

## **SKINNY GIRL MARGARITA™ CASE SHOWS HOW CLASS CERTIFICATION RULES CAN BE A CHALLENGE TO MEET IN THIRD CIRCUIT**

**By Kevin J. O'Connor\***

A new decision from the federal District of New Jersey, *Stewart v. Beam Global Spirits & Wine, Inc.* 2015 WL 3613723 (D.N.J. June 5, 2015), demonstrates the hurdles to class certification in the Third Circuit when the New Jersey Consumer Fraud Act or breach of warranty theory are used as a basis for certifying a broad class of potential claimants.

In *Stewart*, the plaintiffs alleged that defendants Beam Global Spirits and Wine LLC and Jim Beam Brands Co. market and sell a beverage product marketed as Skinnygirl Margarita™, which they represented is an "all natural" product which "uses only natural ingredients[.]" even though the product purportedly contains sodium benzoate. In their putative class action, plaintiffs filed a renewed motion for class certification.

Their prior motion for class certification was denied without prejudice based upon plaintiffs' failure to demonstrate the ascertainability of the proposed classes in accordance with Rule 23 and recent Third Circuit case law. Plaintiffs' motion sought certification of the three classes -- a New Jersey Consumer Fraud Act class, a breach of express warranty class and an unjust enrichment class. The court concluded that the methodology proposed by plaintiffs for ascertaining the classes did not satisfy the ascertainability requirement. This was because they had proposed allowing potential class members to submit affidavits stating that they had purchased the product, which could alleviate the problem of lost receipts.

In their renewed motion, plaintiffs attempted to address the issues identified in the court's prior opinion and order on class certification. They submitted an affidavit by a claims

administration firm detailing how affidavits from proposed class members would be thoroughly vetted to screen out fraudulent claims. The Court was not convinced:

"As this Court already noted, under *Carrera*, *Hayes* and *Marcus*, a process requiring reliance on affidavits of putative class members as the primary method of ascertaining the members of the class "leaves Defendants without a suitable and fair method for challenging these individuals' purported membership in the class." (Op. [Doc. No. 187] at 35, June 26, 2014.) Plaintiffs' proposed method relies on the customers' "say so," which is not acceptable under the law of this Circuit."

The Court noted that the ascertainability requirement not only seeks to protect a defendant's rights but is also aimed at protecting the rights of absent class members. Here, since the Court was of the view that the proposed method for ascertaining the class could result in the submission of fraudulent claims, the renewed motion for class certification was denied. The case ended just a few weeks later with a stipulation of dismissal with prejudice.

The decision in *Stewart* shows that these class actions are defensible, albeit expensive and after protracted litigation. Meeting the ascertainability standards is no small feat for potential claimants in these low-dollar consumer fraud cases where there proof of purchase is not readily available. Competent defense counsel can help to develop strong defenses to liability and destroy the ability of certifying a class where the Third Circuit's rules on ascertainability are not met.

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