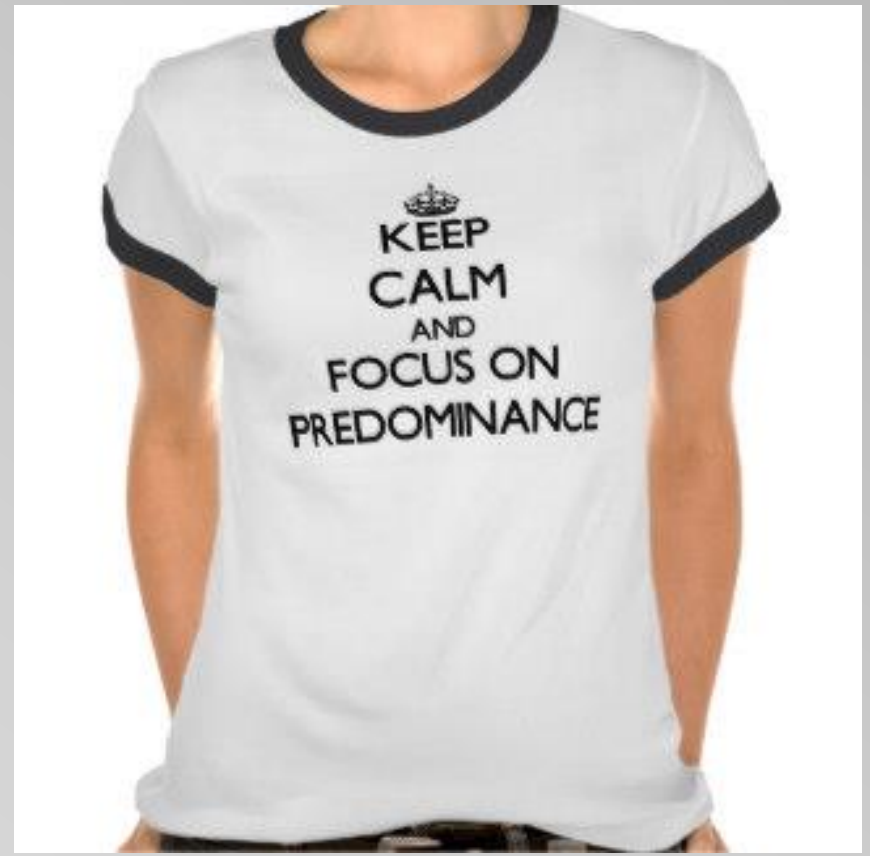
LACK OF COMMONALITY: *WAL-MART v. DUKES*

- Held: Plaintiffs had failed to prove common questions of law or fact: In suing based on millions of employment decisions made by thousands of managers, plaintiffs could not demonstrate that there would be a common answer to the crucial discrimination question
- Justice Scalia: “Common questions” not important, but rather, “common answers” – determination of the single answer will resolve an issue central to the claims of each individual class member

LACK OF COMMONALITY: *WAL-MART v. DUKES*

- After *Dukes*, courts more diligent in performing "rigorous analysis" of plaintiffs' attempts to satisfy all elements required for certification, including (but not limited to) commonality
- *Dukes* has not ushered in a sea-change, however
  - Commentary has suggested that the effect of *Dukes* will be limited to its facts: an immense class of plaintiffs alleging discrimination by thousands of different individuals
- Despite *Dukes*, Courts generally still have not viewed commonality as a difficult element to satisfy

