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PERKINSCOIE

Food Litigation Newsletter

THIS NEWSLETTER AIMS to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

ABOUT
Perkins Coie's Food Litigation Group defends packaged food companies in cases throughout the country.

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RECENT SIGNIFICANT RULINGS

D.C. Circuit Affirms FTC's False Advertising Ruling Against POM Wonderful

POM Wonderful, LLC v. Federal Trade Commission, No. 13-1060 (D.C. Cir.): The D.C. Circuit Court of Appeals recently affirmed a Federal Trade Commission ruling that POM Wonderful used deceptive, unsubstantiated claims in advertising the health benefits of its pomegranate products. In a 2013 administrative ruling, the FTC found that POM made deceptive claims in ads and promotional materials regarding the ability of its pomegranate products to treat, prevent, or reduce the risk of certain diseases, including prostate cancer, heart disease, and erectile dysfunction. For example, one POM advertisement claimed that consuming a glass of POM Wonderful 100% pomegranate juice every day can reduce plaque in arteries by up to 30 percent. While POM argued it had conducted multiple studies and questionnaires to support its claims about the health benefits of its products, the FTC found that POM had cherry-picked favorable results and ignored unfavorable ones. The FTC ruled that disease-related advertising claims must be substantiated by "competent and reliable scientific evidence," specifically the same kind of double-blind, randomized, controlled clinical trials ("RCTs") that are used to study pharmaceuticals.

Affirming the FTC's ruling, the D.C. Circuit held that POM's advertisements were "false and misleading" under the FTC Act because they were not supported by "competent and reliable scientific evidence." The D.C. Circuit also upheld the FTC's holding that, for purposes of POM's disease-related claims, "competent and reliable scientific evidence" requires statistically significant results from an RCT. The decision noted that "the need for RCTs [was] driven by specific type of claims that POM had "chosen to make." That is, because POM's advertisements had "claimed a scientifically established, causal link between its products and various disease-related benefits," POM was bound to provide a correspondingly specific degree of scientific corroboration, which, according to the court, meant at least one RCT. By contrast, a less specific advertising claim about a product's benefit might require a lower level of substantiation than an RCT. Rejecting POM's concerns about the cost of RCTs compared to other scientific studies, the court noted, "if the cost of an RCT provides prohibitive, [companies] can choose to specify a lower level of substantiation for their claims."

The D.C. Circuit, however, rejected the FTC's argument that POM needed at least two RCTs to substantiate its disease-related advertising claims. Acknowledging that the First Amendment protects companies' rights to advertise their products, the court found the FTC had failed "adequately to justify a categorical floor of two RCTs for any and all disease claims." Such a requirement could deny consumers useful, truthful information about products with a demonstrated capacity to treat or prevent serious disease. The D.C. Circuit thus upheld the FTC order "to the extent it requires disease claims to be substantiated by at least one RCT," but reversed "insofar as it categorically requires two RCTs for all disease-related [advertising] claims." *Opinion.*

Muffin Mix Class Action Survives Dismissal

Musgrave v. ICC/Marie Callender's Gourmet Products Division, No. 3:14-cv-02006-JST (N.D. Cal.): In this putative class action alleging that defendant's bread and muffin mixes are falsely labeled and marketed as "all natural" when they in fact contain Sodium Acid Pyrophosphate ("SAPP"), a synthetic ingredient, a federal judge in California dismissed plaintiff's unjust enrichment and injunctive claims but allowed various California statutory and common law consumer protection, warranty, and contract claims to proceed.

The court began by rejecting defendant's preemption and primary jurisdiction arguments. Because the plaintiff seeks to enforce California laws that parallel federal requirements, rather than creating additional or different requirements, the court held the plaintiff's claims are not preempted. Regarding the primary jurisdiction argument, the court concluded that whether the use of the term "all natural" is misleading to consumers if the product contains a synthetic ingredient does not require the FDA's particular expertise. The court also noted that the FDA has already articulated a policy that a product is not "natural" if it contains synthetic substances, thus further guidance from the FDA is not necessary.

