

Why 2nd Time Was Not The Charm For Baby Food Class Cert.

By **Alexandra Laks** (March 6, 2018, 10:40 AM EST)

On remand from the Ninth Circuit, Judge Koh last month nixed a plaintiff's second attempt to certify a nationwide class of Gerber's baby food purchasers. Her decision is notable for two reasons.

First, in denying the plaintiff's Rule 23(b)(2) injunctive relief class based on changes to Gerber's product labels, Judge Koh adds to the factual predicates necessary for injunctive standing. Second, in denying the plaintiff's Rule 23(b)(3) damages class, Judge Koh reaffirms that a plaintiff must present a Comcast-complaint damage model to secure certification.



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Judge Koh's decision is a win for companies facing putative false advertising class actions. It confirms that, despite some recent Ninth Circuit decisions favorable to plaintiffs, the rigorous standards for class certification have not changed.

We review the case background, the court's decision and key takeaways below.

Background

Plaintiff's claims

Plaintiff Natalia Bruton sued Gerber Products Company in 2012, alleging that Gerber's baby foods included unlawful and deceptive nutrient content claims and low-sugar-added claims. She sought to represent a nationwide class of purchasers of these products that contained the challenged claims and alleged violations of the UCL, CRLA and FAL.

Bruton I

The plaintiff's lawsuit, which was part of a barrage of "misbranded" food claims filed in the Northern District of California by the same counsel at that time, slowly made its way through the district court and appellate systems.

First, in June 2014, the court denied the plaintiff's motion for class certification, finding that variations in the challenged label statements rendered the class unascertainable. Then, in December 2014, Judge Koh granted Gerber's motion for summary judgment on all of the plaintiff's claims, finding that the plaintiff failed to provide sufficient evidence that the labels were deceptive.

Ninth Circuit's decision

In July 2017, the Ninth Circuit affirmed in part and reversed in part Judge Koh's order. The panel reversed the district court's class certification decision, as the Ninth Circuit had previously found in *Briseno v. ConAgra Foods Inc.*[1] that there was no separate ascertainability requirement.

The panel affirmed the district court's dismissal of deception-based claims under the UCL, CLRA and FAL, but reversed dismissal of plaintiff's UCL "unlawful" claim, finding that, because the underlying statutory violation did not require a showing of deception, plaintiff's particular "unlawful" allegations did not require such a showing either.

The panel also reversed the district court's earlier decision dismissing the plaintiff's unjust enrichment/quasi-contract claim, as California law had since confirmed that this claim was viable. The panel remanded to Judge Koh to consider class certification and the merits of the plaintiff's remaining unlawful and unjust enrichment claims.

Bruton II — Class Certification Denied, Again

On remand, the plaintiff moved to certify a Rule 23(b)(2) injunctive relief class and a Rule 23(b)(3) damages class. Judge Koh denied both.

Injunctive relief

The court held that the plaintiff lacked standing to seek an injunction because Gerber's labels no longer included the challenged statements, nor was there evidence that Gerber would use the challenged statements again. The plaintiff therefore had no evidence that she would likely be harmed in the future, and accordingly lacked standing to sue.

The plaintiff attempted to rely on *Davidson v. Kimberly-Clark Corp.*[2] to claim she had injunctive standing, but the court found the facts distinguishable. In *Davidson*, the Ninth Circuit found that the plaintiff alleged a sufficient threat of future harm because the plaintiff intended to buy the product again, but could not be sure if the product was misleading.

That was because the defendant's labels had not changed, so the plaintiff would either have to refrain from buying the product despite wanting to purchase it, or wrongly assume that the defendant had changed the product to conform to its label. These scenarios didn't apply to the plaintiff's claims, the court held, because all of the labels had changed. There was accordingly no threat of future harm.

Damages

Nor did the plaintiff put forth evidence necessary to certify a damages class, the court held. For 23(b)(3) certification, *Comcast Corp. v. Behrend*^[3] requires a plaintiff to put forth a damages model consistent with her theory of liability. In a mislabeling case such as plaintiff's, the court confirmed, the correct measure of damages is the price premium: the difference between the market value of the product and the value without the offending statement.

The plaintiff's expert offered three damages models, but none sufficed. The first model, "full refund," didn't attempt to calculate a price premium, but instead wrongly assumed consumers received no value from the product. The second model, "price premium," wrongly assumed that the entire difference in price between Gerber and comparable products could be attributed to the challenged statements "when any number of factors — such as brand recognition or loyalty, ingredients and product quality— might explain all or part of the difference."^[4]

And the third model, "regression," did not provide a reliable means for comparing products with and without challenged label statements, nor did it control for the myriad variables that impact products' prices or sales. The individual issues were compounded by the variations in the label statements over time and across different products. Because each of the damages models plaintiff proposed failed Comcast, the court found that the plaintiff failed to show individual issues related to damages predominated over common ones and denied Rule 23(b)(3) certification as a result.

Takeaway

Judge Koh's decision in *Bruton II* demonstrates that the bar for class certification in the food misbranding context remains high, even in the wake of appellate decisions favorable to plaintiffs. To certify an injunctive class, plaintiffs must present actual evidence that they are likely to be harmed in the future, which means they must intend to purchase the product again, and — as Judge Koh confirms here — show that challenged label statements remain on the product.

And to certify a damages class, a plaintiff must present a rigorous damages model that controls for the many variables that impact price and sales for low-cost, everyday products. This is a tremendous task. After years of district court and appeals litigation, the road to class certification has only become more formidable for plaintiffs. Judge Koh's decision in *Bruton II* shows why.

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[1] 844 F.3d 1121 (9th Cir. 2017).

[2] 873 F.3d 1103 (9th Cir. 2017).

[3] 569 U.S. 27, 33 (2013).

[4] Bruton II, Slip Op., 15:19-21.