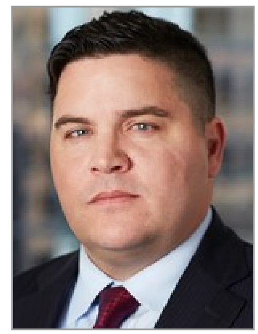
9th Circ. Raises Bar For Claims Over Nondefective Products

By **Jason Russell and Raza Rasheed** (January 5, 2021, 5:34 PM EST)

The U.S. Court of Appeals for the Ninth Circuit recently affirmed the dismissal of McGee v. S-L Snack National, a putative consumer class action, holding that the plaintiff did not plausibly allege that she suffered a cognizable physical or economic injury by eating popcorn that contained transfat as an ingredient.[1]



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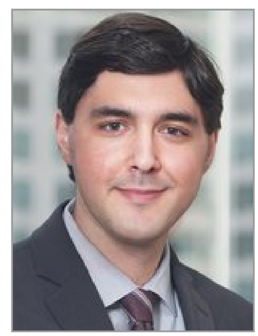
The decision clarifies, and arguably raises, the bar for disappointed consumers to establish standing to bring claims based on their purchase of nondefective products.

Background

The facts of McGee are straightforward. Jacquelyn McGee, a consumer, alleged that she purchased and consumed popcorn manufactured by the defendant, Diamond Foods Inc., which contained artificial transfat, a food additive allegedly linked to heart disease, diabetes and cancer, among other ailments.



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After discovering that the popcorn contained transfat, McGee brought a number of statutory and common law claims against Diamond Foods. She alleged that she suffered: (1) an economic injury because the popcorn was allegedly not fit for human consumption, and was thus not worth what she paid for it; and (2) present and future physical injuries because the popcorn harmed her heart and arteries, and increased her risk of developing serious health problems.

The U.S. District Court for the Southern District of California dismissed McGee's claims for failure to allege that she suffered an injury sufficient to give her standing to sue under Article III of the U.S. Constitution.

The Court's Decision

The Ninth Circuit affirmed. The court first analyzed and rejected McGee's theory that she did not receive the full benefit of her purchase because she thought she was buying a safe product when in fact she allegedly received an unhealthy one.

The court held that a plaintiff alleging that she was denied the "benefit of the bargain" — i.e., that she did not get what she paid for — must allege that the defendant made some misrepresentation about the product that induced her to purchase it. Because the popcorn's ingredients were accurately disclosed on its label, and Diamond Foods never represented that the popcorn did not contain transfat, the court rejected McGee's "benefit of the bargain" standing theory.

The court also rejected McGee's alternative theory of economic injury: that she overpaid for the popcorn because it was unhealthful, and thus worthless. The court noted that it had never squarely decided whether a plaintiff can assert an overpayment theory of economic injury when the defendant did not make any misrepresentations about the product in question.

The court declined to resolve this question, however, because the alleged adverse health effects of transfat were widely known long before McGee started consuming Diamond Foods' popcorn. Thus, the court could not accept that the popcorn's health risks were not reflected in its market price.

Finally, the court rejected McGee's theories that she suffered present and future physical injuries by eating Diamond Foods' popcorn. The court held that McGee's theory that she suffered present physical injuries to her heart and arteries was not plausible, because McGee had not undergone any diagnostic exam to confirm her injuries, and the medical journal articles she relied upon did not substantiate that eating a small quantity of transfat over a long period of time would necessarily injure her.

For the same reason, the court held that McGee's theory that eating the popcorn had substantially increased her risk of serious illness was too speculative to support standing.

The Decision's Significance

Although modest on its face, McGee could potentially make it substantially more difficult in two respects for consumers to bring claims in federal court relating to their purchase of nondefective products.

First, although McGee recognizes that plaintiffs may sometimes establish standing by claiming that they did not get what they paid for, the court was clear that plaintiffs cannot establish an economic injury merely by alleging that the product did not live up to their own subjective expectations for it. Rather, the court squarely held that a "benefit of the bargain" theory of injury is only viable if the defendant made representations about the product that were not true.

The court's holding thus potentially allows manufacturers to insulate themselves from nuisance class actions by carefully labeling their products — a significant win given the costs and risks associated with defending class action litigation that advances past the pleading stage.

Second, the Ninth Circuit may have materially limited consumers' ability to rely on an overpayment theory of injury. Although it did not say so explicitly, the court appears to have borrowed a concept from securities law — the assumption that a product's market price reflects publicly available information about that product — in rejecting McGee's economic injury allegations.

Essentially, the court reasoned that McGee could not have overpaid for Diamond Foods' popcorn because the popcorn's label disclosed that it included transfat, and adverse health effects from transfat were widely suspected when McGee made her purchase. This chain of reasoning may permit other manufacturer defendants to defeat consumer class actions at the pleading stage, based on publicly available information about the risks and characteristics of their products.

Moreover, although it did not unequivocally resolve the question, the Ninth Circuit implied that an overpayment theory of injury is not viable where the manufacturer has not made any misstatements that inflated a product's market price. If the court ultimately adopts this conclusion, it would further limit consumer plaintiffs' ability to allege economic injury, and give manufacturers more tools to dismiss nuisance suits at the pleading stage.

While the court noted that some courts have allowed overpayment claims to proceed even in the absence of misrepresentations about the product, those cases are arguably unsound. When a consumer considers purchasing a product, she compares the value she predicts she will receive from the product to the product's price.

Her prediction about the product's value is based on a combination of her wants and needs, and the information contained in the product's label and advertising. As long as that information is accurate and the product works as advertised, any overpayment that occurs — i.e., the consumer not getting the value from the product that she expected — cannot be the manufacturer's fault, because a manufacturer cannot completely control how consumers will value its product.

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[1] See McGee v. S-L Snack Nat'l, No. 17-55577 (9th Cir. Dec. 4, 2020).