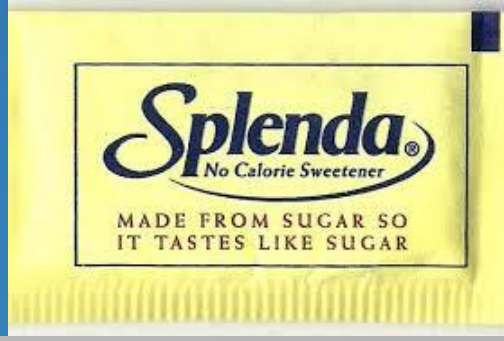
PREDOMINANCE



PREDOMINANCE

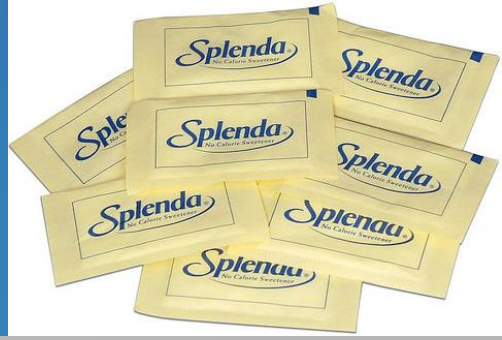
- Predominance of individualized issues is the most commonly used attack on class certification
- In the false advertising context, predominance of individualized issues often focuses on factual issues concerning:
  - Class members' exposure to the alleged misrepresentations
  - Materiality of the alleged misrepresentations to individual consumers
  - Class members' reliance on the alleged misrepresentations

PREDOMINANCE: THE SPLENDA CASES



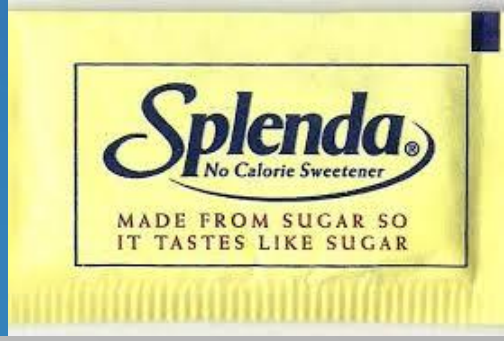
- In 2004, Merisant (maker of Equal) and The Sugar Association brought Lanham Act claims against McNeil Nutritionals, attacking Splenda's tagline, "Made from sugar so it tastes like sugar"
- These suits spawned a series of state court "copycat" consumer class actions, also alleging false advertising, claiming that the tagline suggests the product is real sugar without calories, or that it is natural and contains sugar

PREDOMINANCE: THE SPLENDA CASES



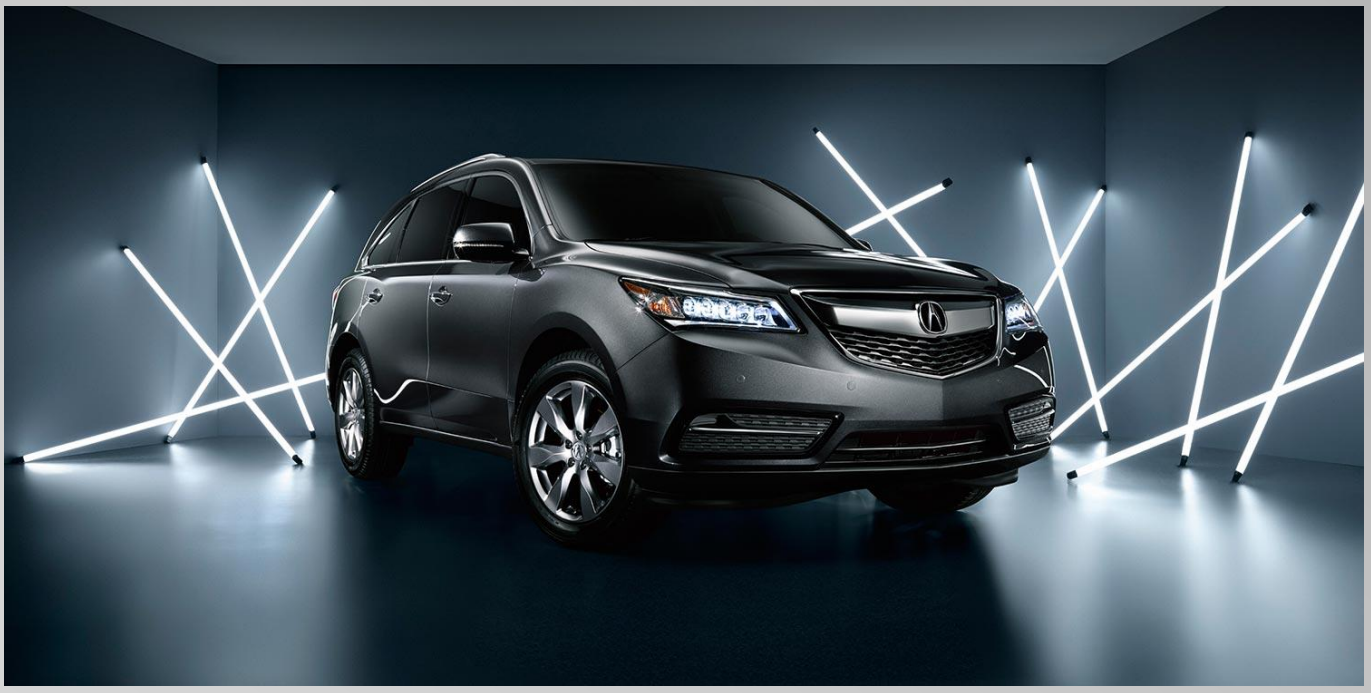
- Though the tagline was ubiquitous, McNeil argued that individualized issues predominated
- Did the consumer actually misinterpret the tagline?
- Did the consumer's interpretation even play a role in their purchase decision?

