IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

ANDREW TOTH and RICHARD ZATTA, individually and on behalf of all others similarly situated	:	JULY TERM 2002
	:	NO. 3886
vs.	:	
BODYONICS, LTD. d/b/a/ PINACLE AND GENERAL NUTRITION COMPANIES INC.	:	

OPINION

Plaintiff brings this class action on behalf of plaintiff, Andrew Toth[1] who purchased products containing specified ingredients at defendant GNC stores which were manufactured and distributed by defendant Bodyonics. Plaintiff brings only three claims. As to defendant Bodyonics, defendant claims only a violation of the UTCPCPL. As to defendant GNC defendant claims a violation of the UTPCPL together with a claim for unjust enrichment. For the reasons set forth below the Motion for Class Certification is denied.

In determining whether the criteria for certification have been satisfied, trial courts are vested with broad discretion in making such decisions. Weinberg, 740 A.2d at 1162 (citing Klemow v. Time, Inc., 466 Pa. 189, 197, 352 A.2d 12, 16, (1976); Prime Meats v. Yochim, 422 Pa.Super. 460, 619 A.2d 769, 773 (1993)). Despite having broad

[1] When this class action was initially filed the plaintiff designated two individuals as class representatives, Andrew Toth and Richard Zatta. Plaintiff's motion for class certification however, lists only one plaintiff Andrew Toth and makes no mention of Richard Zatta.

discretion and liberal license, Rule 1707 does limit the court's inquiries at the certification hearing: The hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint. Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. It is designed to decide who shall be the parties to the action and nothing more. Viewed in this manner, it is clear that the merits of the action and the right of the plaintiff to recover are to be excluded from consideration. Pa.R.C.P. 1707.

The sole issue before this court is whether the prerequisites for certification as stated in Pa. R. C. P. 1702 are satisfied. The purpose behind class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate". DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (Pa. Super. 1996). For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;
(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]:

a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (Pa. Super. 1985). The moving party need only present evidence sufficient to make out a prima facie case "from which the court can conclude that the five class certification requirements are met."

Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d 137,153-154 (2002)(quoting Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 451 A.2d 451, 455 (Pa. Super. 1982)

In other contexts, the prima facie burden has been construed to mean "some evidence," "a colorable claim," "substantial evidence," or evidence that creates a rebuttable presumption that requires the opponent to rebut demonstrated elements. In the criminal law context, "the prima facie standard requires evidence of the existence of each and every element." Commonwealth v. Martin, 727 A.2d 1136, 1142 (Pa. Super. 1999), alloc. denied, 560 Pa. 722, 745 A.2d 1220 (1999). However, "The weight and credibility of the evidence are not factors at this stage." Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001).

In the family law context, the term "'prima facie right to custody' means only that the party has a colorable claim to custody of the child." McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. 2000). Similarly, in the context of employment law, the Commonwealth Court has opined that a prima facie case can be established by "substantial evidence" requiring the opposing party to affirmatively rebut that evidence. See, e.g., Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm., 512 A.2d 1339 (Pa. Commw. 1986).

Courts have consistently interpreted the phrase "substantial evidence" to mean "more than a mere scintilla," but evidence "which a reasonable mind might accept as adequate to support a conclusion." SSEN, Inc., v. Borough Council of Eddystone, 810 A.2d 200, 207 (Pa. Commw. 2002). In Grakelow v. Nash, 98 Pa. Super. 316 (Pa. Super. 1929), a tax case, the Superior Court said: "To ordain that a certain act or acts shall be prima facie evidence of a fact means merely that from proof of the act or acts, a

rebuttable presumption of the fact shall be made;… it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question."

Class certification is a mixed question of fact and law. Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d,154 (Pa. Super. 2002). The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707(c). In determining whether the prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs' right to recover are excluded from consideration. 1977 Explanatory Comment to Pa. R. Civ. P. 1707. Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, "courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice." Janicik, 451 A.2d at 454,455. Accordingly, this court must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be liberally made and in favor of maintaining a class action. Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). See also Janicik, 451 A.2d at 454, citing and quoting Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) ("in a doubtful case . . . any error should be committed in favor of allowing the class action").

