

Chapter 95

Consumer Protection

*by Jerome L. Epstein, Jeremy M. Creelan, and Kenneth K. Lee**

I. INTRODUCTION

§ 95:1 Scope note

II. STRATEGIC AND OTHER PRACTICE CONSIDERATIONS

- § 95:2 When a new action is filed
- § 95:3 The complaint
- § 95:4 —Introduction section
- § 95:5 —Jurisdiction and venue
- § 95:6 —Parties
- § 95:7 —Factual allegations
- § 95:8 —Class allegations
- § 95:9 —Claims
- § 95:10 —Prayer for relief
- § 95:11 The answer
- § 95:12 Motions to dismiss and other threshold motions
- § 95:13 —Pleading standards
- § 95:14 —Additional bases for dismissal
- § 95:15 —Introducing evidence
- § 95:16 —Other options
- § 95:17 Fact discovery
- § 95:18 Experts and expert discovery
- § 95:19 Class certification
- § 95:20 —Timing of filing
- § 95:21 —Common arguments

*The following attorneys at Jenner & Block LLP, several of whom are already accomplished consumer law practitioners in their own right, contributed mightily to the production of this chapter: Christina Avedissian, Thomas A. Bousnakis, Lorenzo G. Di Silvio, Alisa C. Finelli, Thomas D. Garza, Wesley M. Griffith, Joycelyn S. Peyton, Alexander Smith, Kate T. Spelman, and Michael E. Stewart. Azza Khalifa assisted with the word processing and coordination necessary to complete its production.

BUSINESS AND COMMERCIAL LITIGATION 4TH

- § 95:22 — —Predominance under Rule 23(b)(3)
- § 95:23 — —Ascertainability
- § 95:24 Summary judgment
- § 95:25 Settlement
- § 95:26 The trial

III. FTC ENFORCEMENT OF CONSUMER PROTECTION STATUTES IN FEDERAL COURT

A. THE FEDERAL TRADE COMMISSION ACT

- § 95:27 Introduction
- § 95:28 Deceptive practices
- § 95:29 —Likelihood to mislead the consumer
- § 95:30 —Reasonable consumer
- § 95:31 —Materiality of misleading representation
- § 95:32 Unfair practices
- § 95:33 Individual and corporate liability

B. THE FTC ENFORCEMENT PROCESS

- § 95:34 Investigative tools
- § 95:35 Administrative trials
- § 95:36 Consumer redress

C. THE FTC'S REGULATION OF MARKETING AND ADVERTISING

- § 95:37 Section 12
- § 95:38 Recent enforcement actions involving food
- § 95:39 Recent enforcement actions involving consumer products
- § 95:40 Health, safety, and efficacy
- § 95:41 —Testing requirements to substantiate health and efficacy claims
- § 95:42 —Requiring FDA approval
- § 95:43 Individual liability

IV. ENFORCEMENT OF CONSUMER PROTECTION STATUTES BY THE CONSUMER FINANCIAL PROTECTION BUREAU

A. CFPB ENFORCEMENT

- § 95:44 Creation of the CFPB
- § 95:45 Office of Enforcement
- § 95:46 Office of Supervision Examinations
- § 95:47 Office of Fair Lending and Equal Opportunity

CONSUMER PROTECTION

B. FEDERAL STATUTES ENFORCED BY THE CFPB

- § 95:48 Overview
- § 95:49 Truth-in-Lending Act
- § 95:50 Real Estate Settlement Procedures Act
- § 95:51 —Kickback and broker fee provisions
- § 95:52 Home Mortgage Disclosure Act
- § 95:53 Unfair, Deceptive, or Abusive Acts or Practices
- § 95:54 Equal Credit Opportunity Act
- § 95:55 Fair Debt Collection Practices Act
- § 95:56 Electronic Fund Transfer Act

V. ENFORCEMENT OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY, AND ENFORCEMENT ACT OF 1989

- § 95:57 Financial Institutions Reform, Recovery, and Enforcement Act of 1989

VI. FEDERAL CONSUMER PROTECTION STATUTES: PRIVATE CAUSES OF ACTION

- § 95:58 Telephone Consumer Protection Act
- § 95:59 Real Estate Settlement Procedures Act
- § 95:60 —Private right of action under RESPA § 6 for transfer disclosures and certain obligations of the servicer
- § 95:61 —Exempted transactions
- § 95:62 —Prohibition against kickbacks and unearned fees
- § 95:63 —Advance deposits in escrow accounts
- § 95:64 —Prohibition on certain fees
- § 95:65 —Jurisdiction and limitations
- § 95:66 —Class actions