In analyzing the plausibility of plaintiff's claims, the court found the complaint sufficiently alleged that (1) a reasonable consumer could interpret the phrase "all natural" to exclude synthetic compounds, and (2) a reasonable consumer could expect that an "all natural" food product should not contain SAPP. The court further found the plaintiff adequately alleged he was misled by the label and suffered economic injury because he paid more money than he would have for a product that was not "all natural." The court also concluded the plaintiff pled his fraud claims with specificity because he attached photograph exhibits of the challenged labels, described the misleading statements and related marketing, and alleged he personally purchased the products in reliance on the "all natural" label at least 18 times over three years, specifying five retailers and their locations. The court also concluded the plaintiff sufficiently alleged breach of warranty and contract claims, suggesting the product's label may create a contract under which defendant was required to provide food products that were "all natural."

Regarding products that plaintiff did not buy, the court held that the plaintiff does not have standing to assert claims related to defendant's "similar" products he did not buy, but the plaintiff could seek to represent a class of people who purchased those similar products. The right time to determine whether the plaintiff may represent the proposed class, including individuals who purchased products that plaintiff did not, was at class certification.

The court dismissed two of plaintiff's claims. First, the court held the plaintiff had not sufficiently alleged standing to pursue injunctive relief because he had not alleged he would purchase defendant's baking mixes in the future. The court thus dismissed plaintiff's demand for injunctive relief without prejudice. Second, the court dismissed plaintiff's unjust enrichment claim with prejudice, holding it was duplicative of his statutory and common law claims. *Order.*

Federal Court Denies Class Certification of Ensure Muscle Health Omission Claims

Otto v. Abbott Laboratories, Inc., No. 5:12-cv-01411 (C.D. Cal.): The Central District of California granted Abbott's motion to deny class certification of plaintiff's claims that the labeling of Abbott's Ensure Muscle Health drink was materially misleading because it failed to inform customers that the drink's muscle rebuilding properties were not effective for customers with low vitamin-D levels. The plaintiff sought two classes: (1) a California class on various California statutory claims, and (2) a nationwide class on a negligent misrepresentation claim. The court denied both classes. First, because the alleged omission was only relevant to consumers with low vitamin-D levels, the Court held that the proposed class of all California consumers was overbroad as it would include many consumers who were not impacted by, or interested in, the alleged omission. Second, the court held that a nationwide class was not appropriate because (1) the plaintiff failed to show that Illinois law could be applied to consumers nationwide, meaning the laws of all 50 states would apply; and (2) the plaintiff failed to demonstrate how the class could be divided into manageable subclasses to account for variations in different states' laws. Finally, the court found the plaintiff failed to present evidence—the complaint's allegations were not enough—establishing any of the requirements of Rule 23. The plaintiff has until March 30, 2015, to file a renewed motion for class certification of his statewide claims based on a narrowed class definition and additional evidence. *Order.*

Arkansas Court Dismisses "Natural Source of Antioxidants" Case

Craig v. Twinings North America, Inc., No. 5:14-cv-05214-TLB (W.D. Ark.): A federal judge in Arkansas dismissed a putative class action claiming Twinings deceived consumers by labeling its teas as being a "natural source of antioxidants." The plaintiff claimed the teas do not meet the minimum nutrient level to make such a claim. The court, however, held that Twinings' label did not violate federal law because the statement "natural source of antioxidants" is not an improper nutrient-

content claim as it does not characterize the level of nutrients. Unlike qualifiers like "good," "more," or "high," the term "natural" does not modify the word "source" to indicate the *level* of nutrients. In addition, tea is exempt from federal nutrition labeling requirements for antioxidants in this case. Because plaintiff's allegations do not violate the Federal Food, Drug, and Cosmetic Act, any state law claims arising from the same facts are preempted. Further, the plaintiff could not show she suffered actual damages under Arkansas law by relying on Twinings' label. Because Twinings' label is allowed under FDA regulations and because the plaintiff paid for and received tea, it cannot be said that the product was "not at all what defendant represented." Finally, because the label does not violate FDA regulations, the challenged statement is not false or misleading as a matter of law. *Order.*

Olive Oil False Labeling Suit Survives Dismissal

Kumar v. Salov North America Corp., No. 14-CV-2411-YGR (N.D. Cal.): A federal judge in California allowed most of a putative false labeling class action against Salov, the maker of Filippo Berio brand olive oil, to survive dismissal. Claiming violations of various California consumer protection statutes, common law fraud and deceit, breach of contract, and breach of the implied covenant of good faith and fair dealing, the plaintiff alleged Salov deceptively labeled its olive oil as "Imported from Italy" when the olives are not grown or pressed in Italy, and as "extra virgin" when the way the oil is bottled, transported, and stored allows it to degrade so that it may not be "extra virgin" by the time of sale or by the "best by" date.

