

Ninth Circuit upholds decertification of baby formula labeling class action

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The US Ninth Circuit Court of Appeals affirmed the decertification of a class in *Zakaria v. Gerber Prods.*, following an order originally issued by Judge John Kronstadt of the US District Court for the Central District of California.¹ According to the decertification order, the plaintiff failed to provide an adequate basis to calculate restitution under California's Unfair Competition Law (UCL), False Advertising Law (FAL) or Consumer Legal Remedies Act (CLRA). The plaintiff also failed to provide an adequate basis to calculate actual damages under the CLRA.

The suit, filed in early 2015, alleged that Gerber deceptively marketed its baby formula as the "1st and Only" formula to protect against allergies. After initially certifying a class, the district court granted the defendant's motion to decertify because the plaintiff expert's conjoint analysis only showed how much consumers subjectively valued the "1st and Only" labeling, but failed to account for marketplace realities and supply-side considerations that would affect the product's pricing. Under California law, those factors must be part of class-wide restitution and damages models.

The plaintiff expert's report also did not provide evidence that a higher price or "price premium" was actually paid because of the allegedly deceptive labeling. Gerber also provided uncontroverted evidence that it had not raised the price of its baby formula because of the "1st and Only" labeling. Thus, the plaintiff could not establish restitution or actual damages (defined as the difference between the actual value provided by a consumer and the value that person actually received) on a class-wide basis.

1. *Zakaria v. Gerber Prods.*, 2018 U.S. App. LEXIS 32240 (9th Cir. Nov. 14, 2018), *affirming* 2017 U.S. Dist. LEXIS 221124 (C.D. Cal. Aug. 9, 2017)↵

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