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PFAS UPDATE: LITIGATION TRENDS - MOTIONS TO DISMISS

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Marketing campaigns describing products as “green,” “natural,” and “clean” have become increasingly popular as companies seek to attract environmentally conscientious consumers. With a simultaneous increase in public awareness for per- and polyfluoroalkyl substances (“PFAS”), these marketing campaigns may now pose litigation risks when plaintiffs allege the products contain PFAS.

If plaintiffs challenge these marketing statements, a Motion to Dismiss the complaint is among the most important considerations for a defendant’s initial response. BCLP has reviewed numerous cases filed in 2022 involving false and misleading advertising claims based on the allegation that a product contains PFAS substances. While each case has fact-specific nuances, the consistent issue that has been highlighted in the Motions to Dismiss or an equivalent state court motion is plaintiff’s standing to pursue the claims based on their theory of economic damages.

Based on the rulings that have been issued thus far, courts appear to be more receptive to allow plaintiffs to explore their claims through discovery rather than dismissing the case at the pleading stage if plaintiffs pursue what is known as a “price premium economic injury theory.” Courts are usually less deferential when plaintiffs utilize a “benefit of the bargain theory.”

BACKGROUND

Before specifically discussing the Motions to Dismiss, it is important to understand the nature of the claims at issue in these suits. In general, the most common claims in these suits are for false or deceptive advertising based on statements on the product packaging itself, marketing statements, advertisements, or other public statements (such as in annual or sustainability reports) that are identified by plaintiffs as allegedly false or misleading. BCLP published a client alert further discussing this issue and highlighting the specific claims that are being targeted in specific industries. Remedies in these suits vary depending on the state law at issue but typically include monetary damages, and in some cases injunctive relief.

As discussed below, the theory of economic injury usually involves the claim that a plaintiff would not have purchased, or would have paid less for, a product had the marketing information been

accurate.

MOTIONS TO DISMISS BASED UPON STANDING

Defendants have argued in their Motions to Dismiss that plaintiffs have not sufficiently asserted an injury-in-fact that is necessary to confer standing in their cases. To establish standing, a plaintiff must usually demonstrate an injury-in-fact that is particularized. In this context, defendants argue that the plaintiff has failed to allege an injury-in-fact that is concrete, or stated another way, an injury that "actually" exists.

Courts hearing these Motions to Dismiss must answer the following question: has the plaintiff alleged a concrete injury-in-fact such that the plaintiff has standing to bring the litigation? In support of their claims, plaintiffs utilize two related, but distinct, theories to establish standing based upon economic injury:

1) The Benefit of the Bargain Theory; and,

2) The Price Premium Theory.

Depending on the facts, courts have thus far usually have granted Motions to Dismiss claims based on a benefit of the bargain theory, but have also found that the price premium theory may be sufficient to establish standing.

A. Benefit of the Bargain Theory

Under a benefit of the bargain theory, a plaintiff adequately alleges a concrete economic injury when she pleads that she bargained for a product worth a given value but received a product worth less than the value. This theory normally requires more than an allegation that a plaintiff did not receive a benefit she **thought** she was obtaining. Instead, a plaintiff must show she did not receive a benefit for which she "**actually**" bargained in the transaction.

Defendants in the PFAS context have been largely successful under this theory because plaintiffs have not been able to establish the actual benefit necessary to demonstrate standing. Defendants' success here is likely because many of these lawsuits fail to allege the products were "actually" worth less than the amount for which they were purchased. It should be noted, however, that where a defendant obtains dismissal under this theory, courts normally grant leave to amend the complaint.

B. Price Premium Economic Injury Theory

Under the price premium theory, courts have recognized a concrete economic injury when the plaintiff alleges one of the following: either she paid more for a product than she otherwise would have paid; or she bought a product when she otherwise would not have done so. If a product fails to identify on its packaging that it contains PFAS substances, and the product is marketed as "safe,"

"clean," or "natural," courts have often accepted a plaintiff's allegation that she would not have purchased the product, or would have paid less for it, as sufficient to establish standing.

CONCLUSION

False and misleading advertising claims based on the alleged presence of PFAS in consumer products are still relatively new, and there is limited case law available to help businesses evaluate the likelihood of success of these claims. Importantly, the Motions to Dismiss claims that have been decided to date indicate that standing is a major issue raised by defendants (at this point at least), and that courts appear to be more willing to allow certain damages theories to proceed more than others. Companies that are faced with these types of claims should pay particular attention to the theory of damages alleged and consider a Motion to Dismiss based on standing.

For more information on PFAS compounds and related matters, please visit our PFAS webpage. If you have a question about any PFAS litigation trends or cases, contact Tom Lee, Christian Bromley, Justin Jorgensen, John Kindschuh, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

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