COMPARED TO WHAT? THE ROLE OF COMPARATOR PRODUCTS IN CONSUMER FRAUD FALSE ADVERTISING CLASS ACTIONS

By Kevin J. O'Connor*

In recent years product manufacturers have faced an onslaught of class actions alleging false advertising in the marketing of consumer products. Courts in the Third Circuit applying New Jersey's consumer fraud act have held plaintiffs' feet to the fire, dismissing such claims at the outset when a plaintiff is unable to plead an ascertainable loss. Judge Simandle's recent decision in *In re Riddell Concussion Reduction Litigation*, 13-cv-7585 (D.N.J. Jan. 15, 2015) offers a case study on the critical role of comparator products at the pre-answer dismissal stage in stating a plausible theory of recovery.

False advertising claims in the Third Circuit are often brought under New Jersey's Consumer Fraud Act ("NJCFA"). In order to have standing to pursue a claim under the NJCFA and many other state consumer protection statutes, a plaintiff must allege an "ascertainable loss." *See Thiedemann v. Mercedes Benz USA, LLC*, 183 N.J. 234, 246 (2005); *Laufer v. U.S. Life Ins. Co.*, 385 N.J. Super. 172, 186 (App. Div. 2006).

This requirement offers the key to dismissing a NJCFA case at its inception, and the Achilles heel for any new consumer fraud class action. In *Riddell*, for instance, plaintiffs allege that the promises by the football helmet manufacturer of increased safety features for the football helmets were illusory because the helmets do not actually reduce the incidence of concussions. Plaintiffs claim that true concussion rates of users of the Riddell helmets are the same as other helmets, and that the new technology is no better than the "leather helmets of old."

In granting in part a motion to dismiss the complaint, the court held plaintiffs' feet to the fire and required them to show a plausible theory of recovery, including a plausible damages theory that was not theoretical or hypothetical. The court asked the critical question "Compared to what?" in response to the claim by plaintiffs that they had paid a "premium" for the helmets. The court concluded that in the absence of specific allegations of comparator products, such allegations were insufficient to support a claim of ascertainable loss.

The *Riddell* court is not alone, and Judge Simandle's decision is part of a trend among federal courts in this circuit to scrutinize false advertising claims of this sort. In *Parker v. Howmedica Osteonics Corp*., 2008 WL 141628, at *4 (D.N.J. Jan. 14, 2008), for instance, the court held that simply pleading the "purchase price of a product does not constitute an ascertainable loss." Likewise, in *Stewart v. Smart Balance, Inc.*, 2012 WL 4168584, at *9 (D.N.J. June 26, 2012) the court held that where the substance of the claim is that plaintiff would have bought a different product if she had known the truth about the product, the purchase price does not reflect the amount of the loss with reasonable certainty.

The ascertainable loss requirement enables the court to "objectively quantify" the difference in value between the product expected and the product received. *In re Cheerios Mktg. & Sales Practices Litig*., 2012 WL 3952069, at *14 (D.N.J. Sept. 10, 2012) (finding that plaintiffs failed to meet this standard by not, *inter alia*, estimating a loss amount or differentiation of price between the product purchased and a comparative product). To satisfy this requirement, a plaintiff must identify a specific comparable product that costs less and that plaintiff might purchase instead. *See Stewart,* 2012 WL

4168584, at *10 (requiring plaintiffs to allege the price of an "appropriate comparative product" to the allegedly fat-free milk that plaintiffs purchased and rejecting plaintiffs' attempt to rely on a type of milk that was not actually comparable); *Lieberson v. Johnson & Johnson Consumer Cos., Inc.*, 865 F. Supp.2d 529, 541-42 (D.N.J. Sept. 21, 2011) (rejecting assertion that comparable products cost 25% less than the product in question without identifying the comparable products).

In *Riddell* and numerous other false advertising matters, plaintiffs seek to overcome dismissal by alleging that the class representatives "paid a premium," without explaining why that is so. The courts have held that this is insufficient to establish that what the plaintiff received was worth less than what was promised. *See, e.g., Solo v. Bed Bath & Beyond, Inc.*, 2007 WL 1237825, at *3 (D.N.J. Apr. 26, 2007) (holding that plaintiffs failed to sufficiently allege ascertainable loss where they claimed to have received linens that were "lower quality and less valuable than the linens they were promised"). In *Mason v. Coca-Cola Co.*, 774 F. Supp.2d 699, 701 (D.N.J. 2011), plaintiffs alleged that they purchased "Diet Coke Plus" because the labeling led them to believe it was nutritious and healthy. The court held that the mere allegation that plaintiffs paid "money for a product that was of lesser value than what was represented" was "insufficient to state an ascertainable loss" because they did not allege facts demonstrating that the "soda they bought was worth an amount of money less than the soda they consumed." *Id*. at 704. The reasoning in *Mason* was applied in *Riddell.*

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