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James Muehlberger, Jennifer Stevenson and Madeleine McDonough of Shook Hardy & Bacon

The Rise of Consumer Fraud Class Action Lawsuits Against Cosmetic Companies and Tips for Defending Them

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The unprecedented rise of class actions against cosmetics companies has caused widespread concern in the market. James Muehlberger, Jennifer Stevenson and Madeleine McDonough Of Shook Hardy & Bacon highlight how cosmetics can best position themselves to defend these actions.

The Surge of Consumer Fraud Class Action Lawsuits Against Cosmetic Companies

Courts are seeing an unprecedented surge in consumer class actions against cosmetics companies. Multiple factors are likely to blame.

Warning letters the FDA issued to cosmetics companies in late 2012 targeting the labelling and marketing of certain products are partly responsible for the uptick. In the letters, the FDA found fault with marketing claims that suggest the products have properties that are “intended to affect the structure or any function of the human body.” The warning letters were swiftly followed by lawsuits against some companies alleging that the structure/function claims identified in the FDA’s warning letters misled consumers into purchasing the products.

The increase in litigation against cosmetics companies is also likely due to lessons learned in consumer fraud class actions against other industries. Plaintiffs’ counsel have attempted a “make-over” of their class action food claims by applying some of the same theories to cosmetics products. Recently, plaintiffs have filed numerous consumer fraud class action lawsuits alleging that cosmetics were improperly labelled as “all-natural” or “cruelty-free”. Not coincidentally, plaintiffs’ counsel have filed many of these cases implicating plaintiff-friendly consumer protection laws in California, where similar claims against the food industry have met with some success.

Finally, perceived successes in class actions against cosmetics companies have made this industry more attractive to class counsel, who view the cosmetics industry as a relatively untapped “deep pocket.” In the past year, class certification was granted in several lawsuits against cosmetics manufacturers. These results are likely to spur additional lawsuits.

Consumer Fraud Class Action Defence Strategies

Cosmetics companies facing consumer fraud class actions can adopt the following strategies to maximise their chances of successfully resolving these suits.

Provide Dissatisfied Customers a Refund

A simple refund policy may stop a class action. A refund policy can offer putative class members full relief without incurring the costs of a class action lawsuit. If plaintiffs propose incurring these unnecessary costs, they may not adequately represent class interests under Rule 23(a), and a class action may not be the “superior” method for resolving the dispute under Rule 23(b)(3). See *Imber-Gluck v Google Inc*, 2015 WL 1522076 (N.D. Cal. 3 April 2015). In addition, if few customers take advantage of a refund policy, this provides evidence that customers are satisfied and class treatment is inappropriate. For example, *Webb v Carter's Inc*, 272 F.R.D. 489 (C.D. Calif. 2011).

Get Thee to Federal Court

More often than not, defendants in class actions fair better in federal court, where Rule 23's requirements are often more strictly applied. Since the Class Action Fairness Act (CAFA) was passed in 2005, removal to federal court is the norm. CAFA expands federal diversity jurisdiction and permits removal so long as at least one class member is diverse from one defendant and the amount in controversy exceeds \$5 million in the aggregate. The named plaintiff cannot avoid federal court by stipulating that the amount in controversy will not exceed CAFA's threshold. Cosmetics companies facing state court consumer fraud class actions should strongly consider utilising CAFA to remove state court actions to federal court.

Narrow the Claims

Cosmetics companies should also attempt to pare down the claims through motions to dismiss. *Twombly* and *Iqbal* can be effective tools to dispose of certain claims. Companies should also carefully analyse allegations of fraud to determine whether they are pled with sufficient particularity as required by Rule 9(b). Finally, companies should evaluate whether the complaint pleads claims that are not legally viable, eg, claims for breach of warranty in states requiring privity, or claims that are preempted by federal law. See *Elkind v Revlon Consumer Prods. Corp.*, 2015 U.S. Dist. LEXIS 63464 (E.D.N.Y. 14 May 2015) (finding misleading labelling claims for Revlon's “Age Defying with DNA Advantage” cosmetics preempted by federal law). These strategies can help to narrow the claims at issue and force class action plaintiffs to provide more details about the remaining claims, which will allow companies to get a jumpstart on disposing of the claims.

