

[Products Liability Law Daily Wrap Up, CLASS ACTIONS AND MULTI-DISTRICT LITIGATION—FOOD AND BEVERAGES—C.D. Cal.: Class action OK'd for Costco buyers of berry/pomegranate mix linked to hepatitis outbreak, \(Jan. 27, 2016\)](#)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

Nine single-state subclasses were certified by a federal district court in California for the purpose of determining liability in a class action suit brought by ten Costco shoppers who purchased Townsend Farms Organic Antioxidant Blend—a frozen berry and pomegranate mix—that was linked to a 2013 outbreak of hepatitis A, and who subsequently received preventative medical care (*Petersen v. Costco Wholesale Co., Inc.*, January 25, 2016, Carter, D.).

Asserting injury from the risk of exposure to the hepatitis A virus, ten named plaintiffs in nine states filed suit against Costco Wholesale Co., Inc., Townsend Farms, Inc., Purely Pomegranate, Inc., Fallon Trading Co. Inc., and United Juice Corp. Each of the ten alleged that he or she had consumed some of the Townsend mix, and then received a hepatitis A vaccination or an immune-globulin shot after being notified of the contamination. They also asserted that there were thousands of potential class members, of whom 162 individuals in ten states had been infected by the virus. The plaintiffs moved for class certification.

Class action prerequisites. The court first determined that the named plaintiffs were able to establish Rule 23(a)'s prerequisites. The class was ascertainable through objective criteria because Costco maintains records of all customer purchases, and also had the records of 10,316 people who obtained hepatitis A vaccinations at a Costco pharmacy; it was not necessary for every class member to be ascertainable at this stage. The litigation involved a single product sold only at Costco, and there were common questions of whether that product was defective and whether it was the cause of the consumers' injuries. Although the defendants asserted that it would be difficult to prove the existence of a defect, doing so was not a prerequisite to class certification. While the defendants asserted that there was no typical case because the named plaintiffs received different types of medical care, all of the named plaintiffs received some type of preventative medical care and they alleged injuries that were the same or at least very similar to those sustained by other class members and which derived from the same course of conduct.

The defendants argued that the named plaintiffs could not be adequate representatives of the class because they had abandoned potentially viable class claims for negligence and breach of warranty, but there was no rule requiring class certification of every potential cause of action. The court stated that there was no relief obtainable under negligence or warranty that is not available under strict liability, and the plaintiffs were still seeking the full range of economic and non-economic damages.

Class certification. The plaintiffs also satisfied at least one of the certification requirements of Rule 23(b). The predominance requirement was satisfied because the suit involved a single product bought only at Costco for a limited period of time and, thus, there were several common issues that would not require a searching individualized inquiry. There also were significant common facts related to the defendants' recall of the berry mix, the defendants' communications with the buyers about the product, and the class members' receipt of preventative medical care. In addition, the defendants had not raised the possibility of unique or individualized affirmative defenses. Minor factual variations in the consumers' medical history or consumption of the product were not enough to overcome the common questions. The defendants asserted that the predominance requirement could not be satisfied due to variations in state laws, but the court found that many of the differences

were insignificant, and while different state formulations regarding whether a product has to be both defective and unreasonably dangerous or just defective, the court was not required to resolve this issue because the plaintiffs had requested in the alternative the certification of a separate subclass for each of the nine states.

Use of a class action was a superior method of adjudicating the controversy given the thousands of class members and the small size of each individual class member's claim, and the defendants had not identified a better method. Finally, the issue of damages did not need to be resolved because the plaintiffs had proposed to certify a liability-only case, reserving damages for a later phase of the litigation.

The case is No. [SA CV 13-1292-DOC \(JCGx\)](#).

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Companies: Townsend Farms Inc.; Fallon Trading Co., Inc.; United Juice Corp.; Costco Wholesale Co., Inc.

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