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CONSUMER SURVEYS

CERTIFICATION

When is consumer survey evidence used in consumer deception litigation? Attorneys Kenneth A. Plevan and Angela Colt survey recent decisions, including several in California, the leading jurisdiction for the adjudication of consumer class actions. This evidence will continue to play an important role in class certification and other disputes in false advertising cases, the authors say.

Continued Reliance on Consumer Surveys To Address Certification Issues in Consumer Class Actions

By Kenneth A. Plevan and Angela Colt

In a recent analysis of the use of consumer surveys in advertising and consumer deception disputes, a co-author opined that:

> The recent explosion of consumer deception lawsuits brought as putative class actions, filed by private plaintiffs under state consumer protection laws, has led to increased use of [consumer] surveys, in order to address factors relevant to merits and class certification issues.

Kenneth A. Plevan, *Recent Trends in the Use of Surveys in Advertising and Consumer Deception Disputes*, 15 Chi.-Kent J. Intell. Prop. 49, 61 (2016). To track and evaluate that trend, set forth below are summaries of fourteen decisions during the 16-month period April 1, 2015–July 31, 2016 that show the potential relevance of consumer surveys on the issue of class certification.

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Our discussion is divided into three parts. We first discuss nine decisions in courts in California, the leading jurisdiction for the adjudication of consumer class actions. We next summarize four decisions in courts outside of California. Finally, we discuss two recent decisions that have considered whether survey evidence is necessary to prove an implied claim of false or deceptive advertising.

California Decisions Relying on Survey Evidence Offered by Parties

In *In re NJOY, Inc. Consumer Class Action Litigation*, 120 F. Supp. 3d 1050 (C.D. Cal. 2015), both parties presented consumer survey evidence on plaintiffs' motion to certify a class of California and Florida consumers of e-cigarettes. Plaintiffs alleged that defendants promoted NJOY e-cigarettes as being safer than traditional cigarettes. Plaintiffs retained two experts, Dr. Jeffrey Harris and Dr. Thomas Maronick. Dr. Harris, an economist, used a conjoint analysis to calculate a price premium. The court rejected a *Daubert* challenge to the price premium analysis based on Dr. Harris's failure to conduct a "survey to determine whether a reasonable consumer would be willing to pay a price premium for

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the perceived value of a safety claim.'' Rather, the court held that the expert had properly relied on similar surveys reported in the professional literature.

Dr. Maronick's online consumer survey results were offered to show the class-wide materiality of the purported misrepresentations. Respondents were asked open-ended questions about what the ad said or suggested about the product generally, and closed-ended questions about the safety of e-cigarettes compared to traditional cigarettes and the value of that representation. The court rejected defendants' challenges to plaintiffs' survey design, which did not contain any control group, holding that issues of methodology went to weight and not admissibility. The court similarly rejected the criticisms that the survey improperly relied on closed-ended questions and included respondents from states other than California and Florida.

Finally, the court held that defendants' survey, conducted by Kent Van Liere, did not undercut the persuasiveness of plaintiffs' survey evidence. On the issue of whether materiality could be shown on a class-wide basis, Dr. Maronick had criticized the Van Liere survey on the grounds that it led consumers to respond based on the literal language of the advertisements rather than the overall communication. Plaintiffs' analysis also showed that more respondents recognized an implied safety message than had been asserted, in part due to narrow coding of results. Ultimately, the court declined to certify a class because of questions regarding the damages models. *See id.* at 1123; *In re NJOY, Inc. Consumer Class Action Litig.*, No. CV 14-428-JFW (JEMx), 2016 BL 58999 (C.D. Cal. Feb. 2, 2016) (denying amended motion to certify).

In *McVicar v. Goodman Global, Inc.*, No. SA CV 13-1223-DOC (RNBx), 2015 BL 269101 (C.D. Cal. Aug. 20, 2015), *appeal denied*, No. 15-80164 (9th Cir. Nov. 19, 2015), consumer surveys were successfully used by defendants in opposing plaintiffs' motion to certify a class of individuals and entities in California that owned certain brand-name residential air conditioners manufactured with copper evaporator and/or condenser coils. Plaintiffs relied on a purported common defect in the evaporator coils that caused leaks and premature malfunctions in the air conditioner units. The court found an absence of common questions of law and fact, holding that individualized questions regarding (i) exposure to advertising representations, (ii) materiality, and (iii) damages ''would overwhelm class litigation.'' *Id.* The court credited defendants' survey evidence that indicated consumers would not have changed their behavior if they had known the possibility of leakage and showed that a majority of the proposed class never came across marketing materials about the product.

