

Food for Thought: Bruton v. Gerber Products Co.

February 23, 2015

Bruton v. Gerber Prods. Co., No. 12-2412, 2014 WL 2860995 (N.D. Cal. Jun. 23, 2014)

Plaintiff alleged Gerber made prohibited nutrient content claims on products intended for children under the age of two. She further alleged that, contrary to federal requirements regarding products of a certain caloric value, Gerber failed to accompany “No Added Sugar” and “No Added Refined Sugar” labels with a disclosure statement warning of the products’ high-caloric value. Citing the Third District’s opinion in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), Gerber argued that the class was not ascertainable because Gerber and the third-party retailers who sold the products at issue did not keep records of who purchased the products. Under *Carrera*, class members could not submit affidavits in order to join the class because this method does not allow defendants to challenge class membership. On this issue, the court noted that “[w]hile [*Carrera*] may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit . . . In this circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description.” Ultimately, however, the court determined that it was not feasible to reliably determine class membership with self-identification through affidavits. Gerber sold multiple versions of the products at issue and the labels changed throughout the class period. Some of those labels did not contain the challenged statements. Moreover, Gerber submitted evidence demonstrating that at certain times there were products with two different labels for sale in one store — such that on a given day one consumer may have purchased a product with a challenged label while another purchaser of the same product did not. The court distinguished these facts from those in *Werdebaugh v. Blue Diamond Growers*, No. 12-2724, 2014 WL 2191901 (N.D. Cal. May 23, 2014), and *Brazil v. Dole Packaged Foods, LLC*, No. 12-1831, 2014 WL 2466559 (N.D. Cal. May 30, 2014), in which it certified classes where the allegedly misleading labels were consistent throughout the class period. [Read more significant court decisions affecting the food industry in *Food for Thought: 2014 Litigation Annual Review*.](#)

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