Challenge the Named Plaintiff's Standing

Consider challenging the named plaintiff's Article III standing to sue on behalf of the purported class for products the named plaintiff did not purchase. These arguments have gained traction in instances where the class action complaint seeks damages for numerous, allegedly related products, not all of which the named plaintiff has actually purchased.

Primary Jurisdiction

When it is alleged that the use of a word on product labelling is fraudulent, but the FDA has provided no guidance on the meaning of the word, companies have had success arguing that a finding of fraud by the court would violate the primary jurisdiction doctrine. The Ninth Circuit recently affirmed application of the primary jurisdiction doctrine to a class action lawsuit involving allegations that a

cosmetics product was fraudulently labelled as “natural” because there were no FDA rules, regulations or even informal policy statements regarding the use of the word “natural” on cosmetics labels. *Astiana v Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015).

Consider Filing An Early Motion to Strike the Class Allegations

When significant impediments to class certification are obvious from the pleadings, an early motion to strike the class allegations should be considered. Courts have granted early motions to strike class allegations in instances where numerous states’ laws are implicated such that predominance cannot be met. Motions have also been successful when the class was overly broad or when individualised discovery would be necessary to determine class membership. A successful motion to strike allows a company to avoid costly class discovery and the costs associated with fighting class certification.

Vigorously Fight Class Certification

If the case proceeds to the class certification stage, vigorously contest class certification. Carefully analyse and identify individual issues, and create a discovery record supporting the individual nature of the issue. Argue that plaintiffs have the evidentiary burden of proving by a preponderance of the evidence that issues such as causation, reliance, and injury are truly common. Plaintiffs will often fail to clear these hurdles:

- **Predominance:** Attempts to certify a nationwide class are likely to fail the predominance and manageability requirements because of the numerous, disparate consumer fraud statutes implicated. Even when only one state’s law is involved, companies can create an evidentiary record demonstrating that individual issues predominate over common questions. When causation, reliance, materiality, or injury are elements of the consumer fraud claim, predominance is not met because whether each and every member of the class purchased the product because of the alleged misrepresentation, relied on the alleged representation and/or found the alleged misrepresentation to be material is an individual issue. The deposition of the named plaintiff will be key on this point. Consider utilising a consumer behaviour expert to testify about the myriad, individual reasons consumers purchase the product. In addition, damages must now be proven on a class-wide basis. *Comcast Corp. v Behrend*, 133 S. Ct. 1426 (2013).
- **Commonality:** Companies can often make a compelling argument that the commonality requirement is not met. As the Supreme Court made clear in *Wal-Mart v Dukes*, Rule 23(a)(2) requires more than identification of a common question. Instead, there must be supporting evidence that resolving the “common question” will result in “common answers” and will resolve “an issue that is central to the validity of each one of the claims in one stroke.” 131 S. Ct. 2541 (2011).
- **Ascertainability:** Consider whether the proposed class is ascertainable. Courts typically hold that class members must be definable with reference to objective criteria. When there are no records of purchase, class members have no objective criteria to prove that they purchased the product and belong in the class.
- **Adequacy:** Evidence that the named plaintiff is untrustworthy and/or has close ties with class counsel may be another reason to defeat Rule 23(a)(4)’s adequacy requirement. Courts have found plaintiffs of questionable veracity to be inadequate class representatives.

Consider Filing a Motion for Summary Judgment to be Considered at the Same Time as Plaintiff’s Motion for Class Certification

Consideration should be given to the filing of a summary judgment motion as to the individual elements of the named plaintiff's claim, such as lack of causation, reliance, injury or violation of the statute of limitations. Whether you win or lose, the court's consideration of the motion at the same time as the court considers the plaintiff's motion for class certification will demonstrate the individual nature of the issues, precluding class certification.

By following these strategies, cosmetics companies can best position themselves for success in consumer fraud purported class actions, if not at the pleading stage, then at class certification.

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87 Lancaster Road, London, W11 1QQ, UK | Tel: +44 20 7908 1180 / Fax: +44 207 229 6910

<http://www.whoswholegal.com> | editorial@whoswholegal.com