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Kellogg Buyers Say Revised \$13M False Ad Deal Is Gr-r-reat!

By **Craig Clough**

Law360 (March 11, 2021, 10:35 PM EST) -- Kellogg customers told a California federal judge Wednesday they've reached a revised \$13 million class deal over claims the cereal giant falsely advertised sugar-loaded cereals as healthy, saying the settlement addresses concerns U.S. District Judge Lucy Koh raised over previous versions of the deal.

Judge Koh rejected a version of the settlement **in February 2020**, saying consumers had ignored her concerns about certifying an overly broad class and about provisions that basically allowed Kellogg's to reclaim millions if consumers didn't act immediately, among other issues. The judge also rejected a revised version of the deal at a **November hearing** where she criticized class counsel's "kitchen sink" approach to the litigation.

In a renewed motion for preliminary approval of a settlement Wednesday, the customers told the judge that her concerns have been addressed and asked that a settlement class estimated at 16 million households be approved with an average claim award predicted to be \$16.09. The customers also touted the settlement's provision for injunctive relief, under which Kellogg has agreed to restrict or limit cereal box references to phrases such as "heart healthy" and "wholesome."

"Plaintiffs and class counsel worked hard to obtain the settlement's substantial injunctive relief, which appropriately addresses what plaintiffs have always maintained are the most explicit ways in which Kellogg represents that the challenged cereals are healthy," the customers said.

They added, "In effect, plaintiffs have obtained through litigation what the current [U.S. Food and Drug Administration] regulations are conspicuously missing, essentially a disqualifying amount of added sugar — at least for the products and claims to which the injunctive relief applies."

The proposed settlement would certify a class of all consumers who purchased certain Kellogg products between 2012 and May 1, 2020, and the \$13 million settlement fund would pay class member claims, class notice and claims administration, attorneys' fees, expenses and service awards.

Lead plaintiff Stephen Hadley filed the lawsuit in August 2016, claiming Kellogg Sales Co. falsely advertises its sugar-loaded Raisin Bran, Frosted Mini-Wheats and Smart Start cereals and Nutri-Grain breakfast bars as healthy.

Hadley pointed to various phrases on the products' labels. For example, the Frosted Mini-Wheats and Smart Start labels say "lightly sweetened" and the Nutri-Grain bars say "wholesome goodness," which Hadley said implies those products are low in sugar, even though they contain 18% to 40% added sugars.

In August 2018, Judge Koh granted **class certification** to consumers who bought the three cereals but did not grant it to purchasers of the breakfast bars, finding the allegations Kellogg's misled consumers about the sugar content of its cereals could be resolved on a classwide basis.

In a November hearing on a previous version of the settlement, Judge Koh raised a number of issues, including the deal's high administration fees and its "broad" release provision, which she said sought to resolve claims "related in any way" to the litigation and claims "of any nature and description whatsoever."

She added that she "cannot" and "will not" approve a settlement that has such a broad release provision, which she said runs afoul of Ninth Circuit precedent. In the new proposed settlement, the plaintiffs said they addressed her concern and the release is "based on the identical factual predicate" and other facts alleged in the claims that adhere to the Ninth Circuit's 2010 ruling in [Hesse v. Sprint Corp](#) .

In the deal rejected in November, the consumers said they sought to bar Kellogg's policy and practice generally, including but not limited to the products and labels challenged in the suit. But among the changes in the new deal is a more limited scope to address the court's concerns, the consumers said, with the settlement class now limited to products for which the court already certified a California class.

The products included in the deal are Kellogg's Original Raisin Bran and Raisin Bran Crunch cereals in a package stating they are "heart healthy," Kellogg's Smart Start Antioxidants cereal in a package calling it "heart healthy" and/or "lightly sweetened" and other products including Kellogg's Frosted Mini-Wheats Bite Sizes varieties, Little Bites varieties and Touch of Fruit in the Middle varieties in packages labeling them as "lightly sweetened."

By limiting the settlement in this way, the parties addressed the court's concern that the settlement class was much broader than what the court certified, the customers said.

Judge Koh in November also took issue with the "mechanics" of how the proposed deal calculated attorney fees. The judge pointed out that as it is was proposed, fees would need to be approved before a cash settlement is distributed, but the fees depend on how many class members choose to redeem roughly \$8 million available in coupon form compared to those who choose cash payments, and class members need to know how much they would receive in a cash payment in order to decide whether to opt for a coupon or cash. She said it seemed "circular."

The customers in the new proposal said that the vouchers were scrapped, which eliminates "the need for a complicated analysis or multi-step process for awarding attorneys' fees" that the judge had concerns about.

"Due to the reduction in sales covered by the settlement, despite the removal of the voucher component, and in light of the additional cash, the settlement's \$13 million non-reversionary common fund is actually now more economically favorable to the settlement class," the customers said.

Any unclaimed funds from the settlement will be distributed to class claimants in a supplemental distribution or donated to cy pres recipients the American Heart Association and the UCLA Resnick Center for Food Law and Policy, which the customers said was recently preliminarily approved by U.S. District Judge William H. Orrick as cy pres recipients in a **companion case against rival cereal maker Post Foods**.

The company also agreed to continue previously agreed upon provisions to refrain for at least one year after preliminary approval from using phrases on the products including "heart healthy," "healthy," "lightly sweetened," "no high fructose corn syrup," "wholesome," "nutritious" and "benefits."

Counsel for the parties did not immediately respond to requests for comment.

The plaintiffs are represented by Jack Fitzgerald of The Law Office of Jack Fitzgerald PC and Sidney W. Jackson III of Jackson & Foster LLC.

Kellogg is represented by Dean N. Panos of Jenner & Block LLP.

The case is Stephen Hadley v. Kellogg Sales Co., case number 5:16-cv-04955, in the U.S. District Court for the Northern District of California.

--Additional reporting by Lauren Berg and Dorothy Atkins. Editing by Andrew Cohen.

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