Bloomberg BNA

Antitrust & Trade Regulation Report™

VOL. 104, NO. 459 APRIL 5, 2013

CLASS ACTIONS

Consumer Research Among Class Members — Is There an Ethical Issue?

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Today's topic: Is a defendant charged with misleading advertising in a state-law consumer class action free to conduct a survey among class members to develop evidence to defend itself?

It is commonplace for outside counsel for parties in Lanham Act false advertising cases to retain an independent survey expert to conduct a consumer survey to explore the consumer messages conveyed by the challenged advertising. In the typical scenario, the advertiser markets a consumer product to a nationwide segment of the population, and the challenger is a competitor. In a Lanham Act lawsuit, none of the parties are consumers, as consumers have no standing.[1] If the survey results are what the sponsoring party was looking for, the survey will be submitted to the Court or jury (assuming it clears the inevitable *Daubert* challenge).[2] Alternatively, if the survey results are not what was hoped for, they will invariably remain undisclosed as attorney work-product.[3]

But suppose the same or similar misleading advertising issues are raised in a consumer class action brought under a state statute and/or state common law. Is the advertiser's outside counsel free to retain the same independent expert to conduct the same survey among the product's consumers (i.e., among members of the proposed/certified class)? To address the issue of consumer communication, or some other issue that may be relevant to whether the class is certified in the first place?

The familiar Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct states: ''In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.'' The question then becomes whether a defendant's counsel can commission a survey in a class action lawsuit where the survey participants are, at least arguably, represented by counsel, i.e., the lawyers for the customer plaintiff who seeks to become a class representative.

The Restatement for the Law Governing Lawyers provides that ''[a] lawyer who represents a client opposing a class in a class action is subject to the anti-contact rule . . . according to the majority of decisions, once the proceeding has been certified as a class action, the

[1] 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:39 (4th ed. 2012).

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[2] *See* Kenneth A. Plevan, *Daubert's Impact on Survey Experts in Lanham Act Litigation*, 95 TRADEMARK REP. 596 (2005).

[3] *See* Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd., No. 04-02201 (RCL), 2007 BL 44207, at *3-4 (D.D.C. June 28, 2007).

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members of the class are considered clients of the lawyer for the class.''[4] However, the Restatement states that *prior to* certification, a lawyer may contact class members who are only putatively represented by a competing lawyer, ''but not class representatives or members known to be directly represented in the matter by the other lawyer[s].''[5] Likewise, at least one advisory ethics opinion has stated that Disciplinary Rule 7-104, which is directly analogous to Rule 4.2,[6] does not apply before class certification.[7] These authorities, however, do not directly address the ''survey'' issue.

There are a number of reported decisions in the labor and employment area suggesting that courts have ''the authority to limit communications between litigants and putative class members prior to class certification, subject to restrictions mandated by the First Amendment.''[8]

In re M.L. Stern Overtime Litigation was a labor law dispute in which employees moved to limit *ex parte* communications between the employer and members of the putative class and for sanctions. The communications in dispute included a ''survey'' sent by defendant's employees to numerous account executives (putative class members) with five ''yes'' or ''no'' questions.[9] The court ultimately decided that ''Plaintiffs have failed to establish that Defendant's communications with Account Executives were coercive or ethically improper,'' though the court did not refer to any specific ethical rule or principle.[10] The court noted that ''[t]o the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened.''[11] ''It is not enough that a *potentially* coercive situation exists. . . . The court cannot issue an order without evidence that a potential for serious abuse exists.''[12] Since there was ''nothing coercive or even suggestive about the survey,'' the court denied the Plaintiffs' motion.[13]

There was a different outcome in another California employment case, *Mevorah v. Wells Fargo Home Mortgage, Inc.*[14] There, defendants contacted putative class members by phone and made a series of inaccurate and misleading statements that misrepresented the impact of the class action lawsuit on the employees.[15] For the employees who agreed to be interviewed, the employer-defendant then conducted telephone interviews and prepared declarations for the employees to sign.[16]

