Class Certification Denied in Baby Formula Case

February 1, 2012 by Sean Wajert

A federal court last week denied class certification in a lawsuit over insect parts allegedly found in baby formula, recognizing that the claims raised multiple individual issues. Brandner v. Abbott Laboratories, et al., No. 2:10-cv-03242 (E.D. La. 1/23/12).

Plaintiff filed this suit in connection with Abbott's September, 2010 recall of Similac brand infant formula because of the concern that insect parts may have been observed in a batch of finished product. Brandner asserted that she purchased, and her child consumed, Similac that was part of the product recall. Plaintiff contended that during this period her child suffered alleged gastrointestinal problems, which symptoms required numerous visits to a physician, and that she allegedly experienced severe emotional distress upon learning she had fed her child infant formula containing beetles and beetle larvae.

Plaintiff's Rule 23 (b)(2) class allegations were dismissed, but plaintiff then sought monetary damages and moved to certify a class on her products liability and redhibition claims under Federal Rule of Civil Procedure 23(b)(3). Defendant opposed this certification motion on the grounds that she failed to satisfy the commonality, typicality, and adequacy of representation requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3). The court's focus was on the predominance and superiority issues, and found no need to reach all the other questions.

Predominance of individual issues under the product liability claim-

Louisiana law requires a plaintiff to demonstrate that the product was unreasonably dangerous when it left the manufacturer's control. Whether each class member actually purchased contaminated Similac was subject to individualized, not collective proof. Second, each putative class member would need to establish that Abbott's actions were a proximate cause of his or her injury. Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245, 1247 (5th Cir. 1997). The plaintiff's cause of action here would require proof of medical causation, which has two components, general causation, which establishes that a substance has the capability of causing the injury or disorder in humans, and specific causation, which focuses upon whether the substance caused a particular injury to a particular individual. E.g., Ridgeway v. Pfizer, Inc.,, 2010 WL 1729187, at *2 (E.D. La. Apr. 27, 2010). Even assuming general causation, proving specific causation would require a determination of an individual's family and medical history; age; gender; diet; the timing of ingestion of the product; whether that individual suffered an injury, when the injury occurred, the type of injury suffered, and the number of occurrences of injury; and more. See In re Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 459 (E.D. La. 2006)(citing In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 208 F.R.D. 625, 631-32 (W.D. Wash. 2002)).

This highly individualized inquiry led the court to conclude that issues common to the class did not predominate. Interestingly, the court went on to note that all plaintiffs who claimed emotional distress (an issue that plaintiff contended was common to the class) would have to establish not only the distress but also the attendant damages. The damages issue required a determination whether plaintiffs sought medical treatment, psychiatric treatment, the degree to which plaintiffs manifested generalized fear, and the severity of plaintiffs' emotional distress. See Howard v. Union Carbide Corp., 897 So.2d 768, 774 (La. App. 2005). Because the determination of whether each member suffered emotional distress turned on a highly individualized assessment, questions of fact regarding individual members predominated over common issues of fact. While the individual nature of damages alone does not necessarily preclude class certification, class treatment may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation. Establishing emotional damages would entail the exact type of "mini-trials" the courts have cautioned against. Indeed, the very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicated the subjective differences of each plaintiff's circumstances; they were an individual, not class-wide, remedy. See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998). See also In re Katrina Canal Breaches Litig., 401 Fed. Appx.

884, 887 (5th Cir. 2010) (class certification not appropriate when individualized issues, such as the nature and extent of a class member's damages, will predominate).

Superiority-

The court also found that plaintiff made no showing of how she would try these claims on a class-wide basis. She thus failed to demonstrate how she would overcome the manageability problems posed by claims that require such disparate proof. Accordingly, she had not satisfied the requirement that a class action be superior to other available methods of adjudicating the controversy.

Other claims-

Plaintiff's redhibition claims also could not be certified as a class because common issues did not predominate, and a class action was not a superior mechanism for trying these claims. Plaintiff argued, in essence, that defendant admitted defect in recalling lots of the product. But the court found that the recall notice was far from an admission that every unit contained a redhibitory defect. Indeed, the press release actually stated that there was only a "remote possibility" of contamination in the products subject to recall. Plaintiff could not show through common proof that each class member purchased a defective product. Plaintiff's expert did not convince the court otherwise. The overall rate of contamination in tested samples was only 0.16%. The expert admitted there was no scientific way to evaluate contamination in units that were recalled but not tested. And even if the product was considered "adulterated" per the FDCA, a food product is adulterated, inter alia, if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. So a product can be "adulterated" under the FDCA without being contaminated or defective.

Class certification denied under (b)(3).