VII. STATE CONSUMER PROTECTION LAW CLAIMS IN FEDERAL COURT

- § 95:67 Introduction
- § 95:68 Standing
- § 95:69 —Claims for products not purchased
- § 95:70 —Injunctive relief
- § 95:71 Ascertainability
- § 95:72 Predominance
- § 95:73 Superiority
- § 95:74 Typicality and adequacy of class representative

VIII. SAMPLE PLEADINGS AND JURY INSTRUCTIONS

- § 95:75 Form: RESPA complaint

BUSINESS AND COMMERCIAL LITIGATION 4TH

- § 95:76 Form: RESPA jury instructions
§ 95:77 Form: FDCPA jury instructions

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

I. INTRODUCTION

§ 95:1 Scope note

This chapter addresses certain aspects of litigation involving claims by or on behalf of consumers. First, the chapter addresses strategic questions and issues often faced by litigants in consumer protection cases at different stages in federal court.¹ Second, the chapter summarizes some of the most significant federal statutes in this area that underlie either federal agency enforcement actions or claims by private litigants, and which are not discussed in depth in other chapters of this treatise. This portion of the chapter focuses first on enforcement of these statutes by the Federal Trade Commission (“FTC”),² the Consumer Financial Protection Bureau (“CFPB”),³ or the Department of Justice.⁴ The section then focuses on private causes of action brought in federal court under federal statutes⁵ and on state consumer protection law claims in federal court.⁶ Finally, the chapter provides examples of a complaint, answer, and jury instructions for consumer protection cases.⁷ It should be noted that certain topics closely related to consumer protection litigation — for example, class actions,⁸ competition law,⁹ and data privacy¹⁰ — are addressed in depth in other chapters and thus are addressed here, if at all, in a limited fashion.

[Section 95:1]

¹See §§ 95:2 to 95:26.

²See §§ 95:27 to 95:43.

³See §§ 95:44 to 95:56.

⁴See § 95:57.

⁵See § 95:58 to 95:66.

⁶See §§ 95:67 to 95:74.

⁷See §§ 95:75 to 95:77.

⁸See Chapter 19 “Class Actions” (§§ 19:1 et seq.).

⁹See Chapter 75 “Antitrust” (§§ 75:1 et seq.) and Chapter 121 “Torts of Competition” (§§ 121:1 et seq.).

¹⁰See Chapter 122 “Privacy and Security” (§§ 122:1 et seq.).

II. STRATEGIC AND OTHER PRACTICE CONSIDERATIONS

§ 95:2 When a new action is filed

This section addresses a number of steps that are particularly important when representing a client in a newly filed consumer protection case. Consumer protection cases, and particularly class actions, tend to be filed in clusters. In large part this occurs because the business practices at issue are reported in the media or are the subject of government investigations and then gain traction among consumers and their counsel. Lawsuits often follow. Accordingly, it is important to become aware of and to track developments in any parallel actions involving the same or similar practices, even involving a party that is not involved in the litigation you are handling. A series of questions regarding such parallel cases should be asked, including:

- Do parallel actions involve any of the same parties or counsel?
- Have any parallel actions already been resolved, and, if so, what arguments were successfully asserted? What evidence was significant to the fact-finder? If the case settled, how much was paid and what types of injunctive provisions were agreed to?
- Are there sufficient numbers of parallel actions in any court to warrant treatment as a multidistrict litigation in a single district court under 28 U.S.C.A. § 1407?¹ The benefits and drawbacks of seeking treatment as a related case or treatment as a multidistrict litigation should be considered. Even if MDL consolidation is not likely, parties should consider whether similar lawsuits in various jurisdictions should be consolidated into a single district court under the first-to-file doctrine. That doctrine allows judges in the later-filed actions to transfer, stay, or dismiss those actions in deference to the first-filed matter.
- Has the assigned judge handled cases involving similar claims before, and, if so, what can one learn from her prior decisions in the area?

When representing the defendant in such a case, it may be valuable to gather any publicly-available screenshots or cached files of any information on social media sites concerning the named plaintiffs before such information is removed. In addition, regardless which party counsel represents, it is important to gather prior statements made about the product or practice at issue, and

[Section 95:2]

¹See generally Chapter 14 “Multidistrict Litigation” (§§ 14:1 et seq.).

