Overview
In the world of consumer product class actions, fact patterns may often sound like the prelude to a lawyer joke. Indeed, the punch lines to most lawyer jokes (think about three or four pinstriped suits collaborating to screw in a light bulb) focus on a lack of common sense, greed and personal unrelatability. “Did you hear about the lawyer who sued Kellogg’s because he found out that Froot Loops do not contain fruit?” This question anticipates a witty barb, bada-boom ching, not a lugubrious “yeah, he really did that.”[1] Class actions targeting common consumer products often present fertile grounds for mirth — the plaintiffs, suing on behalf of “reasonable” consumers, claim to have been duped by a product or conduct that most real consumers use every day and do not find the least bit offensive or unusual.

It was thus a victory for reasonable consumers several weeks ago when a California judge granted summary judgment to Starbucks in a case where the plaintiff claimed to have been defrauded because his latte contained foam.[2] The plaintiff contended that Starbucks was using foam to fill cups in order to deprive consumers of hot liquid. Of course, most consumers buy lattes because they contain foam, and usually have a pretty good idea how much beverage they will get when they order a tall, grande or venti. As the court noted, “no reasonable consumer would be deceived into believing that Lattes, which are made up of espresso, steamed milk and milk foam, contain the promised beverage volume excluding milk foam. … [A] reasonable consumer would not be misled into believing that foam does not count toward some portion of the volume of their Latte.”[3]

Unfortunately, not all patently ridiculous claims get tossed before defendants have to spend considerable money. The Seventh Circuit recently illustrated this sad fact when it overturned the class settlement in In re Subway Footlong Sandwich Marketing and Sales Practices Litigation. [4] After the parties had spent years negotiating how best to address the “fraud” that foot-long subs are sometimes only 11.5 inches, the court made this blunt assessment: “A class settlement that results in fees for class counsel but yields no meaningful relief for the class ‘is no better than a racket’ and the "class actions ’seek[ing] worthless benefits for the class … should have been ’dismissed out of hand.’”[5] We thus provide a short primer on the “reasonable consumer” to help focus arguments at all stages of class litigation.

Who is the Reasonable Consumer?
In Lavie v. Procter & Gamble Co., the California Court of Appeal articulated the standard that state and federal courts have applied to claims for deception under California’s consumer fraud statutes:

“Likely to deceive” implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few customers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”[6]
An important corollary to this rule is that deceptiveness must be viewed in light of the intended audience.[7] What might mislead one audience may not mislead another. For example, a first-time latte buyer might not expect milk foam, whereas a dedicated Starbucks’ latte sipper would feel cheated without it.

**The Reasonable Consumer at the Pleading Stage**

In Williams v Gerber Products Co., a beloved case of the plaintiffs bar, the Ninth Circuit held that deceptiveness to “reasonable consumers” will usually be a question of fact.[8] The court ruled that reasonable consumers could not be expected, as a matter of law, to read an ingredient list in order to correct misleading images showing fresh berries on a box of fruit snacks. Leaving aside that health-conscious parents focused on toddler nutrition would, as a practical matter, be highly likely to read ingredient lists, Williams has not prevented other courts from dismissing cases that flunk the “Twiqbal” plausibility standard.

Ebner v Fresh Inc., provides an excellent example of a court concluding that claims of deceptiveness simply do not ring true.[9] There, the plaintiff claimed that a tube of lip balm deceptively labeled the content’s net weight because some portion of the lip balm could not be accessed. The court concluded that most consumers are familiar with twist tube technology, can see that there is still lip balm in the tube when the tube will not turn any further, and always have the option to go after it with a finger or knife. Another court has noted that reasonable consumers are well aware of such eternal verities as there is always a little bit of toothpaste left in the tube, a little bit of peanut butter left in the jar, and shampoo residue adheres to the bottle.[10] Manufacturers are not liars simply because consumers have trouble consuming every last drop of their product.

Fortunately, courts have also dismissed complaints where the fact patterns flawlessly conclude phrases like: “You would have to be an idiot to believe that…” Cap’n Crunch’s Crunch Berries are a type of fruit[11]; and “Only someone with serious, untreated OCD would care …” that honey is still called honey after its pollen has been removed.[12] The court said it well in dismissing the Crunch Berries case: “The survival of the instant claim would require this Court to ignore all concepts of personal responsibility and common sense. The Court has no intention of allowing that to happen.”[13]

**Evidence of the Reasonable Consumer**

At class certification and in opposition to summary judgment, plaintiffs’ playbook usually involves declarations from the class representatives that they were personally deceived, and that had they known the true facts, they never would have purchased or paid as much for the product. Such testimony, as long as it is within sniffing distance of what a hypothetical “reasonable consumer” might actually regard as material, is invoked by the plaintiff to support an inference or presumption of reliance.

