

Court Denies Class Certification of Natural Claims

In re Conagra Foods, No. 2:11cv05379 (C.D. Cal.): In a putative class action alleging claims under 12 states' consumer protection laws, as well as breach of express warranty, based on the claim that the defendants label their cooking oils as "100% Natural" when in fact they contain GMOs, the court denied plaintiffs' motion for class certification. First, the court implicitly addressed *Comcast* damages in ruling on the defendant's motion to strike the declaration of plaintiffs' damages expert, who opined that a price premium theory could be established through use of hedonic regression and conjoint analysis methodologies. The court concluded that, because the expert failed to identify specifically how he would apply these methodologies to the facts of the case, such as identifying the particular variables or comparator products he would use, the expert's testimony amounted to "no damages model at all." On that basis, the court struck the testimony. The court went on to address a motion to strike the declaration of the plaintiff's GMO expert, who opined both that foods containing GMO ingredients are not "natural," and on what the meaning of the word "natural" is. The court struck only the latter testimony, finding that it would be unhelpful to the jury because "natural" is a commonly understood term and because the expert lacked expertise in analyzing consumer reactions or beliefs. The court then denied the plaintiff's cross-motion to strike the defendant's expert, who opined that the "100% natural" labelling had no material effect on consumer purchasing decisions, finding that the alleged flaws in his methodology went to the weight not the admissibility of the evidence. At last turning to the class certification motion, the court first addressed injury standing, finding that the plaintiffs' purchase of other GMO-containing cooking oils did not deprive them of standing, although it "seriously undercut their claim[s]." The court also noted that even without their damages expert or proof of purchase price, they might be able to prove damages by using data from Information Resources, Inc. to determine prices in their regions, combined with evidence of what portion of the price constituted a price premium. Regarding ascertainability, the court noted the split in authority as to whether the inability to identify putative class members in a class of consumers of low-priced products makes the class unascertainable. It sided with the courts find such classes ascertainable because the subject class was definable by "objective characteristics," without specifying what those "objective characteristics" were. The court also rejected the defendant's argument that the class was overbroad and could contain individuals who never read or relied upon the accused representations, because all putative class members were, in fact, exposed to the same representations insofar as every bottle of oil contained the same statements. Moving to the Rule 23(b) requirements, the court followed many previous opinions finding that the plaintiffs' lacked Article III standing to seek injunctive relief because they could not show an intent to purchase the products in the future and thus lacked the requisite threat of harm. Regarding the proposed damages class, the court focused on predominance. The court noted that although reliance and causation might be determined on a class-wide basis as to the California CLRA claims, due to the causation inference, the plaintiffs had not shown the same ability under their breach of express warranty claim or under the remainder of their consumer protection claims based on other states' laws. Turning to damages, the court relied on its reasoning in striking the plaintiffs' damages expert's testimony in finding that they had failed to show a workable damages theory. In addition, the court pointed out that under *Comcast*, the price premium theory was not adequately tied to their theory of liability because although their expert proposed to demonstrate that the "100% Natural" labeling caused consumers to pay a price premium, he did not identify how the price premium paid related to the consumers' belief that the products were non-GMO. Indeed, he testified that he believed that "non-GMO" and "100% Natural" were not equivalent. Thus, the court found that the plaintiffs' claims lacked predominance because of their failure to demonstrate that causation and reliance could be established on a class wide basis and because they failed to establish a workable damages theory. Ultimately, although the court denied class certification of any class for the reasons discussed

above, the court did so without prejudice and provided plaintiffs with an opportunity to address the causation and reliance, among other, deficiencies noted in the Order within 30 days. [Order](#).

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