PREDOMINANCE: THE SPLENDA CASES



- McNeil relied on consumer survey evidence, which confirmed that the vast majority of customers purchased Splenda because of personal taste, or recommendations, or health or dietary reasons
- Very few believed that the product was “natural” or contained sugar
- One by one, the state courts each denied class certification, finding that the determination of the issues of materiality, deception and reliance would require individual trials

PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.



Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012)

PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.

- Plaintiffs purchased Acura automobiles, which included “CMBS” braking systems, designed to warn drivers of impending collisions and automatically apply brakes to reduce impact and severity of injury
- They sought to represent a nationwide class of Acura purchasers

PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.

- Plaintiffs sought relief under California's UCL (Bus. & Prof. Code § 17200) and CLRA (Cal. Civ. Code § 1750), alleging misleading marketing of the CMBS
  - Honda allegedly did not warn consumers that the systems' three stages might overlap, that it might not actually warn the driver in time to avoid the accident, and that it shuts off in bad weather

PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.

- Ninth Circuit first rejected Honda's argument under *Wal-Mart*, that plaintiffs failed to demonstrate commonality under 23(a)(2)
  - "… that there is a common question of fact or law that can resolve important issues 'in one stroke.'"
  - "[C]ommonality only requires a single significant question of law or fact…. Honda does not challenge the district court's findings that common questions exist as to whether Honda had a duty to disclose or whether the allegedly omitted facts were material and misleading to the public."

PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.

- Court agreed with Honda, however, that common issues did not predominate over individualized issues
  - Individualized issues of law due to varying state consumer protection schemes made a nationwide class improper
  - Individualized issues of fact concerning purchasers' reliance on the allegedly misleading marketing materials made even a California class improper

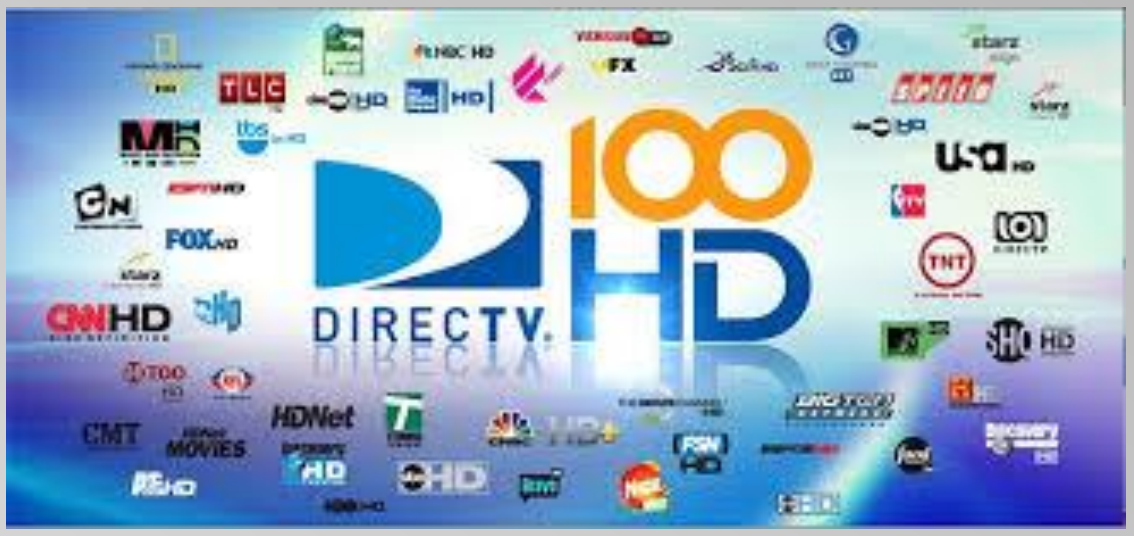
PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.

