Professor DeWolf | Consumer Law
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SAMPLE ANSWER TO EXAM

QUESTION 1

The facts for this case were taken from Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir. 2005), which held that consumers could bring class actions based on claims of biological hazards.

I will first address those aspects of the case that have to do with liability, and then the procedural questions about the class actions and associated remedies.

Liability Issues

The plaintiffs are claiming that the sale of cell phones without separate headsets is both unfair and deceptive. (Under the Linden statute ("LCSPA") unfair practices are denominated "unconscionable," but the standard is similar.)

Federal Preemption. My first hope would be to find some basis for federal preemption of these claims. If the FCC has regulated the amount of radiation, or if the EPA is working on regulations, we could argue that states shouldn't interfere. Even if we couldn't get the cases dismissed on the basis of preemption, there might be some persuasive federal standard that we could appeal to.

Fraud. The complaints allege that the sales were fraudulent, but the tort standard for fraud is very high: there must be a false statement made with *scienter*—knowledge of falsity or recklessness regarding probable falsity. There can be fraud through actions as well as speech, but I don't see that Nokia, simply by selling the cell phones, did something knowingly false.

Unfairness. Nonetheless, many state UDAPs prohibit "unfair or deceptive practices." The standard for what is unfair is contained in the *International Harvester* case, which involved fuel geysering. The court measured what was unfair based upon the likelihood of harm (which was remote) and the severity of the harm if it occurred (which was extreme). Similarly, here the court would have to make some determination of whether the harm that was likely to result from use of a cell phone without a separate headset would be sufficient to justify the additional cost that the plaintiffs want to impose on our client.

Under *International Harvester*, there were three types of practices that would trigger a standards for unfairness: (1) A practice that *harms* consumers; (2) a practice that violates *public policy*; or (3) one that is unethical or unscrupulous.

The form of unfairness I would be most worried about is category #1: harm to consumers. I would analogize this case to *International Harvester*, where there was a very slight chance of very grave harm from the product. The court imposed a 3-part test: (a) is there *substantial* harm; (b) is the risk outweighed by some countervailing benefit that would have to be sacrificed to eliminate the risk of harm; and (c) does the consumer have a means of *avoiding* the harm? I would argue with respect to (a) that, unlike fuel geysering, where the causal link between product and harm was unmistakable, here the claims about physical harm from cell phones is extremely tenuous, and therefore the cases are not analogous. Certainly consumer law is not the place to debate the science of radiation hazards.

As to the other two forms of unfairness, violations of public policy and unscrupulous behavior, I don't think our client has much to fear.

The Class Action and Related Remedies

In order to get the class action(s) certified, the plaintiffs will have to satisfy the standards laid out in the Linden CSPA or the state equivalents. The only one we probably could not challenge is (1) *numerosity*. But the others are open to debate:

(2) *Common questions of law or fact*. We would argue that, while there are some common

questions, they are dwarfed by the differences among claimants. Some Nokia customers purchased their phones through a phone service provider; others may have received one as a gift. Still others got one through their employer. These differences would make it difficult to decide whether or not the actions of Nokia were "negligent" or "fraudulent."

(3) *Typicality* and (4) *Representativeness*. We don't know who the individual class representatives are, but we don't know if they would be typical or representative, given the differences just described.

(5) *Predominance of Common Questions*. Again, we would argue for the denial of the motion to certify the class, pointing to the large number of variations in the situation of the consumers.

One new wrinkle is the recent adoption of the federal Class Action Reform legislation. That allows defendants like our client to ask for removal of cases like this to federal courts, notwithstanding the lack of traditional diversity, or sufficient amounts in controversy. We might have better luck in front of a federal judge than a series of state court judges.

Punitive Damages, Attorney Fees, etc.

The plaintiffs want punitive damages, but there's nothing suggesting that Nokia did anything so egregious as to justify an award of punitive damages. Perhaps there are "dirty papers" like the asbestos cases where Nokia executives sold the product despite clear evidence of danger to consumers, but that seems far-fetched.

Attorney fees are among the more worrisome aspects of this case. If the plaintiffs succeed they would be entitled under most state UDAPs (as well as LCSPA) to recover attorney fees.

QUESTION 2

There are pros and cons to this proposal:

Pros. Obviously consumers would get some benefit from return of more of their money. Also, the more egregious of the rebate scams (which make it almost impossible to comply with the provisions for the rebate, or which simply deep-six a proportion of the valid rebate submissions) would be subject to oversight and a reduction of consumer harm. Undoubtedly some sellers would choose to do away with rebates, which some consumers would regard with a measure of relief.

It could be said that the savvy consumer (who's good at the rebate game) would probably lose out, while the gullible (who don't get their act together or aren't good at paperwork) lose out.

Cons. Rebates presumably benefit sellers by providing information about consumers, and offer a way to sell to more price-conscious consumers. The marketplace generally has more "wisdom" about how to deliver goods and services at less cost. By bureaucratizing this aspect of the marketplace, consumer choice is lost. There's also a difference between rebates on new automobiles and rebates on bottles of mouthwash. A rule that doesn't distinguish is heavyhanded. One might say this rule is like the FTC's enforcement action in *Fairmont Ford*, that was of questionable benefit to the consumer.

Another argument would be for the information aspect of the proposal, but not the coercive aspect. Information doesn't cost that much for the seller to supply and may curb the most serious consumer losses.

QUESTION 3

> This case is based upon *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56 (2nd Cir. 2004), which reinstated a class action brought under the Fair Debt Collection Practices Act that had erroneously been dismissed.

My primary focus would be the enforcement of the Fair Debt Collection Practices Act ("FDCPA"), 15 USC § 1692.

Is Hutton Covered? The first issue is whether or not Hutton would be included in the

coverage of the FDCPA. Hutton would consider itself a law firm, not a debt collector, and