NO MORE MISLEADING ADVERTISING CLASS ACTIONS?

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The ideal class action lawsuit is a case in which there are many similarly placed people who have been injured or who suffered a loss from the same cause, and in the same way, but where few or none of them have suffered sufficient injury to make individual lawsuits worthwhile. If you say that quickly, without giving it a great deal of consideration, misleading advertising seems to be a classic case for such actions. Thousands, perhaps millions, of consumers may have seen the same advertisement and purchased the same product – perhaps all from the same vendor. None of them are likely to have a sufficient loss to make an individual claim worthwhile. But despite the superficial attractiveness of class actions for misleading advertising, motions for certification have often proven unsuccessful.[1]

A recent decision by the Supreme Court of British Columbia, which involved a claim under the BC *Business Practices and Consumer Protection Act* (BPCPA), explains why we may see few such further attempts.[2] The *Energy Brands* case involved an allegation that the marketing and labels for "Vitaminwater" were contrary to the provision of the BPCPA, which prohibits deceptive practices. The allegation was, in essence, that the marketing and labels were misleading because they failed to disclose the considerable amount of sugar added to this "vitamin" product.

The court refused to certify the case as a class action for several reasons. Its key ruling was on the requirement of "commonality": the court held that the issue of whether any given representation induced a specific consumer to purchase a product will almost always be a matter for individual inquiry, and that consequently there were not sufficient common issues to justify a class action. The court noted:

> There is of course, no evidence that all consumers were misled, at all times, in respect of each and every consumer transaction in question. No such evidence would be possible. Yet the relief sought by the plaintiff in the context of the plaintiff's arguments for potential remedies would practically amount to such a conclusion. Otherwise there would be no utility in the declaration sought. (¶125)
>
> In the circumstances of this case, reliance on the various representations whether alone or in combination (as the plaintiff asserts) is inherently individual, as is any potential claim for damage or loss. (¶128)

> In my view similar reasoning [to that in the Singer case[3]] applies in this case. As I have already stated, the motivations lying behind the multitude of consumer transactions at issue are almost endlessly variable among consumers, and even within the context of any individual consumer. This is not a case where the plaintiff is asserting a specific and defined representation, nor is it a case where reliance could reasonably be inferred. (¶133)

This ruling is likely to be applicable to many, if not most, consumer misleading advertising class actions. Unless overturned on appeal, it is likely to militate against certification of most proposed consumer misleading advertising class actions, on the basis of lack of sufficient common issues.

The *Energy Brands* court also refused to certify on the basis that there was not an appropriately identified class.[4]

> The defendants argue, and I agree, that the proposed class definition would include persons who have no claim against the defendants, as well as persons who may have a different claim premised on a different factual basis than the one asserted by the plaintiff, and that the proposed class would include individuals who did not rely on any of the representations set out in the plaintiff's claims, who purchased Vitaminwater for reasons that have no connection to the plaintiff's claims, and who would have purchased it in any event. Therefore, as the defendants argue, the proposed class includes purchasers who may have been uninfluenced by the misleading representations the plaintiff asserts, or who were not misled, in that they may have purchased the product with a full and accurate appreciation of the product's attributes including its sugar content. (¶145)

Ultimately, given the finding on identifiable class, and the variable and indirect nature of the claim, the count found that a class action was not the preferable procedure for such cases. Accordingly, for each of these three reasons, the claim was not certified as a class action.

As noted above, if this decision is confirmed on appeal – and the reasoning adopted in other provinces – it may spell the death knell for most misleading advertising consumer class actions.

by James Musgrove, David Kent and Joshua Chad

1 See e.g. *Wilkinson v Coca-Cola Ltd*., 2014 QCCS 2631; *Wakelam v Johnson & Johnson*, 2014 BCCA 36, leave to appeal to SCC refused, [2014] SCCA No 125; *Ileman v Rogers Communications Inc*, 2014 BCSC 1002; *Arora v Whirlpool Canada LP*, 2013 ONCA 657, leave to appeal to SCC refused, [2013] SCCA No 498; *Price v Panasonic Canada Inc*, [2002] OJ No 2362; *Singer v Schering-Plough Canada Inc*., 2010 ONSC 42; *Griffin v Dell Canada Inc*, [2009] OJ No 418 (Ont SCJ) (certification granted, but not in respect of the alleged misleading representation); *Bédard c Kellogg Canada Inc*., 2008 FCA 125.

2 *Clark v Energy Brands Inc.*, 2014 BCSC 1891.

3 *Singer v Schering-Plough Canada Inc.* 2010 ONSC 42

4 The plaintiff proposed the following class: "Residents of British Columbia who, while residents of British Columbia, purchased one or more of the following nine varieties of Vitaminwater (collectively "Vitaminwater"): "defense"; "energy"; "essential"; "focus"; "formula 50"; "mega c"; "multi-v"; restore"; and "xxx" for consumption and not for resale.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.