FOOD FOR THOUGHT

A REVIEW OF 2018 LITIGATION FROM CARLTON FIELDS

SIGNIFICANT DECISIONS AFFECTING THE FOOD INDUSTRY

CARLTON FIELDS

FOOD FOR THOUGHT 2018

FOOD FOR THOUGHT is a review of significant court decisions affecting the food, beverage, dietary supplement, and personal care products industry. Although many cases in this edition focus on class certification, others relate to motions to dismiss or are otherwise notable. Carlton Fields provides this review on a complimentary basis to clients and friends.

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FOOD, BEVERAGE, DIETARY SUPPLEMENT, AND PERSONAL CARE PRODUCTS GROUP

Companies operating in the food, beverage, and related consumer products industries face increasing and rapidly evolving challenges. Consumers have become more discerning and health-conscious, leading to rising expectations for the goods they purchase, and questions regarding labeling, marketing, and other promotional claims. Against the backdrop of a hypercompetitive market, manufacturers strive to meet this demand for products that are natural, GMO-free, or organic, and for those that fulfill functional claims. At the same time, the Food and Drug Administration regulates and monitors manufacturers' claims in these industries without strictly defining terms such as "natural," or requiring labels to disclose that food is genetically engineered. As a result, inconsistent state consumer protection laws govern in most cases, many of which are viewed as plaintiff-friendly. All these forces combined have led to an explosion in consumer product liability claims, filed as class action lawsuits in light of the generally low economic damages for any individual consumer.

The Carlton Fields food, beverage, dietary supplement, and personal care products group represents domestic and foreign food, beverage, dietary supplement, and personal care product manufacturers in product liability litigation. We focus on defending class action lawsuits, consumer fraud claims, and personal injury and wrongful death actions allegedly stemming from the use of their products. We have represented: a food manufacturer in the defense of a FDUTPA putative class action arising out of the sale and advertisement of probiotic yogurt and claims that challenged the nutritional or health claims of the product; an energy drink manufacturer in class action litigation asserting claims for deceptive and unfair advertising and marketing; and a food manufacturer in a proposed consumer fraud class action regarding the use of the word "natural" in granola bar labeling and advertising.

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TABLE OF CONTENTS

For the Second Time, California Federal Court Declines to Certify Class Action Against Baby Food Manufacturer

Bruton v. Gerber Prods. Co., No. 12-cv-02412-LHK, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018)

BY ANGELA T. PUENTES-LEON

Following the Ninth Circuit Court of Appeals' reversal of its order denying class certification in July 2017, the United States District Court for the Northern District of California again denied class certification. The plaintiff, Natalia Bruton, sued the defendant on behalf of herself and other Californians based on alleged violations of California's Unfair Competition Law (UCL), False Advertising Law (FAL), Consumers Legal Remedies Act (CLRA), Song-Beverly Consumer Warranty Act, and Magnuson-Moss Warranty Act (MMWA). The plaintiff alleged that the defendant violated federal and state law by making false and misleading claims on food labels, specifically, that certain baby food products included claims about sugar and nutrient content that were not permitted under Food and Drug Administration regulations incorporated into California law.

In April 2017, the Ninth Circuit issued an unpublished opinion reversing and remanding several of the district court's decisions. But, at the defendant's request, the Ninth Circuit granted rehearing and withdrew its previous decision on the matter, including the partial dissent filed with it, and issued the new decision in July 2017 reversing the lower court's decision and remanding the case accordingly. Food for Thought reported on the decision here and here. The Ninth Circuit issued its mandate on August 8, 2017. Subsequently, the lower court instructed the parties to file supplemental briefs on class certification.

On February 13, the lower court issued its decision once again denying class certification. Specifically, the court held that the plaintiff could not pursue injunctive relief because the defendant had stopped making the purportedly misleading statements about the products' nutritional content. In addition, the court held that the plaintiff did not propose a damages model that reflected the alleged misconduct. As a result, because the court found that the plaintiff lacked standing to bring an injunctive relief class, and because the damages class failed to satisfy Rule 23(b)(3), the court did not reach whether the proposed classes complied with Rule 23(a).

The plaintiff argued that she had standing pursuant to the Ninth Court's ruling in *Davidson v. Kimberly-Clark*, 873 F.3d 1103 (9th Cir. 2017). In *Davidson*, the Ninth Circuit held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an actual and imminent, not conjectural or hypothetical threat of future harm." *Id.* at 1115 (omitting internal quotes). But the court disagreed and held that *Davidson* did not give the plaintiff standing because the defendant in the instant case, unlike the *Davidson* defendant, had stopped making the misleading statements.