§ 95:2

BUSINESS AND COMMERCIAL LITIGATION 4TH

advertising of the product, by the defendant in any form. Further, any evidence relating to the purchase of the product at issue by the named plaintiff(s) should be gathered, including receipts, warranties, warranty cards, contractual documents, recordings or documentation of communications with customer service, and any documentation related to any advertising referenced in the complaint.

Counsel for defendant in such cases should promptly determine if any other entities or persons should be added to the case as a third-party defendant (*e.g.*, retailers, suppliers, or other entities in the supply chain). Such counsel should also explore whether the defendant may seek indemnification from other entities, or whether any other entities are able and likely to seek indemnification from the defendant.

In addition, the defendant should inquire as to the availability of insurance coverage to address the defense costs, and expenses, to be incurred in the defense of the action, as well as to respond to any possible settlement or judgment arising from the lawsuit.² Once potentially responsive insurance policies have been identified, notice of the lawsuit should be tendered for each of the policies, and the defendant should request that one or more of the insurers agree to pay for defense costs and expenses. Sometimes, an insurer may wish to assign “panel counsel” to defend such a lawsuit, but many insurers recognize the wisdom of permitting the defendant to choose defense counsel familiar with the defendant’s business operations and who will, accordingly, defend the action more efficiently. Once an insurer has agreed to cover defense costs (either through reimbursement of the company or by paying defense counsel directly), the defendant must make sure to keep the insurer informed of developments in the case, and opportunities for settlement. Most insurance policies require that the insured seek consent from the insurer before entering into any final settlement, but the insurer’s consent may not be unreasonably withheld.

§ 95:3 The complaint

When representing a plaintiff in a consumer protection case, particularly a class action, the first strategic consideration is whether to file in state or federal court. The law and strategic considerations governing this issue are addressed in another chapter of this treatise.¹

As addressed in more detail in the discussion of motions to

²See generally Chapter 90 “Insurance” (§§ 90:1 et seq.).

[Section 95:3]

¹See Chapter 10 “Comparison with Commercial Litigation in State Courts”

dismiss in Sections 95:12 to 95:16 of this chapter, plaintiffs filing in federal court must demonstrate through their allegations in the complaint that they have standing to bring their claims in federal court under Article III of the U.S. Constitution.² Further, plaintiffs must satisfy pleading requirements in federal court that often exceed those in state courts and have arguably become significantly more stringent in recent years.³ In particular, in *Bell Atlantic Corp. v. Twombly*⁴ and *Ashcroft v. Iqbal*,⁵ the U.S. Supreme Court announced heightened Rule 8 pleading standards requiring plaintiffs' claims to rise to a more stringent level of plausibility, especially when compared with the notice pleading requirement adopted by most state courts. That requirement has been interpreted to require plaintiffs to allege sufficient details regarding the defendant's violation of law and the resulting injury to the plaintiff to render "plausible" the claim asserted rather than simply possible.⁶ Moreover, under Federal Rule of Civil Procedure 9(b), claims that "sound in fraud" must be pleaded with particularity. Many courts have held that claims under state consumer fraud statutes are subject to Rule 9(b).⁷

Furthermore, removal to federal court of a consumer protection class action that originated in state court should always be considered.⁸

§ 95:4 The complaint—Introduction section

As in other types of cases, it is often useful to begin the complaint with a section titled "Introduction" or "Nature of the Action" that summarizes the lawsuit, especially if the complaint is long or technical. The rest of the complaint will flesh out these allegations; the goal of this section is to explain the case to the judge and to other readers.

(§§ 10:1 et seq.).

²See generally Chapter 1 "Subject Matter Jurisdiction" (§§ 1:1 et seq.).

³See § 95:13 and Chapter 7 "The Complaint" (§§ 7:1 et seq.).

⁴550 U.S. 544 (2007).

⁵556 U.S. 662 (2009).

⁶See, e.g., *Garrison v. Oracle Corporation*, 159 F. Supp. 3d 1044, 1071, 2016-1 Trade Cas. (CCH) ¶ 79514 (N.D. Cal. 2016) (dismissing complaint because "[a] review of the allegations in the [amended complaint] again fails to reveal any specific conduct by [the defendant]"); *Holloway v. Wells Fargo Bank, N.A.*, 2013 WL 1187156, at *10 (N.D. Tex. 2013), report and recommendation adopted, 2013 WL 1189215 (N.D. Tex. 2013) (dismissing plaintiff's FDCPA claim because it failed to allege specific facts to render claim plausible).

