

# Food for Thought: Sixth Circuit Affirms Dismissal of Putative Class Action Claims Against Kraft Foods Global, Inc. and Starbucks

May 16, 2016

*Montgomery v. Kraft Foods Global, Inc.*, 822 F.3d 304 (6th Cir. 2016)

This putative class action arose because plaintiff Pamella Montgomery purchased a Tassimo, a single-cup coffee brewer manufactured by Kraft Foods, expecting it to brew Starbucks coffee because it bore a sticker reading: "Featuring Starbucks® Coffee." Because Starbucks later announced its plan to terminate its distribution agreement with Kraft and thus her expectations were not met, she sued Kraft Foods and Starbucks on behalf of a class for violations of the Michigan Consumer Protection Act (MCPA), breach of express and implied warranties, and breach of contract. The district court dismissed several of the MCPA claims and all of the claims unrelated to the MCPA claims, and denied class certification on the remaining MCPA claims. The district court also entered judgment in plaintiff's favor when she accepted the defendants' offer of judgment under Federal Rule of Civil Procedure 68, and granted only \$6,767 in fees and costs, although she had requested over \$180,000 in fees and costs. Plaintiff appealed the dismissal of her claims for breach of express and implied warranties, the denial of class certification on her consumer-protection claims, and the attorneys' fees the district court awarded as part of the Rule 68 settlement. The Sixth Circuit dismissed the class-certification appeal as moot, affirmed the district court's dismissal of the warranty claims, and affirmed the attorneys' fees award. With respect to the class-certification appeal, the Sixth Circuit held that because plaintiff accepted defendants' Rule 68 offer of judgment, which included costs and attorneys' fees, she lost any putative benefit from class certification and thus rendered her appeal from the denial of class certification moot. In short, because she voluntarily relinquished her claims and received her attorneys' fees and costs and "[c]ertification of the class would not have the potential to leave Montgomery 'in a better position with respect to attorneys' fees and costs than would the [Rule 68 offer she accepted]," the appeal from the denial of class

certification was moot. The court similarly rejected plaintiff's argument that the Rule 68 settlement only related to the costs and fees she incurred in pursuit of her individual claims because the court noted that she did not owe her lawyer any unawarded, class-related attorneys' fees. Turning to the district court's dismissal of the warranty claims under Rule 12(b)(6), plaintiff alleged that the defendants made and breached several express warranties that: (1) Tassimo afforded customers the "present and continued availability" of compatible Starbucks T-Discs, (2) the Tassimo was "designed for use" with the Starbucks T-Discs, and (3) Starbucks T-Discs were "designed for use" with the Tassimo. Kraft Foods moved to dismiss the express warranty claim because plaintiff failed to plead that she was in privity of contract with the defendants, and plaintiff countered by claiming that she met the privity requirement due to her status as a third-party beneficiary of the Kraft-Starbucks distribution agreement. The court, noting that it was obligated to follow a Michigan Court of Appeals decision because the Michigan Supreme Court had yet to rule on the privity issue regarding express-warranty claims, held that privity is required because an express warranty is a specific contract term. Thus, to properly plead a claim of breach of an express warranty, a Michigan plaintiff must plead that she was in privity with the defendants, and plaintiff could not because she purchased the Tassimo from a grocery store and she abandoned the third-party beneficiary argument on appeal. With respect to plaintiff's claim of breach of implied warranty of merchantability, the court observed that Michigan had abandoned the contractual privity requirement. However, plaintiff's claims were still deficient because plaintiff did not allege that the Tassimo was "unfit for its ordinary purpose." The court clarified that "merchantable" is not synonymous with perfect, which means that a good need only be of average quality in the industry to qualify as merchantable. Moreover, the plaintiff did not plausibly allege that the goods failed to conform to the promises of fact on its label because plaintiff's own allegations suggested that the Tassimo lived up to these promises of fact at the time it was purchased and that only after the system was purchased did it become "increasingly difficult ... to find and purchase Starbucks [T-Discs]." Plaintiff argued on appeal that by those allegations she meant that she was unable to brew Starbucks at the time of her purchase. The court rejected this argument because plaintiff did not seek to amend the complaint below and did not expressly make this argument in response to the motion to dismiss. It also rejected plaintiff's argument that the label, which stated that it "[f]eatur[ed] Starbucks® coffee," warranted the "continued availability" of Starbucks T-Discs. Finally, the court affirmed the award of attorneys' fees because plaintiff's argument on appeal that the award of fees and costs was a "non-award" was no more than a "gripe, unaccompanied by legal reasoning in support of judicial relief." Thus, the issue was forfeited on appeal.

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