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Warranty Class Certified In Target Flushable Wipe Suit

By **Shayna Posses**

Law360, New York (September 20, 2016, 6:53 PM EDT) -- An Ohio federal judge certified a class of consumers Tuesday bringing warranty allegations against Target Corp. over flushable wipes that allegedly clog plumbing, partially granting a purchaser's request but holding that fraud claims must proceed individually and injunctive relief would serve no purpose.

U.S. District Judge Donald C. Nugent held that the question of whether toddler wipes made by Nice-Pak Products Inc. and sold under Target's Up & Up brand in a red package didn't live up to the flushability claims on the packaging is common to all potential class members.

"If the product at issue does not do what it claims to do, all purchasers are affected under the alleged warranty theory, regardless of their pattern of usage, or their perceived satisfaction or dissatisfaction with the product," the judge said. "Based on the allegations in the complaint, either 0% or 100% of the proposed class members have used mislabeled products."

However, the judge narrowed the proposed class because the product formulation changed in 2014 and plaintiff Christopher Meta has no standing to raise claims related to the new "Sigma" version. As a result, the warranty class consists of purchasers of the wipes from April 18, 2010, until the "Buckeye" formulation was discontinued in 2014, Judge Nugent held.

The judge appointed Spangenberg Shibley & Liber LLP and Tycko & Zavareei LLP as class counsel.

The companies had challenged Meta's request for injunctive relief based on a consent decree between Nice-Pak and the U.S. Federal Trade Commission requiring that from 2015 onward it can only advertise and label its wipes as "flushable" if it doesn't make certain other representations, including that the product is safe for sewer and septic systems and breaks apart after flushing, according to the opinion.

However, the fact that the formula Meta complains about is no longer on the market means there's no need for injunctive relief, regardless of the consent decree's effect on the court's ability to grant it, the judge said.

Judge Nugent also held that there are too many individual concerns to grant class certification as to the fraud claim that remained against Nice-Pak after he ruled on summary judgment requests last week. Consumers may have chosen to purchase the wipes for a number of reasons, including some that had nothing to do with whether they were flushable, so reliance will have to be established individually, the judge concluded.

Like consumers in other states who have targeted both manufacturers and retailers, Meta has alleged that the purportedly flushable wipes are anything but, claiming that he may have to pay up to \$20,000 to replace his septic system, though he has only had to pay \$210 to have issues corrected so far, according to court filings.

Federal courts in California and New York have also weighed similar claims against Procter & Gamble Co., Kimberly-Clark Corp., Costco Wholesale Corp., Wal-Mart Stores Inc. and others.

Target previously tried and failed to dismiss Meta's suit entirely. Judge Nugent ruled last February

that while certain common-law claims against the company didn't hold up, a number of Meta's product liability-related claims could proceed.

Then, on Sept. 12, Judge Nugent trimmed the litigation further. For one, he tossed claims brought over "flushable moist wipes" made by Rockline Industries Inc. and sold in green packaging, as Meta never bought or used that product.

The judge also concluded that product liability claims can't stand because there is no evidence of harm as it is defined in Ohio statutes, which hold that economic loss isn't harm, and unjust enrichment allegations duplicate the implied warranty claim.

Judge Nugent tossed the fraud claim against Target on similar grounds, holding that Meta already has warranty claims against the retailer and hasn't provided enough evidence to show that he could prove a harm separate from his decision to buy the wipes or any loss beyond the product price.

"We think it's an overall favorable ruling for consumers and the class members," Lorenzo B. Cellini of Tycko & Zavareei LLP, who represents Meta, told Law360 on Tuesday.

Representatives for the other parties didn't immediately return request for comment Tuesday.

Meta is represented by Stuart E. Scott and Daniel Frech of Spangenberg Shibley & Liber LLP and Jonathan K. Tycko and Lorenzo B. Cellini of Tycko & Zavareei LLP.

Target is represented by Denise A. Dickerson and Brian E. Roof of Sutter O'Connell Co. Nice-Pak is represented by John Q. Lewis, Dustin B. Rawlin, Karl A. Bekeny and Jennifer L. Mesko of Tucker Ellis LLP.

The suit is Meta v. Target Corp., suit number 4:14-cv-00832, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Aebra Coe and Emily Field. Editing by Brian Baresch.