⁷See, e.g., *Hesano v. Iovate Health Sciences, Inc.*, 2014 WL 197719, at *4 (S.D. Cal. 2014) (applying Rule 9(b)'s requirements to claims under California unfair competition and false advertising laws).

⁸See generally Chapter 12 "Removal to Federal Court" (§§ 12:1 et. seq.).

§ 95:5

BUSINESS AND COMMERCIAL LITIGATION 4TH

§ 95:5 The complaint—Jurisdiction and venue

If there is a basis for federal jurisdiction, this section should cite the appropriate jurisdictional statute and briefly set forth the relevant jurisdictional facts. For example:

- Jurisdiction is proper under 28 U.S.C.A. § 1331 because Plaintiff's claim arises under the Telephone Consumer Protection Act, 47 U.S.C.A. §§ 227 et seq.
- Jurisdiction is proper under 28 U.S.C.A. § 1332(d) because at least one member of the class resides in California, Acme Corporation resides in Illinois, and there is at least \$5 million in controversy, exclusive of interest and costs.

This section should also recite a basis for venue. Typically, if all defendants reside in a single state the complaint should be filed in a district of that state where any defendant resides or where a “substantial part of the events or omissions giving rise to the claim occurred.”¹

In consumer fraud cases involving products sold nationwide, there are often multiple appropriate venues. The choice of venue will likely be influenced by the law of the forum state or district, especially if it is brought under the federal court's diversity jurisdiction pursuant to 28 U.S.C.A. § 1332(a). In choosing a venue, keep in mind that a defendant may attempt to transfer venue to another district under 28 U.S.C.A. § 1404.²

§ 95:6 The complaint—Parties

This section of the complaint specifies certain facts about the parties in the case. In federal court cases relying upon the court's diversity jurisdiction under 28 U.S.C.A. § 1332(a) or the Class Action Fairness Act (“CAFA”), it is particularly important to specify the state citizenship of the parties.¹

The allegations in this section must be sufficient to demonstrate that the named plaintiffs have standing. In order to demonstrate Article III standing, the plaintiff must be able to allege (and later prove): (a) a sufficiently concrete and particularized injury; (b) a causal connection between that injury and the defendant's conduct; and (c) a likelihood that a favorable decision

[Section 95:5]

¹28 U.S.C.A. § 1391. See also Chapter 3 “Venue, Forum Selection, and Transfer” (§§ 3:1 et seq.).

²See Chapter 3 “Venue, Forum Selection, and Transfer” (§§ 3:1 et seq.).

[Section 95:6]

¹See Chapter 1 “Subject Matter Jurisdiction” (§§ 1:1 et seq.).

could redress that injury.² In addition, state consumer fraud statutes often impose more stringent standing requirements. In particular, certain state consumer protection laws require that a plaintiff must have suffered an *economic* injury. In consumer fraud suits, a plaintiff may be able to satisfy this requirement by alleging, in sufficient detail and not just generically, that he would not have purchased the product but for the defendant's misrepresentations or that he paid an inflated price in reliance on those representations.³

Even if a plaintiff has standing to sue for damages or other retrospective relief (*e.g.*, restitution), she may not have standing to sue for injunctive relief.⁴ The latter may depend upon whether the plaintiff is likely to purchase the same products (or similar products) in the future and, if so, such allegations should be included in the complaint. In addition, some courts have held that a plaintiff lacks standing to assert claims based on products she did not personally purchase,⁵ while others have held that a plaintiff has standing so long as she purchased "substantially similar" products.⁶

If the complaint asserts relief on behalf of consumers in multiple states (or a nationwide class), consider whether the plaintiff is an appropriate plaintiff to assert claims on behalf of consumers from other states. Many courts have found that a class action complaint may not allege claims based on the law of states in which no named plaintiff resides.⁷

In a purported class action, it is important to assess whether the named plaintiff is an adequate and typical class representa-

²See, *e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64, R.I.C.O. Bus. Disp. Guide (CCH) P 11050 (2d Cir. 2006).

³See, *e.g.*, *In re NJOY, Inc. Consumer Class Action Litigation*, 120 F. Supp. 3d 1050, 1088, 98 Fed. R. Evid. Serv. 214 (C.D. Cal. 2015).

