CARLTON FIELDS

Food for Thought: Ebin v. Kangadis Food Inc.

February 23, 2015

Ebin v. Kangadis Food Inc., 297 F.R.D. 561 (S.D.N.Y Feb. 25, 2014)
Plaintiffs in *Ebin v. Kangadis Food Inc.* asserted causes of action for breach of express warranty, breach of implied warranty, and violation of several New Jersey and New York statutes against Kangadis Food Inc., (d/b/a The Gourmet Factory), a food import and distribution company that sold Capatriti olive oil labeled, "100% Pure Olive Oil." Specifically, plaintiffs claimed that the product sold by defendant was not pure olive oil, but was instead an industrially processed substance known as "pomace." Plaintiffs moved to certify a class of New Jersey purchasers and a sub-class of New York purchasers. The court granted plaintiffs' motion. First, the court found that the pre-requisites of Rule 23(a) were met:

- *Numerosity.* Defendant's representations and its more than $81 million in sales supported the court's finding that plaintiffs satisfied the numerosity requirement.
- *Commonality.* Defendant argued that varying standards in the five states where its olive oil was sold precluded a common answer to the question of whether it was 100 percent pure olive oil. Nonetheless, the court found that there was commonality because the claims were based on the same alleged misrepresentation, which "arguably violate all the varying state requirements."
- *Typicality*. Although not all oil sold by defendant contained pomace, the court found that the typicality requirement was satisfied. The court explained that typicality refers to the nature of the claim of the class representatives and not to the specific facts from which the claims arose, which suggested to the court that whether the oil tins purchased by the class representatives contained pomace was not dispositive.
- *Adequacy:* The court found that the lead plaintiffs demonstrated their commitment to pursue the claims on behalf of class members by responding to extensive discovery and sitting for lengthy depositions during which they acknowledged their responsibility to the class. The court further explained that plaintiffs' counsel won multi-million dollar verdicts or recoveries and was experienced in litigating consumer claims—including claims against food manufacturers.

Next, the court considered defendant's argument that the class was not ascertainable. To support its argument, defendant cited the Southern District's decision in *Weiner v. Snapple Beverages Corp.,* No. 07-cv-8742, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), in which the court denied certification. In *Weiner*, plaintiffs proposed that class members could produce a receipt, produce a product label, or sign a declaration that they purchased Snapple during the class period. The court rejected this as unrealistic because there was no basis to believe that the proposed class members kept such evidence and the proposed class members were also unlikely to remember details of their Snapple purchase, making declarations unreliable. The *Ebin* court, however, found that the decision in *Weiner* would render class actions against producers almost impossible to bring. The class action administrator in *Ebin* proposed a process similar to the one found inadequate in *Weiner*. Nonetheless, the court found that the class was ascertainable. Although it acknowledged that the ascertainability difficulties were formidable, the court stated that the difficulties should not be made into a device for defeating the action. To support its decision, the court cited the Second Court's opinion in *In re Via Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), in which the court stated, "failure to certify an action under 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." After finding that plaintiff defined an ascertainable class, the court considered defendant's argument that the predominance requirement was not satisfied. Specifically, defendant argued that a determination of whether a consumer was actually harmed by its label is individualized. While some members of the class may have purchased the olive oil because of the labeling, others may have bought the product without looking at the label, because they liked the taste, the price, or the container's shape or color. To support its argument, defendant cited a New Jersey Supreme Court decision in which the court concluded that individual class member's reactions to a drug company's advertising would predominate over common questions such as the defendant's behavior. *Int'l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372 (N.J. 2007). It also cited a Southern District of New York decision in which the court held that the class members who purchased automatically renewing satellite radio service did not satisfy the predominance requirement because any customer who wanted their subscription renewed did not suffer an actual injury. *Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62 (S.D.N.Y. 2013). The court distinguished *Merck & Co.*, stating, "in the case of medicine, the negative impact of individual injury varies far more significantly than the injury incurred from buying an overpriced product alleging to be olive oil, which was actually pomace oil." It also found *Vaccariello* to be unavailing because there were individuals who did not suffer any injury in that case. The court concluded that even class members who actively wanted to buy pomace instead of 100 percent pure olive oil were nevertheless injured because they paid too much for it. Finally, the court certified a nationwide class for plaintiff's fraud and negligent misrepresentation claims. Although the product at issue was sold in at least five different states, the court found that New York law governed the common law claims and that, even if the court needed to apply the law of numerous states, common issues still predominated. Also, the court surveyed the potential applicable state laws and concluded that there was no material difference that would affect the merits of the class's common law claims at trial. UPDATE: After the court certified the nationwide class, Kangadis Food Inc. filed for Chapter 11 bankruptcy on June 12, 2014. *In Re: Kangadis Food Inc.,* No. 14-72649 (Bankr. E.D.N.Y.). The bankruptcy action stayed the proceedings in the case. However, Kangadis Food Inc was not owned by the Kangadis family. Instead, the family had a partnership in the form of Kangadis Family Management LLC. Soon after the bankruptcy stay, class members filed a separate class action against the owners of the now bankrupt Kangadis Foods Inc. *Ebin v. Kangadis Family Management LLC et al*, No. 14-1324 (S.D.N.Y.). In the new lawsuit, which names Kangadis Family Management LLC (KFM) defendant, plaintiffs sought to "impose liability on KFM" for what plaintiffs alleged was the misleading labeling of Capatriti olive oil. On October 23, 2014, a federal judge granted summary judgment in favor of defendants "because plaintiffs have failed to adduce competent evidence from which any reasonable juror could conclude that defendants used their alleged domination of Kangadis Food Inc., as a means to accomplish the fraud here alleged." *Ebin v. Kangadis Family Management LLC et al*, No. 14-1324 (S.D.N.Y. Nov. 26, 2014). *Read more significant court decisions affecting the food industry in Food for Thought: 2014 Litigation Annual Review.*