In moving to dismiss, Salov argued that a statement on the back label explains that the olives are grown and pressed in other countries, including Spain, Greece, and Tunisia, then shipped to Italy where they are blended and bottled for export. Salov contended the plaintiff must have seen this disclaimer because she admitted she read the "best by" date on the back label. The court rejected this argument, finding the plaintiff never said she read the statement and the court could not infer she had. Further, the court could not find as a matter of law that a reasonable consumer would not interpret "Imported from Italy" to mean the product was made exclusive from olives grown in Italy. The court also denied Salov's motion to dismiss the "extra virgin" claims. Salov claimed the plaintiff lacked standing because the specific bottle she purchased had not itself been tested and found not to be "extra virgin." The court disagreed, finding plaintiff's theory did not require she prove the particular bottle she purchased had, in fact, degraded to the point of not being extra virgin. Each consumer who purchases "extra virgin" olive oil is entitled to receive oil that meets that definition by design, not happenstance. Whether or not a particular bottle of oil had degraded to the point of not begin extra virgin does not defeat the claim.

Turning to Salov's argument that the plaintiff lacked standing to seek injunctive relief because she could not be misled about the olive oil in the future, the court noted defendant's argument would lead to the result that a class action plaintiff alleging mislabeling could never seek injunctive relief on behalf of the class. The plaintiff had standing to seek injunctive relief because the allegedly false statements would

continue to be false in the future, thus the possibility of future injury exists if the plaintiff encountered the same statements in the future and could not be any more confident that they were true.

Salov also contended the plaintiff lacked standing because she only bought one product, but asserted class claims regarding multiple products. The court found this issue should be addressed at the class certification stage.

The court did dismiss plaintiff's contract-based claims because a product label is not a contract and the plaintiff had not identified any contract between the parties. While a product label may support of breach of warranty claim, the plaintiff did not assert a warranty claim. *Order.*

Court Changes Dismissal to Stay in "Evaporated Cane Juice" Case

Swearigen v. Attune Foods, Inc., No. C 13-4541 SBA (N.D. Cal.): Plaintiffs claim Defendant's products are misleadingly labeled because they list "evaporated cane juice" as an ingredient instead of sugar. Based on the FDA's March 5, 2014 announcement that it was actively reviewing its position on use of the phrase "evaporated cane juice," the Court originally dismissed the plaintiffs' complaint without prejudice pending FDA action. Upon plaintiffs' request, the Court reopened the case, vacated the prior dismissal, and stayed the case pending FDA action. Because it is unclear when the FDA will issue final guidance on the term "evaporated cane juice," the court converted the dismissal to a stay because there is a risk the statute of limitations could run on plaintiff's claims before the FDA acts. *Order.*

Court Approves "Natural" Sweetener Settlement

Aguiar v. Merisant Company, No. 2:14-cv-00670-RGK-AGR (C.D. Cal.): The court granted final approval of a class action settlement in a case claiming defendants misleadingly marketed their sweetener products as "natural" when they in fact contain synthetic dextrose and chemically-processed ingredients derived from stevia. Under the settlement, defendants will pay $1.65 million into a settlement fund to compensate consumers who purchased the products. Individual consumers can seek between $5 and $30 from the fund, with any residual funds to be distributed on a pro rata basis to class members. Defendants also agreed to change their product labeling to include an asterisk directing consumers to a website for more information about ingredients and the basis for the 'natural' classification of the products. Finally, the settlement awards the named plaintiff up to $4,000 as an incentive award and allows class counsel to seek up to 30% of the settlement fund for attorneys' fees. *Order.*

NEW FILINGS

Frei v. Vans International Foods, Inc., No. 15-cv-00209-KLM (D. Colo.): On behalf of a putative national class, Plaintiff claims Defendant's waffle products are deceptively labeled as "totally natural" or "100% natural" but actually contain synthetic

ingredients. The complaint asserts claims for violations of various California consumer protection statutes and breach of warranty. *Complaint.*

