

# CLASS ACTION & PRODUCT LIABILITY ALERT

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**Tracey Turnbull**

216.443.2539

tturnbull@porterwright.com

**Ryan Graham**

614.227.2016

rgraham@porterwright.com

**Joyce Edelman**

614.227.2083

jedelman@porterwright.com

**Caroline Gentry**

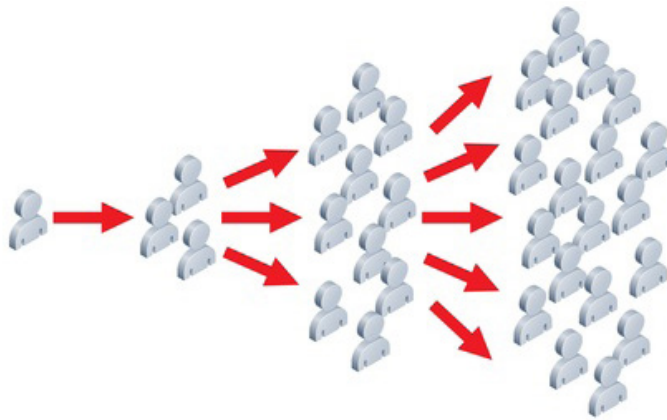
937.449.6748

cgentry@porterwright.com

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## Federal judge refuses to grant class certification concerning fraud claims, but certifies class of warranty claims in flushable wipes litigation



The Northern District of Ohio in *Meta, et al. v. Target, et al.* No. 4:14-CV-832, denied class certification for a class of consumers who brought a fraud claim against Nice Pack, the manufacturer of Target brand flushable toddler wipes. The consumers argued that the potential class of purchasers all relied on the same “flushable” claims made on the wipes’ packaging, but the wipes did not properly disintegrate. The court rejected the consumers’ reliance theory because the wipes had multiple potential purposes, both for personal and household cleaning. The court reasoned that the inquiry into each individual’s reliance on the cleaning statements on the packaging versus the “flushability” statements on the package created too much individual inquiry to justify class litigation on the consumer fraud claim.

The court did, however, grant certification for a class of plaintiffs asserting breach of warranty claims against the retailer Target. The breach of warranty claims also concerned the allegedly misleading statements on the packaging regarding the wipes’ “flushability.” The court did not accept

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Target's arguments that individual issues concerning consumers' use or satisfaction with the wipes could defeat class certification. Additionally, the court refused to accept the position that differences in wording on the wipes' packaging over time defeated class certification when the overarching promises made by the product's packaging, namely that the wipes were "flushable," remained the same. Rather, the court held that where the packaging of a product makes a general claim, the common issue of whether or not the packaging's claim is true or false creates a common issue sufficient to justify class certification.



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### The facts

Christopher Meta (Meta), the named plaintiff, alleged that he brought Up and Up® brand "flushable" wipes manufactured by Nice Pack and sold by the retailer Target to help potty train his daughter. The packaging for the wipes stated that the wipes were "flushable," "dispersible" and "sewer and septic safe."

According to the complaint, Meta began to notice plumbing problems in his house, but the issues self-corrected for a time. Eventually, Meta contacted a plumber to diagnose the problems. The plumber discovered that the wipes had caked together instead of disintegrating, causing the plumbing problems. The plumber flushed the pipes and charged Meta \$210 for his labor and services, warning Meta that the septic system could be permanently damaged and a replacement would cost approximately \$20,000.

In 2013, Meta brought a putative class action on behalf of "[a]ll persons residing in the state of Ohio who purchased Target brand 'Up and Up®' 'flushable' moist tissue wipes and toddler family wipes." Meta brought

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claims for tortious breach of warranty, negligent design, failure to warn, breach of implied warranty of merchantability and fitness for a particular purpose, violations of the Ohio Consumer Sales Practices Act (OCSPA), and unjust enrichment against both Target, the retailer and Nice Pack, the manufacturer. Following motions to dismiss and motions for summary judgment, one fraud claim against Nice Pack, and two warranty claims against Target remained. The warranty claims included a claim related to the wipes' fitness for a particular purpose, and a Magnuson-Moss Warranty Act claim, but both of the claims concerned the wipes' alleged failure to conform to the promises made on the packaging that the wipes were "flushable" and safe for septic use.