The court found the ''defendant's statements to potential class members . . . misleading,'' further pointing out that the defendant's ''statements also have a 'heightened potential for coercion because where the absent class member and the defendant are involved in an ongoing business relationship, such as employer-employee, any communications are more likely to be coercive.' ''[17] Given the confluence of factors, the court found the defendant's pre-certification communications with class members ''misleading and improper.''[18]

A labor law decision outside of the Ninth Circuit stated that a ''broad discretion to limit communications between parties and putative class members,'' even though courts have also acknowledged that ''there is no mandatory, across-the-board prohibition against employer contact with prospective class members in an FLSA [Fair Labor Standards Act] collection action at the pre-certification stage.''[19] The ''survey'' there consisted of one-on-one meetings with defendants' attorneys and questions concerning pay practices.[20] This survey was deemed to be unethical, as it was neither ''for academic, internal or informational purposes,'' but instead an attempt to ''marshal[] data to use against all of [defendant's] hourly workers . . . in litigation.''[21] Again, no specific ethical rule was cited.

Apparently of concern to the court in *Longcrier* was the fact that defendant's ''lawyers neither informed the declarants that a class action lawsuit concerning the very pay practices about which they were being 'surveyed' was pending, nor that those declarants were themselves potential class members whose execution of a form declaration for [defendants] might effectively strip them of an opportunity to join in the lawsuit.''[22] Further, the court was concerned with the overtly coercive environment under which the survey was conducted. As a sanction against defendants' conduct, the court struck the survey results and prohibited its use in the litigation.[23]

Snide v. Discount Drug Mart, Inc.[24] was yet another labor law case in which an employee-plaintiff made a motion for a protective order and sanctions regarding

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[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. 1 (2000).

[5] *Id.*

[6] Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 343 (D. Conn. 1991).

[7] N.Y.C. Bar Ass'n Comm. on Prof'l & Jud. Ethics, Formal Op. 2004-1 (2004).

[8] In re M.L. Stern Overtime Litigation, 250 F.R.D. 492, 496 (S.D. Cal. 2008).

[9] *Id.* at 494.

[10] *Id.* at 499.

[11] *Id.* at 496 (emphasis omitted) (citing Burrell v. Crown Cent. Petroleum, Inc., 176 F.R.D. 239, 244 (E.D. Tex. 1997)).

[12] *Id.* (citing Burrell, 176 F.R.D. at 244 (emphasis in original)).

[13] *Id.* at 494.

[14] No. C 05-1175 MHP, 2005 BL 53043 (N.D. Cal. Nov. 17, 2005).

[15] *Id.* at *4.

[16] *Id.*

[17] *Id.* at *5 (citing Belt v. Emcare, Inc., 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003)).

[18] *Id.* at *6.

[19] Longcrier v. HL-A Co., 595 F. Supp. 2d 1218, 1226 (S.D. Ala. 2008).

[20] *Id.* at 1229.

[21] *Id.* at 1227.

[22] *Id.* at 1228.

[23] *Id.* at 1229-30.

[24] No. 1:11CV0244, 2011 BL 339401 (N.D. Ohio, Oct. 7, 2011).

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an employer's ''survey'' of its employees. The court, however, declined to ''presume that [employer's] communication with employees was coercive based solely on a single Affidavit,'' as ''defendants should and do have the right to gather facts on a plaintiff's claim through communication to putative opt-in class members if the communication is fair.[25] The defendant-employer claimed that ''it conducted the interviews of the Wooster store employees as an investigation of the factual basis of [plaintiff's] claims,'' and the court ultimately denied plaintiff's motion.[26]