- Material differences existed among the various state consumer protection laws
  - Some require scienter and/or reliance, while others do not
  - Remedies vary from state to state
- Each state has separate interests in balancing range of available products and prices vs. levels of consumer protection
- Application of California law to residents of other states would impair those states' ability to strike that balance, while California had little interest in applying its law to foreign residents

PREDOMINANCE:
MAZZA v. AM. HONDA MOTOR CO.

- Even as to California residents, individualized issues of fact predominated
  - California law allows an inference of classwide reliance under some circumstances, but not where there is no evidence that the alleged misrepresentations were uniformly made to all members of the class
  - In this case, the marketing materials were not broadly disseminated, with various materials available for limited periods of time in different media

PREDOMINANCE:
COHEN v. DIRECTV



Cohen v. DIRECTV, Inc., 178 Cal. App. 4th 966 (2d Dist. 2009)

PREDOMINANCE: *COHEN v. DIRECTV*

- Class action under California law
  - Consumer Legal Remedies Act
  - Unfair Competition Law – Cal. Civ. Code §17200
- Plaintiff alleged that class members relied on DirecTV's ads promising HD channels in 1920x1080i resolution, but DirecTV later lowered resolution
- Trial court denied certification on ascertainability and predominance grounds

PREDOMINANCE: *COHEN v. DIRECTV*

- Court of Appeal found that the class was ascertainable, but still rejected the class on predominance grounds
- First, the court held that common issues of law would not predominate, in that out-of-state consumers may not be protected by the California statutes at issue, and their rights under their own states' laws might vary

PREDOMINANCE: *COHEN v. DIRECTV*

- Regardless, even as to California consumers, common issues of fact would not predominate. DirecTV subscribers:
  - May not have seen any ads
  - May have seen or relied only on ads with no reference to the resolution of the HD channels
  - May have purchased service based primarily on word-of-mouth, or recommendations of friends and family

PREDOMINANCE: *COHEN v. DIRECTV*

- Court relied, in part, on anecdotal evidence in the form of affidavits from DirecTV customers
- Because the issue of reliance would vary greatly among class members, no class could be certified

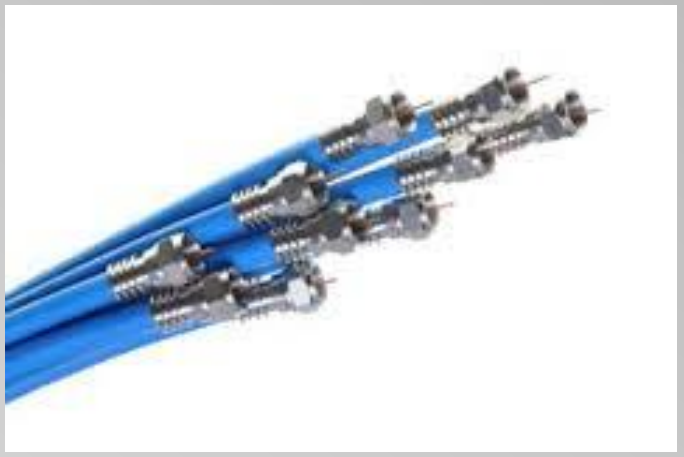
PREDOMINANCE: A NOTE ON DAMAGES

- Very often, class members have individualized damages
- Generally speaking, individualized damages alone will be insufficient to overcome a finding of predominance
- "[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013)

PREDOMINANCE: A NOTE ON DAMAGES

- "If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013)
- But plaintiffs must present a likely method for determining class damages when seeking to certify under 23(b)(3)

PREDOMINANCE AND DAMAGES: *COMCAST CORP. v. BEHREND*



Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

PREDOMINANCE AND DAMAGES: *COMCAST CORP. v. BEHREND*

- Antitrust class action concerning Comcast's acquisition of increased market share of subscribers in the Philadelphia metro area
- Plaintiffs asserted four theories of antitrust impact that led to increased prices in the market at issue
- Plaintiffs offered a damages computation methodology based on a comparison of cable prices between the actual marketplace and a hypothetical market in which none of the four injury-causing behaviors had occurred

