

The Blender Atop the Cabinet of Mr. Callegari¹

by Norman G. Tabler



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If his lawyers had read the law as carefully as Alejandro Callegari read the advertised specifications of his blender, his class action against the blender's manufacturer might have fared better.

Mr. Callegari Buys a Blender²

Florida resident Callegari is an avid cook. He wanted a blender to use when cooking for his family and friends. Shopping for a blender online, he was particularly interested in the power of various makes and models.

Callegari was delighted to find the Blendtec website offering several blender models promising horsepower (HP) between 3.0 and 3.8. He settled on the Blendtec Classic 475 120v, ordered it online, and eagerly awaited its arrival.

The Heartbreak of Weak Horsepower

The blender arrived. Callegari plugged it in and turned it on. *But something was wrong!* The blender was underpowered! Callegari was no engineer, but even as a layman he could tell that the machine was not powered at 3.0 HP, let alone 3.8 HP!

His use of the blender declined rapidly. After all, who wants to cook with a wimpy blender? But Callegari did more than merely sulk about the matter. He did what Americans do when they're disappointed in a purchase: He went to a law firm to find out what could be done to compensate him for the disappointment that Blendtec had visited upon him.

But, as we shall see later, what Callegari did *not* do will prove to be significant.

The Lawyers Enlist the Engineers

Callegari's lawyers hired electrical and mechanical engineers to conduct multiple power tests on the motors in Blendtec blenders—not just their client's model Blendtec Classic 475 120v, but several other Blendtec models as well. The tests revealed that none of the models could achieve 3.0 HP, let alone 3.8 HP. In fact, the maximum HP of the models was less than 25 percent of the HP represented in Blendtec advertisements.

But it gets worse! The engineers reported that the horsepower claimed by Blendtec was physically

impossible. No standard household electrical outlet provides electrical energy sufficient to generate the HP claimed by Blendtec for any period of time!

Making a Federal Case of It

Callegari's lawyers did what lawyers do: They sued. They literally made a federal case of their client's disappointment, filing an action in federal court in Utah, where Blendtec is located.

But the lawsuit they filed wasn't limited to righting the grievous wrong done to their client. Their lawsuit sought to vindicate the rights of everyone who had ever bought a new Blendtec blender, no matter what model. Thus, it was not an individual action they filed, but a *class action* on behalf of all such purchasers.

The Complaint

The complaint recited that Callegari had seen the online representations of the power of Blendtec blenders and, believing that the Classic 475 120v would provide the claimed power, he purchased it online sometime in July 2017.

To back up Callegari's allegations regarding Blendtec's representations, the complaint included a photograph taken from the packaging of a Blendtec blender and containing the line "3.0 PEAK HP." Also included was a screenshot taken from the Blendtec website showing models Classic 575, Designer 625, Designer 675, Designer 725, and Professional 800, the first three indicating horsepower of 3.0 HP, the latter two 3.8.

The complaint described Callegari's disappointing experience with the power of his blender and related the results of the engineering tests. It noted that if Callegari had known the true power of his blender, he would not have bought it—or at least he wouldn't have paid as much as he did for it. Callegari claimed to represent a class comprising everyone who had bought a Blendtec blender, excepting only those who purchased on resale.

The 20-page complaint included six counts. The first alleged violation of the prohibition in the Utah Consumer Sales Practices Act (UCSPA) against "deceptive" and "unconscionable" acts.³

The second and third counts alleged, respectively, breach of express warranty under the Utah Uniform Commercial Code (UCC)⁴ and breach of implied warranty of merchantability under that code.⁵

The fourth count alleged breach of implied warranty under a federal statute, the Magnuson-Moss Warranty Act.⁶

The fifth and sixth counts alleged, respectively, breach of express warranty under common law and breach of implied warranty under common law.

Relief Sought

What relief did our plaintiff seek for himself and the thousands of members of the class he hoped to represent? How should they be made whole for Blendtec's treachery—for exaggerating the power of the blenders foisted on an unsuspecting public?

The complaint was clear. First, the court should acknowledge that Callegari did, in fact, represent the class identified in the complaint. In addition, the class should be awarded "compensatory, multiple, and/or punitive damages" and "restitution and all other forms of equitable money relief." Every class member's prior acceptance of a blender should be revoked. And, of course, class members should receive prejudgment interest.

