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# Case Law Highlights Puffery as a Defense to Consumer Fraud Class Actions

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Increasingly, class action litigation by consumers focuses on product advertising rather than on traditional theories of products liability such as design defect or failure to warn. This trend is based, in part, on state consumer protection statutes that ease, or eliminate, the reliance requirement applicable to common law fraud claims. Moreover, courts have shown greater willingness to certify class actions seeking economic damages for alleged misleading advertising than to certify class actions for personal injuries caused by alleged product defects. Claims for alleged misleading advertising have been asserted against manufacturers and service providers in a host of industries, including technology, food and beverage, construction and pharmaceuticals.

A threshold inquiry in any such action is whether the defendant's advertising contains a misrepresentation of fact that can form the basis for a cause of action. Courts have long recognized that a claim cannot be based on a statement that merely expresses the manufacturer's opinion or that sets forth a subjective description of the product's qualities. Statements of this nature are regarded as "puffery," an exaggerated recommendation of the product made for promotional purposes and, by their nature, are not actionable. Recent decisions emphasize the continuing importance of this principle.

In *Provenzano v. Thomson Corp.*, No. 1:07-CV-00746 (N.D.N.Y. Dec. 3, 2007), for example, the plaintiffs were former law students who filed a putative class action against the owners and producers of the BAR/BRI bar review course alleging violations of New York's consumer protection statute and common law fraud. Plaintiffs claimed that while in law school, they were "barraged" and "bombarded" with advertisements that "falsely and deceptively" suggested that a law school graduate needed to purchase a BAR/BRI course "to have any chance" of passing the New York bar examination. For example, defendants' marketing materials stated that BAR/BRI

provides "the nation's most experienced, most personalized, and most up-to-date bar review course," that the BAR/BRI program "give[s] you the best chance of passing your bar exam the first time," and that without a review course, it is "nearly impossible to accumulate the necessary materials, prepare a 2 month study plan and discipline yourself to pass the bar exam ..."

Plaintiffs did not claim that there was anything wrong with the BAR/BRI course itself -- indeed, all three passed the bar exam on their first try. Instead, plaintiffs claimed that they purchased BAR/BRI products at "inflated" prices and that they purchased products that, in hindsight, were "unneeded."

The court dismissed plaintiffs' claims, because defendants' advertisements could not be characterized as misleading to a reasonable third-year law student.

The court explained: "Advertising carries with it a certain latitude. Puffery, bragging and a degree of exaggeration are not unexpected, and generally, courts will not interfere with a company's marketing strategy." A subjective claim of product quality, or a mere expression of opinion, the court said, is not actionable.

Similarly, in *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910 (Ill. 2007), purchasers of personal computers brought a putative class action for deceptive trade practices against the manufacturer of the Pentium 4 microprocessor. They alleged that the name Pentium 4 implicitly represented that the Pentium 4 was "the best and fastest" microprocessor on the market, but that the name was misleading



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because the Pentium III processor was faster. In dismissing plaintiff's claims, the court stated that puffery is an exaggeration "expected of a seller as to the degree of quality of his or her product, the truth or falsity of which cannot be precisely determined."

The court found that the manufacturer had not made any misrepresentation common to the supposed class, because the name Pentium 4 did not describe any "specific attribute" of the processor. Moreover, even if the name Pentium 4 implied that the processor was "better" than the Pentium III, this was a "mere suggestion, a belief, or an opinion," not a representation of fact.

*Saltzman v. Pella Corp.*, No. 06C4481, 2007 WL 844883, at \*1 (N.D. Ill. Mar. 20, 2007), was also a purported class action. Plaintiffs claimed that defendant misrepresented that its window products were "durable," "manufactured to high quality standards," and "maintenance free." The court dismissed plaintiffs' claims for violations of deceptive trade practice statutes of various states, because the manufacturer's statements were "subjective" and "non-quantifiable."

The court refused, however, to dismiss plaintiffs' claims for statutory and common law fraud. See also *Heath v. Palmer*, 915 A.2d 1290, 1296 (Vt. 2006) (upholding dismissal of consumer fraud claim in connection with construction of new home, because alleged misrepresentations that defendants "take pride" in "quality construction with exceptional value" were "subjective evaluations of workmanship rather than objectively verifiable statements of fact").

In another purported class action, *Fraker v. KFC Corp.*, No. 06-CV-01284-JM, 2007 WL 1296571, at \*1 (S.D. Cal. Apr. 30, 2007), plaintiffs asserted claims based on KFC's statements in advertising that it served the "best food," that it used "the highest quality ingredients," and that "all foods can fit into a balanced eating plan." Plaintiffs claimed that these statements were misleading, because KFC's products contained high levels of trans fat. The court held that these statements were not actionable because they lacked "definitive positive assertions of fact" and because no reasonable consumer would rely on them "as specific representations as to health, quality, or safety."

A similar rationale was applied in *Goodwin v. Anheuser-Busch*, No. BC310105, 2005 WL 280330, at \*5 (Cal. Sup. Jan. 28, 2005). There, plaintiffs purported to represent a class of California residents

under the age of 18 who were allegedly influenced by the defendants' advertising campaigns illegally to buy and drink alcoholic beverages. They claimed that defendants' advertisements featured "fun, sexiness, popularity, social acceptance, [and] athleticism." The court ruled, however, that the characteristics featured in defendants' advertisements were puffery, "not affirmations of fact ..."

Thus, plaintiffs who seek to challenge a manufacturer's advertisements will be required to set forth specific misrepresentations of fact to support their claims. It is not enough to allege that the manufacturer's advertisements touted the product using superlatives or portrayed the product in a highly favorable light, even if the product does not live up to consumers' expectations.

Rather, a manufacturer's statement that "is not specific and measurable," or that does not provide "a benchmark by which the veracity of the statement be ascertained," constitutes puffery. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004). This broad definition "provides advertisers and manufacturers considerable leeway to craft their statements, allowing the free market to hold advertisers and manufacturers accountable for their statements, ensuring vigorous competition, and protecting legitimate commercial speech."

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