Notably, following the filing of the complaint, Nice Pack changed the technology it used for its flushable wipes sometime in 2014 from a technology named "Buckeye" to a new technology named "Sigma," which was also distributed by Target. Nice Pack made this change "sometime in 2014" to comply with a consent decree that Nice Pack entered into with the Federal Trade Commission that required Nice Pack to change the claims on its packaging regarding the flushability of its wipes and the formula before 2015. There was no evidence that Meta ever purchased the updated Sigma formula wipes.

In April 2016, Meta moved to certify the class. Meta requested certification for a class of consumers harmed by Nice Pack's alleged fraud, injunctive relief prohibiting the further advertising of the wipes as "flushable," and a class of consumers harmed by Target's alleged breach of warranty.

### **The court's analysis**

On Sept. 20, 2016, the Northern District of Ohio denied, in part, Meta's motion for class certification.

The court refused to certify a class concerning the fraud claims against Nice Pack. The court reasoned that there are multiple uses for flushable wipes, including both for sanitary applications and for general household cleaning purposes. Because a consumer could have purchased the product relying solely on its promise of household cleaning, and the plaintiff admitted that the wipe satisfactorily performed the function of cleaning, some class members may not have purchased the wipe relying on its claim

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of “flushability” at all. The court held that this individual inquiry into each consumer’s reliance for purchasing the wipes defeated Meta’s request for class certification.

The court also denied injunctive relief. The court held that when Nice Pack switched its formula from the Buckeye to the Sigma formula, the injunctive claim became moot because the Buckeye product at issue was no longer advertised on the market.

However, the Northern District granted certification for the class of plaintiffs allegedly harmed by the warranty claims against Target. The court rejected Target’s defense that some of the packages produced during the relevant class time period had different wording. The court swept this semantics argument aside, stating “the differences in other wording on the packaging should not be relevant to the ultimate question of whether this product conforms to those representations.” As such, the court reasoned that the wipes were either flushable, or not flushable; and if Meta’s wipes were flushable, then the same would be true for every absent class member. The court summarized: “[b]ased on the allegations in the complaint, either zero percent or 100 percent of the proposed class members have used mislabeled products.” Relying on this common question of flushability, the court granted certification for the breach of warranty claims against Target.

The court did, however, limit the class to the time period when the Buckeye formula was used to manufacture the wipes, cutting off the relevant timeframe in 2014. The court held that Meta lacked standing to bring his claim concerning the updated Sigma formula wipes because no evidence or pleading had been presented indicating that Meta had ever purchased a Sigma formula wipe.

### Conclusions

Based on *Meta, et al. v. Target et al.*, companies facing a potential class action consumer product fraud claim should consider the potential uses of the product because they may defeat the fraud claim’s common issues required for class certification. Companies should also consider the claims made on packaging and analyze those claims for potential warranty pitfalls that could support class certification. Additionally, companies assessing

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potential litigation should determine whether any change or improvement in the formula or technology will limit the potential class.

### Takeaways

- Multiple potential uses of a product may defeat class certification of a fraud claim where the packaging makes claims concerning both potential uses.
- A change or update in the formula of a consumer good may limit a class or defeat a claim for injunctive relief when the plaintiff has not purchased an updated product.
- Changing the wording on packaging will not defeat a class warranty claim where the overarching statements concerning the performance of a product remain the same.

For more information please contact [Tracey Turnbull](#), [Ryan Graham](#), [Joyce Edelman](#), [Caroline Gentry](#) or any member of Porter Wright's [Class Action](#) or [Product Liability](#) Practice Groups.