Likewise, the Commonwealth Court has held that "in doubtful cases any error should be committed in favor of allowing class certification." Foust v. Septa, 756 A.2d 112, 118 (Pa. Commw. 2000). This philosophy is further supported by the consideration

that “[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied.” Janicik, 451 A.2d at 454.

Within this context, the court will examine the requisite factors for class certification.

I. Numerosity

To be eligible for certification, the proponent must demonstrate that the class is "so numerous that joinder of all members is impracticable." Pa.R.C.P. 1702(1). A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually." Temple University v. Pa. Dept. of Public Welfare, 30 Pa.Cmwlth. 595, 374 A.2d 991, 996 (1977) (123 members sufficient); ABC Sewer Cleaning Co. v. Bell of Pa., 293 Pa.Super. 219, 438 A.2d 616 (1981) (250 members sufficient); Ablin, Inc. v. Bell Tel. Co. of Pa., 291 Pa.Super. 40, 435 A.2d 208 (1981) (204 plaintiffs sufficiently numerous). Proponent need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." Janicik, 451 A.2d at 456. The requirement of numerosity has been met herein.

II. Commonality

The second prerequisite for class certification is that “there are questions of law or fact common to the class.” Pa. R. Civ. P. 1702(2). Common questions exist “if the class members’ legal grievances arise out of the ‘same practice or course of conduct on the part

of the class opponent." Janicik, supra. 133, 451 A.2d at 457. Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all." Weismer by Weismer v. Beechnut Nutrition Corp., 419 Pa. Super. 403, 615 A.2d 428 (Pa. Super. 1992)). However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist.

"While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding." D'Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 338, 487 A.2d 995, 997 (Pa. Super. 1985). In examining the commonality of the class' claims, a court should focus on the cause of injury and not the amount of alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." See Weismer by Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (Pa.Super.). Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis. Cook v. Highland Water and Sewer Authority, 108 Pa. Cmwlth. 222, 231, 530 A.2d 499, 504 (Pa. Cmwlth.1987).

Plaintiffs' claims under the UTPCPL fail to satisfy the commonality requirement. To recover under the UTPCPL, plaintiffs must prove reliance. See Skurnowicz v. Lucci, 798 A.2d 788 (Pa. Super. 2002). A private UTPCPL plaintiff must show that he or she sustained injury as a result of a defendant's unlawful act. Weinberg v. Sun Co.Inc. , 565 Pa. 612, 777 A.2d 442, 446 (Pa. 2001). Because reliance is an integral element of any

UTPCPL claim, it is an inappropriate vehicle upon which to predicate a class action. In Debbs v. Chrysler Corp., 810 A.2d 137, 156 (Pa. Super. 2002). The Superior Court said:

"The UTPCPL was addressed by our Supreme Court in Weinberg, supra. There, the Court held that a plaintiff bringing a private action under the UTPCPL must establish the common-law elements of reliance and causation with respect to all subsections of the UTPCPL. Weinberg, 777 A.2d at 446. Our Supreme Court stated: "the UTPCPL's underlying foundation is fraud prevention. Nothing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation."

"Both fraud and UTPCPL claims were at issue in Basile, supra. There, the plaintiffs brought a class action against H & R Block as well as Mellon Bank alleging that the defendants failed to disclose that tax refunds under H & R Block's "Rapid Refund" program were actually short-term, high interest loans. Basile, 729 A.2d at 577. The plaintiffs alleged, inter alia, fraud and violations of the UTPCPL. Id. at 578.

This Court reasoned that, as to the UTPCPL claims, the plaintiffs must show detrimental reliance. The Court noted that "an action under the UTPCPL may not be amenable to class certification due to discrepancies in the respective levels of reliance displayed by individual class members." Id. at 584, citing DiLucido, 676 A.2d at 1241. The Court held that the plaintiffs need not show individualized detrimental reliance with respect to H & R Block, because H & R Block's fiduciary relationship with the plaintiffs established detrimental reliance as a matter of law. Id. On the other hand, Mellon Bank had no such fiduciary relationship with the plaintiffs. Id. at 585. Therefore, the Court concluded that:

"[The plaintiffs] may not assert the reliance inherent in such a relationship to establish this requirement. Rather, because Plaintiffs' claims against Mellon, unlike those against Block, assert conduct outside the confines of an agency relationship, Plaintiffs must establish reliance as a matter of fact on the basis of the testimony of individual class members. Because such a showing would vary between class members, Plaintiffs' claims against Mellon are not appropriate for treatment as a class action. Id. at 585."

