

SPF 70 Claims Blocked re: Advertising Law

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A putative class action got burned at the certification stage earlier this month when U.S. Magistrate Judge Edwin G. Torres for the Southern District of **Florida** found that the proposed class failed to satisfy the ascertainability and typicality requirements.

Plaintiff Nathan Dapeer sued **Neutrogena**, claiming that he and similarly situated consumers had been deceived by the company's labeling of its Beach Defense Broad Spectrum SPF 70 Lotion. SPF, or Sunscreen Protection Factor, measures the degree to which a sunscreen protects skin against UV rays. According to Plaintiff, consumers generally believe that there is a linear relationship between a sunscreen's SPF and the protection it provides, when, in fact, SPFs over 50 do not offer increased protection compared to SPF 50. Dapeer alleged that Neutrogena took advantage of this common mistaken assumption by using "SPF 70" combined with a price premium to misleadingly suggest that the product provided superior sun protection than less expensive, lower SPF sunscreen products.

The complaint initially included other high-SPF Neutrogena products (SPF 55, 60, 85, 100 and 110), but an earlier motion to dismiss knocked out products Dapeer himself had not purchased. The amended complaint alleged that Neutrogena's labeling of the Beach Defense SPF 70 product violated the **Florida Deceptive and Unfair Trade Practices Act (FDUTPA)** and asserted a claim of unjust enrichment. Plaintiff proposed to certify a class of Florida consumers and two subclasses covering various states with respect to the unjust enrichment claim.

The court first noted that extensive state law conflicts defeated the predominance of any common questions of fact or law for the unjust enrichment claim. The FDUTPA claim, however, cleared the commonality hurdle. Surprisingly, the court was unfazed by the fact that Plaintiff's damages model was based on a hypothetical SPF 50 product and would require individualized determinations regarding the extent of damages suffered by each plaintiff.

Dapeer's inability to remember essential facts regarding the circumstances of his alleged purchase of the product at issue proved fatal to his certification bid for the FDUTPA claim. Unable to recall basic details crucial to his claim (when or where he purchased the product, how much he paid, and what other products he considered), the court found that the class was simply not ascertainable. If the named plaintiff could not remember these essential facts, the court reasoned that other members

of the proposed class would not remember these details either and class member identification would therefore be extremely difficult.

Dapeer's compromised memory also prevented satisfaction of the typicality requirement. The court found that because Dapeer could not remember how much he had paid for the product, when or where he purchased the product, or even if he had done so in Florida, he failed to provide evidence that he had standing or suffered injury-in-fact. Dapeer therefore did not have the requisite representative standing to satisfy the typicality requirement.

This case serves as a reminder that defense counsel should always assess the credibility and specific experience of the lead plaintiff in consumer class actions.

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