Other forms of communication to absent class members other than surveys have also been the subject of court sanctions. For example, *Belt v. EmCare, Inc.*[27] was another labor case in which the court imposed sanctions because of a letter from the employer and its lawyer that was sent to absent class members with information regarding the pending suit. The court determined that the employer had ''misrepresented many of the issues in this action in such a way as to discourage absent class members from joining the suit. For example, the letter suggested that the current action was an attack on the potential plaintiffs' status as professionals. Additionally, EmCare misrepresented the amount of damages available to the absent class members . . . .''[28] For these reasons, the court determined that sanctions (including an injunction and attorneys' fees) were appropriate, citing its ''duty and . . . broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.''[29]

Though not a labor case, a similar outcome occurred in *Dondore v. NGK Metals Corp.*, in that the court applied Rule 4.2 to an uncertified class, holding that the rule ''prohibits defense counsel from contacting or interviewing potential witnesses who are putative class members.''[30] Plaintiffs in *Dondore* were homeowners who lived next to a metal manufacturing facility. Plaintiffs alleged that they suffered from chronic beryllium disease as a result of defendants' emission of particulate matter. Defendants wanted to informally interview plaintiffs' neighbors. The court held that ''[i]f defense counsel or counsel otherwise adverse to [putative class's] interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined.''[31]

However, one ethics committee has distinguished the result in *Dondore*, noting that there, ''the court was concerned about the potential for abuse 'which may arise when unsophisticated putative class members are interviewed by counsel.' ''[32]

In sum, the employment cases offer guidance, but not a bright-line test. A court's authority to control the communications comes from Rule 23 as well as the ethical rules. A defendant's communication with absent class members must be noncoercive, and not be misleading as to facts or issues. One could argue (as we do below) that a properly conducted independent consumer survey will never be ''coercive.''

None of these cases, in addition, addressed the conduct of class counsel. While presumably Rule 23's limitation would apply to class counsel, the ethical principle in Rule 4.2 would presumably not, as the class members (putative or certified) are represented by plaintiffs' counsel if they are represented by anyone. Therefore, class counsel are free of ethical restraints to conduct a survey among absent class members. This might strike some as unfair – why would one side be free to conduct such research, while the adversary is not?

To address this issue, we conducted research among recent consumer class action cases. What we found is that defendants are in fact conducting surveys among putative class members, i.e., before certification. In deciding whether such survey evidence is persuasive, no ethical, or indeed Rule 23 abuse, issue was apparently raised in these cases.

In *Fairbanks v. Farmers New World Life Insurance Co.*,[33] insureds brought a putative class action against insurer alleging negligent misrepresentation, fraudulent inducement and violations of California's Unfair Competition Law (''UCL'') in connection with the insurer's marketing and sale of universal life insurance policies. Defendants pointed to a survey commissioned by plaintiff's own counsel in which 500 policyholders were asked if they would have purchased their policies had it been disclosed that the policies were not permanent.[34] A total of 47.4% of the respondents said that they would still have purchased the policies. Defendants argued that as roughly half of the policyholders would have nonetheless bought the policy, the materiality of any misrepresentation of permanence was not subject to class-wide proof.[35] The court agreed. ''While it may have been material to a sizeable subclass of policyholders, plaintiffs made no attempt to seek certification of a class for whom materiality was subject to common proof,'' the court noted.[36] For these reasons, the court found materiality to be subject to individual proof and affirmed the lower court's denial of class certification. While in this case, plaintiff's counsel conducted the survey, in the four cases below, the consumer surveys of class members were either actually conducted by or recommended to be conducted by defendants.

A survey was cited in *In re POM Wonderful LLC Marketing & Sales Practices Litigation.*[37] There, the court found materiality satisfied by survey evidence (offered by defendants) that ''a significant majority of respondents, in excess of 90%, cited health reasons as a motivating factor behind their purchase of POM juice.''[38] This survey was conducted before the class was certified.

