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CLASS ACTION & PRODUCT LIABILITY ALERT

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Setback for plaintiff in class action suit against Tito's Vodka

Manufacturers of consumer products have reason to toast following last month's decision by a federal judge in Cincinnati cutting off a consumer class action against the maker of Tito's Vodka. In *Terlesky v. Fifth Generation Inc.*, Judge Susan Dlott of the United States District Court for the Southern District of Ohio joined a growing number of courts demanding strict compliance with the class action notice requirements

of the Ohio Consumer Sales Practices Act (OCSPA). Judge Dlott also dismissed the plaintiff's claims under the Ohio Deceptive Trade Practices Act (ODTPA), adopting the majority view that such claims may be asserted only in the commercial context and not by individual consumers.

Terlesky's lawsuit is one of several that have been brought in courts across the country charging Tito's distiller Fifth Generation with falsely advertising its vodka as "handmade" and "crafted in an old fashioned pot still by America's original microdistillery." In reality, Terlesky alleged, Tito's Vodka is mass-produced in industrial vats and is about as artisanal as spray cheese. Based upon this alleged deception, Terlesky asserted claims under the OCSPA and the ODTPA as well as under theories of common-law fraud, negligent misrepresentation and promissory estoppel. She asserted these claims in her individual capacity as well as on behalf of a class consisting of other Ohio purchasers of Tito's Vodka and sought damages plus an injunction to force Tito's to change its label.

The Ohio Consumer Sales Practices Act's class action notice requirement is strictly applied

Judge Dlott's dismissal of Terlesky's class claims under the OCSPA was based on the plaintiff's failure to satisfy the notice requirement of Ohio Revised Code § 1345.09(A). To paraphrase, this provision states that a consumer may qualify for class action certification under the OCSPA only if the defendant's alleged violation of the OCSPA is substantially similar to an act or practice previously declared to be deceptive by an Ohio administrative rule or an Ohio state court decision. Judge Dlott's

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application of R.C. § 1345.09(A) is significant in and of itself, as plaintiffs have argued in previous cases that the provision is procedural in nature and therefore applies only in state court. This argument has generally been rejected by courts, including the Northern District of Ohio in its 2010 decision in *McKinney v. Bayer Corp.*, in which Porter Wright attorneys Joyce Edelman, Kathleen Trafford, Caroline Gentry and Tracey Turnbull, along with co-counsel from DLA Piper, successfully represented Bayer Corporation in obtaining the dismissal of the plaintiffs' class claims under the OCSPA related to the sale of Bayer multi-vitamins based on similar non-compliance with R.C. § 1345.09(A).

Of further significance is Judge Dlott's strict application of R.C. § 1345.09(A) to Terlesky's class claims. In opposition to Fifth Generation's motion to dismiss, Terlesky effectively admitted that her complaint did not point to any case law or administrative rule placing Fifth Generation on notice that its labeling was deceptive, but she attempted to cure that failure by citing to a variety of cases in her opposition brief that she claimed furnished the requisite notice. Judge Dlott refused to consider those cases, holding that R.C. § 1345.09(A) is a "pleading requirement"—

meaning that the cases or rules alleged to constitute notice must be set forth within the four corners of the complaint itself. Because Terlesky's complaint failed to do that, she is limited to pursuing relief under the OCSPA only on her own behalf.

Consumers lack standing to sue under the Ohio Deceptive Trade Practices Act

In addition to her class claims under the OCSPA, Terlesky made identical class allegations against Fifth Generation under the ODTPA, which allows private suits against those who commit "deceptive trade practices." Unlike the OCSPA, the ODTPA does not require pleading that the defendant was on notice that its conduct was deceptive in order to maintain a class action. But Judge Dlott's holding on this claim was no less of a defeat for Terlesky and her attorneys. Siding with the majority of courts to consider the issue, Judge Dlott held that Terlesky lacks standing to assert a claim under the ODTPA because the statute provides a private right of action only to commercial parties and not to consumers.

Judge Dlott's decision acknowledges the lack of consensus on the issue of whether consumers have standing to sue under the ODTPA. The Ohio Supreme Court has not yet answered this question, and two decisions by judges in the Southern District of Ohio (Judge Walter Rice's 2004 decision in *Bower v. International Business Machines, Inc.* and Judge Arthur Spiegel's 2014 decision in *Schumacher v. State Auto Insurance Co.*) have held in favor of consumer standing under the ODTPA. Nevertheless, the majority of federal courts and lower state courts to consider the issue have concluded that relief under the ODTPA is limited to parties engaged in commerce for competitive injury suffered as a result of another party's deceptive practices. These courts have reasoned that the ODTPA must be construed in accord with its federal analog, the Lanham Act, which likewise limits standing to commercial actors. Judge Dlott's decision further endorses that position as the prevailing and better-reasoned approach.

Judge Dlott's interpretations of the OCSPA and ODTPA make the Tito's Vodka case a potent precedent for companies that find themselves the target of consumer class actions based upon state consumer statutes. The inability to proceed under such statutes frequently sounds the death knell for a class action based upon allegedly deceptive advertising, as common-law claims in such cases are typically ill-suited for class treatment. Indeed, in addition to dismissing Terlesky's statutory class claims, Judge porterwright

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Dlott threw out her class claims for fraud and negligent misrepresentation, recognizing that negligent-misrepresentation claims are proper only where the alleged misrepresentation is made to a limited group of people (not to the public at large) and that fraud claims require proof of some special injury (not just money spent to purchase a deceptively advertised product). The only class claim left standing after Judge Dlott's decision is one for promissory estoppel—which alleges that Fifth Generation's representation that Tito's Vodka is "handmade" constitutes a "promise" upon which Terlesky and the proposed class members relied—but this claim is likely to topple as well following some discovery and a motion for summary judgment. In short, the plaintiff's prospects in this suit are not good.

For more information please contact Terry Miller, Tracey Turnbull, Carolyn Taggart, Caroline Gentry, Joyce Edelman, Phil Calabrese, Jared Klaus or any member of Porter Wright's Class Action or Product Liability Practice Groups.