In *McVicar*, defendants' surveys were conducted by Dr. Robert Klein, an expert in applied marketing, and Dr. Itamar Simonson, a consumer behavior expert. Dr. Klein's survey showed that only 27% of the consumers surveyed had reviewed the manufacturer's brochures or websites prior to making a decision to purchase, and that another 30% were not even involved in a purchasing decision. Dr. Simonson's survey showed that, after adding a ''disclaimer'' of the potential for leakage, only 14% said they would ''probably'' or ''definitely'' not purchase the unit, compared to 10% of those in the control group who did not receive that disclosure. Citing this evidence, the court held that the materiality of the defect at issue was not common among class members but rather would require individualized proof.

California Decisions Suggesting Surveys Could Have Been Useful

In *Walker v. Life Insurance Co. of the Southwest*, No. CV 10-9198 JVS (RNBx), 2015 BL 459212 (C.D. Cal. Apr. 14, 2015), the court noted that consumer surveys could have been, but were not, used at trial to strengthen the position of the class. Plaintiffs claimed on behalf of a certified class of life insurance policyholders that defendant violated California's Unfair Competition Law (''UCL'') by failing to disclose the risk of policy lapse or reduced value due to stock market volatility and the potential tax consequences thereof. In ruling on equitable issues after a jury verdict for the defendant, the court rejected the plaintiffs' reliance on anecdotal evidence to establish on a class-wide basis that an alleged omission was contrary to consumer expectations. The court noted that a consumer survey might have been helpful in establishing consumer expectations, but none was offered.

In *Circle Click Media LLC v. Regus Management Group LLC*, No. 12-cv-04000-EMC, 2016 BL 144612 (N.D. Cal. May 5, 2016), *appeal filed*, No. 16-80071 (9th Cir. May 20, 2016), plaintiffs alleged that defendants failed to adequately disclose leasing fees in lease documents and in sales presentations to individual customers. In denying plaintiffs' motion to certify the class, the court found that plaintiffs had ''failed to present any evidence of [defendants'] salespeople regularly failing to disclose the disputed fees, *i.e.*, by providing consumer surveys showing a consistent practice in the field.'' *Id.*

California Decisions Relying on Consumer Surveys in Defendants' Files

In *Dei Rossi v. Whirlpool Corp.*, No. 2:12-CV-00125-TLN-CKD, 2015 BL 122834 (E.D. Cal. Apr. 28, 2015), at issue were defendant's alleged misrepresentations about the Energy Star compliance of two refrigerator models. In concluding that plaintiffs had made a sufficient showing that the alleged false statements were material on a class-wide basis, the court relied, as did plaintiffs, on defendant's own consumer studies. The materiality finding, in turn, supported a presumption of reliance as to all class members.

In *Santamarina v. Sears Roebuck & Co.*, No. B246705, 2016 BL 132222 (Cal. Dist. Ct. App. Apr. 26, 2016) (unpublished opinion), the court affirmed the trial court's refusal to certify a class comprised of customers of ''any Craftsman branded tool or product where any unit or part thereof was entirely or substantially made, manufactured, or produced outside of the United States'' after January 6, 2001. The court held *inter alia* that the proposed class lacked commonality given the variety of defendant's advertising materials and the large number of products advertised. Plaintiffs had relied on consumer survey evidence found in defendant's files showing that consumers believed that Craftsman tools were made in the United States and had a reputation of being American-made. That evidence, however, was found unpersuasive, because it did not include data beyond 2006, the survey methodology

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was unknown, and the survey did not show that consumers' beliefs were based on defendant's advertising.

Mullins v. Premier Nutrition Corp., No. 13-cv-01271-RS, 2016 BL 119464 (N.D. Cal. Apr. 15, 2016) (to be published in F. Supp. 3d), involved a putative class action against the company that marketed ''Joint Juice,'' a dietary supplement containing glucosamine and chondroitin. Plaintiff alleged *inter alia* that Joint Juice advertising conveyed an *implied* message that it would relieve pain and stiffness associated with osteoarthritis. Defendant challenged plaintiff's ability to establish the existence of any implied message in the absence of a consumer communications survey. Before the litigation began, defendant had commissioned several market research studies to gain a better understanding of its customers and test the effectiveness of its marketing. Respondents in each study reported they took glucosamine supplements because they suffered joint pain. Internal customer data also confirmed that 90-95% of Joint Juice users purchased the product because they had joint pain. The court found that plaintiff did not need to ''hire an expert to conduct another consumer survey to survive summary judgment when there [was] sufficient evidence from [defendant's] own marketing files to lend support for her claims.'' *Id.*

In *Mullins*, defendant's survey expert Hal Poret opined, based on the results of a survey he designed, that only 5.5% of Joint Juice consumers chose to buy the product because of statements on the label, and that the statements on the label did not influence consumer decision-making. Plaintiff's expert reviewed the results of Poret's survey and reached dramatically different conclusions. The court found that plaintiff had raised triable issues of fact by showing that ''consumers consistently [bought] and use[d] Joint Juice because they [had] joint pain, raising the reasonable inference that consumers believe[d] the product would provide a remedy for such afflictions.'' *Id.*

