

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAR 13 2001

IN RE: VITAMINS ANTITRUST
LITIGATION

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

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) Misc. No. 99-197 (TFH)
) MDL No. 1285

THIS DOCUMENT RELATES TO:
Watkins v. F. Hoffman-LaRoche, Ltd., et al.

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MEMORANDUM OPINION Re: Watkins Motions

Pending before this Court are various Motions to Dismiss filed by defendants in the above captioned action.¹ Based upon careful consideration of the parties' briefs and the entire record herein, the Court will grant defendants' Motions to Dismiss.

I. BACKGROUND

Plaintiff, Nathan Watkins, District Attorney for the Seventeenth Judicial Circuit of the State of Alabama, brings the instant parens patriae action for violation of the Alabama Deceptive Trade Practices Act ("ADTPA"), ALA. CODE §§ 8-19-1 to 8-19-15 (2000), on behalf of "Alabama consumers" who are "indirect purchasers of vitamins, vitamin premixes, or other vitamin products manufactured by defendants" and other unnamed co-conspirators.² Compl. at

¹ The following defendants have filed joint memoranda in support of their motions to dismiss, or in the alternative, to dismiss all claims for acts falling outside the applicable statutes of limitations: BASF Corp.; Hoffmann-LaRoche, Inc.; Roche Vitamins, Inc.; Eisai U.S.A., Inc.; Eisai, Inc.; DuCoa L.P.; EM Industries, Inc.; Chinook Group, Ltd.; Lonza, Inc.; and Takeda Vitamin & Food USA, Inc. Additionally, defendants J.L. "Pete" Fischer and Lindell Hilling have filed motions to dismiss based on lack of personal jurisdiction. Since the Court finds that plaintiff lacks standing to bring this action, it is not necessary for the Court to address the alternative grounds advanced by defendants for dismissal.

² The named defendants include: F. Hoffmann-LaRoche, Ltd.; Hoffmann-LaRoche, Inc.; Roche Vitamins, Inc.; Rhone-Poulenc Animal Nutrition, Inc.; Rhone-Poulenc, S.A.; BASF AG; BASF Corp.; Lonza AG; Lonza, Inc.; Chinook Group, Inc.; DuCoa, L.P.; John Kennedy; Robert Samuelson; Lindell Hilling; J.L.

9. Plaintiff purports to bring this action in his official capacity as district attorney and in a representative capacity on behalf of indirect purchasers. Plaintiff claims authority to bring this action pursuant to § 8-19-10(f) of the ADTPA.³

Plaintiff alleges that defendants and their co-conspirators engaged in price fixing and market allocation in violation of the ADTPA, thereby injuring Alabama consumers “in their trade or business.” Compl. Part VI ¶ 36, at 22. Plaintiff argues that Alabama consumers have been injured because they paid more for defendants’ vitamin products than they otherwise would have paid in the absence of the alleged unfair trade practices. Plaintiff further argues that Alabama consumers “have been and will continue to be injured in their business and property by defendants’ unfair and deceptive trade practices.” Compl. Part VII ¶ 58, at 29. Plaintiff seeks “damages, penalties, injunctive relief, and restitution” pursuant to ALA. CODE §§ 8-19-10 and 8-19-11. Id. ¶ 59.

In addition to the ADTPA claim, plaintiff seeks disgorgement under the theory of unjust

“Pete” Fisher; Antonio Felix; Eisai Co., Ltd.; Eisai U.S.A., Inc.; Eisai, Inc.; Takeda Chemical Industries, Ltd.; Takeda Vitamin & Food U.S.A., Inc.; Takeda U.S.A., Inc.; Merck KgaA; E. Merck; and EM Industries, Inc.

³ Section 8-19-10(f) provides:

A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class; provided, however, that the office of the Attorney General or district attorney shall have the authority to bring action in a representative capacity on behalf of any named person or persons. In any such action brought by the office of the Attorney General or a district attorney the court shall not award minimum damages or treble damages, but recovery shall be limited to actual damages suffered by the person or persons, plus reasonable attorney’s fees and costs.

