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An Inch, 3% Or 10 Calories: Which Is Material?

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Class plaintiffs often accuse food manufacturers of misrepresenting some aspect of their product offerings. There are countless examples where the discrepancies latched onto by the plaintiffs' bar between what the manufacturer advertised and what the consumer received are small.

But how small is too small to matter? Lawyers have a name for this question: materiality. A claim for fraudulent misrepresentation can only go forward if the alleged misrepresentation is material.

The Seventh Circuit recently rejected a proposed settlement involving Subway, citing materiality as one reason. In In re Subway Footlong Sandwich Marketing & Sales Practices Litig., ___ F.3d ___, 2017 WL 3666635 (7th Cir. Aug. 25, 2017), class members sued Subway for marketing its trademark sandwich as a "footlong" when some sandwiches fell a little short.

The parties presented a settlement to the district court that involved injunctive relief and up to $525,000 in attorney's fees. The Seventh Circuit Court of Appeals rejected the settlement, calling it "utterly worthless." Discovery established that the vast majority of sandwiches are 12 inches; minor variations in length were attributable to unpreventable vagaries in the baking process. Importantly, even if the sandwich was slightly shorter, each customer received the same amount of food.

The court noted that "the element of materiality — a requirement for a damages claim under most state consumer-protection statutes — was an insurmountable obstacle to class certification" because "[i]ndividualized hearings would be necessary to identify which customers, if any deemed the minor variation in bread length material to the decision to purchase." Because there was no compensable injury, the parties shifted to an injunctive relief class, which the court said "d[id] not benefit the class in any meaningful way."

In the coming years, the Seventh Circuit is likely to see additional cases against food manufacturers addressing what seem to be similarly immaterial discrepancies. Indeed, days after the Subway opinion, the Northern District of Illinois blessed such a lawsuit (at least at the pleading stage) against Lifeway Foods. In Block v. Lifeway Foods Inc., No. 17-1717, 2017 WL 38955655 (N.D. Ill. Sept. 6, 2017), a consumer accused Lifeway of fraudulently misrepresenting that its kefir product contained one percent (or less) lactose, when it actually contained three percent more. The plaintiff alleged he purchased

based on that representation.

Although Lifeway did not move to dismiss based on materiality, the court fronted the issue, noting that "consumers have brought consumer fraud claims against food manufacturers based on discrepancies between the quality of the food and the manufacturer's representations that are so minor as to be immaterial." The plaintiff had cited "health benefits that come from not consuming lactose," and the fact that four percent lactose is the same as regular milk. The plaintiff also argued that Lifeway deliberately misrepresented the percent of lactose in order to boost its sales and justify charging the same price for 32 ounces of kefir that consumers pay for 128 ounces of milk. Based on these arguments, the court found the discrepancy was "not marginal or immaterial."

Another case recently filed in Illinois state court — that will likely be removed to federal court — also turns on the same key issue. In Tyksinski v. Wm. Wrigley Jr. Co., Case No. 2017-CH-11877 (Cook Cty., Ch. Div. Aug. 30, 2017), a consumer sued Wm. Wrigley Jr. Company and Mars Inc. for an alleged discrepancy between the calories disclosed on the front of a package of Starburst Gummies Sours — 130 calories — and the actual calorie count: a whopping 10 additional calories (for a total of 140 calories). The plaintiff's allegations signaled that he is aware of the impending fight; he alleges that the product "contains materially more calories per serving" and "appreciably more calories than he intended" to consume.

While this case was filed in state court, it is likely that the defendant will seek to remove to federal court under the Class Action Fairness Act, which makes a class action removable when the putative class is over 100 members, at least one class member is diverse from at least one defendant and more than $5 million is in controversy. Tyksinski is seeking to represent a nationwide class of "hundreds, if not thousands" of class members who purchased the Gummies Sours for the length of the statute of limitations period. This case is likely headed to federal court where a federal district court, and possibly the Seventh Circuit, will weigh in.

The good news for defense lawyers is that there are several avenues available to attack materiality or assert analogous arguments like "no injury" or "lack of reliance." The first is challenging the plaintiff's Article III standing to bring the claim. A plaintiff must adequately allege she "suffered an injury in fact" — see Spokeo Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) — and a claimed discrepancy can be so insignificant that it fails to constitute a constitutional injury.

The second is challenging a representation as inactionable because the discrepancy between that promised and that proferred is not meaningful. At bottom, this argument is calling on a court's common sense and life experience in evaluating whether a consumer would actually care about the difference. In Lifeway, the court was persuaded that the plaintiff found meaningful the "health benefits that come from not consuming lactose," particularly when compared with the allegation that the kefir was no different than regular milk, which is "anything but lactose-free."

A related argument is that plaintiff failed to adequately allege (or establish, depending on the stage of the litigation) that he or she relied on the representation in making the purchase — and, accordingly, would not have purchased the item if he or she knew the truth. Lifeway presents a potential weakness in this argument. In that case, the plaintiffs alleged that the misrepresentation was deliberate and designed to boost sales of kefir. The court held that allegations that the defendant intended for consumers to rely upon a deceptive statement was sufficient. In other words, the court credited allegations regarding the defendant's intent, seemingly obviating the need to establish that the plaintiff relied on the statement (although, in Lifeway, the plaintiff did specifically allege reliance).

Third, defense counsel can challenge the claim as failing to establish a viable damages theory. This last argument proved fatal in the Subway settlement because the original action sought relief on behalf of a damages class under Rule 23(b)(3). After a short discovery period, it became clear that plaintiffs' damages theory was flawed. The court noted that "[p]roof of injury was nigh impossible because no customer whose sandwich roll actually failed to measure up received any less food because of the shortfall." So the parties negotiated a settlement for injunctive relief under Rule 23(b)(3) instead. However, the injunctive relief afforded by the settlement – even with the enforcement hook of contempt sanctions – "equal[ed] zero."

(So the answer to the question in the headline is three percent — but that may change, so stay tuned.)

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