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NEW JERSEY FEDERAL COURT DISMISSES EYE-DROP SUIT FOR LACK OF ARTICLE III STANDING

A New Jersey federal court recently dismissed a putative consumer class action on grounds that the plaintiffs failed to allege an injury sufficient for Article III standing. *Cottrell v. Alcon Labs., Inc.*, No. 14-5859 (D.N.J., order entered March 24, 2016.) The case will likely have a significant impact on future consumer class actions in the drug and medical device industry, as defendants have bolstered support for attacking speculative damages claims in the context of purported class actions alleging unfair trade practice act violations. The decision, handed down by The Hon. Freda L. Wolfson, rejects "unsupported conclusion[s] regarding alleged loss" based on pricing theories that are purely hypothetical.

The defendants were manufacturers and distributors of U.S. Food and Drug Administration (FDA)-approved prescription eye drop medications sold as fluids in plastic bottles. The complaint alleged that the plastic tips on the bottles dispensed larger-than-necessary drops of medication, causing plaintiffs to pay inflated costs because of the "wasted" glaucoma treatment. The court had previously held that the plaintiffs lacked standing, reasoning that absent allegations plaintiffs were promised a specific number of doses or drops, their "theory of loss was too conjectural." The court gave the plaintiffs the opportunity to cure the defects in their complaint. They responded by citing numerous articles and studies commenting on eye-drop volume and potential cost savings of smaller drops.

The court said such evidence missed the point: "The flaw in relying on these opinions is that they do not specifically address or discuss Defendants' pricing model as to the ophthalmic medications at issue... Plaintiffs have not pled any basis for alleging that the way Defendants price their products will take into account the drop sizes. Rather, Plaintiffs and these authors resort to hypothesizing what manufacturers would do if tip dispensers were made smaller." Noting that the plaintiffs' theory of unfair overcharging was insufficient to confer Article III standing, the court found that the plaintiffs' claims were based on the faulty premise that hypothetically redesigned bottles dispensing smaller drops would

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cost less—a conclusion the "Court has no way of knowing … particularly since the pricing of pharmaceuticals is complex and multi-factored." And the plaintiffs could not base standing on their "disagreement with how Defendants designed their bottles," a design "specifically approved by FDA in a medical context."

The implications for cases brought under consumer protection statutes is clear: Claims based on hypothetical products and prices and conjectural injuries are insufficient to confer Article III standing and subject to successful attack at the motion to dismiss stage.

Shook Partners Lori McGroder and Jim Muehlberger represented Allergan, Bausch & Lomb and Valeant.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

ABOUT SHOOK

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