Class Certification Denied in BPA Litigation

January 3, 2012 by Sean Wajert

A Missouri federal court last week denied the class certification motion of consumers suing defendants in the multi-district litigation over the use of bisphenol A in baby bottles and sippy cups. In re: Bisphenol-A Polycarbonate Plastic Products Liability Litigation, No. 4:08-md-01967 (W.D. Mo.).

As we have posted before, the federal judge in the MDL involving BPA in baby bottles refused last Summer 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). That decision offered an interesting discussion of choice of law, and of commonality after *Dukes v. Walmart*, and an important reminder that while individual issues relating to damages do not automatically bar certification, they also are not to be 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).

The court gave plaintiffs an opportunity to show that a class of Missouri-only consumers should be certified, and plaintiffs then moved for certification of three classes of Missouri consumers. Plaintiffs alleged three causes of action: violation of the Missouri Merchandising Practices Act (MMPA), breach of the implied warranty of merchantability, and unjust enrichment.

The court focused first on standing. A court may not certify a class if it contains members who lack standing. In re Zurn Pex Plumbing Products Liability Litigation, 644 F.3d 604, 616 (8th Cir. 2011). Plaintiffs' proposed class could not be certified because it included individuals who had not suffered an injury in fact. Individuals who knew about BPA's existence and the surrounding controversy before purchasing defendants' products had no injury. There was a potential for the proposed classes to include a large number of such uninjured consumers. Plaintiffs admitted that parents often carefully research baby care product purchases, and defendants submitted proof that information regarding BPA was in the media (including popular press such as 20/20) as early as 1999.

The opinion also offers an instructive discussion of reliance. Plaintiffs argued the issue of knowledge goes only to consumers' reliance on defendants' alleged nondisclosure, and plaintiffs always contend reliance is not an element of their consumer fraud claims. The court explained that the hypothetical posed by the question of reliance – whether the plaintiff would have purchased the product if she/he had known – presupposes the consumer did not know the relevant information. Thus, the question of knowledge logically precedes the question of reliance.

Even consumers who were unaware of BPA when they purchased defendants' products may not have suffered an injury. Consumers who fully used defendants' baby bottles and other products without physical harm before learning about BPA suffered no injury, and could not assert a claim under consumer protection statutes or for breach of warranty. Plaintiffs asserted that none of the proposed class members received what they intended to obtain because plaintiffs were not provided material information before making their purchases. But plaintiffs were bargaining for baby products at the time of transaction, not a certain type of information. Those who fully used the products before learning about BPA would have received 100% use (and benefit) from the products.

In the Rule 23 analysis proper, the court also noted that plaintiffs' proof of what defendants failed to disclose would not be common for all class members, at least with respect to the scientific debate concerning BPA. Class-wide evidence cannot be used to show what defendants knew or should have known because their knowledge and the available information about BPA changed during the class period. Plaintiffs' proposed trial plan stated they intended to show defendants' alleged awareness and nondisclosure of various scientific studies from 1997 to at least 2006.

The court's observation on materiality is also worth noting. A material fact for state consumer fraud liability includes a fact which a reasonable consumer would likely consider to be important in making a purchasing decision. Even if this is an objective inquiry, that does not mean it can always be proven with class-wide evidence. A 2006 study allegedly showing BPA's effect on the endocrine systems of snails, even if material, would not be probative of defendants' liability in 2002. Similarly, a reasonable consumer may be less likely to consider a scientific study from 1997 significant if that consumer learned that federal agencies over the years – the FDA in particular – considered that study, and nevertheless still concluded BPA could be safely used to make baby products.

Finally, the court considered superiority and manageability, with a key issue of concern how to determine who was in the class (some courts do this analysis under the ascertainability rubric). Identifying himself or herself as a purchaser would not prove a person is in the class. A plaintiff in a typical case is not allowed to establish an element of a defendant's liability merely by completing an affidavit swearing the element is satisfied, and this should be no different for a class action. Defendants would be entitled to cross-examine each and every alleged class member regarding his or her memory and story.

For all these reasons, class certification denied.