ALA. CODE § 8-19-10(f).

enrichment. In support of this claim, plaintiff argues that “Defendants have benefitted from their illegal restraints of trade . . . through the Alabama consumers’ overpayment for Defendants’ vitamin products . . . [and] [i]t would be inequitable for the Defendants to be permitted to retain any of the . . . overpayment.” Compl. Part VII ¶¶ 61-62, at 30. Plaintiff seeks disgorgement of monies acquired through defendants’ allegedly illegal and inequitable conduct, plus interest and costs. Id. ¶¶ 63, 65.

Defendants argue that plaintiff lacks standing to bring this action; the ADTPA does not cover the conduct alleged in the Complaint; plaintiff’s claims are barred by the applicable statutes of limitations; the Complaint should be dismissed or stayed because of prior pending actions; this Court lacks personal jurisdiction over these defendants; and plaintiff failed to provide an opportunity for dispute resolution prior to instituting this action in violation of ALA. CODE § 8-19-8(a).⁴

⁴ The statute provides in relevant part:

Whenever the office of the Attorney General or the office of the district attorney has reason to believe that any person is engaging in, has engaged in or is about to engage in any act or practice declared to be unlawful by this chapter, the Attorney General or the district attorney may bring an action in the name of the state against such person to restrain by temporary restraining order, temporary or permanent injunction such acts or practices. However, unless the Attorney General or district attorney determines that a person subject to the provisions of this chapter designs quickly to depart from this state or to remove his property therefrom, or to conceal himself or his property therein, or to continue practices unlawful under this chapter, he shall, before initiating any legal proceedings is contemplated [sic], allow such person a reasonable opportunity to appear before the Attorney General or district attorney and solve the dispute to the parties’ satisfaction.

ALA. CODE § 8-19-8(a). As discussed infra Note 11, plaintiff requests injunctive relief for violations of the ADTPA pursuant to §§ 8-19-10

II. DISCUSSION

A. Plaintiff's First Cause of Action - Violation of the ADTPA

Plaintiff asserts that defendants' actions constitute "unfair or deceptive trade practices substantially affecting trade or commerce in the state of Alabama in violation of § 8-19-1, et. seq.," of the ADTPA.⁵ Compl. VII ¶ 54, at 29. Plaintiff seeks damages, penalties, injunctive relief, and restitution for violation of the ADTPA pursuant to §§ 8-19-10 and 8-19-11.

1. Standing

a. Plaintiff's ADTPA claim must be brought on behalf of "consumers"

Plaintiff lacks standing to bring this action because the ADTPA claim in the instant case must be brought by or on behalf of "consumers" as defined in the statute. The ADTPA provides:

Any person who commits one or more of the acts or practices declared unlawful under this chapter and thereby causes monetary damage to a consumer, and any person who commits one or more of the acts or practices declared unlawful in subdivisions (19) and (20) of Section 8-19-5 and thereby causes monetary damage to another person, shall be liable to each consumer or other person

ALA. CODE § 8-19-10 (emphasis added). The ADTPA defines "consumer" as "[a]ny natural

and 8-19-11, not § 8-19-8. This distinction is relevant, because § 8-19-10(f) limits remedies available to the office of Attorney General or district attorney in representative actions.

⁵ In his Complaint, plaintiff does not plead a violation of a specific section of the ADTPA, but rather asserts a general violation of the ADTPA. However, plaintiff does assert that defendants' conduct constitutes an "unconscionable, false, misleading and deceptive act or practice in the conduct of trade or commerce in violation of the Alabama Trade Practices Act." Compl. VI. ¶ 33, at 21. This language parallels the language of § 8-19-5(26), which declares unlawful "[e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce." Notably, plaintiff references this catchall provision in his Response to defendants' Motions. See infra note 7.