The court also highlighted that the policy concerns in *Davidson* were not present in the instant matter. The *Davidson* court was especially concerned that a holding that consumers who discovered they previously purchased a product based on misleading advertising lacked standing to pursue an injunction preventing the misleading advertising because it was unlikely that they would be fooled into buying the product again. The court feared the holding would risk diluting consumer protection laws that rely on injunctive relief to protect consumers from unfair business practices. Again, the court in this case stated that this policy risk was not present because the defendant had stopped its allegedly misleading practice. In fact, the court was clear that "the bottom line is that nothing in *Davidson* suggests the Ninth Circuit created a freestanding right to seek injunctive relief based on conduct that has ended."

The court then turned its attention to restitutionary damages models, holding that none of the plaintiff's three proposed models properly reflected the amount of money consumers lost from the defendant's alleged mislabeling of its products. The court rejected the "full refund model" because it proposed refunding the entire purchase price of the allegedly mislabeled product, even though consumers received some benefit from purchasing the products. Similarly, the court rejected the "price premium model" because the plaintiff's expert could not link the difference in prices between the defendant's allegedly mislabeled products and allegedly comparable products or account for other reasons why allegedly comparable products may have different prices. Finally, the court rejected the plaintiff's "regression model" because it lacked a reliable means for comparing the products that did and did not feature the challenged statements, and because the plaintiff did not explain how the regression model would account for independent variables that affect price or sales.

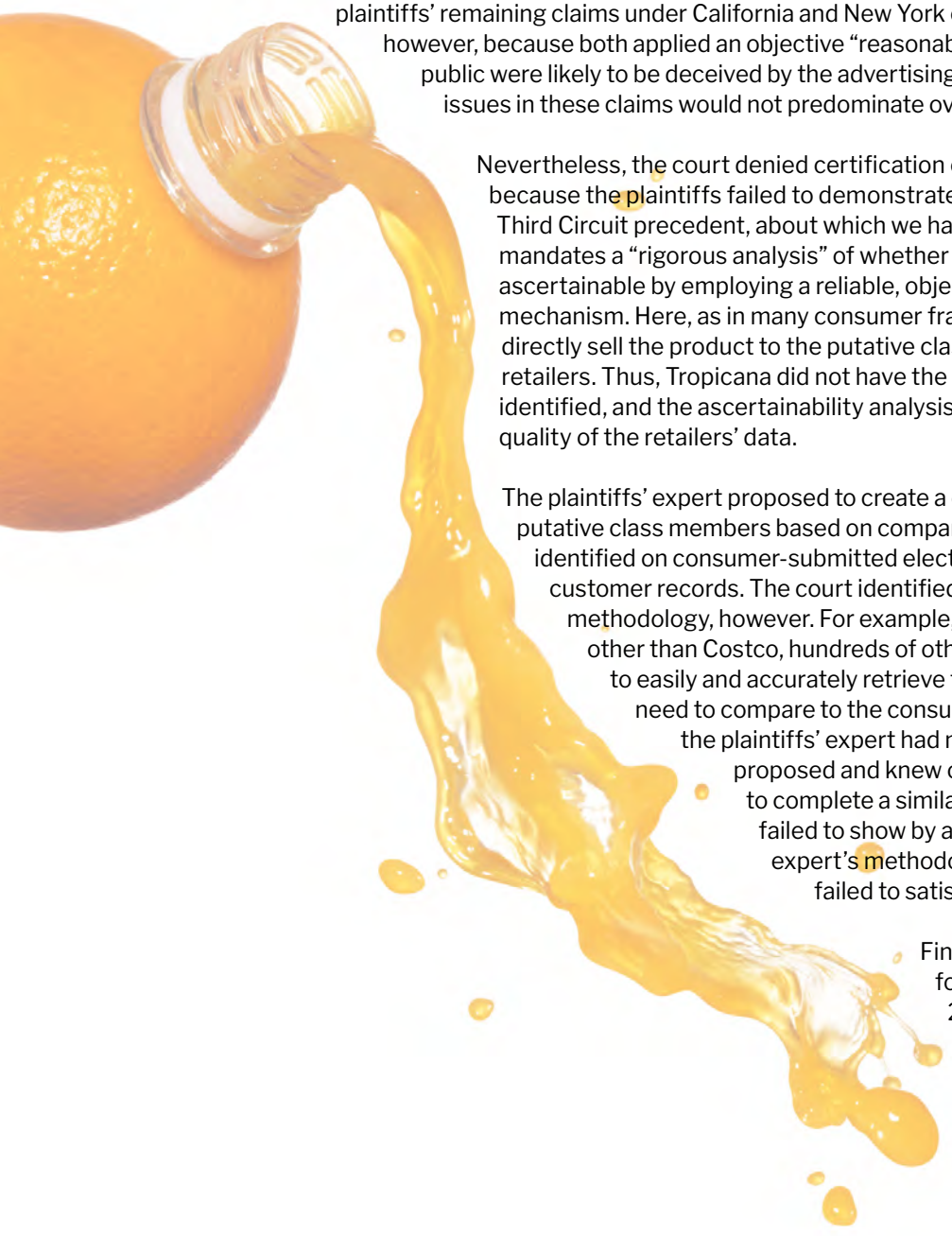
Third Circuit Ascertainability Requirement Puts the Squeeze on Orange Juice Purchasers

