Food Spread Class Action Certified: What Happened to Wal-mart?

November 21, 2011 by Sean Wajert

A California federal judge recently denied certification of a nationwide class, but certified a statewide class of plaintiffs in a suit over allegedly misleading promotion of the hazelnut spread Nutella as part of a healthy breakfast for kids. Hohenberg et al. v. Ferrero USA Inc., No. 3:11-cv-00205 (S.D. Calif.).

This type of case falls squarely in the zone we have warned readers about: the aggressive and excessive use of consumer fraud act claims by plaintiff attorneys, and certification triggering the need to think about "blackmail settlements."

Plaintiffs brought a putative consumer class action lawsuit on behalf of people who purchased Ferrero's Nutella spread after relying on allegedly deceptive and misleading labeling and advertisements. Specifically, Plaintiffs alleged that Ferrero misleadingly promoted its spread as healthy and beneficial to children when in fact it contains levels of fat and sugar inconsistent with that claim. We have posted on this product before.

Typically, plaintiffs brought causes of action alleging (1) violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq.; (2) violations of California's False Advertising Law, ("FAL"), Cal. Bus. & Prof. Code §§ 17500 et seq.; (3) violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1770 et seq.; (4) breach of express warranty; and (5) breach of implied warranty of merchantability.

Plaintiffs moved for class certification. Defendant Ferrero argued that plaintiffs did not satisfy the commonality requirement as clarified by the United States Supreme Court in *Wal-Mart*, because they did not offer evidence of a common injury. Indeed, plaintiffs did not support their motion with expert declarations that, for example, all class members were misled by a common advertising campaign that had little to no variation. But the court, relying in part on pre-*Wal-Mart* decisions, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019-20 (9th Cir. 1998), stressed that commonality under Rule 23(a)(2) only requires there be some common issues of fact. To the extent that defendant interpreted the decision in *Wal–Mart* as requiring plaintiffs to prove common class-wide injury at the class certification stage, the court disagreed. Rather, all plaintiffs must show, said the court, is that the claims of the class depend upon a common contention of such a nature that it 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. While that clearly was part of *Wal–Mart,* the decision is best read as finding that commonality requires the plaintiff to demonstrate that the class members have suffered the same injury, which means more than merely that they have all suffered a violation of the same provision of law. Nevertheless, in this case, the court found sufficient the claims made on behalf of the proposed class based on a common advertising campaign,

But then there was the predominance issue of Rule 23(b). Defendant disputed that common issues predominate, arguing that proposed class members' injuries would require individualized assessment. Notably, one named plaintiff did not regret buying Nutella despite the alleged marketing, and continued using the spread after she learned about its sugar content. Another named plaintiff testified that her family loved Nutella and was upset when she took it away. Clearly, this case involved class members' individual expectations, dietary preferences, nutritional knowledge, and the availability or non-availability of substitutes in the market. The court conceded that plaintiffs' dietary choices may prove relevant to the merits of their case, but felt that it need not "decide the merits" of the case at this stage. However, as we have posted before, the Ninth Circuit has noted that it is not correct to say a district court may consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements.

The court did reject the proposed national class, because plaintiffs made no showing that non-California class members saw the advertising at issue in California, purchased Nutella in California, or that their claims arise out of conduct that occurred in California. The choice of law issue thus overwhelmed the alleged common issues. So the certified class included "all persons who, on or after Aug. 1, 2009, bought one or more Nutella products in the state of California" for personal use. *Wal-Mart* needs to have more impact than this.