That relief would take care of Blendtec's past wrongs. But what about the *future*—naïve buyers in the days to come who might be misled by Blendtec's siren songs of 3.0 and 3.8 HP? Not to worry! The complaint prayed for such "injunctive relief as the court may deem proper."

The Court Slices and Dices

Not surprisingly, Blendtec moved to dismiss for failure to state a claim on which relief could be granted. The court's analysis began with a body blow to the plaintiff's case: denial of the appropriateness of a class action.⁷

The court noted that the UCSPA permits class actions only for violations specified by the enforcement authority as appropriate for class action status. The plaintiff cited Utah Administrative Code R152-11-3 as his authority. But that rule, titled "Bait Advertising/Unavailability of Goods," applies only to bait-and-switch allegations. Callegari's complaint was that his blender failed to live up to Blendtec's representations—not that he was diverted from one blender model to another.

Rule 9(b), to be Specific

Therefore, class status was unavailable. If Callegari were to proceed, it would be as a lonely individual plaintiff. But even that status was unavailable. Why? Because Rule 9(b) of the Federal Rules of Civil Procedure requires that a party alleging fraud must state "with particularity" the circumstances constituting the alleged fraud.

In the court's view, that requirement obligated Callegari to set out the "who, what, when, where and how" and the "time, place, and contents of the false representation," the party making the representations, and the consequences thereof.⁸

Callegari's complaint failed this test and failed it miserably. He didn't even identify where he bought the blender, except to say that it was an "online" purchase, or where he read the false statements before purchase, except to say that "each and every" blender package bore the misrepresentations.

Nor did he allege any specific misrepresentation about the particular model he purchased: the Classic 475 120v. And though his

complaint included photos of Blendtec blender models and packaging, none of them depicted or referred specifically to the Classic 475 120v model. As to dates and times, the complaint included only the general allegation that the plaintiff bought the blender sometime "in July of 2017."⁹

Failure to Notify

The second and third counts were for breach of warranty under the Utah UCC. The court agreed with Blendtec that Callegari had failed to comply with the UCC's notice requirement: the requirement that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy."¹⁰

Had Callegari notified Blendtec of the alleged breach of its horsepower representation? No. But, his lawyers argued, Blendtec *already knew* that its representations were false or at least greatly inflated. Nice try, the court responded, but (1) there is no legal authority for that argument, and (2) the statute expressly says, "The buyer must notify the seller."

Common Law Claims Superseded

The fifth and sixth counts were for breach of common law express and implied warranties. The court brushed them aside, noting the plaintiff's failure to provide authority for the proposition that Utah's UCC does not supersede the common law claims.

No State Law Breach, No Magnuson-Moss Violation

The fourth count, breach of warranty under the Magnuson-Moss Warranty Act, was, as the plaintiff acknowledged, dependent upon a valid state warranty claim. When the court dismissed the state breach of warranty claims, the Magnuson-Moss claim went with them.

Motion Granted

Having rejected Callegari's claim to represent a class, as well as every one of his six counts, the court granted Blendtec's motion to dismiss. Callegari was left with nothing. What's more, he can't refile because as the court noted in disposing of counts two and three, the Utah UCC provides that a purchaser who fails to notify a seller of a breach within a reasonable time of discovering it is "barred from any remedy."

Lessons Learned

What lessons can we learn from Mr. Callegari's experience?

One lesson is the risk of overreaching. Initially, Callegari may well have had a valid claim against Blendtec or the seller (an entity never identified in the complaint) for his Classic 475 120v blender's failure to provide the power that was advertised. Indeed, if the factual allegations of the complaint were true, then he *certainly* had a claim. But that's a far cry from a right to represent the interests of everyone who has ever bought a new Blendtec blender of any model.

What's more, Callegari allowed his arguably valid claim to get lost—overlooked—in the general, class-oriented allegations of the complaint. How else to explain omission of the Classic 475—the model he actually bought—from the photo lineup of Blendtec models in the complaint?