In re Tropicana Orange Juice Mktg. & Sales Practices Litig., No. 2:11-cv-07382, 2018 WL 497071 (D.N.J. Jan. 22, 2018)

BY GARY M. PAPPAS

A New Jersey district court denied certification to a putative class of Tropicana orange juice purchasers from "Members Only" or "Loyalty Card" stores in California, New York, New Jersey, and Wisconsin. The plaintiffs alleged various common law and statutory consumer protection causes of action based on Tropicana's alleged false marketing of its orange juice as "all natural." The court found that the plaintiffs satisfied the four certification requirements of Rule 23(a) but failed to satisfy Rule 23(b)(3) for their damages class or (b)(2) for their fallback injunctive relief class.

In denying certification, the court first addressed the plaintiffs' failure to satisfy Rule 23(b)(3) predominance and superiority requirements with respect to their unjust enrichment claims because each required individualized proof of the benefit of the bargain for which the plaintiffs and putative class members purchased Tropicana's orange juice. Similarly, the court dispensed with the plaintiffs' breach of express warranty and New Jersey consumer fraud act claims because each required individualized proof that the plaintiffs and putative class members actually saw and relied on allegedly false statements by Tropicana. The plaintiffs' remaining claims under California and New York consumer protection laws were different, however, because both applied an objective "reasonable consumer" standard that members of the public were likely to be deceived by the advertising. As a result, the court found that individual issues in these claims would not predominate over common issues as they did for the others.



Nevertheless, the court denied certification of the remaining consumer fraud claims because the plaintiffs failed to demonstrate the proposed class was ascertainable. Third Circuit precedent, about which we have blogged in the past (here and here) mandates a "rigorous analysis" of whether the class is currently and readily ascertainable by employing a reliable, objective, and administratively feasible mechanism. Here, as in many consumer fraud cases, the named defendant did not directly sell the product to the putative class members but instead distributed through retailers. Thus, Tropicana did not have the records from which consumers could be identified, and the ascertainability analysis focused primarily on the content and quality of the retailers' data.

The plaintiffs' expert proposed to create a computer program that would identify the putative class members based on comparing Member Club or Loyalty Card numbers identified on consumer-submitted electronic claim forms and retailer-supplied customer records. The court identified numerous flaws in the expert's proposed methodology, however. For example, the evidence in the record showed that other than Costco, hundreds of other retailers involved lacked the capability to easily and accurately retrieve the data that the plaintiffs' expert would need to compare to the consumer-submitted claim forms. Additionally, the plaintiffs' expert had never conducted a project like the one being proposed and knew of no one in the field who had attempted to complete a similar project. The court held that the plaintiffs failed to show by a preponderance of the evidence that their expert's methodology would be successful and, therefore, failed to satisfy the ascertainability requirement.

Finally, the court denied the plaintiffs' request for class-wide injunctive relief under Rule 23(b)(2) because none of the named plaintiffs expressed with certainty that they intended to purchase the same orange juice products in the future, and thus they failed to show a sufficiently real and immediate threat of future injury.

District Courts Split on Whether *Bristol-Myers Squibb*'s Specific Personal Jurisdiction Analysis Bars Nationwide Class Actions in Districts Beyond Defendant's Home Venue

Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018)

In re Morning Song Bird Food Litig., No. 3:12-cv-01592-JAH-AGS, 2018 WL 1382746 (S.D. Cal. Mar. 19, 2018)

BY AARON S. WEISS AND D. MATTHEW ALLEN

The ramifications of the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), remain unsettled. In *Bristol-Myers Squibb*, the United States Supreme Court rejected California's "sliding scale approach" to assertions of specific personal jurisdiction. California's Supreme Court had addressed a nationwide mass action and held that California could assert specific jurisdiction over the claims of non-California plaintiffs who were allegedly injured by a pharmaceutical drug outside of California because those claims were of the same variety as those asserted by California residents.

