

Food for Thought: Florida District Court Denies Class Certification Based on Failure to Show Ascertainability

March 19, 2015

Mirabella v. Vital Pharmaceuticals, Inc., No. 12-62086-CIV-Zloch, 2015 WL 1812806 (S.D. Fla. Feb. 27, 2015)



In *Mirabella*, consumers sued the manufacturer of Redline Xtreme Energy Drink, alleging that the manufacturer concealed the dangerous side effects of the energy drink. Plaintiffs requested relief for (1) violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA); (2) unjust enrichment; (3) breach of implied warranty of merchantability; and (4) violations of the Magnuson-Moss Warranty Act. Plaintiffs sought to certify a nationwide class action on behalf of all U.S. citizens who purchased Redline Xtreme since October 2008. The Southern District of Florida denied class certification because the proposed class was not clearly ascertainable given the product's low price (consumers would not keep receipts), the number of substantially similar products (consumers could not reliably declare class membership), and defendant did not have records identifying individual consumers. In *Mirabella*, individual plaintiffs Adam Mirabella and Kristen Arrendell filed an action against Vital

Pharmaceuticals, Inc. as the manufacturer of Redline Xtreme Energy Drink, claiming Vital Pharmaceuticals failed to warn consumers that consuming the product could cause adverse side effects such as chills, sweating, vomiting, convulsions, chest pain, and rapid heartbeat. Plaintiffs alleged violations of FDUTPA, unjust enrichment, breach of implied warranty of merchantability, and violations of the Magnuson-Moss Warranty Act. The plaintiffs requested that the court certify a nationwide class of “All United States Citizens who have purchased the REDLINE Xtreme Energy Drink, during the period extending from October 2008, up to the date notice is provided to the class.” In addition to the requirements specified in Federal Rule of Civil Procedure 23(a), a plaintiff seeking class certification must first establish that the proposed class is “adequately defined and clearly ascertainable.” In *Mirabella*, the Southern District of Florida held that the proposed class was not clearly ascertainable “since the class may not be ascertained on the basis of objective criteria.” The court noted several factors that supported this conclusion:

1. The nature of the purchase undermined the ascertainability of the putative class. Each Xtreme Energy Drink is sold for less than \$3. Purchasers were not likely to retain receipts or other records of purchase.
2. There are a variety of Redline products, including Redline Energy Drink RTD, that are substantially similar to the product at issue. These other products (that are not at issue in this case) contain substantially similar ingredients and are bottled in similar containers. Without physical receipts, would-be class members, based on memory alone, would need to recall whether they drank the product at issue or a substantially similar product. As such, a “subjective memory problem” subsisted. “The ‘subjective memory problem’ is present when a proposed class of individuals is unascertainable because there is no good way to identify such individuals and the court cannot expect members of the class to recall the cumulative total of the product which they have consumed.”
3. Vital Pharmaceuticals’ distribution/sales model increased the likelihood that the class was unascertainable. Defendant sells most of its products through distributors who, subsequently, sell to retailers. Plaintiffs would thus not have adequate documentation to establish the identity of the end of the line consumers, i.e., potential class members.

Plaintiffs argued generally that ascertaining class membership could be accomplished through a nationwide notice program advertised with major media outlets and through use of an experienced third-party administrator. However, the court opined that any proposed protocol for a class administrator would not mitigate the potential subjective memory problem associated with self-identification. As such, the court held that plaintiffs failed to prove the threshold issue of ascertainability and plaintiffs’ motion to certify class was denied. *Read more significant court decisions affecting the food industry in [Food for Thought: 2015 Litigation Annual Review](#).*

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