# Consumer Science Applied to Class Action Litigation

A large number of Class Action Suits (CAS) seek to redress alleged harm or damage suffered by members of the assumed class who have purchased a product or a service where the seller is faulted for having made a false claim that induced members of the class to make the purchase—as opposed to not making it—or caused them to pay more than they would have expected to pay had the seller not made that claim.

The reasons typically invoked by plaintiffs are that the seller:

* Promised benefit(s) that the object in question, be it product or service, did not, in fact, deliver.
* Mentioned a series of ingredients that were supposed to act in concert to deliver one or more benefits when, in fact, only one of those ingredients is responsible for producing the entire effect.
* Specified in its communication with consumers a fabrication method, i.e., the way the various ingredients are combined to produce the litigated object, that differs from the method used in reality.
* Did not specify in the usage directions the various dangers that may arise from the object’s use in conjunction with other objects or in specific environments that might harm the buyer or others.
* Failed to disclose all the facts about the object that would have been relevant during consumers’ deliberations that are ordinarily part of the purchase decision-making process.[[1]](#footnote-1)

It should be noted that all of these reasons relate exclusively to what the defendant might have done wrong. None of them take into account consumer behavior theory and research, which has the ability to inform the finder of fact by bringing consumer reactions into the solution space.

Typically, plaintiffs’ strategy is to enumerate as many of the alleged infractions committed by the defendant as possible while the defense pivots on the consumer when trying to refute the alleged effects. However, as long as consumer behavior is left out of the picture, neither guilt nor reparations can be assessed objectively. To paraphrase the old song "T'ain't What You Do (It's the Way That You Do It),"[[2]](#footnote-2) it isn’t what you say, it is what consumers get out of it.

Fortunately, CAS litigation allows defendants to enter into evidence consumer survey results, which can purportedly represent the consumer viewpoint, but there is no established framework for designing surveys that address the question: “Is the defendant guilty of having affected consumers’ decision making in a manner that is beneficial to the defendant and, at the same time, *detrimental to the plaintiff*?” This paper offers such a framework.

## Framework for CAS Consumer Research

The approach I propose, and have used extensively in my practice, seeks to establish: (1) consumers’ *expectations* about the product at the time of purchase; (2) the *motivational triggers* most responsible for the purchase; and (3) the *satisfaction* consumers have experienced with the product in question.

The Expectations-Motivations-Satisfaction model, which I refer to as the EMS Model from this point on, is based on the theoretical background provided by consumer science. Many marketing research investigations in a variety of topics use elements of this approach to understand consumption behavior and to develop new products or new advertising campaigns that seek to communicate to consumers and influence their brand choices. In other words, the EMS Model does not qualify as “new science;” it is established and frequently employed science that is put to use in the litigation environment.

### Expectations

Marketing science defines products as “bundles of benefits.” As one author puts it: “Generic product benefits are intended benefits that manufacturers design into a product. However, these intended benefits may or may not be perceived or appreciated by particular consumers. A product has benefit to customers to the degree that they can perceive, appreciate and then use that product as anticipated consumption activities to achieve personal values.”[[3]](#footnote-3) Therefore, the constituent benefits that make up the product are not necessarily those conceived by the seller but rather those perceived by consumers.

Survey research is used to measure the value of each attribute to the people who bought the product adjudicated in the specific CAS. Those value perceptions represent the true expectations of the people who bought the product and, as such, they should be the only criteria used in determining the materiality of the plaintiff’s case.

When designing such a survey, one should rely on two measurements: (1) open-ended questions that invite users to express in their own words the benefits they expected the product to deliver; and (2) attribute ratings on a quantitative scale that allows the researcher to put value on consumer expectations. The items the researcher builds into the scale should include the “generic” product benefits usually highlighted by the plaintiffs, but should not be limited to them.

### Motivational Triggers

While manufacturers may believe that their product presentation to the public—via advertising, packaging, promotions or public relations—is all-inclusive and complete, that is only a supposition until confirmed by listening to the voice of the consumer. It is for that reason that CAS-related consumer surveys should make a point of asking respondents for the reasons that prompted them to purchase the brand in question. Consumers’ open-ended answers constitute the best, and I dare say, the only acceptable evidence as to what prompted them to buy the product.

