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No More Baby Talk: Class Certification Denied in Gerber False Advertising Suit

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The Northern District of California recently denied class certification to a plaintiff who alleged that Gerber Products misbranded nutritional claims about baby food products in violation of state and federal labeling laws. *Bruton v. Gerber Products Co. et al.* The plaintiff had previously moved to certify a damages and an injunctive relief class in 2014. However, the court found that neither proposed class was ascertainable and denied class certification. In July 2017, the Ninth Circuit reversed and remanded. On remand, Judge Lucy Koh found that (i) plaintiff lacked Article III standing to assert a claim for injunctive relief and (ii) plaintiff's proposed damages theories failed to satisfy Rule 23(b)(3)'s predominance requirement.

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The plaintiff, Natalie Bruton, alleged that Gerber made nutrient content claims on its baby food products, such as being an "excellent" or "good" source of vitamins and minerals, even though the FDA does not authorize nutrient content claims on foods for children under two. The plaintiff also alleged that many of Gerber's products labeled with "No Added Sugar" or "No Added Refined Sugar" claims should have been accompanied by a disclosure statement warning of their high caloric value.

Judge Koh disagreed that plaintiff had standing to certify an injunction class under *Davidson v. Kimberly-Clark*. In *Kimberly-Clark*, the Ninth Circuit held that a consumer who learns a company used false advertising in the past still might having standing to seek injunctive relief because she does not necessarily know whether the advertising will remain false in the future. However, Gerber had stopped making the allegedly misleading statements, so the plaintiff did not face any actual or imminent threat of future harm. Judge Koh observed that "nothing in *Davidson* suggests the Ninth Circuit created a freestanding right to seek injunctive relief based on conduct that has ended."

The court also rejected certification of a damages class. It found that the plaintiff's three proposed models of restitutionary damages did not satisfy Rule 23's predominance requirement because they failed to isolate only those damages attributable to Gerber's conduct. Judge Koh noted that the first model, a refund of the entire amount consumers paid for the product, was improper because it improperly assumed class members received no benefit from the purchase. The second model compared the price of the identified Gerber products to the price of allegedly comparable products and measured damages based on the premium consumers paid for Gerber products. But like the first model offered by plaintiff, this model also improperly assumed that any price difference was entirely due to the allegedly misleading statements. Finally, the third proposed model, a regression analysis, estimated damages by comparing the sales of the products at issue before and after Gerber used the disputed labels while controlling for other variables that might explain changes in sales. The court held that this model lacked a reliable means for comparing products with and without the challenged label statements and did not explain how it would account for independent variables that might affect the products' price or sales. Accordingly, none of plaintiff's damages models met the threshold for class certification.

This case underscores the difficulty of obtaining class certification for damages and also shows that, even following *Kimberly-Clark*, class certification for injunctive relief is no sure thing. Watch this space for analysis of any appeal.