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When Plaintiffs Sue Over Products They Did Not Purchase

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The question of whether, and under what circumstances, a plaintiff can represent a class as to products he or she did not purchase remains a vexing one for courts.

Some courts have analyzed the issue as a matter of Article III or statutory standing, while other courts view it as a typicality issue under F.R.C.P. 23. Indeed, the U.S. Supreme Court has noted that "there is tension in [its] prior cases" regarding whether differences among class members "is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a)." Gratz v. Bollinger, 539 U.S. 244, 263, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 263, n.15 (2003).

Judge St. Eve of the Northern District of Illinois recently weighed in on this issue. In Wagner v. General Nutrition Corp., 2017 U.S. Dist. Lexis 112106 (N.D. Ill., July 19, 2017), Judge St. Eve concluded that the plaintiff had adequately alleged standing for claims based on products that he had not purchased, because he alleged the products were materially the same.

Courts viewing this as a “typicality” issue have analyzed whether (i) the other products and representations are “fairly encompassed” by the named plaintiff’s claims, and (ii) common evidence can be used to establish the claims. See, e.g., Weiner v. The Dannon Co., 255 F.R.D. 658, 665-66 (C.D. Cal. 2009) (finding no typicality because putative class members’ claims based on other products were not “fairly encompassed by [the plaintiff’s] claims”); see also Clancy v. Bromley Tea Co., 308 F.R.D. 564 (N.D. Cal. 2013); Forcellati v. Hyland's Inc., 876 F. Supp. 2d 1155, 1162 (C.D. Cal. 2012).

In Clancy, for example, the named plaintiff bought two of the defendant’s products. The plaintiff alleged that the defendant made unlawful and deceptive claims on its product labels, including on products that the plaintiff did not purchase. The defendant moved for judgment on the pleadings, arguing that plaintiff lacked standing as to certain products and representations that he did not see.

The court rejected the defendant’s argument, concluding that: “Deciding at the pleading stage that a plaintiff cannot represent a class who purchased any different products than the plaintiff seems unwarranted, at least on the facts of this case.” 308 F.R.D. at 571.

The court went on to state: “Whether products are ‘sufficiently similar’ is an appropriate inquiry, but it

does not relate to standing: a plaintiff has no more standing to assert claims relating to a 'similar' product he did not buy than he does to assert claims relating to a 'dissimilar' product he did not buy. Seen this way, analyzing the 'sufficient similarity' of the products is not a standing inquiry, but rather an early analysis of the typicality, adequacy, and commonality requirements of Rule 23." Id.

Other courts have reached the opposite conclusion, holding that a plaintiff lacks standing to assert claims as to products that he or she did not purchase. See, e.g., Allen v. Hyland's Inc., 2012 WL 1656750, at *5 (C.D. Cal. 2012) (plaintiffs lacked standing to assert claims about homeopathic products they did not purchase). Generally, these courts employ a "substantially similar" test, under which standing exists if the products and alleged misrepresentations are substantially similar.

Courts applying the "substantially similar" test have mostly done so in cases asserting food-misbranding or mislabeling claims. See, e.g., Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861 (N.D. Cal 2012) (compiling cases and finding products not substantially similar).

The Northern District of Illinois — Standing to Pursue Claims for Products Plaintiff Did Not Purchase

In Mednick v. Precor Inc., 2014 U.S. Dist. Lexis 159687 (N.D. Ill. Nov. 13, 2014), the court explained that the majority of courts that have considered the issue "hold that a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar." Id. at *8 (citing Quinn. v. Walgreen Co., 958 F. Supp. 2d 533, 541 (S.D.N.Y. 2013)).

The court in Mednick concluded that the plaintiffs had standing to pursue claims related to nineteen products even though the named plaintiffs purchased only one treadmill manufactured by the defendant. The defendant had argued that its products were different mechanically. Indeed, fifteen of the nineteen products complained of were not even treadmills.

The court concluded that this fact was of little consequence because the plaintiffs' claims were for a specific component of the machines and not the machines as a whole. As a result, the court held that the plaintiffs had standing to pursue claims related to all nineteen products. The court left open the possibility, however, that the defendant could challenge the plaintiffs' ability to satisfy Rule 23 at the certification stage.

In Wagner, the plaintiff claimed that he purchased and consumed a glutamine supplement "because [he] believed, based upon the misleading labels, that they enhanced muscle growth, provided faster recovery, and had anti-catabolic properties." 2017 U.S. Dist. Lexis 112106 *2. The defendant, a retailer of dietary supplements, markets at least four glutamine supplements.

The defendant argued that, because the plaintiff purchased only one of these four supplements, he lacked standing to assert claims on behalf of putative class members who purchased the remaining three supplements. The court noted that, while courts have varying approaches to the question of a plaintiff's standing to sue regarding products he did not purchase, both parties cited Mednick for the relevant case law.

In denying the defendant's motion to dismiss, the court noted that the products have the same key ingredient of glutamine, and that the plaintiff alleged that all of the products contain misrepresentations for the same reason: "glutamine supplements do not have the benefits indicated on the products' labels."

According to the court: “GNC fails to explain, however, how any of these differences are material. Moreover, based on the allegations in the [complaint], the Products are substantially similar — they contain the same active ingredient, are sold by the same company, and all contain labels including some or all of the claimed benefits listed on the Product Plaintiff purchased. In sum, similar to the plaintiff in Mednick, Plaintiff has adequately alleged standing for claims based on all Products given that he has alleged the products are essentially materially the same.” Id. at *16.

Accordingly, the court concluded that the plaintiff had adequately alleged standing for claims based on products that he had not purchased.

Based on Mednick and Wagner, it appears likely that courts in the Northern District of Illinois may permit plaintiffs to allege standing for products they did not purchase, but only when the products and any purported misrepresentations are substantially similar.

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