Research finds very often that the motivational forces acting upon buyers at the time of purchase are many and varied; some of those forces may be identical to the motivations envisioned by manufacturers, but there is seldom a one-to-one correspondence between what manufacturers assume and what purchasers actually do.

In addition to the open-ended questions that take down respondents’ verbatim answers, it is appropriate and necessary to present them during the interview with a comprehensive list of factors and ask them to rate them on a quantitative scale as to how important each factor was when making the decision to purchase the product in question. The resulting array—from highest to lowest—should be used as the determining factor in arriving at a decision as to whether or not the marketer’s communication caused consumers to act in a manner that is not in line with their best interests.

### Satisfaction

We have previously defined “product” as a bundle of benefits. In the act of purchase, each consumer evaluates that bundle in terms of its perceived value to her. If that evaluation turns out positive, purchase is very likely to follow. The perceived value at the time of purchase may rise, decline or remain unchanged depending on the extent to which expectations are met during consumption. It is for that reason that consumer science advocates the use of customer satisfaction indices as the final proof, so to speak, of the sagacity of the purchasing consumers.

CAS litigation assumes a priori that purchasers like the one in whose name the suit had been launched are dissatisfied. Typicality is one of the tests for certification.[[4]](#footnote-4) But what if a significant proportion of purchasers turns out to be satisfied with the product and feel that the value delivered by the product justified the economic sacrifice, i.e., price, paid for it?

Customer satisfaction research is a mainstay of consumer science and of the practice of marketing research as most of us can attest to from our own experience, no matter how annoyed we may be at times when we get yet another request to fill out a customer satisfaction questionnaire. CAS litigation is a perfect venue for customer satisfaction evaluation, which typically asks buyers of the product to rate it on satisfaction and most often to also rate it on the likelihood of recommending it to others or buying it again, if it is a frequently purchased product category.

Measuring customer satisfaction is a very important component of CAS research because it focuses attention on the likelihood of prevailing in the courtroom. The higher the satisfaction, the less likely it is that finders of fact would be able to find for the plaintiffs, whose claim of injury contradicts the finding of high satisfaction among the whole class of purchasers. In that regard, it is highly advisable for attorneys contemplating to launch a CAS to conduct preliminary consumer survey to be in a position to support claims of lack of satisfaction, injury, damages, etc.

### Summary

CAS-related consumer research should always be considered a necessary element of CAS litigation, whether on the plaintiff’s or the defendant’s side. The former to determine whether there is a case; the latter to offer consumer-based evidence that may disprove the plaintiffs’ point of view.

The EMS model recommended here can be envisioned graphically as follows:

Figure EMS Model -- Graphic Depiction

Its application in CAS litigation emphasizes two important facts about the conduct of that litigation. First, is the inescapable fact that without bringing consumers’ perceptions into the picture there is no way that CAS can be properly litigated. Second, the model informs litigators and finders of fact that the consumer point of view is multi-faceted and cannot be properly accounted for unless all the relevant facets are made part of the discussion.

1. In addition to product- or service-related CAS, there is a separate category of cases that might be termed “the meaning of…” where litigation revolves around the meaning of various phrases used in marketing communication, such as: “all natural,” “natural;” “Made in USA;” “sugar-free;” “homemade;” etc. [↑](#footnote-ref-1)
2. Song written by [jazz](https://en.wikipedia.org/wiki/Jazz_music) musicians [Melvin "Sy" Oliver](https://en.wikipedia.org/wiki/Sy_Oliver) and [James "Trummy" Young](https://en.wikipedia.org/wiki/Trummy_Young) and first recorded in 1938. See: [https://en.wikipedia.org/wiki/T%27ain%27t\_What\_You\_Do\_(It%27s\_the\_Way\_That\_You\_Do\_It)](https://en.wikipedia.org/wiki/T%27ain%27t_What_You_Do_%28It%27s_the_Way_That_You_Do_It%29) [↑](#footnote-ref-2)
3. http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=7772 [↑](#footnote-ref-3)
4. http://www.federalpracticemanual.org/node/42 [↑](#footnote-ref-4)