

4 KEY TAKEAWAYS

Conjoint Surveys in Class Actions: What You Don't Know CAN Hurt You

Kilpatrick Townsend's class action defense specialists [Nancy Stagg](#) and [Joe Reynolds](#) recently presented a webinar addressing "Conjoint Surveys in Class Actions: What You Don't Know CAN Hurt You." They discussed how plaintiffs are using conjoint surveys in consumer class actions and what in-house counsel need to know to successfully defend their company from class actions.

Four key takeaways from the presentation, include:

1

After the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), to obtain certification under Fed. R. Civ. Proc. 23, class plaintiffs must provide a damages model that matches their theory of liability and show that damages are susceptible to measurement across the entire class. This often means a class damages expert must calculate the value of the misleading advertising claim or omission, or the "price premium," the difference between what the consumer paid and the value of what the consumer received. Conjoint surveys have been routinely accepted by many courts as a method of determining price premium damages in class actions.

Conjoint surveys ask consumers to choose between products with different sets of features or attributes. The survey responses are then used to determine a dollar value that consumers attach to each measured feature. That value (or "partworth") is used to calculate class damages. (Simple example: consumers surveyed value a product with organic ingredients on average \$1 more than a product with non-organic ingredients. The company sold 1 million product units mislabeled organic during the class period. Class damages = \$1 million).

2

Class action defendants must understand how to evaluate conjoint surveys proposed by class plaintiffs and how to attack poorly-designed or poorly-executed conjoint surveys. Most attacks on this expert evidence go to the weight of the evidence, but not admissibility. However, if a conjoint survey is "untethered" to the facts of the case, it is not helpful to the trier of fact, and may be excluded from evidence under Fed. R. Evid. 702. For example, a conjoint survey that does not survey class members or a conjoint survey that does not use historically accurate market prices may be subject to exclusion.

3

If your company is targeted by consumer class actions where "price premium" damages are sought, in house counsel should learn more about how the company's marketing professionals use conjoint surveys to make product and marketing decisions. Valuable information that may be helpful to attacking a class action conjoint survey, such as customer demographics, may already exist. To make sure your company is not missing opportunities to attack class plaintiffs' conjoint survey damages analysis, consult experienced class action defense counsel knowledgeable about conjoint surveys.

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For more information, please contact:
Nancy Stagg, nstagg@kilpatricktownsend.com
Joe Reynolds, jreynolds@kilpatricktownsend.com