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Ninth Circuit: conjoint analysis fails to show class-wide damages for fraud and negligent misrepresentation claims

by James F. Bogan III

Takeaway: We have written about the use of survey-based conjoint analyses to prove class-wide damages. *See Ninth Circuit summarily reverses exclusion of conjoint survey with "major flaws"* (January 18, 2022). Recently, in *Mier v. CVS Health*, No. 22-55665, 2023 WL 4837851 (9th Cir., July 28, 2023), the Ninth Circuit affirmed the denial of class certification of fraud and negligent misrepresentation claims based on flaws in the conjoint analysis prepared by the putative class representative's expert witness.

In *Mier*, Joseph Mier filed a putative class action against CVS, asserting fraud and negligent misrepresentation claims (among other claims) based on the "price premium" received by CVS for its allegedly deceptive hand sanitizer label touting that the sanitizer "kills 99.99% of germs." To satisfy Rule 23's predominance requirement, Mier presented a conjoint analysis prepared by John Krosnick, Ph.D. The district court ruled that the damages model did "not adequately account for market supply and thus cannot measure class-wide damages based on market value." 2023 WL 4837851, at *1.

Mier appealed, contending that the model provided a "*Comcast*-compliant damages model" supporting his allegations of class-wide harm. The Ninth Circuit panel disagreed and affirmed the district court's ruling.

The panel started its analysis by setting out the measure of damages for fraud and negligent misrepresentation claims, which is "the difference between what the consumer paid for the product and what the product's ***market value*** would have been but for the misrepresentation." *Id.* (emphasis added). Reviewing the record evidence, the panel ruled that the "damages model does not adequately account for market supply and thus cannot measure class-wide damages based on market value," for the following reasons: (1) the evidence showed, contrary to the model, "that market supply fluctuated during the class period," and, even assuming the supply remained fixed throughout the Covid 19 pandemic, the class damages period extended back to 2016, and the model "did not calculate a supply curve for pre-pandemic months"; (2) the model did "not account for how a change in market demand from removing the [allegedly false label] would affect market supply"; and (3) the expert relied on market testimony that CVS "did not consider label claims in its pricing decisions," but, assuming that testimony was accurate, it "could reasonably suggest there was no price premium at all." *Id.*

The panel concluded that "Mier failed to establish a class-wide damages model for his fraud and negligent misrepresentation claims" and affirmed the denial of class certification as to those claims. *Id.* at *2.