However, the United States Supreme Court rejected that analysis as reflecting "a loose and spurious form of general jurisdiction," which violated the non-resident defendants' due process rights under the Fourteenth Amendment. Since *Bristol-Myers Squibb* was decided, a split developed in district courts regarding the increasingly important question of whether this holding applies to Rule 23 class actions. *See, e.g.*, *DeBernardis v. NBTY, Inc.*, No. No. 1:17-cv-06125, 2018 WL 461228, at *1-2 (N.D. Ill. Jan. 18, 2018) (describing split among district courts on this issue and holding that "it is more likely than not[,] based on the Supreme Court's comments about federalism[,] that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a forum, such as in this case, where there is no general jurisdiction over the Defendants").

In *Practice Management Support Services Inc. v. Cirque du Soleil Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018), Judge Thomas M. Durkin of the Northern District of Illinois agreed with the courts holding that *Bristol-Myers Squibb* applies to class actions. The court reached this conclusion because, under the Rules Enabling Act, the constitutional right to due process (on which the personal jurisdiction analysis is predicated) applies equally to class actions. Indeed, the United States Supreme Court has emphasized that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the [federal] rules of procedure 'shall not abridge, enlarge, or modify any substantive right.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997) (quoting 28 U.S.C. § 2072(b)). Because *Practice Management* involved an asserted class under the Telephone Consumer Protection Act — which does not provide for nationwide service of process — the court provided its analysis under the typical Fourteenth Amendment personal jurisdiction framework that also applies to diversity cases.

In *Practice Management*, Judge Durkin also rejected the position that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), resolved the

personal-jurisdiction question at issue. Specifically, *Practice Management* agreed with the *Bristol-Myers Squibb* majority that *Shutts* addressed the different question of whether the class at issue there violated the due process rights of the *out-of-state class members* — not the due process rights of non-resident defendants (*Practice Management* involved Canadian and Delaware/Nevada entities being sued in an Illinois federal court). The personal jurisdiction argument centering on the due process rights of non-resident defendants simply was not raised in *Shutts*.

Ultimately, because Judge Durkin found that his court lacked specific jurisdiction over the claims of the prospective class members who did not reside in Illinois, he denied class certification regarding the out-of-state, prospective class members (but granted it as to the Illinois class members).

A week later and 2,000 miles away, Judge John A. Houston of the Southern District of California reached a different result in *In re Song Bird Food Litigation*, No. No. 3:12-cv-01592-JAH-AGS, 2018 WL 1382746, at *5 (S.D. Cal. Mar. 19, 2018). This case involved an already certified nationwide class about bird food. Following class certification, and issuance of *Bristol-Myers Squibb*, the defendants sought to limit the class to a California-only class. They argued that *Bristol-Myers Squibb* dictated this outcome, and their arguments tracked those which Judge Durkin accepted in *Practice Management*.

Judge Houston, however, found *Bristol-Myers* "inapplicable." "*Bristol-Myers* involved a state court's exercise of personal jurisdiction over a non-resident defendant" as to the mass tort claims of non-resident named plaintiffs. "The Court in *Bristol-Myers*, specifically limited its ruling to the exercise of jurisdiction by a state court and left open the question of whether 'the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.'" Judge Houston found "*Bristol-Myers* inapplicable to this suit which involves a class action. *Bristol-Myers* was a mass tort action and it determined the court's exercise of jurisdiction to hear claims by named non-resident plaintiffs. While the claims of the non-resident named plaintiffs were pertinent to the issue of specific jurisdiction in *Bristol-Myers*, 'claims of unnamed class members are irrelevant to the question of specific jurisdiction.'" He noted that in *Bristol-Myers Squibb*, the majority left open the question of the decision's applicability to class actions. 137 S. Ct. at 1789 n.4 ("The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.").

Starbucks Defeats Icy Class Action

Forouzesh v. Starbucks Corp., 714 F. App'x 776 (9th Cir. 2018)

BY ADRIANA A. PEREZ

On March 12, the Ninth Circuit affirmed the dismissal of a proposed class action against Starbucks. The lead plaintiff alleged that Starbucks's method of preparing its iced beverages deceives its customers by misrepresenting the amount of liquid a customer receives when he or she orders an iced drink. The plaintiff brought claims of breach of express warranty, breach of implied warranty, negligent misrepresentation, unjust enrichment, fraud, and violations of California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

The Ninth Circuit held that the plaintiff's claims failed because a "reasonable consumer" would not think that "a 12-ounce 'iced' drink … contains 12 ounces of coffee or tea and no ice." Moreover, the plaintiff's fraud claims failed because he did not show that consumers justifiably relied on Starbucks's representation and "justifiable reliance" is a required element of fraud. Last, the claim for breach of express warranty failed because the plaintiff did not allege that Starbucks ever promised that its iced drinks contained a specific amount of liquid "as distinct from a total amount of liquid and ice."

