Monday, May 16, 2011

Standing in the Rain

"For lo the Winter is past, the rain is over and gone." Song of Solomon, 2:11. Except it's not gone. The torrents of Spring have arrived in the Delaware Valley. Yesterday was dank and stormy, and it shows no signs of letting up. "There is a sound of abundance of rain." Kings, 18:41. We do not like that sound. Not even a little. We've seen one YouTuber who shares our attitude about Spring rain: He shoots it. We used the word "Spring" above, but here it's really nothing but a season of mud. We'd move back to California for the better weather, but we'd miss our friends, Italian pork sandwiches, and that month of perfect early Fall weather. Plus, we'd hate dealing with traffic on the I-10, Bus. & Prof. Code 17200, and the fact that we'd always be the ugliest, least fit person in the room.

The rain kept us indoors yesterday. The Phillies' loss darkened our mood some. The thunder (and the effect it has on our skittish dogs) made it worse. Then we read cases, which made things even worse. Pretty much everything we read was dumb, depressing, or dense. And, as if nature loves alliteration, a leak sprung in the ceiling and those cases also became damp. We will say only a little about one of those soggy cases.

In *Rikos v. Procter & Gamble Co*., 2011 WL 1707209 (S.D. Ohio May 4, 2011), the plaintiff filed a putative class action against P&G for allegedly making misleading claims about the health benefits of a daily food supplement called Align. (In addition to reading cases, we also devoted a chunk of Sunday to reading the **New York Times**, which had a big article on "functional foods" and the claims made on their behalf.) The plaintiff claims to have read the Align claims, believed they were true, purchased Align in reliance on such claims, and then didn't get what was promised. The claims were brought under California law (including that bad old Bus & Prof. Code section 17200 alluded to above).

P&G made lots of arguments. We're focusing on one. (By the way, P&G is one of the all-time most successful companies in American history. Once, when we were in college and were either bored or fueled by a beer called Old Bohemian that cost,

so help us, $1.50 per six-pack, we decided to count every P&G product in our dorm room. P&G makes an astounding amount of stuff. Coffee, detergent, and toothpaste barely begin to tell the story. And if you ever work with somebody from that great company, make sure you spell it right. It's "er" not "or." One P&G alum taught us to remember that P&G makes bett**er** products.) P&G argued that the named plaintiff lacked Article III standing to seek injunctive relief "because he does not and cannot allege a threat of future injury." *Rikos*, 2011 WL 1707209 at *5. Since this plaintiff now claims to know that the Align claims are not in alignment with reality, he won't buy the product anymore. He don't need no stinking injunction.

Maybe this issue is old hat to some of you federal jurisdiction junkies out there, but P&G's argument actually works. It turns out there is ample case law holding that "the standing of unnamed class members will not suffice to give the Court jurisdiction to grant injunctive relief." *Id*., citing *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). That sort of derivative standing might work in some state courts, but it doesn't supply Article III standing in federal courts.

Thus, you have yet another reason to move cases into federal court. If somebody is alleging a consumer fraud class action and says (as they must) that they are now on to the fact that the product claims are bunk, you can use Article III standing to toss out requests for injunctive relief. That's pretty good news, isn't it? Why, we think for a moment that we can almost see the clouds parting. We're misty-eyed.

The rest of the *Rikos* opinion is pretty terrible. The less said about it. the better. Maybe all those bad bits will eventually be lost in time, like tears in rain.