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False Labeling Lawsuits Get Hung Up On Faulty Damages Models

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Some of our colleagues from Mintz Levin's Class Action Practice, **Joshua Briones**, **Crystal Lopez**, and Grace Rosales, recently authored an interesting and timely article in the Bloomberg BNA *Product Safety & Liability Reporter*. The article examines certain defenses in consumer fraud class actions over product labeling - specifically, defenses based on faulty damages models. Beyond proving the factual truth of the allegedly misleading labeling claims, the authors tell us, food and other consumer product companies can combat meritless suits by showing that the plaintiff's damages-calculation model does not meet the requirements established under Rule 23 of the Federal Rules of Civil Procedure.

When reviewing a purported class action lawsuit, Federal Rule 23(b) requires the court to determine that "questions of law or fact common to class members predominate over any questions affecting only individual members." Generally, a consumer's damages in a false advertising case are equal to the amount of money needed to make the consumer "whole" — that is, to compensate the consumer for the harm caused by the false claim. But measuring the actual value received by a consumer and the but-for value that consumer would have received absent the false labeling by the product's manufacturer requires a fact-intensive economic inquiry (for example, questions related to individual consumers' behavior and preferences, the actual amount consumers paid for the product, time frame of the purchase, etc.). As a result, according to our expert litigators, defendants in product labeling lawsuits can oppose class certification or even file an early motion to decertify by showing that the plaintiffs' damage model cannot be calculated with proof that is "common" to the class.

Joshua, Crystal, and Grace's full article can be viewed **here**. Any manufacturer or retailer of consumer products that is facing a false labeling suit should give it a quick read!

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Joanne counsels global clients on the regulatory and distribution-related implications when bringing a new FDA-regulated product to market and how to ensure continued compliance after a product is commercialized.