

BUSINESS LITIGATION ALERT

SEPTEMBER 2011

Just The Facts: A Refresher On Federal Pleading Standards In New Jersey Consumer Fraud Act Cases

By now, you would think that those pursuing claims in federal court would be well aware of the pleading standards set forth in the U.S. Supreme Court decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and that those with fraud-based claims would be familiar with the requirement to plead fraud “with particularity” under Federal Rule of Civil Procedure 9(b). Not so! Recent decisions on New Jersey Consumer Fraud Act (“NJCFA”) claims caution us again to plead factual allegations beyond mere conclusory statements and, when pleading fraud, to do so with particularity.

New Jersey federal courts had a full end-of-summer calendar dismissing NJCFA complaints for failure to meet these applicable pleading standards: *Glushakow v. Boyarsky*, No. 11-cv-2917, 2011 U.S. Dist. LEXIS 90586 (D.N.J. Aug. 15, 2011) (dismissing with leave to amend NJCFA claims under renter and personal article insurance policies); *Capogrosso v. State Farm Ins. Co.*, No. 08-cv-2229, (D.N.J. Aug. 8, 2011) (dismissing with leave to amend NJCFA claims under life insurance policy allegedly sold as retirement and investment tool); *Mickens v. Ford Motor Co.*, No. 10-cv-05842, 2011 U.S. Dist. LEXIS 87422 (D.N.J. Aug. 5, 2011) (dismissing with leave to amend NJCFA claims on Ford’s handling of an alleged defect in certain cars).

NJCFA claims “sounding in fraud” are subject to the particularity requirements of Federal Rule of Civil Procedure 9(b).” *Capogrosso*, No. 08-cv2229 at *5 (citation omitted). “To satisfy this heightened standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.” *Glushakow*, 2011 U.S. Dist. LEXIS 90586 at *7 (citation omitted). In bringing NJCFA claims in an attempt to establish a *per se* regulatory violation, a plaintiff must at a minimum “identify a specific regulation or articulate an underlying basis suggestive of a particular regulation in support of such claim.” *Capogrosso*, No. 08-cv-2229 at *6 (citation omitted). “Speculative assertions do not satisfy the plausible pleading standard.” *Mickens*, 2011 U.S. Dist. LEXIS at *13.

Whether you are bringing a NJCFA complaint in federal court, or have been served with such a complaint, it is wise to reacquaint yourself with the U.S. Supreme Court *Iqbal* and *Twombly* decisions and with the federal pleading rules. The recent New Jersey District Court decisions demonstrate that these federal courts stand ready to dismiss a complaint for a failure to meet applicable pleading requirements, even if dismissal may be without prejudice to a possible later amendment. ■

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All Natural? Retaining Counsel Months Before Purchase Of Offending Product Results In Denial Of Class Action Certification In Consumer Fraud Lawsuit

In contrast to the NJCFA cases above, when a putative NJCFA class action representative provided another federal court with too much information, that court denied class certification.

Coyle v. Hornell Brewing Co., No. 08-cv-2797, 2011 U.S. Dist. LEXIS 97762 (D.N.J. Aug. 30, 2011). Based upon pleadings and confirmatory discovery, the plaintiff failed to demonstrate that she was an adequate representative of the class of purchasers under the federal class action standards in Federal Rule of Civil Procedure 23(a) (4).

On reconsideration, the Court in *Coyle* confirmed denial of class certification in connection with allegations that Arizona brand beverages were falsely labeled “All Natural.” In August 2007, plaintiff had signed a retainer agreement with counsel to represent her in this putative class action. In April 2008, her putative class action complaint was filed, alleging that she had been deceived into purchasing Arizona brand beverages in March 2008 and other prior unspecified dates.

In opposing class certification, the defendants argued, and the court agreed, that plaintiff was “susceptible to unique defenses regarding her credibility” in light of her allegations, repeated in certified discovery materials, that she purchased the product *after* she retained counsel to pursue her NJCFA claims. The court found that “courts may deny class treatment if that unique defense is even arguably present.” The court also found that the unique credibility defense could become the focus of the entire litigation because it is unlikely she could overcome summary judgment.

The court, however, offered some solace to plaintiff’s counsel, in reconsidering its prior decision to deny class certification on the independent basis of inadequacy of counsel in light of the repeated March 2008 allegation throughout the pleadings and discovery responses. In reevaluating counsel’s adequacy under Fed. R. Civ. P. 23(a) standards for appointment as class counsel, the court found that, although plaintiff’s counsel made a serious error, the error was outweighed by other factors such as counsel’s otherwise positive record. Thus, the court left the door open for plaintiff’s counsel to pursue the suit if another adequate class representative were found. ■

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