person who buys goods or services for personal, family or household use.”⁶ ALA. CODE § 8-19-3(2). In his Complaint, plaintiff asserts injury to Alabama consumers “in their trade or business,” Compl. ¶ 36, at 22, and “continue[d] . . . injur[y] in their business and property.” Compl. ¶ 58, at 29. In his Response to defendants’ Motions to Dismiss, plaintiff asserts for the first time that his action is really brought “on behalf of all consumers who purchased vitamin products.” Pl.’s Resp. at 14. However, this characterization of plaintiff’s claim is directly contradicted by the language of his Complaint. In such cases, the language of the complaint is deemed controlling. Hawthorn v. Dept. of Navy, 29 F.3d 682, 688 (“The purpose of a motion to dismiss is to assess the validity of the pleadings”) (emphasis added). A plaintiff is not entitled to avoid dismissal by attempting to amend his complaint in a legal memorandum filed in response to a motion to dismiss. Id. (in ruling on a motion to dismiss, Court should not consider factual allegations in a memorandum of law that contradict those in the complaint). Accordingly, the Court finds that plaintiff alleges injury to consumers only in their trade or business and thus does not satisfy the statutory definition of consumer under the ADTPA.

The catchall provision⁷ on which plaintiff bases his claim affords a right of action only to

⁶ Section 8-19-10 appears to provide two instances in which an action may be brought for injury to a person other than a consumer, as defined in the statute. These two instances pertain to pyramid schemes, § 8-19-5(19), and misrepresentations made in the context of seller-assisted marketing plans, § 8-19-5(20). Neither of these provisions has been pleaded in the instant case.

⁷ In his Complaint, plaintiff purports to bring his claim for injury resulting from violation of the ADTPA, without alleging a specific statutory section or subsection violated by defendants. However, in his Response to defendants’ Motions, plaintiff references the statute’s catchall provision, § 8-19-5(24). Pl.’s Resp. at 13. Pursuant to the 1999 amendments, the correct reference is § 8-19-5(26). The statute declares unlawful “[e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or

“consumers,” as defined in the statute -- that is, persons who buy goods or services for personal, family or household use. See Deerman v. Federal Home Loan Mortgage Corp., 955 F. Supp. 1393, 1399 (N.D. Ala. 1997) (stating that in regards to the catchall provision, “[o]nly ‘consumers’ have private rights of action under this section”), aff’d, 145 F.3d 364 (11th Cir. 1998); see also Ebsco Indus., Inc. v. LMN Enters., 89 F. Supp. 2d 1248, 1266 (N.D. Ala. 2000) (finding that corporate plaintiff lacked standing to bring false advertising claim under ADTPA because liability is imposed under § 8-19-5(5) for injury only to “consumers”). Plaintiff’s allegations of injury to consumers injured in their trade or business do not satisfy the statutory definition of “consumer.” Therefore, plaintiff lacks standing to maintain his action for violation of the ADTPA.

b. Failure to bring the action on behalf of a named person

Plaintiff also lacks standing to bring this action because he has failed to bring the action “on behalf of any named person or persons.” Joint Mem. at 4. Defendants concede that plaintiff is entitled to bring an action under the ADTPA in a representative capacity, but argue that § 8-19-10(f) requires plaintiff to name at least one allegedly injured party.⁸ Plaintiff asserts that naming himself and filing on behalf of Alabama consumers, generally, is adequate under the statute.

Because Alabama case law is silent as to the interpretation to be given to this provision,

commerce.” § 8-19-5(26). As noted by defendants, this is the only section of the ADTPA upon which plaintiff could base his claim, because all other sections are inapplicable to the alleged wrongful conduct.

