

Federal Court Denies Class Certification in Vitamin Consumer Case

August 2, 2011 by [Sean Wajert](#)

A federal court late last month declined to certify a proposed class action in which plaintiffs challenged alleged claims about the weight-loss properties of One-A-Day WeightSmart vitamins. Gray v. Bayer Corp., No. 08-4716 (D.N.J. 7/21/11). Our readers will be interested in the discussion of the predominance and superiority requirements for class actions.

Plaintiff alleged that the packaging of One-A-Day WeightSmart falsely claimed that the vitamin enhances a user's metabolism. Plaintiff filed a complaint against Bayer alleging claims based on intentional and negligent misrepresentation, and the New Jersey Consumer Fraud Act (NJCFA), N.J.S.A. 56:8-1, et seq.; plaintiff later moved to certify a class of purchasers of One-A-Day WeightSmart pursuant to Rule 23(b)(3), which requires that a plaintiff establish that the questions of law or fact common to the class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

As plaintiff's proposed nationwide class called for the application of state substantive law, the court first looked to determine which state's law governed the claims. Plaintiff argued that New Jersey had the most significant relationship to the claims because all of the decisions with respect to marketing allegedly took place in New Jersey, and all of the alleged operative misrepresentations originated in New Jersey, at Bayer's headquarters. Defendant noted that because consumers purchased One-A-Day WeightSmart throughout the United States and thereby received the alleged misrepresentations in various jurisdictions other than New Jersey, the consumer fraud laws of the states where the product was purchased should apply. The court agreed that the place where the putative class members received Bayer's alleged representations and the place where the consumers acted in reliance upon those representations, were key factors pointing to the law of the individual states where the product was purchased. (Consumers purchased One-A-Day WeightSmart at retail locations nationwide, not from Bayer itself.)

Moreover, to apply the NJCFA to all the out-of-state consumers in this case would be to ignore the interests of potentially fifty other jurisdictions. Simply because New Jersey has struck a particular balance between consumer protection and the promotion of business within its borders does not suggest that its interest in deterrence should displace the differing policy goals of its fellow states. Those states have instead struck their own legislative balances, awarding compensation based on differing standards of, inter alia, intent, causation, reliance, and damages. The interests of interstate comity and the competing interests of the states counseled against the blanket application of one state's law over the laws of other interested states.

Thus, the court had to next consider whether variations in state laws presented the types of insuperable obstacles which render class action litigation unmanageable. See *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004). Where the applicable law derives

from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will compound any disparities among class members from the different states. It is plaintiff's burden to credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles.

Here, plaintiff failed to carry this burden. The court acknowledged a "brewing issue" in the Third Circuit over whether the NJCFA could be applied in a national class action. But the better view was that the court would be required to apply distinct standards of, inter alia, intent, causation, reliance, and damages in order to adjudicate plaintiff's claims under each state's consumer fraud law. Litigating plaintiff's claims based on law from potentially fifty-one different jurisdictions would likely require a multitude of mini-trials to determine Bayer's liability to each statewide group of consumers. Such a procedure would be an inefficient use of judicial resources and would defeat the purported economies of class treatment.

The court therefore concluded that plaintiff's proposed nationwide class failed both the predominance and superiority requirements under Rule 23(b)(3).

Bayer argued that the alternative proposed Florida class was not ascertainable because claims under the Florida consumer fraud act are subject to a four-year statute of limitations and thus the claims of some Florida class members would be barred -- an issue requiring an individual analysis. Plaintiff was, however, granted leave to file a revised motion for class certification with respect to a more ascertainable Florida class only.