A Man Walks Into a Walmart

by Norman Tabler

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When you hear the basic facts, you can't help waiting for the punch line. But there isn't one because this isn't a joke. It really happened:

> A man walked into a Walmart and bought a pair of pre-packaged shoe inserts off the shelf. Later he sued the manufacturer, claiming that he had been defrauded into thinking that the inserts had been individually fitted to his feet by a doctor.

The Background

James Kommer had foot trouble. In 2011 at the recommendation of a chiropractor, he was fitted for custom orthotic inserts. They cost $333. In 2014 he wanted a second pair but balked at the cost. He thought that he had found the answer in a Walmart in Saratoga Springs, N.Y.

The Walmart featured a Dr. Scholl's Custom Fit Orthotic Inserts Foot Mapping Kiosk. Shelving on the side of the kiosk displayed 14 models of pre-fabricated, pre-packaged inserts. As instructed by the directions on the kiosk, Kommer removed his shoes and stood on the machine to have his feet "mapped."

At the conclusion of the process, the kiosk identified one of the 14 models as appropriate for Kommer. He bought the recommended model for about $50.

He used the inserts for several months, but they didn't relieve his foot pain; in fact, they made it worse.[1]

The Complaint

Kommer filed a class action complaint in the Federal District Court for the Southern District of New York against the manufacturer of Dr. Scholl's Custom Fit Orthotic Inserts.[2] His claim was that he and other purchasers of the inserts had been defrauded into believing that the inserts were individually fitted to their feet when they were actually "standardized factory-manufactured" inserts.

Kommer's definition of "custom fit" was a strict one:

> Custom fit orthotics are custom-made shoe inserts which are specifically designed for the individual patient. Ideally, they are fitted by the podiatrist, chiropractor, or physician upon completion of a detailed physical examination and measurements of the patient's foot. Indeed, "custom-made" is defined in the Merriam-Webster dictionary as "made to fit the needs or requirements of a particular person; made to individual specifications."

According to the complaint, Kommer and his fellow class members were induced to believe—incorrectly—that the inserts they purchased met that strict standard. Of course, they didn't.

What was Kommer's explanation of how he (or any other class member) could believe that the inserts met that strict standard when they had obviously been manufactured in the past, were standardized, and were purchased off the shelf? How could a purchaser believe that ideally the inserts had been individually fitted for the purchaser by a doctor when there was no doctor in sight?

Kommer cited three basic reasons for believing that the inserts met the standard. First, there is the name of the product. They are branded as "Custom Fit," and Kommer claimed that label made him believe that they had been custom-fitted to his own feet.

Second, the product is heavily promoted across the country, including television and print ads, the Dr. Scholl's website, and other promotional material—always as "Custom Fit."

And then there is the Dr. Scholl's Custom Orthotics Foot Mapping Kiosk, which Kommer labelled a "high technology-looking machine." Kommer found the kiosk particularly devious. His evidence? Well, he states:

> [The kiosk] is not programmed to refuse offering a product to those who stand on it. Rather, every person who stands on the machine and follows the on-screen instructions will be recommended to purchase one of 14 Dr. Scholl's Custom Fit Orthotic Inserts, even if the person has no foot problems at all.

Kommer claimed that the defendant's deceptive behavior violated §§ 349 and 350 of the New York General Business Law. Section 349 prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce." Section 350 declares unlawful "false advertising in the conduct of any business, trade or commerce."

Relief Sought

Kommer requested that the court (1) certify his action as a class action; (2) for violation of each of §§ 349 and 350, award "damages to be determined at trial, plus statutory and treble damages"; (3) award interest, costs, and attorney's fees; (4) issue an injunction against further violations of §§ 349 and 350; and (5) award such other relief as the court may deem appropriate.

Trial Court Judgment

Defendant moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) for lack of standing to seek an injunction and 12(b)(6) for failure to state a claim upon which relief can be granted. The motion came before Judge Deborah Batts.[3]

The first part of the court's ruling sounds almost like the punchline we've been waiting for since we first heard the facts: Kommer can't have an injunction *because he lacks standing.* We can almost hear the rim shot.

Why did he lack standing? (And, no, it wasn't because his feet were sore.) It was because he had conceded that he wouldn't again buy the inserts or be deceived by defendant's marketing. Under Second Circuit precedent, that meant that he had no need for the protection of an injunction and therefore no standing to seek injunctive relief.[4]

Defendant's Rule 12(b)(1) motion was granted.

On the merits, Kommer's claims of violations of §§ 349 and 350 fared no better. Judge Batts held that defendant's conduct was not likely to mislead a reasonable consumer. Not even the sinister kiosk could deceive a reasonable person:

> At the point that the customer is directed to select a pre-packaged Insert stacked along shelves on the side of the Kiosk … it is no longer reasonable for him to think that he is getting a product "individually designed" for his feet….
>
> As for Kommer himself,
>
> Plaintiff needed only to look at what he was buying to see that it was "standardized," "mass produced," and "over-the-counter."

Apparently not wanting to pile on, the judge resisted asking rhetorically how Kommer could have thought that ideally the inserts had been fitted by a doctor when there was no doctor in sight. Nor did she observe that unlike Kommer's (or anyone else's) own two feet, the two inserts in the package were identical.

The court granted defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim.

On Appeal

Not one to give up easily, Kommer appealed the ruling to the Second Circuit. Early this year that court issued a summary order affirming the ruling.[5]

The Lesson

The lesson of the case is that a consumer is expected to use common sense in making a purchase. If he can see before making the purchase that the product differs from his alleged understanding of the label, he can't successfully argue that he was deceived by the label.

But then, your mother could have told you that. ⊙

Endnotes

[1]The facts are taken from the complaint in *Kommer v. Bayer Consumer Health*, Case 1:16-cv-01560 (S.D.N.Y., *filed* Feb. 29, 2016), and the trial court's Memorandum and Order (S.D.N.Y., *issued* May 18, 2017).

[2]Kommer named five related defendant corporations in charge of manufacturing, marketing, distributing, and selling the product. For simplicity's sake this article refers to them by the singular "defendant" and the term "manufacturer."

[3]Memorandum and Order (S.D.N.Y., *issued* May 18, 2017).

[4]*Citing Chang v. Fage USA Dairy Indust.,* 14-cv-3826, 2016 WL 5415678 (E.D.N.Y. 2016) and cases cited therein.

[5]Summary Order (2d Cir., *issued* Jan. 31, 2018).