[25] *Id.* at *9 (citing Jackson v. Papa John's USA, Inc., No. 1:08cv2791, 2009 BL 47803, at *3 (N.D. Ohio Mar. 10, 2009)).
[26] *Id.* at 10.
[27] 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003).
[28] *Id.* at 666.
[29] *Id.* at 667.
[30] 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001).
[31] *Id.*
[32] Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2006-6 (2006).
[33] 197 Cal. App. 4th 544, 128 Cal. Rptr. 3d 888 (2011) (review denied Oct. 19, 2011).
[34] *Id.* at 555, 898.
[35] *Id.*
[36] *Id.* at 566, 907.
[37] No. ML 10-02199 DDP (RZx), MDL No. 2199, 2012 BL 260801 (C.D. Cal. Sept. 28, 2012).
[38] *Id.* at *5.

In *Wiener v. Dannon Co., Inc.*,[39] defendants also presented survey evidence showing that purchasers bought the products for different reasons in order to show that the materiality of the misrepresentation is unique to each purchaser.[40] The survey there was conducted prior to class certification.

Similarly, a survey was offered in *In re Visa Check/Mastermoney Antitrust Litigation*,[41] a putative class action filed by a number of large retailers, smaller merchants and retail associations, who brought an antitrust action against credit card associations that required stores accepting their credit cards to also accept their debit cards (creating a tie between credit cards and debit cards). The plaintiffs made a motion for class certification. Part of the dispute was the use of ''off-line'' debit, which, rather than requiring customers to enter a PIN code, required them to sign a slip much as they would if paying by credit card.[42] The defendants argued that there was no causation or injury regarding the use of off-line debit, as ''any merchant that does not like off-line debit cards is capable of 'steering' its customers to other forms of payment. Any merchant that chooses not to steer . . . cannot claim that any injury it suffers from off-line debit interchange fees is caused by the tie; instead, it is caused by the decision not to steer.''[43] The court disagreed with defendants' arguments. ''A merchant that steers will not succeed in every single transaction; there will always be an irreducible minimum of customers who will use their off-line debit cards.''[44] The court notes in a footnote to this statement that consumer surveys submitted by defendant showed that consumers *prefer* off-line debit to on-line debit.[45]

[39] 255 F.R.D. 658 (C.D. Cal. 2008).
[40] *Id.* at 668.
[41] 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001).
[42] *Id.* at 72.
[43] *Id.* at 85-86.
[44] *Id.* at 86.
[45] *Id.* at 86 n.17.

Finally, in *McCabe v. Crawford & Co.*,[46] the court noted that in order to determine whether consumers were actually confused by the language in a debt collection letter, ''the Seventh Circuit has emphasized that evidence, such as consumer surveys similar to ones used in trademark cases, may be needed to show that a collection letter is confusing to the unsophisticated consumer.''[47] *McCabe* was a class action suit by debtors against a debt collector, alleging violations of the Fair Debt Collection Practices Act and Illinois Collection Agency Act. No actual survey is referenced in the opinion.

From these recent cases, the authors conclude that in the typical consumer class action case, a defendant faces no ethical issues if it elects to conduct a survey among putative class members. In order to be admissible (and to be accorded weight), the survey would have to meet the well-documented stringent requirements for such surveys.[48] These standards include that the survey be conducted independently, and that the consumer interface not be misleading. Given those requirements, the consumers are protected from coercion, or from being misled about the underlying dispute. Indeed, the survey results would be invalid if the survey participants were told that it was being conducted in connection with litigation. Thus, none of the concerns expressed in the employment cases should be applicable. And, of course, there seems no justification to permit one side only to conduct such surveys.

Based on the ethics opinions, it is a closer question of whether a defendant can conduct a survey among product users *after* a class is certified. In the view of the authors, the result should be the same, as, again, the opportunity for ''mischief'' seems remote.

[46] 272 F. Supp. 2d 736 (N.D. Ill. 2003).
[47] *Id.* at 745.
[48] *See, e.g.*, Schering Corp. v. Pfizer Inc., 189 F.3d 218, 225 (2d Cir. 1999).

  ATRR ISSN 0003-6021