Class Certification Denied in BPA MDL

July 11, 2011 by Sean Wajert

The federal judge in the MDL involving BPA in baby bottles refused last week to certify three proposed multistate classes in this multidistrict litigation. In re: Bisphenol-A Polycarbonate Plastic Products Liability Litigation, No. 08-1967 (W. D. Mo. July 7, 2011).

On August 13, 2008, the Judicial Panel on Multidistrict Litigation centralized the cases; there are approximately twenty-four cases left in this litigation.

The court's discussion focused on three of the components required for certification: commonality, predominance, and superiority. The court said it focused on these issues because they presented "the most insurmountable obstacles to" plaintiffs' request.

The analysis offered several interesting points:

1. Choice of law. The court noted that many problems and immense difficulties arose from the vagaries of state law. The difficulties involved in comparing and contrasting all of the nuances of the laws of fifty-one jurisdictions is "undeniably complicated." Several courts have indicated the mere need to engage in such an analysis – and the exponential increase in the potential grounds for error – demonstrates a class action is inappropriate. E.g., Cole v. General Motors Corp., 484 F.3d 717, 724-26 (5th Cir. 2007); Klay v. Humana, Inc., 382 F.3d 1241, 1267-68 (11th Cir. 2004); Castano v. American Tobacco Co., 84 F.3d 734, 751-52 (5th Cir. 1996); In re American Medical Systems, Inc., 75 F.3d 1069, 1085 (6th Cir. 1996); In re Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986).

Here, the court offered a sampling of the legal disputes that the court was unable to resolve without delving into a legal inquiry more extensive than had been provided by the parties in order to ascertain (or predict) the holdings of the highest courts in these jurisdictions on legal issues. While defendants cannot thwart certification simply by tossing out imagined or slight variances in state laws, it is the plaintiffs' burden to demonstrate the common issues of law. Here, the plaintiffs could not show that the legal groupings they proposed actually satisfy Rule 23(a)(2)'s commonality requirement. And they present significant manageability concerns.

Significantly, the court noted that even if the plaintiffs had correctly grouped similar states' laws, the application of those laws can turn out to be different even if they appear similar on the surface. For example, plaintiffs have never alleged that the FDA banned BPA or argued that any government agency has definitively concluded that BPA in baby products is unsafe. Rather, the underlying theory of plaintiffs' case is that, during the class period, there existed a serious scientific debate or controversy regarding the safety of BPA and that all defendants were aware of this controversy; defendants failed to advise them that the product contained BPA, a substance that the FDA approved for use but that was the subject of ongoing scientific discussion or controversy. But, would every state regard this fact as material and something defendants were obligated to warn about?

2. Common issues of fact? The court relied on the recent Dukes v. Wal-Mart decision to note that commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. Their claims must depend upon a common contention that is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Even before *Dukes*, many courts held that commonality required an issue (1) linking the class members (2) that was substantially related to the litigation's resolution. DeBoer v. Mellon Mortg. Co., 64 F.3d 1171, 1174 (8th Cir. 1995), cert. denied, 517 U.S. 1156 (1996); Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983).

While there were some common issues, other facts plaintiffs described as "common" clearly were not. For instance, "Plaintiffs' testimony regarding the purchase of their Baby Products" was not common for all class members. One plaintiff's actions, decisions, knowledge, and thought processes are unique to that plaintiff. While this question must be answered for each plaintiff, the question will not be proved with the same evidence or have the same answer for each plaintiff. Even the simple question "Did each Plaintiff purchase a product manufactured by Defendant?" is not a common question because it is not capable of class-wide resolution as required by *Dukes*.

3. Individual issues. Numerous individual issues predominated, including damages. Individual issues relating to damages do not automatically bar certification, but they also are not completely ignored. E.g., In re St. Jude Medical, Inc., 522 F.3d 836, 840-41 (8th Cir. 2008) (individual issues related to appropriate remedy considered in evaluating predominance); Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc., 339 F.3d 1001, 1012 (8th Cir. 2003), cert. denied, 541 U.S. 973 (2004) (individual issues related to damages predominated over common issues); see also In re Wilborn, 609 F.3d 748, 755 (5th Cir. 2010).

Another individual issue in this case was each plaintiff's knowledge about the BPA "controversy." A consumer's knowledge of BPA's existence and the surrounding controversy is legally significant. Knowledge of the controversy carries with it knowledge of the likelihood (or at least possibility) that a plastic baby bottle contained BPA. A consumer who knew about the BPA knew what defendants allegedly failed to disclose. Similarly, a consumer who knew about the controversy and exhibited no concern about whether the product purchased contained BPA may have difficulty convincing a jury that the seller did anything wrong.

The time and other resources necessary to resolve the individual issues in a single forum, in the context of a single case, in front of a single jury, would be staggering. In contrast, the common factual issues would be relatively easy to litigate, said the court.

4. Adequacy. The court observed that plaintiffs had elected not to assert consumer protection claims and warranty claims against certain defendants, apparently motivated by the fact that the class representatives are from states that do not support certification of such claims. But other states may have more favorable law for plaintiffs, and thus the court concluded the class representatives were inadequate to protect the class. There was a problem with depriving

absent class members of his/her opportunity to pursue a warranty claim just because the class representative cannot assert such a claim on his/her own.

Plaintiffs proposed state-wide classes in the alternative, but the MDL court noted that the judges who preside over the individual cases would be best-equipped to rule on the single-state classes.