PREDOMINANCE AND DAMAGES: *COMCAST CORP. v. BEHREND*

- Trial court certified class, but accepted only one of the four theories of antitrust injury, rejecting the others
- Court of Appeals affirmed, declining to reach the merits of the damages model, and holding that by demonstrating that damages could be measured, plaintiff had met its burden

PREDOMINANCE AND DAMAGES: *COMCAST CORP. v. BEHREND*

- Supreme Court reversed certification, holding that even at class certification stage, model for computing damages must measure damages attributable only to the plaintiffs' viable theory of injury
  - Otherwise, the model "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)"

STANDING

- Named plaintiffs must demonstrate that they suffered an injury-in-fact caused by the alleged misrepresentations
  - Actual reliance is required
- Plaintiffs generally need not demonstrate standing for all absent class members, although the class must be defined in a way that includes only members who could potentially have viable claims
  - Variations in reliance will still impact the issues of commonality and predominance

STANDING

- Courts have held the named plaintiffs may even have standing to sue for products they themselves did not actually purchase
- *Lanovaz v. Twinings N. Am., Inc.*, 2013 U.S. Dist. LEXIS 74250 (N.D. Cal. May 23, 2013) – Class action concerning Twinings' marketing of tea as a "natural source of antioxidants"
- Plaintiff bought only six varieties of the tea, but sued on behalf of purchasers of all 53 varieties

STANDING

- Court allowed the case to proceed as to all but two of the varieties, because those 51 varieties were made from the same plant, such that plaintiff had the necessary personal stake in the litigation
- As to the two remaining varieties, which came from a different plant, the court struck plaintiff's claims

TYPICALITY AND ADEQUACY OF REPRESENTATION

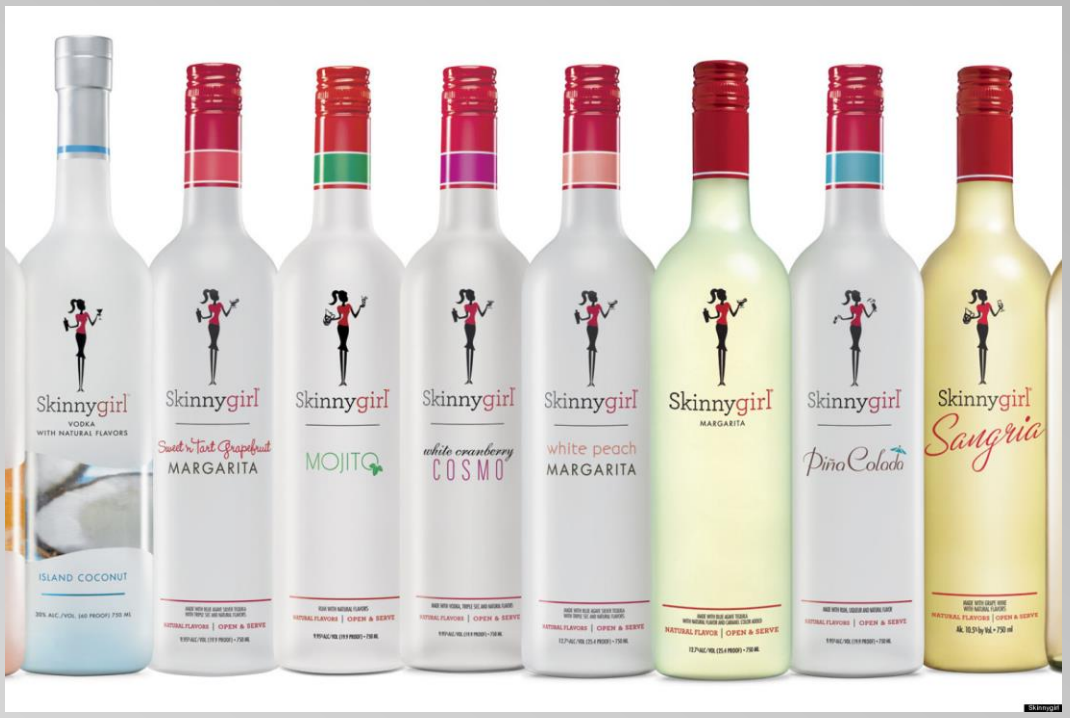
"I sent the club a wire stating, 'Please accept my resignation. I don't want to belong to any club that will accept people like me as a member.'"

