

Federal Court Dismisses Proposed Television Consumer Fraud Class Action

August 5, 2011 by [Sean Wajert](#)

Here's a case of a venerable rule (puffery) and an important new doctrine (*Twiqbal*) being applied in the context of a troubling trend -- the spate of consumer fraud class actions challenging everything a defendant says about its products. A New Jersey federal court recently rejected a putative class action alleging that Panasonic Corp. falsely advertised its Viera plasma televisions made in 2008 and 2009. [Shane Robert Hughes et al. v. Panasonic Consumer Electronics Co.](#), No. 2:10-cv-00846 (D.N.J. July 21, 2011). A useful and detailed analysis of commonly found flaws in consumer fraud class action complaints.

Plaintiffs putatively represented a class defined as individuals and entities who own or purchased any 2008/2009 model Panasonic Viera Plasma Television. Plaintiffs alleged that the televisions suffered from increased "voltage adjustments" causing a rapid deterioration in picture quality. The class members allegedly relied on Panasonic's representations concerning the "industry leading" black levels and contrast ratios, and/or personally observed the televisions' excellent picture quality on models displayed in retail stores. Plaintiffs sought damages and/or refunds from Panasonic for violations of the New Jersey Consumer Fraud Act ("NJCFA"), N.J. STAT. ANN. § 56:8-1 et seq.; other states' consumer protection acts; and under various express and implied warranty claims.

Defendant moved to dismiss. The adequacy of pleadings is governed by Fed. R. Civ. P. 8(a)(2), which requires that a complaint allege "a short and plain statement of the claim showing that the pleader is entitled to relief," but also requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Although class members were from around the country, the court determined it need not decide whether it was appropriate to engage in a choice of law analysis at the pleadings stage because, as detailed below, each of the plaintiffs' claims failed as a matter of law under any of the possibly applicable laws.

Claims under the NJCFA and most state consumer fraud acts require a plaintiff to allege (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. Panasonic argued, among other things, that even if the allegations are true, plaintiffs' CFA claim failed because plaintiffs had not pointed to any actionable unlawful conduct by Panasonic. According to Panasonic, plaintiffs did not set forth any specific advertisements, marketing materials, warranties, or product guides that plaintiffs viewed; where and from whom at Panasonic did plaintiffs received any such information; or how precisely, plaintiffs were injured by any such representations.

The Court found that Panasonic's alleged misrepresentations about the Televisions' "industry leading" technology and features, which create superior image and color quality, were not "statements of fact," but rather subjective expressions of opinion. Indeed, such statements of product superiority are routinely made by companies in advertising to gain a competitive advantage in the industry. The NJCFA distinguishes between actionable misrepresentations of fact and "puffery." *Rodio v. Smith*, 123 N.J. 345, 352 (1991) (the slogan "You're in good hands with Allstate" was "nothing more than puffery" and as such was not "a deception, false promise, misrepresentation, or any other unlawful practice within the ambit of the Consumer Fraud Act"); see *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 13-14 (N.J. Super. App. Div. 2003) (finding that defendant's advertisements which employed phrases as "you . . . can lead a normal nearly symptom-free life again" were "not statements of fact, but are merely expressions in the nature of puffery and thus were not actionable" under the NJCFA). The same is true in many states.

The remaining misrepresentations may have been statements of fact rather than mere puffery. However, plaintiffs did not assert sufficient allegations of fact to satisfy the requisite level of adequate pleading under Rule 9(b) or by *Twombly/Iqbal*. For example, regarding the alleged misrepresentation about half-brightness, the Amended Complaint did not allege the date, place or time of this misrepresentation or otherwise inject some precision and some measure of substantiation into plaintiffs' allegations of fraud. While plaintiffs could not be expected to plead facts solely within Panasonic's knowledge or control, plaintiffs should be able to allege the specific advertisements, marketing materials, warranties or product guides that they each reviewed, which included this misrepresentation and when it was so advertised.

Plaintiffs also alleged various omissions, but fraudulent omissions require a showing of intent. Here, even accepting the allegations of omissions in the Amended Complaint as true, the court found that plaintiffs failed to allege sufficient facts to raise any plausible inference that Panasonic knowingly concealed the alleged defect with the intent that consumers and industry experts would rely upon the concealment. Indeed, throughout the Amended Complaint, it was alleged that Panasonic knew "or should have known" of the defect, but provides no additional facts explaining how or why Panasonic had knowledge of the defect to satisfy *Twombly/Iqbal*. Such allegations of intentionally failing to disclose the alleged defect were merely conclusory assertions.

Even assuming plaintiffs sufficiently alleged the "unlawful conduct" element under the consumer fraud acts, the court also concluded that the Amended Complaint did not satisfy the pleading requirements of *Twombly/Iqbal* or Rule 9(b) as to the "ascertainable loss" element. A plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical. The certainty implicit in the concept of an ascertainable loss is that it is quantifiable or measurable. The allegations did not sufficiently plead either an out-of pocket loss by plaintiffs or a showing of loss in value. For example, plaintiffs failed to allege how much they paid for their Televisions and how much other comparable Televisions manufactured by Panasonic's competitors cost at the time. Plaintiffs failed to allege how much of a premium they claim to have paid for their Panasonic Televisions. Furthermore, in the Amended Complaint, plaintiffs affirmatively stated that most continue to use the Televisions, thus

obscuring any possible measurable loss. Typically, plaintiffs try not to allege details in this area for fear of undermining their class certification arguments.

Plaintiffs' warranty claim suffered from several defects. While the claim at times was presented as an alleged manufacturing problem, a review of the Amended Complaint revealed that plaintiffs alleged only that the Televisions suffered from an inherent design defect and/or improper programming. Plaintiffs one vague, conclusory allegation that the defect was caused, in part, due to "manufacturing errors" was insufficient to satisfy the requisite pleading standards under *Twombly/Iqbal*. Moreover, the express warranty claims were impacted by what the court already concluded in connection with plaintiffs' consumer fraud claims, that Panasonic's statements about the Televisions' "industry leading" technology and features, which create superior image and color quality, were mere expressions of puffery. As such, these marketing statements were not sufficient enough to create an express warranty.

On the implied warranty claim, while plaintiffs alleged that the Televisions were defective, plaintiffs did not allege that the Televisions were inoperable or otherwise not in working condition. Indeed, the Amended Complaint did not contain any explicit allegation that plaintiffs could no longer use their Televisions - in other words, that they were no longer generally fit for their ordinary purpose. Although the Televisions may not have fulfilled plaintiffs' subjective expectations, plaintiffs did not adequately allege that the Televisions failed to provide a minimum level of quality, which is all that the law of implied warranty requires. See also *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 2001 WL 1266317, at *22 (D.N.J. Sept. 30, 1997) (merchantability "does not entail a promise by the merchant that the goods are exactly as the buyer expected, but rather that the goods satisfy a minimum level of quality").

Thus, the court concluded, each of plaintiffs' claims failed to state a claim under Rule 12(b)(6), to satisfy Rule 9(b) heightened pleading requirements, and/or pleading standards under *Twombly/Iqbal*. The court granted Panasonic's motion to dismiss the Amended Complaint without prejudice.