⁸ The statute provides in relevant part that “the office of the Attorney General or district attorney shall have the authority to bring action in a representative capacity on behalf of any named person or persons. ALA. CODE § 8-19-10(f) (emphasis added).

the Court will apply general principles of statutory construction. Section 8-19-10(f) grants to the Attorney General or district attorney authority to bring action in a representative capacity on behalf of any named person or persons.⁹ The purpose of this requirement is to provide defendants with sufficient information about the injured party or parties and the circumstances of the alleged wrong to allow them to adequately defend themselves. Plaintiff has not fulfilled this requirement by naming only himself, because he has not alleged that he was personally injured by defendants' actions. Therefore, since it is clear that plaintiff has failed to bring this action on behalf of any named person or persons, thereby violating the plain language and intent of § 8-19-10(f), the Court finds that plaintiff lacks standing to bring this action.

c. Approval from the Governor is required for actions commenced by outside counsel on behalf of the State

Another factor warranting dismissal of plaintiff's Complaint lies in § 36-15, which outlines the duties of the Attorney General or district attorney in bringing a representative action. Specifically, section 36-15-12(12) provides that "no attorney shall represent the State of Alabama, or any agency, department, or instrumentality of the state in any litigation in any court or tribunal unless the attorney has been appointed as a deputy general or assistant attorney general." Ala. Code § 36-15-12(12). In the instant case, plaintiff has brought his action through private counsel. Although the approval requirement is raised in at least one of the motions to dismiss, plaintiff does not address this issue in his Response. However, the Alabama Supreme Court has interpreted this provision in Ex parte Weaver, noting that "if private counsel is to be

⁹ The APTPA provides that "in constructing 8-19-5, due consideration and great weight shall be given . . . to the interpretations of the . . . Federal Trade Commission Act." ALA. CODE § 8-19-6 (emphasis added). However, § 8-19-6 specifically enumerates only § 8-19-5 as a provision to be interpreted in light of the FTCA.

hired to represent a state agency, that counsel must be employed by the attorney general with the approval of the Governor.” Ex parte Weaver, 570 So. 2d 675, 679 (Ala. 1990) (discussing the discretion of the attorney general to “direct and control” litigation, but reading 36-15-21 as requiring the approval of the Governor “for the employment of outside counsel to represent a department”). Based on the pleadings before the Court, there is no evidence that plaintiff has sought and obtained approval from the Governor to bring this action through private counsel. Therefore, defendants are entitled to dismissal of the ADTPA claim on this ground as well.

2. Other Grounds For Dismissal

Given that plaintiff lacks standing to bring the ADTPA claim in this case, there is no reason for the Court to address the scope of the ADTPA, the applicable statute of limitations, the effect of any prior pending litigation, or any personal jurisdiction issues raised in defendants’ Motions. However, despite the Court’s dismissal of the ADTPA statutory claim for lack of standing, the Court must still determine whether plaintiff may pursue his equitable claim under the theory of unjust enrichment.

B. Plaintiff’s Second Cause of Action - Unjust Enrichment

In addition to asserting violations of the ADTPA, plaintiff also seeks disgorgement based upon the theory of unjust enrichment. Defendants direct this Court’s attention to § 8-19-10(f), arguing that plaintiff’s claim must be limited to actual damages. Defendants also assert that plaintiff lacks standing to bring a claim of unjust enrichment on his own behalf because he has not personally suffered any injury. Defendants further argue that plaintiff cannot bring an unjust enrichment claim in a representative capacity because there is no legal precedent in the ADTPA or elsewhere for such a claim. Finally, defendant Fischer argues that plaintiff cannot maintain an equitable action when there is an adequate remedy at law. Fischer Mot. at 11.

This Court finds that § 8-19-10(f) is dispositive on this issue. Defendants correctly point out that § 8-19-10(f), which confers authority upon the attorney general or a district attorney to bring a suit in a representative capacity, limits damages in such actions “to actual damages suffered by the person or persons, plus reasonable attorney’s fees and costs.” See Joint Reply Mem. at 6 (quoting ALA. CODE § 8-19-10(f)). In support of this position, this Court would also direct plaintiff’s attention to Exxon, in which the Alabama Supreme Court cautioned against circumvention of the intent of the Alabama legislature through statutory construction that creates new causes of action.¹⁰ See Ex parte Exxon Corp., 725 So. 2d 939, 933-34 (Ala. 1998).

