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Consumers Go Up In Smoke In Phillips V. Philip Morris

Law360, New York (April 15, 2013, 1:34 PM ET) -- Manufacturers of consumer products scored a double-win in a recent decision by Judge Sara Lioi of the United States District Court for the Northern District of Ohio. In the case of Phillips v. Philip Morris Companies Inc., No. 5:10-cv-1741, Lioi held that the plaintiffs could not maneuver around a class action-limiting provision in the Ohio Consumer Sales Practices Act (CSPA) by suing in federal court; and the plaintiffs could not sue at all under the Ohio Deceptive Trade Practices Act (DTPA) because the DTPA affords no cause of action to consumers.

As a result, Lioi dismissed the plaintiffs' class claims under the CSPA as well as their claims under the DTPA, which alleged that defendants Philip Morris USA Inc. and Altria Group Inc. falsely advertised their cigarettes as "light" and "low tar" when they actually contained as much tar or nicotine as regular cigarettes.

The Ohio Consumer Practices Act's Class Action-Limiting Provision Applies in Federal Court

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

The plaintiffs had argued that R.C. § 1345.09(B), although binding in state court, did not apply in a federal court action founded on diversity jurisdiction. To apply the statute in federal court, the plaintiffs argued, would conflict with Rule 23 of the Federal Rules of Civil Procedure, which sets forth the procedure governing class certification in federal court and does not contain a similar notice requirement as a precondition to certification.

Lioi rejected plaintiffs' argument, finding that R.C. § 1345.09(B) was so "intertwined" with the substantive rights conferred by the CSPA that it must be applied in Ohio diversity actions just like any of the CSPA's other substantive provisions.

In reaching her decision, Lioi relied in part on the U.S. District Court for the Northern District of Ohio's 2010 decision in McKinney v. Bayer Corp., No. 10-CV-224, in which Bayer Corporation obtained the dismissal of plaintiffs' class claims under the CSPA based on alleged false advertising in the sale of Bayer multivitamins.

In that case, as in this case, former District Judge Kathleen O'Malley based her decision on the plaintiffs' failure to show that Bayer was on notice that its alleged conduct was deceptive as required by R.C. § 1345.09(B), which O'Malley, like Lioi, found to be substantive in nature and therefore applicable in a diversity action.

Consumers Lack Standing to Sue under the Ohio Deceptive Trade Practices Act

The plaintiffs in the Philip Morris case brought suit not only under the CSPA but also under the DTPA, which they alleged was violated by the defendants' "deceptive and unfair representations" regarding their "light" and "low tar" cigarettes. The plaintiffs' DTPA claim presented a completely different issue for the court to decide but one that turned out to be equally fatal to plaintiffs' case: whether consumers may pursue a claim under the DTPA.

This question came close to being definitively resolved in the Bayer case, mentioned above, when O'Malley certified to the Ohio Supreme Court the question of a consumer's standing under the DTPA. The plaintiff in Bayer headed off a decision by the high court on this issue, however, by voluntarily dismissing his DTPA claim before the court had the opportunity to rule.

Still, the vast majority of federal courts and lower state courts to consider the issue have concluded that relief under the DTPA 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 DTPA must be construed in accord with its federal analog, the Lanham Act, which likewise limits standing to commercial actors.

Although a 2004 decision by the U.S. District Court for the Southern District of Ohio, Bower v. International Business Machines Inc., reached the opposite conclusion, Lioi found the Bower court's reasoning unpersuasive and instead sided with her colleagues in the majority of the reported decisions, dismissing the plaintiffs' DTPA claims because, as the plaintiffs' conceded, they were suing in their capacity as consumers of the defendants' cigarettes.

The dual holdings of the Philip Morris case make the decision a useful precedent for companies that find themselves the targets of consumer class actions based upon state consumer statutes. In particular, the court's holding that the class action-limiting provision of R.C. 1345.09(B) applied in federal court will help put an end to forum-shopping by class action plaintiffs and ensure that class action defendants do not forfeit this important right under the CSPA by removing a class action to federal court.

The Philip Morris case's utility is by no means, however, confined to cases governed by Ohio law. States other than Ohio have also inserted provisions in their consumer protection statutes that seek to erect barriers to the prosecution of class actions by forcing plaintiffs to meet certain requirements that are not mandated by Federal Rule of Civil Procedure 23.

The Philip Morris case stands for the proposition that these state law barriers still apply in federal court and are not overridden by Federal Rule 23 when they are inextricably "intertwined" with the substantive rights conferred by the state consumer statutes. Practitioners defending against consumer class actions brought in federal court in any state should thus be keenly aware of any applicable state law limitations on class actions and be prepared to argue that these state provisions are "intertwined" with substantive rights just like the Ohio provision at issue in Philip Morris.

On the other side of the coin, practitioners faced with the decision of whether to remove to federal court a consumer class action filed in state court should first survey the applicable law for any class action-limiting provisions to determine what rights their clients may be giving up by removing to federal court, should the state provisions at issue not survive the Philip Morris analysis (i.e. be deemed "procedural" rather than "substantive" and thus trumped by Federal Rule 23).

Although federal court is generally, and for good reason, viewed as being a more friendly forum for a class action defendant, practitioners should still consider whether there are any state law procedural protections that might tip the scales in favor of staying put.

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