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How To Fight The Rising Tide Of Cosmetic Class Actions

Law360, New York (June 03, 2014, 10:23 AM ET) -- Courts are seeing an unprecedented surge in consumer class actions against cosmetics companies. Multiple factors are likely to blame for this increase.

Warning letters that the U.S. Food and Drug Administration issued to cosmetics companies in late 2012 targeting the labeling and marketing of certain products are partly responsible for the uptick. In the letters, the FDA found fault with marketing claims suggesting that the products have properties "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 and 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 involving other industries. Plaintiffs' counsel have attempted a "makeover" of their class action food claims by applying some of the same theories to cosmetics products. Recently, plaintiffs have filed numerous consumer fraud class actions alleging cosmetics were improperly labeled 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 been 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 last year, class certification was granted in several lawsuits against cosmetics manufacturers. These results are likely to spur additional lawsuits.

Consumer Fraud Class Action Defense Strategies

Cosmetics companies facing consumer fraud class actions can follow these strategies to maximize their chances of successfully resolving these suits.

Get Thee to Federal Court

More often than not, defendants in class actions are better situated in federal court, where Rule 23's requirements are often more strictly applied. Since the Class Action Fairness Act 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.[1] Cosmetics companies facing state court consumer fraud class actions should strongly consider using CAFA to remove state court actions to a 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 analyze fraud allegations to determine whether they are pleaded with sufficient particularity as required by Rule 9(b). Finally, companies should evaluate whether the complaint pleads claims that are not legally viable (e.g., claims for breach of warranty in states requiring privity). 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.[2]

Primary Jurisdiction

When it is alleged that the use of a word on product labeling is fraudulent, but the FDA has provided no guidance on the word's meaning, companies have had success arguing that a finding of fraud by the court would violate the primary jurisdiction doctrine. Indeed, a California federal court recently dismissed a class action involving allegations that a cosmetics product was fraudulently labeled as "natural" because there were no FDA rules, regulations or even informal policy statements regarding the use of the word "natural" on cosmetics labels.[3]

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.[4] Motions have also been successful when the class was overly broad or when individualized

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 class certification, the company should vigorously contest certification. Carefully analyze 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. More often than not, plaintiffs will not be able 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.[5] 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 named plaintiff's deposition will be key on this point. Consider using a consumer behavior expert to testify about the myriad, individual reasons consumers purchase the product. In addition, damages must now be proven on a classwide basis.[6]

- Commonality: Companies can often make a compelling argument that the commonality requirement is not met. As the U.S. Supreme Court made clear in Wal-Mart Stores Inc. 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."[7]

- Ascertainability: Consider whether the proposed class is ascertainable. Courts typically hold that class members must be definable with reference to objective criteria.[8] When purchase records do not exist, class members have no objective criteria to prove that they purchased the product and belong in the class.[9]

- Adequacy: Evidence that the named plaintiff is untrustworthy and/or has close ties with class counsel may be reason enough to defeat Rule 23(a)(4)'s adequacy requirement. Courts have found plaintiffs of questionable veracity to be inadequate class representatives.[10]

Consider Filing a Motion for Summary Judgment to Coincide with Consideration of the 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 or injury or violation of the statute of limitations. Whether you win or lose, the court's consideration of the motion when considering 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, either at the pleading or class certification stage.

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[1] See Standard Fire Insurance Co. v. Knowles, 133 S. Ct. 1345, 1349 (2013) (holding that the named plaintiff's stipulation did not defeat federal jurisdiction under CAFA because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified).

[2] See, for example, Toback v. GNC Holdings Inc., No. 13–80526–CIV, 2013 (S.D. Fla. Sept. 13, 2013) (holding that the named plaintiff lacked Article III standing with respect to any products other than those he purchased); Lieberson v. Johnson & Johnson Consumer Cos., 865 F. Supp. 2d 529, 537 (D.N.J. 2011) (same).

[3] Astiana v. Hain Celestial Group Inc., 905 F. Supp. 2d 1013 (N.D. Cal. 2012).

[4] See, for example, Pilgrim v. Universal Health Card LLC, 660 F.3d 943, 946-48 (6th Cir. 2011) (holding that the predominance requirement was not satisfied because different states' laws would apply and "any potential common issues of fact cannot overcome this problem").

[5] See, for example, Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012) (decertifying a nationwide class because individual issues predominated).

[6] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

[7] Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2545 (2011).

[8] See, for example, Marcus v. BMS of North America LLC, 687 F.3d 583, 593-94 (Third Circuit 2012) (collecting cases).

[9] Karhu v. Vital Pharmaceuticals Inc. d/b/a VPX Sports, No. 13-60768, 2014 (S.D. Fla. March 3, 2014) (denying motion for class certification because inter alia the proposed classes were not ascertainable).

[10] See, for example, Bohn v. Pharmavite, No. 11-10430, 2013 (C.D. Cal. Aug. 7, 2013) (denying class certification because plaintiff's credibility would "undermin[e] the interests of the class").