



COURTS MUST CLOSELY EVALUATE RULE 23 “PREDOMINANCE” FACTOR IN FOOD LABELING CLASS ACTIONS

by

David E. Sellinger and Theodore J. McEvoy

Hardly a week goes by without new consumer class actions being filed against food and beverage manufacturers alleging that product descriptions—on labeling or in advertisements—are deceptive. These complaints generally allege that a certain product is advertised as “all natural,” or healthy or beneficial in some other way, but that the product claims are untrue or unsubstantiated. Typically, these suits are brought under state consumer protection statutes and various common law theories. Before long, a manufacturer is facing the prospect of drawn-out class action litigation where the claimed injury could be theoretical at most.

These suits are especially troubling because of the unique nature of a class action. Even when the case may prove to be meritless, the potential exposure for a corporate defendant once a case is certified creates enormous settlement pressure on a company. This concern is heightened by the danger that the court may not apply the necessary analysis of individual consumers’ decision-making in determining whether to certify a class.

In order to certify a class action under Rule 23 of the Federal Rules of Civil Procedure, a court must find that each of the elements of numerosity, commonality, typicality, and adequacy are met. Additionally, in cases in which certification is requested under Rule 23(b)(3), a class may only be certified where the court finds that “questions of law or fact common to class members *predominate* over any questions affecting only individual members” and that a class action is “superior” to other available methods for fairly and efficiently adjudicating the controversy. The predominance requirement is frequently the class-certification battleground in consumer cases. The cases are inconsistent in the extent to which they take account of individual class members’ purchase decisions in determining whether that requirement has been met. Yet in consumer class actions, it is particularly important that the predominance inquiry focus on the individual class members because of the differences among them in their purchase decisions and experiences.

A recent order of the U.S. District Court for the Southern District of California in *In re Ferrero Litigation*, 278 F.R.D. 552 (S.D. Cal. 2011), demonstrates the peril for defendants in how courts analyze the predominance issue. There, the plaintiffs sought certification of a nationwide class of consumers who purchased Ferrero’s Nutella spread. The plaintiffs alleged that they had relied on allegedly deceptive and misleading advertisements, which plaintiffs claimed promoted Nutella spread as healthy and beneficial to children when in reality the spread was high in fat and sugar.

Ferrero argued that a class could not be certified because, among other things, each class member’s decision to purchase Nutella depended on his or her individual expectations, dietary preferences, nutritional knowledge, and other factors that predominated over the general claims being asserted by the representative plaintiffs on behalf of the proposed class. Ferrero offered factual evidence to show that one named plaintiff

David E. Sellinger is Of Counsel, and **Theodore J. McEvoy** is an associate, with the law firm Greenberg Traurig, LLP, in its New Jersey office.

continued to use Nutella even after learning about its sugar content. However, the court rejected Ferrero’s argument and concluded, without an extensive factual analysis, that all of the members of the proposed class shared a “common contention” regarding Ferrero’s advertising campaign, which predominated over the individual differences in their factual situations. While the *Ferrero* court acknowledged that factual issues specific to the named plaintiffs “may prove relevant to the merits of their case,” it did not focus on the issue of whether, notwithstanding one or more common issues, the class members would be able to prove the issues of causation or reliance and injury at trial without individual proofs. *Id.*

In deciding whether to certify a class, a court should consider what elements plaintiff would have to prove at trial under his theory of the case, and then assess whether the elements can be proven on a class-wide basis within the requirements of Rule 23. This means the court must consider the substantive elements of the plaintiff’s cause of action and determine whether common issues susceptible to common proof predominate over individual issues requiring individual proofs.

Although consumer protection statutes differ substantially from state to state, some of these statutes require that, in order to recover damages, a plaintiff must not only show that the defendant engaged in a wrongful practice such as making a misleading statement, but must also prove reliance or causation and injury-in-fact. Establishing those elements, where required, typically demands individual proof. Further, as a general proposition, class members must have standing. Standing requires that the plaintiff has suffered an injury-in-fact that was caused by the challenged conduct.

In consumer purchases, there often is wide variation in what motivates people to buy a given product. Consumer decision-making is influenced by many different factors, including the person’s attitudes and perceptions relating to a particular purchase, his or her demographic characteristics, and various aspects of marketing. Different consumers may be affected differently by the same marketing practices, and may or may not have seen or relied upon particular labels and advertising. These factual differences go to issues of causation, reliance, and injury-in-fact. Therefore, a court must look at each individual consumer in order to understand what influenced his or her purchase decision. The better-reasoned cases identify these issues, address them, and, in cases where such individual issues predominate over common issues, deny class certification.¹

Accordingly, if the trial will require proof of causation or reliance and injury-in-fact, then at the class certification stage the court should look ahead to how those elements will be proved. Decisions such as the order in *Ferrero* are at odds with the analysis that courts should conduct before certifying a class in this type of class action alleging consumer fraud.² If individual proofs will be necessary on one or more elements of the plaintiff’s claim, class treatment will be inappropriate. Hopefully, as the current crop of cases involving product descriptions winds its way through the courts, the opinions will provide guidance on the particular need to address consumers’ purchasing decisions in deciding whether the predominance requirement is satisfied.

¹ Numerous federal appellate and district level class action decisions have held that issues of reliance or causation and injury-in-fact must be proven on an individualized basis for each member of the putative class.

² *Ferrero* was a California case. While predominance is a required element for class certification, under California’s Unfair Competition Law (which was one of the claims at issue there) only the named class representative (but *not* each class member) must meet the standing requirements of injury and causation at the class certification stage. There is also law in California that a “common marketing scheme” obviates the need to show reliance for each class member. While those concepts may have factored into the decision, there is no indication in the Order that these concepts provided the rationale for the decision. The court, in certifying a California class, simply accepted that “any injury suffered by a class member in this case stems from Defendant’s common advertising campaign,” 278 F.R.D. at 560, despite evidence suggesting that even the named plaintiffs may not have suffered any injury-in-fact, and plaintiffs’ ultimate need to prove that each class member relied upon (or even saw) the challenged advertisements.