Davis v. Hampton Creek, Inc., No. 1:15-cv-20440-CMA (S.D. Fla.): Plaintiff claims Hampton Creek's "Just Mayo" spread is falsely advertised and mislabeled because it is not actually mayonnaise as it does not contain eggs. On behalf of a class of Florida consumers, the complaint alleges violation of Florida's Deceptive and Unfair Trade Practices Act and unjust enrichment. *Complaint.*

Guttman v. Nissin Foods (U.S.A.) Company, Inc., No. 4:15-cv-00567 (N.D. Cal.): On behalf of a putative national class, the plaintiff asserts claims for violation of California's Unfair Competition Law, nuisance, and breach of the implied warranty of merchantability based on allegations that several of Nissin Food's instant noodle products contain partially hydrogenated oil, a toxic carcinogen that is not safe in any quantity and that has safe alternatives. Plaintiff claims defendant's use of partially hydrogenated oil in its products is "unfair" in violation of California law. *Complaint.*

Finally, on February 2, 2015, New York Attorney General Eric Schneiderman sent letters to four major retailers—Target, Walmart, Walgreens, and GNC—for allegedly selling store-brand herbal supplement products that either do not contain the active ingredient listed on the label or contain ingredients not listed on the labels. The challenged products include Target's "Up & Up" brand, Walmart's "Spring Valley" brand, Walgreen's "Finest Nutrition" brand, and GNC's "Herbal Plus" brand. The attorney general demanded the retailers stop selling the supplements, which include Echinacea, Ginseng, and St. John's Wort, in New York. Within days of the announcement, several false labeling class action lawsuits had been filed in California and Arkansas, including the following:

- *Taketa v. Wal-Mart Stores, Inc.*, No. 4:15-cv-00542 (N.D. Cal.) (putative class action of California and Florida consumers alleging violations of California and Florida consumer protection laws regarding Walmart's Spring Valley branded supplements). *Complaint.*
- *Clemmons v. Walgreen Co.*, No. 5:15-cv-05032 (W.D. Ark.) (putative nationwide class regarding alleging deceptive trade practices, unjust enrichment, warranty claims, and negligence under Arkansas law regarding Walgreen's Finest Nutrition brand supplements). *Complaint.*
- *Sparks v. Wal-Mart Stores, Inc.*, No. 15-cv-5031 (W.D. Ark.) (putative nationwide class action alleging deceptive trade practices, unjust enrichment, warranty claims, and negligence under Arkansas law regarding Walmart's Spring Valley branded supplements). *Complaint.*
- *Sparks v. Target Brands, Inc.*, No. 15-cv-5033 (W.D. Ark.) (putative nationwide class action alleging deceptive trade practices, unjust enrichment, warranty claims, and negligence under Arkansas law regarding Target's Up & Up branded supplements). *Complaint.*
- *De la Torre v. Wal-Mart Stores, Inc.*, No. 5:15-cv-00557 (N.D. Cal.)

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(putative class action of California consumers alleging violations of various California consumer protection statutes, warranty claims, and unjust enrichment regarding Walmart's Spring Valley branded supplements). *Complaint.*

- *De la Torre v. GNC Holdings Inc*. No. 5:15-cv-00561 (N.D. Cal.) (putative class action of California consumers alleging violations of various California consumer protection statutes, warranty claims, and unjust enrichment regarding GNC's Herbal Plus branded supplements). *Complaint.*
- *De la Torre v. Walgreen Co*., No. 5:15-cv-00556 (N.D. Cal.) (putative class action of California consumers alleging violations of various California consumer protection statutes, warranty claims, and unjust enrichment regarding Walgreen's Finest Nutrition branded supplements). *Complaint.*
- *De la Torre v. Target Corp*., No. 15-cv-00559 (N.D. Cal.) (putative class action of California consumers alleging violations of various California consumer protection statutes, warranty claims, and unjust enrichment regarding Target's Up & Up branded supplements). *Complaint.*
- *Barber v. Target Corp*., No. 3:15-cv-00568 (N.D. Cal.) (putative class action of California consumers alleging violations of various California consumer protection statutes regarding Target's Up & Up branded supplements). *Complaint.*