In *Kumar v. Salov North America Corp.*, No. 14-CV-2411-YGR, 2016 BL 228406 (N.D. Cal. July 15, 2016), plaintiff alleged she was deceived by labels stating defendants' olive oil was ''Imported from Italy'' when in fact it was produced in Tunisia, Greece, and Spain, then shipped to Italy, mixed with Italian olive oil, bottled, and sold to consumers. The court held that ''[m]ateriality can be shown by a third party's, or defendant's own, market research showing the importance of such representations to purchasers.'' *Id.* Plaintiff relied on market research from defendants' files, along with other industry research, to show that Italian origin is important to consumers' olive oil purchasing decisions. Although defendants presented competing market evidence, the court held that materiality of the representations could be determined on a class-wide basis.

California Decision Refusing to Accept Survey That Had Not Yet Been Conducted

In *Miller v. Fuhu Inc.*, No. 2:14-cv-06119-CAS-AS, 2015 BL 397289 (C.D. Cal. Dec. 1, 2015), the court declined to accept as sufficiently documented a consumer survey proposed by plaintiff's damages expert. Plaintiff alleged that Fuhu, the manufacturer of Nabi tablet computers, provided misleading information about the devices' charging capabilities. Plaintiff's expert, Dr. Michael Dennis, proposed the use of a ''contingent valuation'' approach, whereby a consumer survey would be used to identify the values that consumers placed on different product attributes and the ''price premium'' allegedly attributable to non-disclosure of the product's charging ability. The court found the proposed survey inadequate, noting that the expert had ''not yet performed any consumer survey . . . , let alone even designed such a survey.'' While the court acknowledged that ''at the class certification stage, a plaintiff's burden is only to provide a method for calculating damages on a classwide basis,'' here, ''given the relatively undeveloped state of plaintiff's proposed survey,'' the court denied the motion for certification, but with leave to file a renewed motion. *Id.*

Four Non-California Decisions

In *Shamblin v. Obama for America*, No. 8:13-cv-2428-T-33TBM, 2015 BL 121665 (M.D. Fla. Apr. 27, 2015), *leave to appeal denied*, No. 15-90015 (11th Cir. Aug. 18, 2015), *and appeal filed*, No. 15-14968 (11th Cir. Nov. 6, 2015), one of the defendants offered a consumer survey in opposition to plaintiff's motion to certify a class asserting violations of the Telephone Consumer Protection Act (''TCPA''). The proposed class consisted of all Florida residents who received non-emergency telephone calls without prior consent from September to November 2012 in support of President Obama's reelection through an automated dialing system or with an artificial or prerecorded voice. The survey was based on making calls to phone numbers that plaintiff claimed were illegally called, showing that many of the designated numbers were not actually assigned to cell phones. The court denied plaintiff's motion to certify the class for failure to meet the commonality requirement of Rule 23(a), concluding that whether or not the numbers were assigned to a cell phone at the time of the call and whether or not the individuals consented to the call, represented individual, not common, questions.

In *Ault v. J.M. Smucker Co.*, 310 F.R.D. 59 (S.D.N.Y. 2015), plaintiff sought certification of a class of New York consumers of various Crisco cooking oils, asserting that defendant had labelled the oil products as ''All [N]atural'' when they were heavily processed and made with genetically modified crops. Defendant's survey expert, Dr. Itamar Simonson, presented the results of a consumer survey showing that 55% of respondents could not or did not know what ''All [N]atural'' cooking oil meant, and those who attempted to define the term in the context of cooking oils did not have consistent responses. Moreover, only 1.6% of respondents indicated that whether or not the oil was ''natural'' was pertinent to their decision to purchase the product—pricing and brand awareness were more salient considerations. Although plaintiff's expert, Dr. Jeremy Keegan, proposed as part of the damages analysis a survey to determine the price premium for a ''natural'' oil, the court found the survey approach insufficient because it would not analyze actual pricing and sales data for natural-labeled oils and did not explain how the survey responses would be analyzed. *Id.* at 67-68. The court thus denied the motion for certification for failure to satisfy the requirements of ascertainability, commonality, and predominance.