The Court continued:

"As noted above, Rule 1702 requires, for class certification, that "there are questions of law or fact common to the class." When determining whether a class action is a fair and efficient means of litigating the dispute, "one factor to consider is whether common questions of law or fact predominate over any question affecting only individual members." Rule 1708(a)(1).

Our Supreme Court's directions in Klemow and Weinberg, as well as the Court's directions in Basile and DiLucido, guide us here. In order to prove both common-law fraud and a violation of the UTPCPL, the plaintiffs must show that they suffered harm as a result of detrimental reliance on Chrysler's fraudulent conduct. See, Klemow, 352 A.2d at 16 (cause of action for fraud includes a showing that the plaintiff acted in reliance on defendant's misrepresentations and, as such, is not generally appropriately resolved in a plaintiff class action); Weinberg, 777 A.2d at 446 (to sustain a private action under the UTPCPL, plaintiffs must show that they suffered "an ascertainable loss as a result of the defendant's prohibited action"). This Court has excused proof of individual detrimental reliance where the defendant has a fiduciary relationship with the plaintiffs. Basile, 729

A.2d at 585. Because no fiduciary relationship has been demonstrated between the class and defendant to excuse proof of individualized reliance, the individual questions involving reliance and causation would remain a significant barrier to class certification."

The Pennsylvania Supreme Court recently remarked that the causation requirement found in all private UTPCPL actions presented "questions of fact applicable to each individual private plaintiff that would be 'numerous and extensive'". Weinberg v. Sun Co., 565 Pa. 612, 777 A.2d 442, 446 Pa. Super. 2001). The same is true in this case. Such a determination would involve innumerable individual questions as to each class member. This cannot be established using class wide proof.

Our Appellate Courts have clearly and uniformly defined the law as requiring individualized proof of reliance even under the "catch-all" clause of the UTPCPL unless there exists a "fiduciary" relationship between the parties. Accordingly, these UTPCPL claims are not suitable for class treatment and certification is denied. This is the only claim for certification as to defendant Bodyonics.

Plaintiff claims the commonality claim is met as to the remaining claim of unjust enrichment against defendant GNC because GNC sold an "illegal product" and therefore was unjustly enriched as to all purchasers.

Although plaintiff presented into evidence limited numbers of advertisements by Bodyonics concerning the products in question and there is some limited testimony that some of these advertisements were contained in magazines generally available at GNC stores there is no specific evidence that the named plaintiff saw any specific advertisement let alone relied upon any advertisement distributed at a

GNC store. Therefore the commonality question is exclusively based upon the claim that GNC was unlawfully enriched by selling an illegal product.

"Unjust Enrichment" is essentially an equitable doctrine. Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 666 A.2d 327, 328 (Pa. Super. 1995). The elements of unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant and acceptance and retention of such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." Id. (quoting Wolf v. Wolf, 356 Pa. Super. 365, 514 A.2d 901 (Pa. Super. 1986). The application of this doctrine depends on the factual circumstances of the case at issue. An unjust enrichment class requires answers to the following questions of fact: (1) whether plaintiffs conferred a benefit upon defendants, (2) whether the defendant appreciated the benefit and (3) whether the defendant accepted and retained the benefits under the circumstances that would make it inequitable for the defendant to retain the benefit without payment for value.

Herein, plaintiff seeks to charge defendant GNC with unjust enrichment for having on its store's shelves a product designed and manufactured and advertised by it's supplier without any evidence that defendant GNC knew or had any reason to suspect that the manufacturer was selling an allegedly illegal product. This is not a products liability case where the seller can be jointly responsible for a defective product. This is an action charging unjust enrichment because of the illegal sale of controlled substances only against a party that had no reason whatsoever to know or even suspect that the product was alleged to be a controlled substance.

