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Contradictory testimony dooms class certification of Krazy Glue "slack-fill" class action (C.D. Cal.)

by Jay Bogan

Takeaway: Creative legal theories are easier to allege than prove. And a putative class representative does not always make the best deponent, especially when it comes to substantiating the key allegations in an unfair and deceptive trade practice case. A recent decision denying class certification by the Central District of California, *Spacone v. Sanford, L.P.*, Case No.: 2:17-CV-02419-AB-MRW, 2018 WL 4139057 (C.D. Cal. Aug. 9, 2018), shows how contradictory and ultimately unreliable testimony by a class representative can be used by a class defendant to secure the denial of class certification.

In *Spacone*, the class representative purchased a two gram package of Krazy Glue from a hardware store. The packaging featured Krazy Glue's "Stay Fresh Container," a relatively large opaque plastic cylinder housing a tube containing two grams of Krazy Glue cyanoacrylate adhesive. Spacone claimed that he reasonably relied on the packaging when he purchased Krazy Glue, and that he was led to believe the package contained more glue than it actually did.

Spacone asserted "nonfunctional slack-fill" claims against Sanford, claiming that the space between the interior of the Stay Fresh Container and the inner Krazy Glue tube constituted nonfunctional slack fill, in violation of California's Fair Packaging and Labeling Act, Cal. Bus. & Prof. C. § 12606(b), which defines "slack fill" as "the difference between the actual capacity of a container and the volume of product contained therein," and which defines "nonfunctional slack fill" as "the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of" fifteen specified justifications for slack fill.

Spacone's principal claims were claims under California's (1) Consumers Legal Remedies Act ("CLRA"), Cal. Bus. & Prof. Code §§ 1750–1782; (2) False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500–17535; and (3) Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200–17204. He sought the certification of a class of "[a]ll individuals who purchased one or more [Krazy Glue] Stay Fresh Container Products in California from January 31, 2013, until the date of trial." 2018 WL 4139057, at *1.

The district court's order first addressed Spacone's legal standing. To establish standing under the CLRA, FAL, and UCL, Spacone must show "that he lost money or property (economic injury) because Sanford misrepresented their Krazy Glue. Spacone must further establish that but for this misrepresentation, he would not have bought Krazy Glue, at least not at the price it was offered." 2018 WL 4139057, at *3.

The district court focused on Spacone's deposition testimony. Spacone testified that he purchased the

Krazy Glue not once but twice, so he could finish a job repairing the trim of an automobile. According to Spacone, he did not overpay for the Krazy Glue, and he denied he was "ripped off." His biggest problem was that, had he known how much product was actually in the package, he would have purchased two Krazy Glue packages instead of one. As it turned out, the single package he purchased did not provide enough glue for him to finish his automotive trim job. Instead, he had to get in his car, return to the hardware store, and buy a second package, all the while enduring California traffic.

The problem with this testimony, according to the district court, is that it showed that Spacone suffered the mere inconvenience of having to drive to the store to make a second purchase. This testimony did not substantiate the economic injury necessary to confer standing. 2018 WL 4139057, at *4-*5.

But there was also conflicting testimony. Spacone had submitted a written declaration wherein he stated he "lost money or property" because he did not "receive the amount of glue [he] expected to receive based on the visible packaging of the All Purpose Krazy Glue." 2018 WL 4139057, at *5. The district court disregarded this testimony, however, relying on the "sham affidavit rule," which holds that "[t]he general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Id.* (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)). Also, there was "muddled testimony" near the very end of his deposition, to the effect that Sanford had profited from its deceptive packaging and – to the extent the testimony indicated that Spacone had suffered some kind of economic injury – conflicted with his prior deposition testimony. The district court disregarded this testimony, as well, finding "the sham affidavit doctrine to be instructive, if not analogous." *Id.*

Evaluating all of this testimony, the court ruled that Spacone had not demonstrated that he lost money or property because of the alleged misrepresentations, and therefore lacked statutory standing to bring his claims.

The same testimonial issues doomed class certification in terms of the typicality and adequacy requirements. Typicality was not satisfied, because Spacone lacked standing and his Krazy Glue purchasing experience was not typical of the class claims.

Perhaps more importantly, Spacone was not an adequate class representative, because his testimony was not adequate. The district court noted: "The honesty and credibility of a class representative is a relevant consideration when performing the adequacy inquiry because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims." 2018 WL 4139057, at *9 (quoting *Harris v. Vector Marketing Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (citations omitted)).

On this point, the court concluded: "Here, the Court does not question class representative Mr. Spacone's overall character. However, the Court finds that Mr. Spacone's questionable standing assertion impedes his ability to adequately represent his proposed class. As noted above, the Court finds that Spacone's declaration and unclear testimony at the end of his deposition are insufficient to overcome his repeated admissions that effectively disprove standing. But even were the Court to find this ostensible conflict of evidence sufficient to let the standing issue go forward, his credibility as to his claimed injury jeopardizes

the class's ability to prevail. Spacone's repeated and unambiguous denials at deposition to the effect that he did not take issue with the price of the Krazy Glue product he purchased, that his injury was inconvenience, and that had he known how much adhesive the [Stay Fresh Container] actually contained, the only thing he would have done differently is purchase two packages in a single trip at a minimum call into question any subsequent assertions that he lost money or property because of the alleged misrepresentations – the fundamental elements of standing that Spacone must prove. Because there are at least serious questions going to Spacone's standing and his credibility to claim an economic injury but-for the alleged misrepresentation, the Court considers him as having interests antagonistic to the class and he is not reasonably well-situated to pursue the interests of the class." 2018 WL 4139057, at *10.