This decision comes on the heels of another proposed class action that Starbucks defeated in January. There, a group of consumers alleged Starbucks was cheating its customers by underfilling select drinks such as lattes. The court held that because the plaintiffs conceded that milk foam was a component of these drinks, Starbucks was not underfilling the drinks.

Under California Law, Individual Class Members Need Not Show Reliance on Allegedly Misleading Statements at Time of Purchase

Bradach v. Pharmavite, LLC, 735 F. App'x 251 (9th Cir. 2018)

BY ANGELA T. PUENTES-LEON

In its latest opinion addressing class action claims related to allegedly misleading labels, the Ninth Circuit Court of Appeals held that individual class members need not show they relied on allegedly misleading statements for a proposed class action against supplement manufacturer Pharmavite LLC to proceed. The lawsuit alleged that the heart health claims on the defendant's vitamin E supplements were misleading and violated California's Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA). The plaintiff, Noah Bradach, brought the suit against the defendant on behalf of himself and other Californians. Specifically, the plaintiff alleged he and other consumers purchased the defendant's Nature Made Vitamin E dietary supplements in reliance on the statement "Helps Maintain a Healthy Heart," which appears on the product's label.

The lower court held that the plaintiff lacked standing to assert his claims because it concluded that his deposition testimony and interrogatory response indicated he believed the defendant's heart health statement was a disease claim, preempting his state-law claims. As a result, the district court held the plaintiff could not serve as the class representative, declined to certify the class, dismissed the case, and awarded the defendant its costs for the consumer survey it commissioned to defend the lawsuit. The Ninth Circuit reversed and remanded.

Under federal law, which primarily governs labeling of dietary supplements, manufacturers' statements on product labels are either "structure/function" claims (allowing manufacturers to display truthful, non-misleading statements about the benefits the dietary supplement provides) or "disease claims" (which are statements that a product can diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases). Structure/function claims do not require preapproval from the Food and Drug Administration (FDA) so long as the manufacturer has substantiated that the statements are truthful and not misleading, and so long as the manufacturer provides a disclaimer that the FDA has not approved the statement. Similarly, the manufacturer must notify the FDA of any structure/function claims it makes no later than 30 days after its first use. Disease claims, on the other hand, require preapproval from the FDA.

Here, the parties did not dispute that the defendant's heart health statement was a structure/function claim. While federal law can preempt state laws that impose different requirements from those dictated by federal statutes and regulations, federal law does not preempt state requirements that statements on dietary supplement labels that are structure/function claims and speak of maintaining heart health be accurate and not misleading. Federal law does preempt state laws that regulate statements on dietary supplements that are disease claims and speak of preventing heart disease if those state regulations impose requirements that are different from those imposed by the federal government.

The district court denied class certification on the grounds that the plaintiff's claims were preempted, he was not a member of the proposed class and, as a result, failed the typicality requirement of Federal Rule of Civil Procedure 23. The Ninth Circuit held that the plaintiff's claims were not preempted. Specifically, the court indicated that the plaintiff's testimony reflected that he had a mixed understanding of what the defendant's product would do; he understood that the product could both maintain his heart health and prevent heart disease. Thus, the court held that the plaintiff's claims were not solely premised on preempted disease claims, and because the court has recognized that a plaintiff may have claims based on mixed motives, the plaintiff was allowed to proceed with claims arising partly from non-preempted motives.

In addition, the district court held that the proposed class filed the ascertainability, commonality, predominance, and superiority elements of Rule 23 because it would be difficult to determine whether the putative class members viewed the heart health statement as a disease claim a structure/function claim. The Ninth Circuit held that class members in actions based on CLRA and UCL violations are not required to prove individual reliance on the allegedly

misleading statements. As a result, the Ninth Circuit reversed the district court's ruling for reconsideration of the class allegations.

Finally, the district court granted the defendant's motion seeking recovery of more than $84,000 in expenses incurred to conduct a consumer survey for its expert report. The Ninth Circuit held that although Rule 54(d) grants the districts courts discretion to refuse to tax costs in favor of a prevailing party, a district court may not rely on its equity power to tax costs beyond those authorized by 28 U.S.C. § 1920. The court explained that the text of section 1920(4) is narrow and permits fees only for the physical preparation and duplication of documents, not for the intellectual effort involved in the production. The Ninth Circuit held that the district court also erred in granting the defendant's motion seeking to recover the costs of the survey.