Plaintiff argues that other sections of the ADPTA authorize injunctive relief and would therefore have this Court extrapolate a “broad equity jurisdiction” in order to permit recovery of unjust enrichment damages.¹¹ Pl.’s Resp. at 16. Plaintiff contends that “[o]nce a court’s equity jurisdiction has been established by [injunctive] relief statutes, the court has inherent and broad powers to grant all forms of equitable relief, including disgorgement and restitution.” Pl.’s Resp.

¹⁰ In Ex parte Exxon, the Alabama Supreme Court reviewed a mandamus petition arising from a lower court’s choice of law analysis in the context of a class certification proceeding. The plaintiffs sought to bring a consumer class action based on New Jersey consumer protection laws. The court found New Jersey laws to be contrary to Alabama law, which reserves class action representation to the attorney general or a district attorney. The court explained that “by suing under another state’s law that is more favorable to the result they seek, parties could circumvent the clear intent of the Alabama legislature and, in effect, force this Court to judicially create new procedures or causes of action.” Ex parte Exxon, 725 So. 2d at 933.

¹¹ See e.g., § 8-19-8(a) (permitting an attorney general or district attorney to bring injunctive proceedings against “any person [who] is engaging in, has engaged in or is about to engage in any act or practice declared to be unlawful by [the ADTPA]”). However, unlike § 8-19-10, § 8-19-8 does not specifically address representative actions brought by the office of the attorney general or the district attorney.

at 16 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398-99 (1946); U.S. v. Exxon Corp., 561 F. Supp. 816, 855 (D.C. Cir 1983)). Porter and its progeny stand for the proposition that “district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress.” Meghrig v. KFC Western, 516 U.S. 479, 487 (1996) (citing Porter v. Warner Holding Co., 328 U.S. 395 (1946); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Hecht Co. v. Bowles, 321 U.S. 321 (1944)). However, these cases refer to the jurisdiction of federal districts courts to afford equitable remedies in the context of federal statutes. Even if the principle of broad equity jurisdiction articulated in Porter can be extended to federal courts, sitting in diversity jurisdiction, applying state law and interpreting state statutes, Porter and its progeny qualify this equitable jurisdiction and teach that a district court has equitable jurisdiction if, and only if, “a statute in so many words, or by necessary and inescapable inference,” does not restrict the court’s jurisdiction in equity. Porter, 328 U.S. at 399; see also FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996). Applying this contrary statutory intent principle to the instant case, the Court finds that dismissal is warranted, because the ADTPA expressly limits available remedies in § 8-19-10(f) representative actions to actual damages plus costs and fees.¹² Plaintiff offers no argument to refute the provision’s circumscription of remedies available in representative actions; and this Court is persuaded by the plain language of § 8-19-10(f) that the Alabama legislature has determined to preclude, in representative actions, the very type of remedy that plaintiff seeks. Therefore, the

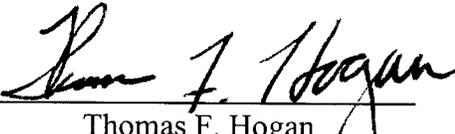
¹² The statute directs that when the office of the Attorney General or a district attorney brings an action in a representative capacity, that “the court shall not award minimum damages or treble damages, but recovery shall be limited to actual damages suffered by the person or persons, plus reasonable attorney’s fees and costs.” ALA. CODE § 8-19-10(f).

Court will grant defendants' Motions to Dismiss plaintiff's unjust enrichment claim.

III. CONCLUSION

Based on the foregoing reasons, the Court finds that plaintiff lacks standing to bring an action for violation of the ADTPA. In addition, the Court finds that plaintiff is not entitled to disgorgement under the theory of unjust enrichment due to the limitation of available remedies delineated in 8-19-10(f). Accordingly, defendants' motions to dismiss are granted and plaintiff's claims are dismissed. An Order will accompany this Opinion.

March 13, 2001


Thomas F. Hogan
United States District Judge

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ORDER Re: Watkins Motions

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED defendants' Motions to Dismiss are **GRANTED**. It is further hereby

ORDERED that plaintiff's claims are **DISMISSED IN THEIR ENTIRETY**.

March 13, 2001



Thomas F. Hogan
United States District Judge

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