⁴See § 95:70 for discussion of standing to pursue to injunctive relief.

⁵See § 95:69 for discussion of standing to assert claims for products not purchased.

⁶Compare *Lieberson v. Johnson & Johnson Consumer Companies, Inc.*, 865 F. Supp. 2d 529, 537 (D.N.J. 2011) ("Because Plaintiff has not alleged that she purchased or used two of the four [] products at issue here, Plaintiff cannot establish an injury-in-fact with regard to those products."), with *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012) ("[A] plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar.").

⁷See, *e.g.*, *In re HSBC BANK, USA, N.A., Debit Card Overdraft Fee Litigation*, 1 F. Supp. 3d 34, 49 (E.D. N.Y. 2014), on reconsideration, 14 F. Supp. 3d 99 (E.D. N.Y. 2014) ("In this case, the Court finds that the Plaintiffs may only assert a state claim if a named plaintiff resides in, does business in, or has some other connection to that state.").

§ 95:6

BUSINESS AND COMMERCIAL LITIGATION 4TH

tive,⁸ a requirement under Federal Rule of Civil Procedure 23. Among other questions, consider:

- Did the named plaintiff actually purchase the product at issue? Will it be possible to prove that he or she purchased it?
- Is the named plaintiff a serial plaintiff? Have other courts found him inadequate?
- Are there any individualized defenses that would apply only to the named plaintiff?

Similarly, the defendants must be appropriately chosen. Among other questions, consider:

- In a non-CAFA diversity case, would any named defendant defeat diversity jurisdiction?
- If suing a corporate defendant, has the correct company been named? Parent companies are not typically liable for the torts of their subsidiaries or affiliates and vice versa.

§ 95:7 The complaint—Factual allegations

The “factual allegations” section must contain sufficient detail to substantiate whatever claims the plaintiff alleges, especially in light of the pleading standards imposed by Federal Rule of Civil Procedure 9(b).¹ For consumer fraud claims, this section should include, among other things, detailed allegations that address:

- Information about the plaintiff’s purchase of the product.
 - Where did he or she purchase the product?
 - When did he or she purchase the product?
 - How much did he or she pay for the product?
- The specific portions of the advertising or apparent packaging that were allegedly false or misleading.
 - Consider images, unusually large font, or other distinctive characteristics as well as the statement itself.
 - Include portions of the packaging or advertising seen and relied upon by the plaintiff in the allegations. In turn, the defendant may also submit other portions of the packaging or advertising for the court’s consideration under the “incorporation by reference” doctrine.
 - Consider also citing representations made in marketing campaigns upon which the plaintiff relied that were allegedly false or misleading.
- Allegations detailing why the allegedly misleading representations were material to consumers and why they relied on

⁸See § 95:76.

[Section 95:7]

¹See Chapter 7 “The Complaint” (§§ 7:1 et seq.).

them.

— Consider that most consumer protection statutes are interpreted using a “reasonable consumer” standard, so the complaint should allege why those representations were material to a reasonable consumer.²

- Why the allegedly misleading representations were, in fact, false or misleading.
 - In certain cases, it is important to distinguish between claims alleging certain representations were *false*, and those alleging certain representations were *unsubstantiated*. The applicable statutes and case law should provide guidance on the importance, if any, of this distinction.³
- Information relevant to damages/restitution, *e.g.*, the purchase price, the cost of comparable products, the value and method of calculation of any alleged premium paid, etc.

§ 95:8 The complaint—Class allegations

While the requirements of Rule 23 are typically assessed at class certification, some courts have granted motions to dismiss or strike inadequately-pled class allegations. To that end, it is important to make sure that the complaint’s allegations satisfy each of the requirements of Rule 23.¹ When considering how to define the class in consumer protection class actions, consider the following:

- Are there a sufficient number of class members to satisfy the numerosity requirement?
- Is the class membership sufficiently ascertainable?²
- Did the class members suffer essentially the same injury? Did they buy the same product? Did they see the same labels? Did they pay the same price? If the answer to these questions (or similar questions) is “no,” consider whether to define the class more narrowly.
- Is the class a nationwide class? If so, are there state-specific subclasses? (Consider adding state-specific subclasses or limiting the states included when the complaint alleges multiple claims under the consumer protection laws of different states.)