Fast-Track to Trans Fat Removal Not Required for "Fast Bites"

Hawkins v. AdvancePierre Foods, Inc., 733 F. App'x 906 (9th Cir. 2018)

BY ANGELA T. PUENTES-LEON

The Ninth Circuit, in an unpublished opinion, affirmed the lower court's decision dismissing a lawsuit against a manufacturer of frozen foods because the allegations did not establish that the manufacturer acted unlawfully, unfairly, or fraudulently. The plaintiff, Shovanda Hawkins, brought a putative class action suit on behalf of a nationwide class of consumers who purchased "Fast Bites," a line of microwavable sandwiches manufactured or distributed by the defendant, AdvancePierre Foods Inc. The plaintiff alleged that the product contained partially hydrogenated oil (PHO) and that use of the ingredient in human food violated state law. The plaintiff sued based on violations of California's Unfair Competition Law (UCL) and for breach of the implied warranty of merchantability.

The lower court dismissed the plaintiff's complaint because the plaintiff's state claims were barred by conflict preemption. Specifically, the lower court held that the plaintiff's claims were a "direct obstacle" to the Food and Drug Administration's (FDA) objective. In June 2015, the FDA issued a final determination on PHOs that called for companies to remove the ingredient from products by June 2018. The three-year compliance period would allow manufacturers the time necessary to phase out the ingredient while minimizing business disruptions. The plaintiff sued the defendant in 2015, before the deadline by which the defendant needed to comply with the FDA's directives.

The circuit court "assume[d] without deciding" that the plaintiff's claims were not preempted by federal law. However, the court also held that the plaintiff failed to state a claim for violation of the UCL or for breach of warranty because the plaintiff failed to establish the requisite "unlawful, unfair or fraudulent business act or practice." The court reasoned that a claim under the UCL's "unlawful" prong requires a predicate violation of another law. The defendant was not required to stop using PHO until 2018 and, as a result, the defendant did not violate the provision of the UCL because it did not violate federal law. The court also rejected the plaintiff's claim alleging breach of the implied warranty of merchantability because her allegation that she "is a busy person and cannot reasonably inspect" ingredients in the food she purchases does not excuse the plaintiff from examining the labels on the products she purchased.

Plaintiff's Claim Still Has Some Muscle – Ninth Circuit Reverses Class Action Against Protein Powder Manufacturer Alleging Source of Protein Was Misrepresented

Durnford v. MusclePharm, Corp., 907 F.3d 595 (9th Cir. 2018)

BY ANGELA T. PUENTES-LEON

The Ninth Circuit Court of Appeals reversed an order from the Northern District of California that dismissed an action against defendant MusclePharm Corp. alleging false or misleading statements. The plaintiff, Tucker Durnford, alleged that the defendant, a manufacturer of nutritional supplements, made false or misleading statements about the protein in one of its products by engaging in "protein spiking" or "nitrogen spiking." Protein spiking or nitrogen spiking is the practice of inflating measurements of a supplement's protein content using non-protein substances. Specifically, the plaintiff alleged that the defendant used creatine monohydrate and free-form amino acids to inflate protein figures. Thus, according to the plaintiff, the supplement's true protein value was 19.4 grams per serving, rather than 40 grams per serving. The plaintiff also alleged that, in response to an unknown individual's question to the defendant's official Twitter account regarding nitrogen spiking, the defendant denied engaging in that practice and stated that its products were scientifically backed. The plaintiff alleged that the defendant's supplements were misleading and violated California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA). The plaintiff also brought an action for breach of express warranty premised on the theory that the supplement's label, marketing, and advertising became part of the basis of the bargain at the time of purchase.

The lower court ruled in favor of the defendant and granted its motion to dismiss. The district court rationalized that the Food and Drug Administration (FDA) allows nitrogen spiking because regulations allow a manufacturer to use nitrogen content as a proxy for protein content. As a result, the district court held that the Food, Drug, and Cosmetic Act (FDCA) expressly preempts state law requirements and, even if the product's label might be considered misleading, California consumer law could not be used to create liability for an FDA-compliant measurement. The district court similarly ruled in favor of the defendant based on preemption grounds on the plaintiff's theory related to the source of the protein in the product. The court accepted the theory that the defendant's label falsely or misleadingly stated that the product's protein was derived entirely from hydrolyzed beef protein and lactoferrin, not from nitrogen spiking. Nonetheless, the district court also ruled in favor of the defendant on preemption grounds relating to the claim of the origin of the protein in the product. The court found that the plaintiff did not allege that his independent study demonstrating a lack of true protein "conformed to the FDA's requirements for measuring protein content." Finally, the district court ruled in favor of the defendant on the plaintiffs claims that he was misled by the defendant's statement on Twitter regarding nitrogen spiking because the plaintiff failed to adequately plead reliance, resulting in a lack of statutory standing under California's consumer protection laws.