Indeed, to prove the product was illegally sold, plaintiff relies upon a not yet published and highly confidential report which analyzes the contents of the products, describes animal testing and concludes that certain ingredients do make the final product a controlled substance.[2] Plaintiffs rely upon thirty-five pages of highly technical scientific analysis including detailed mathematical calculations and technical analysis such as:

"Y is measured in millipollarization unit (Mp); [C] = concentration of competitor; mPo= the highest limiting value of polarization (receptor:FA complex~98%) or 0% competitive displacement; mP100 = the lowest limiting value of polarization (receptor:FA complex~05) or 100% competitive displacement." to conclude that the factor which everyone believed was not in the product (and therefore the products should not be classified as controlled substances) was in fact present. This is not the stuff of which anyone could conclude someone retained benefits inequitably.

Even at this stage of the proceedings, even with plaintiff's minimum prima facie burden at the certification stage, this cannot be considered prima facie proof of a common question when the uncontroverted facts are that no criminal agency, not a District Attorney in any County, not the Attorney General of Pennsylvania or any Federal criminal agency has ever declared these substances to be controlled or ever prosecuted anyone for possessing or even selling them. Pursuant to 35. P.S section 780-103 the Secretary of Health of the Commonwealth of Pennsylvania has responsibility to designate substances as controlled. No substance involved herein has ever been so designated. Likewise, Federal Law allows the Attorney General to make comparable designations and he has likewise never done so.

[2] Plaintiff's failed to file this report with their response to defendant's motion for summary judgment because the Prothonotary would not accept it "under seal" without a specific court order. Plaintiff would only file it under seal because it has not yet been publicly released.

The Congress of the United States has recently passed legislation which will ban sales beginning in January 2005. The need for new statutory authority is compelling evidence that no one in the country except plaintiff herein based upon unpublished cutting edge scientific results believed that the law at the time of sale made the sale illegal.

III.Typicality

The third step in the certification test requires the plaintiff to show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that pursuit of their interests will advance those of the proposed class members. DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (Pa. Super. 1996).

In this case, not even the named plaintiff herein believed the sale was illegal and therefore he cannot meet the typicality requirement for class certification. Indeed named plaintiff has a potential conflict which precludes him from as serving as class representative. The named Plaintiff is an experienced Commonwealth of Pennsylvania Narcotics Officer who purchased these products over an extended period of time. If he believed these were controlled substances, if he had any inkling that these might have been controlled substances he would never have risked his reputation and his job by making these purchases. Indeed, if he in any way suspected that these were controlled substances he was in position to ask his employer to do an analysis and make a determination as to legality.

Having purchased the product, without questioning whether the product was legally sold, plaintiff herein is unsuitable to be the representative for a class of plaintiffs whose only hope of recovery is convincing a jury (should a Judge find there is a factual question to be resolved) that the named plaintiff had been sold an illegal controlled substance. Indeed, in testimony as the class representative, plaintiff herein may have a conflict between the position advanced by his attorney and his professional experience and responsibility, a conflict which may be successfully exploited on cross examination to the disadvantage of other class members. The single named plaintiff cannot be considered typical of the class represented.

For the reasons set forth above the plaintiff has not met the typicality requirement.

IV. Adequacy of Representation

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class." Pa. R. Civ. P. 1702 (4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

> "(1) whether the attorney for the representative parties will adequately represent the interests of the class,
> (2) Whether the representative parties have a conflict of interest in the maintenance of the class action, and
> (3) Whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed." Rule 1709.

"Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession." Janicik, 305 Pa. Super. at 136, 451 A.2d at 458. Here, defendants do not challenge plaintiffs' counsels' skill and therefore, the court presumes that counsel is skilled in their profession."

"Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict." Janicik, 305 Pa. Super. at 136, 451 A.2d at 458. This criteria has been met.

V. Fair and Efficient Method of Adjudication

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. A class action is probably the least efficient or fair method for adjudicating the issue of the legality of the sale of this product. This could conceivably be done by an individual suit or by a Declaratory Judgment Action which results would be universally precedential without the significant expense and delay of notification, class certification proceeding, and appeal. As discussed above, it is neither a fair nor efficient method of adjudication.

For the reasons set forth about, certification is denied. The above captioned matter is hereby remanded to the appropriate management track in the court of Common Pleas of Philadelphia, after the time for appeal has run.

BY THE COURT:

DATE:_____ _____

Mark I. Bernstein, J.