²See § 95:30 for a discussion of the “reasonable consumer”.

³See § 95:29 for a discussion of false and unsubstantiated claims.

[Section 95:8]

¹See generally Chapter 19 “Class Actions” (§§ 19:1 et seq.).

²See § 95:71.

§ 95:9 The complaint—Claims

This section should recite the elements of the claims alleged in the complaint. Consider the following questions when deciding which claims to allege or whether a complaint has satisfied the applicable requirements:

- Which elements are required to be pled by the plaintiff? Will proving certain elements on a class-wide basis (especially reliance and materiality) be difficult?
- Does the claim sound in fraud, so as to subject it to Rule 9(b)?
- If there are class members from multiple states, will alleging certain state-law claims require the court to apply materially different laws from different states? If so, will this prevent class certification (likely for predominance-related reasons)?¹
- What relief is available? Certain state consumer protection laws allow damages, while others do not.²
- Are punitive damages or other enhancements available, and what is required to obtain them?
- Are attorney’s fees available?³
- Does the statute require prior notice to the defendant or impose other procedural requirements before filing a lawsuit (e.g., California’s Consumer Legal Remedies Act)?

In addition to claims based on state consumer protection statutes, many consumer class actions assert the following state-

[Section 95:9]

¹See § 95:72.

²Certain state statutes target very particularized conduct and include specific provisions regarding the relief available. For example, New Jersey’s Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18, was enacted in 1982 but has only recently spawned a wave of consumer litigation. The statute prohibits merchants from employing contracts, notices, or signs that include any terms that violate New Jersey law. It also forbids the use of broad “void where prohibited” clauses without specifying which provisions, specifically, are invalid in New Jersey. An “aggrieved” consumer may seek actual damages or a minimum statutory penalty of \$100. In 2013, the New Jersey Supreme Court drew new interest to the statute by holding that it covered online restaurant coupons that failed to specifically indicate whether their terms were valid in New Jersey. *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 70 A.3d 544 (2013). Since that time, consumers have brought a variety of class actions challenging non-specific “void where prohibited” clauses employed by various kinds of businesses in New Jersey. See, e.g., *Greenberg v. Mahwah Sales & Service, Inc.*, No. BER-L-6105-15 (Super. Ct. N.J. Jan. 8, 2016); *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 208–10 (D.N.J. 2015); *Venditto v. Vivint, Inc.*, 2014 WL 5702901, at *1 (D.N.J. 2014).

³See generally Chapter 57 “Court-Awarded Attorney’s Fees” (§§ 57:1 et seq.).

law claims:

- Breach of Express and/or Implied Warranty.⁴
 - This class of claims may also include claims for violation of the Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301, which incorporates state warranty law.
- Intentional Misrepresentation.
- Negligent Misrepresentation.
- Unjust Enrichment.

§ 95:10 The complaint—Prayer for relief

This section should include the following relief, as appropriate:

- Damages
 - Statutory and/or punitive damages, if applicable.
 - A request for pre-judgment and post-judgment interest.
 - Consider whether to include a specific amount of damages, usually expressed as a minimum (“at least . . .”).
 - If no damages are available, consider whether analogous equitable relief (*e.g.*, restitution) is allowed.
- Injunctive relief
- Attorney’s fees, if allowed by statute

This section should end with a catch-all request for relief, *e.g.*, “such other and further relief as the Court deems just and proper.”

Finally, it is important to consider whether the claims asserted support a request for a jury trial, rather than a bench trial. If so, such a request should be included beside the caption on the first page of the complaint to ensure that the plaintiff’s right is protected and not arguably waived.¹

§ 95:11 The answer

In addition to the defenses listed in Federal Rule of Civil Procedure 8(c),¹ defendants should consider whether additional affirmative defenses are applicable and appropriate to include in an answer to a consumer protection complaint. For example:

- Conformity with the Law
 - Certain state consumer protection laws provide for exemptions from the statute if the defendant’s conduct

⁴See generally Chapter 117 “Warranties” (§§ 117:1 et seq.).

[Section 95:10]

¹See Chapter 7 “The Complaint” (§§ 7:1 et seq.).

[Section 95:11]

¹See Chapter 8 “Responses to Complaints” (§§ 8:1 et seq.).

