Legal Opinion Letter

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OHIO CONSUMER CLASS ACTIONS NO LONGER MIRED IN (LOW-) TAR PIT?

by
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Class action lawsuits alleging violations of consumer sales and deceptive trade practices laws, which have grown in popularity in recent years, are likely to become much less popular in Ohio in light of *Phillips v. Philip Morris Companies Inc.*, No. 5:10-cv-1741, 2013 U.S. Dist. LEXIS 40908 (N.D. Ohio Mar. 21, 2013) (Judge Sara Lioi).

In reaching its common-sense decision, the court decided two important questions of consumer law and provided future consumer class action defendants with a roadmap to an early pleading-stage victory. First, the court upheld the consumer class action restraints in the Ohio Consumer Sales Practices Act ("CSPA"), despite Federal Rule 23's more forgiving requirements. And, second, the court adopted the majority view that a plaintiff cannot sidestep the CSPA's requirements by instead bringing a consumer class action under the Ohio Deceptive Trade Practices Act ("DTPA").

Phillips' Complaint. In this case, Plaintiffs Eva Marie Phillips and Greg Phillips (the "Plaintiffs") filed a class action suit against Defendants Phillip Morris USA Inc. and Altria Group, Inc. ("Philip Morris" or "Defendants"), alleging that the Defendants had violated the CSPA, the DTPA, and various common law torts by advertising and selling "light" and "low tar" cigarettes, when these cigarettes allegedly contained as much tar and nicotine as the Defendants' regular line of cigarettes. Plaintiffs filed their purported class action in federal court based on diversity of citizenship. Philip Morris moved for judgment on the pleadings as to the CSPA and DTPA statutory claims. Specifically, Philip Morris argued that (1) the class allegations under the CSPA must be dismissed because Plaintiffs had not pleaded compliance with the statute's notice requirements, and (2) Defendants were entitled to judgment as a matter of law on Plaintiffs' DTPA claim because the DTPA does not provide a cause of action for consumers. Importantly for Ohio consumers and consumer class action defendants—of "low-tar" cigarettes and otherwise—the district court agreed on both counts.

The Ohio CSPA's Class Action Notice Requirement Applies in Federal Court. The court first held that the CSPA's class action "notice requirement" restriction applies in diversity cases and is not trumped by Federal Rule 23. Under R.C. 1345.09(B), the relevant CSPA provision, a plaintiff may not bring a class action without alleging that the defendant had sufficient "notice" that the conduct was deceptive. A defendant has "notice" only where the conduct at issue is "substantially similar" to conduct that was previously found deceptive by an Ohio administrative rule or an Ohio state court decision. R.C. 1345.09(B).

Plaintiffs argued that the notice requirement was an onerous state procedural requirement that conflicted with, and was thus preempted by, the broader and more forgiving procedural requirements of Federal Rule 23. According to the Plaintiffs, a class action brought in *federal* court need only comply with the *federal* rules and Ohio procedural law could not preclude an otherwise viable class action lawsuit.

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The court reviewed the CSPA notice requirement under *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co*., 559 U.S. 393 (2010), in which the Supreme Court addressed the conflict between a New York statute that precluded class actions seeking penalties or statutory minimum damages and Rule 23, which generally governs class actions in federal court. In his concurring opinion in *Shady Grove* (which has become the controlling opinion for use in determining whether a federal procedural rule may displace a conflicting state law[1]), Justice Stevens explained that not all state "procedural rules" are, in effect, merely procedural. "A federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is *so intertwined with a state right or remedy that it functions to define the scope of the state-created right.*" *Id.* at 1452 (emphasis added).

Applying this "intertwined" test, which both Plaintiffs and Philip Morris agreed was applicable, the court found that the CSPA notice provision was intertwined with Ohio consumer protection law, and thus "was not merely intended by the state legislature to function as a procedural rule to govern class actions" in general (as was the New York law in *Shady Grove*). *Phillips*, at *17. Rather than being contained in the Ohio Rules of Civil Procedure or some other law applicable to class claims generally, the notice limitation was "contained within the very statute that provides consumers with an avenue for relief from unfair sales practices." This fact "demonstrates that it [R.C. 1345.09(B)'s notice provision] impacts substantive rights." *Id.* As such, Plaintiffs' failure to meet the notice requirement was fatal to its class claims.

The DTPA Is Dead, Long Live the CSPA. The court then gave teeth to the CSPA's class action restrictions. It found that a consumer class action that can be brought under the CSPA *must* be brought under the CSPA—and thus must comply with its class action requirements—and cannot be brought instead under the less-restrictive DTPA.

Although the Ohio Supreme Court has not yet addressed whether consumers have standing to sue under the DTPA, the "vast majority" of federal courts and all lower state courts "have concluded that relief under the DTPA is not available to consumers." *Id*. at *19-20. In fact, ***all*** courts that have addressed the issue in published opinions have so concluded—save for one.

In the sole decision reaching the opposite conclusion, the district court noted that the DTPA allows claims to be brought by a variety of enumerated plaintiffs, including "an individual." *Bower v. Int'l Bus. Machs., Inc.*, 495 F. Supp. 2d 837, 842-843 (S.D. Ohio 2004). This, the *Bower* court reasoned, would presumably include a consumer.

Other courts, however, have found that there is more to the statute. *See, e.g., Holbrook v. Louisiana-Pacific Corp.*, No. 3:12CV484, 2012 U.S. Dist. LEXIS 124822, 2012 WL 3801725, at *4-*5 (N.D. Ohio Aug. 29, 2012). Specifically, the statute's laundry lists of potential plaintiffs is qualified by the phrase "or any other legal or commercial entity." This qualification, the courts have explained, limits potential plaintiffs to only those "involved in commercial activity," which would *not* include a consumer. This more restrictive reading is in keeping with the prevailing interpretation of the Lanham Act, the DTPA's federal corollary. The added weight of *Phillips* will, perhaps, finally thwart Ohio plaintiffs' enduring reliance on *Bower*.

Beyond Tobacco. Consumer advocates in Ohio—and states with similar consumer protection laws—should take heed of the lessons from this case before filing a class action lawsuit: (1) Under *Shady Grove*, federal courts sitting in diversity likely will enforce a state-law class action restriction that is specific to and set forth within a substantive consumer protection statute, and (2) state "deceptive practices" statutes modeled after the federal Lanham Act likely will not support a consumer class action.

[1] *See Phillips*, 2013 U.S. Dist. LEXIS 40908, at *10 (citations omitted).

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