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Carriuolo V. GM And The Future Of The Overcharge Theory

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In Carriuolo v. General Motors Corp.,[1] the Eleventh Circuit affirmed class certification for consumers alleging that inaccurate safety ratings on Cadillacs permitted General Motors to obtain "a price premium" or "overcharge," thereby establishing the causation element of Florida's consumer fraud statute. Under an overcharge theory, the consumers claim that because the fraud permitted the seller to artificially inflate a purchase price, the fraud caused harm to all buyers, regardless of whether any individual class member actually saw and relied on the misrepresentation.

The decision represents the latest acceptance by a federal appeals court of the overcharge theory, and a strong precedent for plaintiffs. Without the need to show that each consumer relied on a misrepresentation, class defendants lose one of their best arguments that individual issues predominate, and therefore, class certification should be denied under Fed. R. Civ. P. 23(b)(3).

The Carriuolo Decision

Geri Carriuolo purchased a 2014 Cadillac CTS sedan in Florida in December of 2013. The vehicle had the standard "Monroney" window sticker, which asserted that the vehicle had a five-star safety rating assigned by the National Highway Traffic Safety Administration for three categories. However, the manufacturers of Cadillacs (General Motors) jumped the gun. The NHTSA had not yet assigned safety ratings for the vehicle, and when it did, it did not assign a five-star score for frontal crash and rollover performance.

The plaintiffs sought class treatment under a host of state law claims, including the Florida Deceptive and Unfair Trade Practices Act. To assert a FDUTPA claim, the plaintiff must show a deceptive or unfair practice caused actual damages. The plaintiffs asserted that because of GM's misrepresentations about the safety ratings, GM could charge more for the Cadillacs whether or not any purchasers actually saw and relied upon the Monroney stickers. This overcharge to all class members meant that the fraud caused an injury to the entire class. The district court agreed with Plaintiffs and certified a FDUTPA class.

In its 23(f) petition to reverse, GM argued individual inquiries predominated because some class members may have known that the safety ratings were inaccurate; or had not seen the sticker; or had negotiated their own purchase price. The court of appeals agreed with District Court Judge James L. Cohn that because the statute specifically did not require reliance as an element, GM was "incorrect to

suggest that the plaintiffs must prove that every class member saw the sticker and was subjectively deceived by it."[2]

Instead, the plaintiffs needed only show that the sticker inaccurately stated the safety ratings, and that such a misrepresentation would deceive an objectively reasonable observer. That GM later obtained five-star ratings in some of the categories did not matter, as the "injury occurs at the point of sale because the false statement allows the seller to command a premium on the sales price."[3] The court also disregarded any potential inquiry as to whether the purchaser saw the Monroney sticker, reasoning that, "By inaccurately communicating that the 2014 Cadillac CTS had attained three perfect safety ratings, General Motors plainly obtained enhanced negotiating leverage that allowed it to command a price premium. The size of that premium … represents the damages attributable to that theory of liability. Because that theory of liability is consistent for all class members, 23(b)(3) is satisfied."[4]

The Mixed History of the Overcharge Theories in Consumer Class Actions

Carriuolo followed the Eleventh Circuit's decision in Fitzpatrick v. General Mills Inc.[5] There, the plaintiff alleged a different "GM" violated the FDUTPA by misrepresenting its YoPlus yogurt as supporting digestive health." The court found the plaintiff's allegations that General Mills exacted a 44 percent price increase of sales over its nearly identical Yoplait brand yogurt supported the causation element.

Several previous district court opinions by Judge Cohn similarly held that sellers could face class trials over purchase prices inflated by misrepresentations, like that their baby formulas were uniquely healthy,[6] or that their chewing gum was scientifically proven to fight bad breath.[7] Other courts have also recognized the overcharge theories in certifying class actions involving the consumer fraud laws of California, New York and Minnesota.[8]

Other consumers have not been as successful. The Illinois and Pennsylvania Supreme Courts rejected a "market theory" in factually similar cases based upon previous holdings that required the consumer to prove she was in fact deceived.[9] New Jersey courts spurned a "price inflation theory" as an attempt to apply the "fraud on the market" presumption accepted in securities litigation to the consumer context, where there was no basis to presume an efficient market that would automatically incorporate the fraud into the price.[10]

The Case for Permitting an Overcharge Theory for Causation

Recognizing that a fraud can cause injury besides through direct reliance flows logically from Florida's consumer protection statute. First, by deliberately not including a reliance element into the consumer protection law, Florida wanted to make it easier for class certification, and interpreting causation to mean reliance would contradict that goal.[11] This fits with the historical roots of many of the consumer fraud acts passed in the 1970s. These laws were styled after the Federal Trade Commission Act, and focused on the misconduct of the seller, and the objective deceptiveness of the act, eschewing a reliance requirement.[12]

Recent U.S. Supreme Court rulings also support interpreting causation as broader than reliance. The Supreme Court disaggregated reliance and causation in Bridge v. Phoenix Bond & Indemnity Co.[13] There, an Illinois county had adopted a "single, simultaneous bidder rule," to bid on tax liens, but some bidders conspired to rig their bids. The plaintiffs complained that the conspirators were violating the Racketeer Influenced and Corrupt Organizations Act, and that the predicate acts (mail and wire fraud) were actionable even though the plaintiffs had never relied on the bids.

The court held that first-party reliance was not necessary to show a RICO fraud-based claim. The court noted that, "the alleged injury — the loss of valuable liens — is the direct result of the petitioners' fraud. It was a foreseeable and natural consequence of the petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens."[14] It is similarly foreseeable (if not the direct goal) that misrepresentations regarding a product or service will artificially inflate a price, causing consumers to overpay, whether or not each saw a representation.