--Groucho Marx

TYPICALITY AND ADEQUACY OF REPRESENTATION

- Sometimes taken for granted in assessing case strategy
- Deposition of named plaintiffs can provide basis to challenge class certification on these two related elements

TYPICALITY AND ADEQUACY OF REPRESENTATION: *RAPCINSKY v. SKINNYGIRL COCKTAILS LLC*

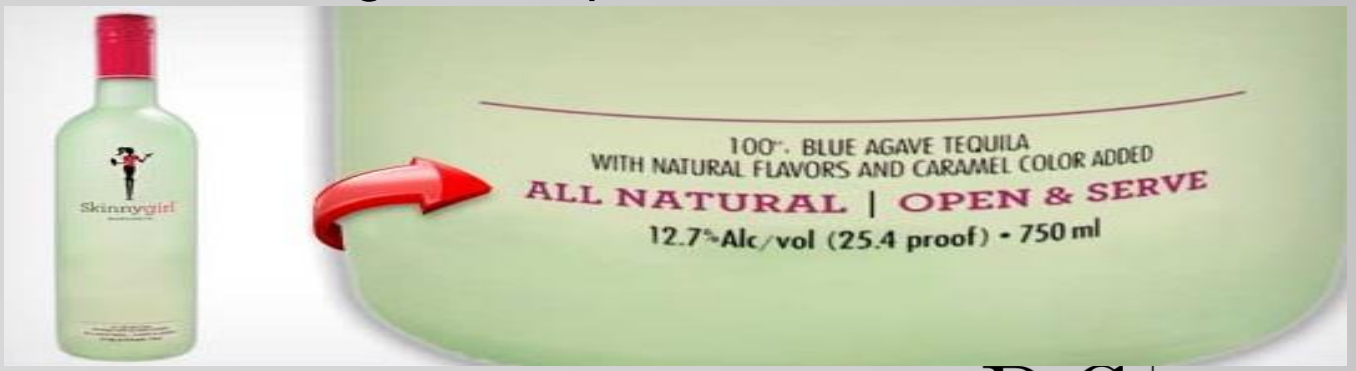


Rapcinsky v. Skinnygirl Cocktails, LLC,

2013 U.S. Dist. LEXIS 5632 (S.D.N.Y. Jan. 9, 2013)

TYPICALITY AND ADEQUACY OF REPRESENTATION: *RAPCINSKY v. SKINNYGIRL COCKTAILS LLC*

- Class action under NY Gen. Bus. L. § 349 (Deceptive Acts and Practices), NY Agric. and Mkts. Law, breach of warranty and promissory estoppel
- Plaintiff's complaint alleged that defendants convinced millions of purchasers to buy under the false pretense that the product was "All Natural" and contained only "100% Blue Agave Tequila"



TYPICALITY AND ADEQUACY OF REPRESENTATION: *RAPCINSKY v. SKINNYGIRL COCKTAILS LLC*

- During his deposition, plaintiff conceded that he bought the product in Massachusetts, not New York
  - The New York statutes apply to activities within New York State
  - S.D.N.Y. therefore found plaintiff was not typical of the New York Class protected by the New York statutes invoked in the complaint, and would not be an adequate class representative

TYPICALITY AND ADEQUACY OF REPRESENTATION: *RAPCINSKY v. SKINNYGIRL COCKTAILS LLC*

- Plaintiff also conceded at his deposition that he bought the product as a thank-you to his wife, and would have purchased it regardless of its price or his belief as to whether it was "all natural"
  - This made him atypical and inadequate as to the warranty and promissory estoppel claims as well

TYPICALITY AND ADEQUACY OF REPRESENTATION

- *Falcon v. Phillips Elecs. N. Am. Corp.*, 304 Fed. App'x 896 (2d Cir. 2008) – Named plaintiff inadequate as representative because she discarded the product at issue, a television set
- *Drimmer v. WD-40 Co.*, 343 Fed. App'x 219 (9th Cir. 2009) – Named plaintiff had too close a relationship with his lawyer, making him an inadequate representative – "[T]his relationship indicated a potential conflict of interest between Drimmer and his counsel and the proposed class members."

D&G | DAVIS & GILBERT LLP
ATTORNEYS AT LAW

QUESTIONS?

Neal H. Klausner

Partner
(212) 468-4992
nklausner@dglaw.com