The Ninth Circuit accepted the district court's ruling on preemption, in part. The court stated that federal regulations allow nitrogen to be used on the nutrition label as a proxy for protein content. As a result, the plaintiff's claim about the amount of protein in the product was preempted. However, the court agreed with the plaintiff on his claim regarding the source of the protein. Specifically, the court held that FDA regulations only concern the amount of protein, not the source of the protein. Thus, the court held that the plaintiff adequately alleged facts necessary to support a consumer claim premised on the theory that the label falsely or misleadingly suggested that the protein in the product was entirely composed of two kinds of actual protein (beef and lactoferrin) as stated on the product's label. The court further opined that because the defendant did not attempt on appeal to distinguish between the plaintiff's California statutory claims and his breach of express warranty claim, reversal on the protein composition theory applied to all claims in the complaint. Finally, the court agreed with the district court's dismissal of the claims relating to the defendant's tweets because the plaintiff failed to allege a connection between the tweet and his purchase of the product, and because he did not adequately plead the tweet as an independent basis of the plaintiff's claims.

Ninth Circuit Reverses Dismissal of Putative Class Action Alleging Misleading Label on Kroger Bread Crumbs

Hawkins v. Kroger Co., 906 F.3d 763 (9th Cir. 2018)

BY ERIC D. COLEMAN

In *Hawkins v. Kroger Co.*, the Ninth Circuit Court of Appeals reversed the district court's dismissal of the plaintiff's putative class action alleging that the defendant, The Kroger Company, sold Kroger Bread Crumbs with packaging that included misleading labels. Specifically, the plaintiff alleged that the product's package stated "0g Trans Fat per serving," when in fact the product contained 0.05 grams of trans fats. The district court granted the defendant's Rule 12(b)(6) motion to dismiss, with prejudice, holding that the plaintiff lacked standing to bring these claims, and alternatively, the plaintiff's labeling claims were preempted by federal law.

In initially dismissing the plaintiff's putative class action, the district court found that the plaintiff lacked standing because she did not allege that she read the "0g Trans Fat per serving" statement on the face of the label and, therefore, had not relied on the allegedly misleading statement in purchasing the defendant's product, nor had she been injured.

On appeal, the Ninth Circuit held that the district court had misread the plaintiff's complaint in finding that she had not alleged reliance on the "0g Trans Fat per serving" statement. In its ruling, the district court had relied on a paragraph of the complaint wherein the plaintiff alleged that she "first discovered Defendant's unlawful acts described herein in August 2015, when she learned that Kroger Bread Crumbs contained artificial trans fat." However, the Ninth Circuit held that this paragraph did not state that the plaintiff first read the product label in August 2015, but that she first discovered that the label contained a misrepresentation at that time. The Ninth Circuit found that there were at least three other paragraphs in the complaint in which the plaintiff "concretely alleged that she relied on the label."

The district court had further held that the plaintiff's claims were preempted by Food and Drug Administration (FDA) regulations that expressly permit the claim "0g Trans Fat per serving" on the face of the defendant's product. However, the Ninth Circuit, relying on its 2015 opinion in *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015), held that a requirement to state certain facts on the nutrition label is not a license to make that statement elsewhere on the product packaging. Thus, the Ninth Circuit held that while the FDA regulations relating to the Nutrition Facts label may have required the defendant to round down to zero where the amount of trans fat was less than one gram, this did not give the defendant the authority to make a nutrient content claim elsewhere on the packaging.

No Injury, No Problem? The First Circuit Weighs in on Certification Where Absent Class Members Lack Harm

In re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018)

In *Tyson Foods*, the Supreme Court declined to resolve the issue of whether a class may be certified if it contains members who were not injured and have no legal right to damages. Dealing with this increasingly common issue in class action litigation, the First Circuit recently summarized circuit precedent on the issue — and ultimately reversed a district court decision certifying a class that contained class members who had not suffered any injury.