§ 95:11

BUSINESS AND COMMERCIAL LITIGATION 4TH

was authorized by a regulatory agency. For instance, under the Illinois Consumer Fraud Act, “actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of [Illinois]” are not subject to the statute.² Courts have held that this exemption applies if a defendant’s conduct was in compliance with federal regulations, such as FDA regulations.³

- Absence of Actual Damages
 - Certain consumer protection statutes require that plaintiffs suffer actual damages. A plaintiff’s lack of actual damages may therefore be asserted as an affirmative defense.⁴
- Sufficient Disclosure
 - Under certain circumstances, disclosure by warranty may be an affirmative defense to consumer protection claims. Defendants have argued that a warranty is an express acknowledgment of the potential for defects and therefore is a defense to allegations that the plaintiff engaged in misleading or deceptive practices.⁵ Courts are wary of allowing consumer protection claims where a product has outlasted the warranty because such claims would effectively compel manufacturers and sellers to extend their warranties for the entire life of a product.⁶ However, a warranty defense may be unavailable where there are allegations of intentional concealment of a defect or where a defendant has an obligation to disclose the defect.⁷
- Plaintiff is Sophisticated Entity
 - Certain state consumer protection laws do not apply to transactions among “sophisticated entities” in the “ordinary course of business.”⁸ Because such entities are capable of protecting themselves via contract and tort law, they do not fall within the class of persons or enti-

²815 ILCS 505/10b(1) (2016).

³Newman by Newman v. McNeil Consumer Healthcare, 2013 WL 7217197 at *5 (N.D. Ill. 2013).

⁴See Raziev v. Compass Truck Sales, LLC, 2014 WL 184967 at *2 (N.D. Ill. 2014).

⁵See Doll v. Ford Motor Co., 814 F. Supp. 2d 526, 546 (D. Md. 2011).

⁶Doll v. Ford Motor Co., 814 F. Supp. 2d 526, 546 (D. Md. 2011) (citing *In re Philips/Magnavox Television Litigation*, 2010 WL 3522787, at *6–7 (D.N.J. 2010)).

⁷Doll v. Ford Motor Co., 814 F. Supp. 2d 526, 546 (D. Md. 2011).

⁸See *Ivanhoe Financial, Inc. v. Highland Banc Corp.*, 2004 WL 2091997 at *6 (N.D. Ill. 2004).

ties that consumer protection laws were designed to protect.⁹ Federal courts have permitted affirmative defenses alleging lack of standing under this principle of consumer protection law.¹⁰

§ 95:12 Motions to dismiss and other threshold motions

In consumer protection cases, motions to dismiss¹ are often used to valuable effect to limit or end claims before a defendant is required to expend substantial resources in discovery or, in class actions cases, attempting to defeat the certification of a class. Sections 95:13 to 95:16 of this chapter outline some of the most common bases for such motions that should be considered by defense counsel and plaintiffs' counsel alike.

§ 95:13 Motions to dismiss and other threshold motions— Pleading standards

Particularly in class actions, the pleading requirements are stringent and care must be taken to satisfy them. For defense counsel, the plaintiff's failure to do so can provide a sound basis for a motion to dismiss. These requirements have been heightened further in recent years in several U.S. Supreme Court decisions that reinforce that a plaintiff's allegations must render her claims plausible and not just possible.¹

In consumer fraud cases, Federal Rules of Civil Procedure 8 and 9 usually apply. Rule 8 requires pleading of the facts — as opposed to legal conclusions — to meet the plausibility standard, and each element of each cause of action must contain sufficient factual allegations to make it plausible. Rule 9 applies not only to

⁹Ivanhoe Financial, Inc. v. Highland Banc Corp., 2004 WL 2091997 at *6 (N.D. Ill. 2004); see also Greenpoint Mortg. Funding, Inc. v. Family First Mortg., Inc., 2007 WL 2608554, at *6 (N.D. Ill. 2007).

¹⁰See Ivanhoe Financial, Inc. v. Highland Banc Corp., 2004 WL 2091997 at *6 (N.D. Ill. 2004).

[Section 95:12]

¹See Chapter 8 “Responses to Complaints” (§§ 8:1 et seq.) for discussion of motions to dismiss generally.

[Section 95:13]

¹See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007) (to survive a motion to dismiss, a complaint must set forth “enough facts to state a claim to relief that is plausible on its face”); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 2009-2 Trade Cas. (CCH) ¶ 76785, 73 Fed. R. Serv. 3d 837 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). See Chapter 7 “The Complaint” (§§ 7:1 et seq.).