Furthermore, the arguments securities defendants have marshaled against the "efficient market" theory show that the securities market is not so different than the consumer market.[15] Yet, in recognition of the value of 10b-5 lawsuits against securities fraudsters, the Supreme Court rejected fully dismantling the "fraud on the market" presumption.[16] The court noted that actual proof of no price impact from the fraud can still thwart class certification.[17] Similarly, class certification relying on the overcharge theory fails absent evidence that the misrepresentation caused an inflated price — as the plaintiffs cannot prove an injury to all class members through common evidence.[18]

Looking Ahead

An overcharge theory is not a free pass to class certification. Carriuolo did not adopt a presumption of market efficiency that assumes that the fraud inflated prices. Plaintiffs who assert an overcharge theory must still support class certification with evidence demonstrating that the fraud inflated the prices consumers paid. This may be through expert testimony that can isolate, absent the misrepresentation, how much customers would have paid for the product or service. Tools such as regression analyses or conjoint analysis can aid in this task. Armed with these tools, and decisions like Carriuolo, plaintiffs will likely continue to rely on an overcharge theory to obtain class-wide relief in consumer class actions.

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[1] No. 15-14442, 2016 WL 2870025 (11th Cir. May 17, 2016).

[2] Id. at *4.

[3] Id. at *6.

[4] Id. at *7.

[5] 635 F.3d 1279 (11th Cir. 2011).

[6] Nelson v. Mead Johnson Nutrition Co., 270 F.R.D. 689 (S.D. Fla. 2010).

[7] Smith v. W.M. Wrigley Jr. Co., 663 F. Supp. 2d 1336, 1340 (S.D. Fla. 2009).

[8] See, e.g., Khoday v. Symantec Corp., No. CIV. 11-180 JRT/TNL, 2014, at *33 (D. Minn. March 31, 2014) (certifying under Minnesota and California consumer protection statutes a class of purchasers of a product redownload service implicitly represented as necessary, where "even class members who used download insurance or who would have purchased download insurance even had they known of the alternatives suffered an injury in the form of an increased price" for the service); Stoltz v. Fage Dairy Processing Industry S.A., No. 14-CV-3826 MKB, 2015, at *23 (E.D.N.Y. Sept. 22, 2015) (finding sufficient allegations for a New York General Business law Sec. 349 claim where plaintiffs alleged that "[t]hrough the deceptive practice of marketing and selling their products displaying 'Total 0%', the defendants have been able to command a premium price by deceiving consumers about the attributes of their yogurt and distinguishing themselves from similar products."); Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 568-69 (S.D.N.Y. 2014) (holding class-wide injury existed where the defendant falsely labeled pomace oil as 100 percent pure olive oil because "even if a class member actively wanted to buy pomace instead of 100 percent pure olive oil, they nevertheless paid too much for it."); Negrete v. Allianz Life Insurance Co. of North America, 287 F.R.D. 590, 607 (C.D. Cal. 2012) ("So long as at least some class members — and presumably, a large percentage of class members, although not every single one — were induced into purchasing Allianz products because of the alleged misrepresentations, the price of these annuities would be greater for everyone in the class, even those class members who did not rely on the misrepresentations.")(emphasis in original)).

[9] Oliveira v. Amoco Oil Co., 201 Ill.2d 134, 140, 776 N.E.2d 151 (2002) (rejecting argument for class of all purchasers of misrepresented gasoline as the plaintiff did not allege that he saw, read or relied upon any misstatements); Weinberg v. Sun Co. Inc. 565 Pa. 612, 777 A.2d 442 (2001) (rejecting price inflation theory under identical facts and holding that Pennsylvania's Unfair Trade Practices and Consumer Protection Law requires actual reliance.)

[10] See, e.g., In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, No. 2:06-CV-5774 (SRC), 2009, at *31 (D.N.J. July 10, 2009) (holding "fraud on the market is essentially a creature of federal securities litigation," and dismissing the plaintiffs' NJCFA claims because they alleged only a price inflation theory of damages, which was insufficient to show that their injuries were proximately caused by the defendant's conduct). Accord New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 16, 842 A.2d 174 (App. Div. 2003) (holding that "fraud on the market" has no place in NJCFA suits because it would "fundamentally alter the concept of causation in the CFA context").

[11] See, e.g., Nelson, 270 F.R.D. at 698. ("Indeed, if the act requires a consumer to prove reliance, it becomes impossible for a court to ever certify a class in a FDUTPA action. ... Because a reliance element would effectively deprive [many] plaintiffs of a remedy, the court agrees … that FDUPTA does not require the plaintiffs to prove reliance.")

[12] See, e.g., Leaffer, Marshall A. and Lipson, Michael H., "Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence," 48 G.W.U. L. Rev. 521, 522, 536 (1980).

[13] 553 U.S. 639 (2008).

[14] Id. at 658.

[15] Halliburton Co. v. Erica P. John Fund Inc., 134 S. Ct. 2398, 2409 (2014).

[16] Id. at 2417.

[17] Id. at 2414 (“In the absence of price impact, Basic [v. Levinson's] fraud-on-the-market theory and presumption of reliance collapse.”)

[18] See e.g., Brazil v. Dole Packaged Foods LLC, 2014 at *6 (N.D. Cal. Nov. 6, 2014) (decertifying class where plaintiffs failed to show damage model that could isolate the impact of the fraudulent “all natural” claim); Prohias v. Pfizer Inc., 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007) (rejecting as too speculative plaintiffs’ “price inflation damages” where the plaintiffs offered no proof that the defendant’s allegedly inaccurate Lipitor marketing supported a higher price for the prescription drug than what the defendant was charging).