But the most important lesson by far is the importance of reading

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in which legal services are provided.”⁵ People of color make up 19 percent of the Minnesota population, which is continuously growing.⁶ The current Minnesota legal profession is an accurate representation of the population it serves, with 21 percent of Minnesota lawyers identifying themselves as a person of color. However, the future workforce outlook is not so promising, especially within the Twin Cities. According to the 2018 ABA Standard 509 Information Report for each law school, people of color make up 15.6 percent of the University of Minnesota Law School student body and 16.1 percent of the University of St. Thomas School of Law student body. MHSL is faring better with 23.4 percent of its student body being people of color.⁷ These numbers are an indication of a less diverse legal workforce in the future, which is contrary to the ABA’s Goal III and Resolution 113. This lack of diversity in the pipeline for lawyers can be overcome through programs like MHSL’s “Gateway to Legal Education” and the initiatives of the Minnesota Chapter’s Diversity Committee task force. Increasing diversity within the legal pipeline is the key to eliminating bias, enhancing diversity, and growing and maintaining a legal workforce best suited to serve the people of Minnesota. ☺

Endnotes

¹AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY (2018), <https://www.americanbar.org/content/dam/aba/administrative/>

[market_research/National_Lawyer_Population_by_State_2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2018.pdf).

²Mike Mosedale, *Minnesota Lawyers: At Least 79% are White*, MINN. LAW. (Mar. 15, 2017), <https://minmlawyer.com/2017/03/15/minnesota-lawyers-at-least-79-are-white>.

³Letter from Diversity and Inclusion 360 Commission, ABA, to Chief Legal Officers, Fortune 1000, Requesting Your Assistance in Implementing ABA Resolution 113 to Help Promote Diversity in the Legal Profession (Sept. 7, 2016), at 1 [hereinafter A.B.A. Res. 113 Letter], https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/ABA/letter-from-the-signatories-general-counsel-implementation-of-aba-resolution1.pdf.

⁴*Diversity and Inclusion*, FED. BAR ASS’N, <http://www.fedbar.org/Chapters/Minnesota-Chapter/Diversity-and-Inclusion.aspx> (last visited Apr. 8, 2019).

⁵A.B.A. Res. 113 Letter, *supra* note 3.

⁶*Age, Race, & Ethnicity*, MINNESOTA STATE DEMOGRAPHIC CTR., <https://mn.gov/admin/demography/data-by-topic/age-race-ethnicity> (last visited Apr. 8, 2019).

⁷*Standard 509 Information Reports*, AM. BAR ASS’N, <http://www.abarequireddisclosures.org/Disclosure509.aspx> (last visited Apr. 8, 2019).

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the statutes that one relies on. Why, for example, attempt to rely on the consumer code’s prohibition of *bait-and-switch advertising* in a complaint that has nothing to do with such a practice? Why disregard the Utah UCC’s clear warning that failure to notify the seller of a breach is a bar to any remedy?

Similarly, a plaintiff who sues in federal court must abide by the rules of that forum: The Federal Rules of Civil Procedure. And Rule 9(b) could not be plainer in its requirement that a plaintiff alleging fraud must plead it *with particularity*. Callegari’s complaint was so intent on global, generalized allegations on behalf of the universe of Blendtec purchasers that it failed this requirement miserably—not even identifying who sold the plaintiff his blender.

And that’s the tale of the blender atop the cabinet of Mr. Callegari. (OK, maybe it was a counter.) ☺

Endnotes

¹⁴“The Cabinet of Dr. Caligari,” a silent film produced in 1920 Germany, is widely considered the first true horror film. The author concedes that the title of this article is a stretch.

²Because the case, *Callegari v. Blendtec Inc.*, Case No. 2:18-cv-00308-EJF (D. Utah 2018), was disposed of on the basis of defendant’s motion to dismiss, this article assumes the truth of the factual allegations in the complaint.

³Utah Code §§ 13-11-1 13-56-302.

⁴Utah Code §§ 70A-2-313 & 70A-2A-210.

⁵Utah Code §§ 70A-2-314 & 70A-2A-212.

⁶15 U.S.C. §§ 2301-2312.

⁷Memorandum Decision and Order, Nov. 6, 2018 (Decision).

⁸*Id.* at 9 (quoting *Wood v. World Wide Ass’n of Specialty Programs & Sch.*, 2007 WL 1295994 (D. Utah 2007)).

⁹*Id.* at p. 10.

¹⁰Utah Code § 70A-2-607(3)(a).