In *Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239 (S.D. Ill. 2015), defendants manufactured single-serve coffee cups for use in Keurig machines. Plaintiffs

claimed that defendants marketed the coffee as premium, ground coffee, but it was actually more than 95% instant coffee. Plaintiffs offered the opinions of Bobby Calder, a professor at Northwestern University who specialized in consumer behavior and marketing strategies. Defendants sought to exclude Calder's first set of opinions because they were not based on evidence of actual consumer perceptions. The court noted that Calder had ''plenty of other evidence regarding consumer deception,'' in (i) defendants' own market research showing Keurig users did not want instant coffee, so defendants avoided using the word ''instant'' on the label; (ii) product testing to determine if consumers noted the difference between defendants' cups and Keurig cups; and (iii) hundreds of consumer complaints from defendants' files, in which customers ''said they felt disappointed, dissatisfied, displeased, disgusted, swindled, robbed, cheated, ripped off, duped, and misled.'' *Id.* at 245. The court concluded that there was no need for a survey to measure consumer perceptions.

Defendants in *Suchanek* further sought to exclude Calder's second set of opinions, which had been based on a study he had designed and conducted, in which he interviewed 23 consumers who owned and used Keurig machines. The court noted that, in light of defendants' own internal documents and Calder's first set of opinions, Calder's survey was not critical to class certification, but it was not so fundamentally flawed as to render it inadmissible. Any deficiencies in the survey's universe methodology went to the weight of the survey, not its admissibility.

In *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29 (E.D.N.Y. 2015), the proposed class consisted of consumers who allegedly paid a premium for defendant's ''flushable'' wipes, which they claimed were not flushable. The court stayed the litigation pending the outcome of further action by the Federal Trade Commission, in part because there was no clear definition of the term ''flushable.'' *Id.* at 79. After citing to a number of proffered definitions of the term, the court noted the absence of a survey addressing the issue:

> No scientifically-designed survey has been offered indicating consumer understanding of the term. A well-designed survey would be expensive. There has been no suggestion that the class representative is prepared to pay for such an inquiry.

Id. at 51.

Survey Evidence and Implied False or Deceptive Claims

Two recent decisions have discussed, in different contexts, whether survey evidence is needed to allege and/or prove an implied claim.

The Tenth Circuit imposed (in an unpublished decision) stringent plausibility standards in affirming the dismissal of a Lanham Act implied-claim false advertising cause of action. In *Vincent v. Utah Plastic Surgery Society*, 621 F. App'x 546 (10th Cir. 2015), two cosmetic surgeons filed a lawsuit against a society of plastic surgeons, challenging certain advertisements sponsored by the society as implying that there were increased risks in having surgery performed by cosmetic surgeons. On defendant's motion to dismiss, the district court granted the motion, and the Tenth Circuit affirmed.

The complaint in *Vincent* had alleged that the challenged statements had ''created confusion among Plaintiff's clients, potential clients, and will continue to do so if permitted to continue.'' The panel characterized this allegation as ''mere speculation'' that fell short of the *Iqbal/Twombly* requirements. *Id.* at 550 (citation omitted). The court also rejected plaintiffs' argument that they should be given an opportunity to conduct a survey to show that there was a false implied message: ''Plaintiffs argue they should be permitted to produce customer reaction surveys if this court concludes they are necessary. This argument is easily rejected. Plaintiffs have not indicated that they possess any such surveys.'' *Id.* at 550 n.7.

Concerning the applicability of the Tenth Circuit's logic in consumer class action complaints, there is at least one significant difference: In a Lanham Act lawsuit, the plaintiff is typically a competitor, which cannot assert that it was deceived, whereas putative class action representatives, to have standing, must allege that they were personally deceived. Arguably, that assertion might be enough to provide a plausible basis for an implied-claim allegation. Nevertheless, defendants in consumer class action lawsuits in federal court could cite *Vincent* in support of an *Iqbal/Twombly* motion to dismiss implied (non-literal) advertising messages. The reasoning in *Vincent* might also apply when a defendant is confronting a motion to certify a class based in part on a consumer survey that is merely proposed, but has not yet been conducted.

In *Mullins*, discussed above, in denying defendant's motion for summary judgment, the court noted that although extrinsic evidence may be required to prove an implied claim under the Lanham Act, California state court decisions have no such requirement for plaintiffs asserting implied false claims under California consumer deception statutes. *Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 BL 119464 (N.D. Cal. Apr. 15, 2016) (to be published in F. Supp. 3d). The *Mullins* court did not ultimately resolve whether a plaintiff needed to offer a consumer survey, because there was sufficient consumer evidence from defendant's own marketing files that supported her claims, precluding summary judgment for defendant.

The authors are aware of no decision that directly addresses the issue of whether, under the *Erie* doctrine, a federal court considering state consumer fraud cases should impose federal evidentiary standards taken from Lanham Act cases (and thus require consumer surveys to support implied claims in appropriate cases), or consider the issues one of substance inherent in a state's definition of deception, and thus follow the California state cases not imposing any survey requirement. *See generally Shady Grove Orthopedic Associates, P.A., v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010).

In conclusion, one can predict with confidence that consumer survey evidence will continue to play a role in consumer class actions.

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