Defendants have many tools to rebut inferences or presumptions of reliance.

Surveys can often provide critical evidence about what “reasonable consumers” think, but can be expensive and can backfire if not carefully designed and executed. For example, in the Starbucks case, the plaintiff tried to use survey evidence to bolster his claim that consumers do not expect milk foam to comprise part of their beverage volume. The court rejected this evidence. There was no dispute that milk foam is an ingredient of lattes, so it did not matter what consumers thought, and moreover, the survey questions were patently leading.[14]

Methodologically, one of the biggest challenges is structuring the consumer survey that authentically resembles actual shopping experience. A survey that focuses too narrowly on the practice at issue may generate false positives by putting more emphasis on the challenged practice than a customer ordinarily would, while simultaneously excluding other important influencing factors.

When done well, however, a survey can eviscerate a plaintiff’s chance for class certification or success on the merits. Most obviously, a survey can demonstrate that it is not “probable” that the challenged practice will mislead a substantial portion of the target audience. Although there are no clear cutoff lines, anytime a defendant can show that many or most consumers do not share the plaintiff’s interpretation, class certification becomes improbable and summary judgment likely.

Surveys can also expose intractable conflicts of interest within a putative class. Suppose there is more than one type of reasonable consumer? For example, in In re Vioxx Class Cases, the class representatives argued that, but for the defendant’s fraud, they would have used less expensive over-the-counter pain relievers instead of a product that increased their risk of heart attack.[15] Other consumers testified, quite rationally, that they would gladly still use the withdrawn drug, notwithstanding its risks. Nothing else could treat their pain as well. The court noted that class certification is not possible where the materiality of the information will vary from consumer to consumer.
Even without investing in a survey, defendants can often prove the behavior of reasonable consumers based on what they do after learning of the alleged deception. Consumer products are used repeatedly, and consumers form expectations based on their own experience. The mere fact of repeat purchases will often prove that consumers understand and are satisfied with the product, notwithstanding the alleged fraud. When someone orders a Starbucks’ latte, for example, they have likely done so before. Rather than expecting a precise measurement of 12, 16 or 20 fluid ounces, they probably expect to get about the same drink they bought last time.[16] This behavior has special significance in slack fill/underfill cases. Whether the product is a box of Raisinets or a can of tuna, customer expectations depend most importantly on past experience, and will also include sensory perceptions such as the feel of the candy box, the obvious air in the chip bag or the sound the product makes in its container.

Once a consumer knows what to expect, the size and shape of the container’s exterior loses any power to deceive. This is not science. It is common sense. In fact, it is captured by the aphorism “fooled once, shame on you; fooled twice, shame on me.” The concept is so old, it has an expression in Latin: Volenti non fit iniuria — to those who consent, no injury is done.

Reasonable Consumers in the Jury Box and On Appeal

Relatively few class actions get tried, but if all else fails, a defendant can look forward to either having 12 potentially “reasonable consumers” serve as the trier of fact, or another lawyer, this one wearing a black robe. This scenario creates interesting choices. A jury of latte drinkers would laugh the plaintiff out of court, but the plaintiff would strike as many as possible; a jury of non-latte drinkers might not understand Starbucks’ “target audience”; and a judge that has let this certified class get to trial may not be in a position to undo the train wreck. This specter, along with the substantial costs of defense, may well have caused Subway to conclude that settlement was the line of least resistance. But the Seventh Circuit’s opinion does at least prove, even on appeal, that common sense may yet prevail.

Conclusion

The world would be a better place if class action counsel, before sending Consumer Legal Remedies Act letters, tested their claims by explaining them to a church choir. Righteous indignation in one direction or another would be a good indicator of whether to file suit or leave it alone. In any event, defense counsel faced with consumer fraud claims involving commonly used products should focus on the reasonable consumer standard at each stage of the litigation. While a plaintiff may allege “plausible” facts sufficient to avoid dismissal at the pleadings stage, their luck may run out when the court can consider a more fulsome evidentiary record. Starbucks’ summary judgment pointedly illustrates the success of evidence-based motion practice.

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[3] Id. at 6.
[5] Id. at 556-557 (citations omitted).
[7] Id. at 506-507.


