UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Kurtz v. Costco Wholesale Corp.

No. 17-1856(L)-cv, 17-1858-cv, United States Court of Appeals for the Second Circuit (June 26, 2020)

SUMMARY

In this unpublished Second Circuit summary order, the court affirmed certification of a damages class under Rule 23(b)(3) in a false advertising suit alleging that Costco and Kimberly-Clark misrepresented wipes as "flushable," holding that the plaintiff's expert hedonic regression analysis provided common evidence of a price premium sufficient to satisfy predominance. The court reversed certification of an injunctive relief class under Rule 23(b)(2), finding the plaintiff lacked Article III standing because he did not allege any intent to purchase the wipes again. The court also rejected challenges to the plaintiff's adequacy and typicality, and held that expert methodology critiques went to weight rather than admissibility at the certification stage.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Per Curiam; Guido Calabresi; Debra Ann Livingston; Raymond J. Lohier, Jr.
JURISDICTION	Federal
DECIDED	June 26, 2020
DOCKET	17-1856(L)-cv, 17-1858-cv
DISPOSITION	affirmed_in_part_reversed_in_part_remanded
PROCEDURAL POSTURE	Appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.) certifying a class.
STANDARD OF REVIEW	Abuse of discretion for class certification decisions; de novo for conclusions of law; clear error for findings of fact.
PRECEDENTIAL VALUE	Unpublished
PARTIES	Costco Wholesale Corporation, Kimberly-Clark Corporation v. D. Joseph Kurtz

TOPICS

class actions · standing · injunctions · expert testimony · consumer protection

PRACTICE AREAS

Class Actions | False Advertising | Consumer Protection

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in finding that Kurtz satisfied Rule 23(a)'s adequacy and typicality requirements.
2. Whether Kurtz has standing to seek injunctive relief under Rule 23(b)(2).
3. Whether the district court abused its discretion in concluding that common issues predominate under Rule 23(b)(3).

HOLDINGS

1. The district court did not abuse its discretion. No fundamental conflict exists between Kurtz and absent class members, and his purchasing history is irrelevant to typicality because injury occurred at purchase.
2. Kurtz lacks standing because he does not allege any intention to purchase flushable wipes in the future, so there is no imminent future injury.
3. The district court did not abuse its discretion. Weir's regression analysis provides common evidence of injury and causation, and Defendants' critiques go to weight, not admissibility.

KEY QUOTATIONS

> *“Kurtz makes no assertion that he intends to purchase additional flushable wipes products—from Costco, Kimberly-Clark, or any other company. Absent any stated intention to buy additional flushable wipes products in the future, Kurtz has not pleaded an injury that is 'actual and imminent, not conjectural or hypothetical.'”*
> (at 5)

> *“Ultimately, none of Defendants’ critiques demonstrates that there exists 'some fatal dissimilarity among class members that would make use of the class-action device inefficient or unfair. Instead, what [Defendants] allege[] is a fatal similarity—an alleged failure of proof as to an element of the plaintiffs’ cause of action.'”*
> (at 8)

FACTUAL BACKGROUND

Plaintiff D. Joseph Kurtz sued Costco and Kimberly-Clark, alleging that their wipes were falsely labeled as 'flushable' and that purchasers paid a price premium. The district court certified a damages class under Rule 23(b)(3) and an injunctive relief class under Rule 23(b)(2). On remand after the first appeal, the court received expert reports, including a hedonic regression analysis by Colin Weir showing a marketwide price premium for wipes labeled flushable.

PROCEDURAL HISTORY

The district court certified damages and injunctive relief classes under Rule 23. On first appeal, the Second Circuit remanded for further development of the record on predominance. On remand, the district court received additional evidence and reaffirmed its certification. Defendants appealed again.

DISPOSITION

affirmed_in_part_reversed_in_part_remanded

REMAND INSTRUCTIONS

Remanded for further proceedings consistent with the opinion.

CASES CITED

- Kurtz v. Kimberly-Clark Corp., 321 F.R.D. 482 (E.D.N.Y. 2017)
- Kurtz v. Costco Wholesale Corp., 768 F. App'x 39 (2d Cir. 2019)
- Kurtz v. Kimberly-Clark Corp., 414 F. Supp. 3d 317 (E.D.N.Y. 2019)
- UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 130 (2d Cir. 2010)
- Sergeants Benevolent Ass’n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71, 86 (2d Cir. 2015)
- In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 264 (2d Cir. 2016)
- In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011)
- Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)
- Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)
- Dubuisson v. Stonebridge Life Ins. Co., 887 F.3d 567, 573 (2d Cir. 2018)
- Nicosia v. Amazon, Inc., 834 F.3d 220, 239 (2d Cir. 2016)
- Kommer v. Bayer Consumer Health, 710 F. App'x 43, 44 (2d Cir. 2018)
- Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 468 (2013)
- Bickerstaff v. Vassar Coll., 196 F.3d 435, 450 (2d Cir. 1999)
- Bazemore v. Friday, 478 U.S. 385, 400 n.10 (1986)
- Bricklayers & Trowel Trades Int’l Pension Fund v. Credit Suisse Sec. (USA) LLC, 752 F.3d 82, 91-97 (1st Cir. 2014)
- Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2014)
- Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046-47 (2016)
- In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129-30 (2d Cir. 2013)
- In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 470 (S.D.N.Y. 2018)