Personal Injury Class Actions – Not Even Trying Anymore

February 1, 2012

We've been noting the impending death of class actions in personal injury cases for some time. But apparently the death will be agonizing. One example of that is Bradner v. Abbott Laboratories, Inc., 2012 U.S. Dist. LEXIS 7017 (E.D. La. Jan. 23, 2012), a proposed personal injury class action involving a recall of the baby formula Similac. Abbot had instituted a nationwide recall of all Similac lots that it believed could have been contaminated after it found contamination in a finished batch of Similac at one of its plants. *Id.* at *3.

The plaintiff faced significant (we say insurmountable) hurdles, including FRCP 23(b)(3)'s requirements of predominance and superiority, to certifying a class of Similac purchasers with product liability claims. But rather than amaze us with inventive or even outrageous arguments, plaintiff's counsel didn't even seem to try. Their motion to certify a class offered no particulars to show how common issues could actually predominate over individual ones. They instead made a conclusory and simple argument that Abbot's supposed bad conduct was "without a doubt the predominate issue." *Id.* at *11. They had little more to say. But the court did.

The court found failure to meet the predominance requirement at every turn. On manufacturing defect, each class member would need to show that he or she purchased contaminated product. But since the recall broadly covered "potentially" contaminated product, simply showing that a class member purchased a Similac unit that was subject to the recall was not enough. *Id.* at *12-13. Medical causation, the court found, would also require the type of highly individualized inquiries that were not susceptible to common proof. *Id.* at *13-14. It was the same with damages. Emotional distress, for instance, would require "mini-trials" for each class member on individualized issues involving medical and psychological history and treatment. *Id.* at *15.

But that was just predominance. Plaintiff's counsel's failure to show superiority was worse. They didn't even address it. According to the court, the plaintiff made absolutely "no showing of how" these claims could be tried on a class-wide basis, no less how it would be superior to other methods of adjudication. *Id.* at *17. Didn't even try.

Most striking is what the plaintiff's expert, a former CDC microbiologist, had to say. The expert could neither say that every recalled unit of Similac was contaminated nor offer a way to establish it by common proof. *Id.* at *27-28. Instead, the expert flatly admitted: "[t]here is no scientific way to evaluate contamination" in all of the recalled units of Similac. *Id.* at *27. No kidding? In other words, it would have to be an individual inquiry. The court properly concluded that this opinion "fatally undermine[d plaintiff's] arguments about the certifiability of the proposed class." *Id.*

It would have made a whole lot of sense for plaintiff's counsel to have taken this into account before filing the case. A frank discussion between the expert and counsel could have saved the parties, lawyers and courts time and money. While we kid sometimes, we know full well from experience that there are a lot of talented, effective plaintiff's lawyers who produce thorough and thoughtful work. Not on this one.