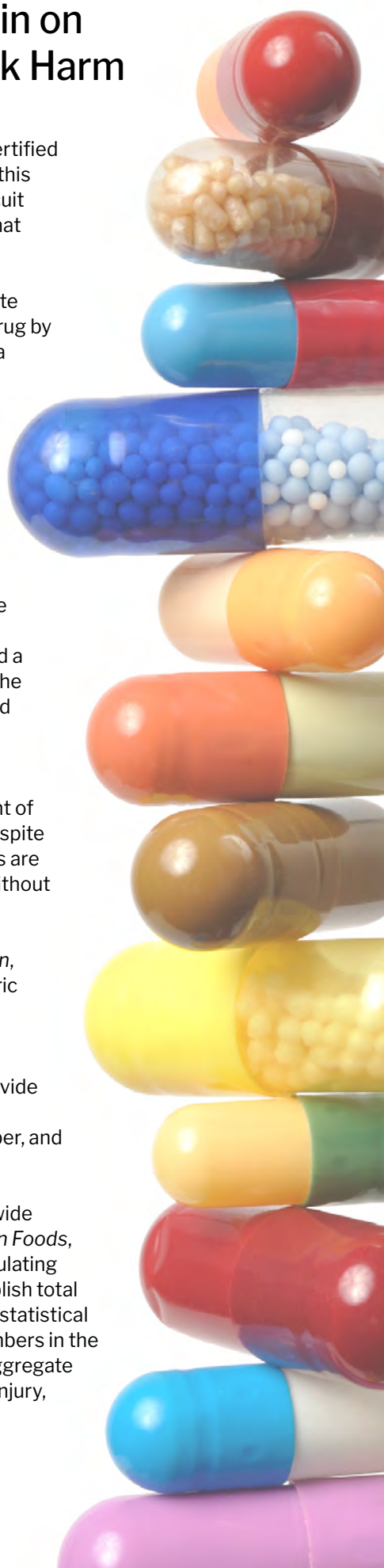
The plaintiffs filed the suit against defendant drug manufacturers for violations of various state consumer protection and antitrust laws, alleging they had suppressed generic versions of a drug by pulling it from the market months before its patent expired while simultaneously introducing a replacement with longer patent protection. The United States District Court for the District of Massachusetts granted the plaintiffs' motion to certify the class, finding that the named plaintiffs had standing to bring claims on behalf of class members in 26 states and had met the requirements of Rule 23 despite the fact that approximately 10 percent of the purchasers had not suffered an injury caused by the defendants' conduct. The court found the number of uninjured class members was "de minimis" and could be separated in a later proceeding. The First Circuit granted the defendants leave to file an interlocutory appeal and subsequently reversed.

The circuit court first reviewed the district court's finding that named the plaintiffs had Article III standing, explaining that the plaintiffs' claims need not be identical to those of the putative class members but that it must determine whether the differences meant the plaintiffs lacked a sufficient personal stake in litigating the claims. Because the parties agreed that the laws of the different states were materially the same and the court determined that subtle differences did not change the analysis, the plaintiffs satisfied Article III.

Next, the circuit court looked to the requirement of Rule 23(b)(3) that common questions predominate over individual issues. It accepted the district court's conclusions that 10 percent of class members would not have purchased a generic drug, and that a class may be certified despite the existence of individual issues where the adjudication is feasible and the defendants' rights are protected. However, the circuit court found that the case could not be tried on a class basis without undermining the defendants' rights.

The plaintiffs attempted to rely on a prior First Circuit opinion, *In re Nexium Antitrust Litigation*, which found that unrebutted affidavits stating that consumers would have purchased a generic drug if available would be sufficient to determine which class members had been injured. Here, however, the court had no reason to believe that such affidavits would be available or sufficient, and the defendants had already stated an intention to rebut any such evidence. Additionally, a review by a claims administrator to remove uninjured consumers would not provide defendants a meaningful opportunity to contest whether class members would actually have purchased generic drugs, and the case would be unmanageable, as any individual class member, and thousands overall, might not have suffered an injury.

The plaintiffs next argued that these differences did not matter since they could prove classwide antitrust impact through expert testimony, relying on the Supreme Court's precedent in *Tyson Foods*, an overtime compensation case in which the Court approved the use of an expert report calculating employees' average time spent donning and removing protective equipment in order to establish total hours worked. However, the First Circuit distinguished that precedent as limited to the use of statistical evidence in employment cases — and thus inapplicable to prove individual injury of class members in the case at bar. The court emphasized that class actions do not create a class entity, but rather aggregate individual claims. Because approximately 10 percent of class members had not suffered any injury, the First Circuit reversed the lower court's certification decision.



Belch! Ocean Spray Price Premium Damages Model Passes *Comcast* Scrutiny

Hilsley v. Ocean Spray Cranberries, Inc., No. 3:17-cv-02335-GPC-MDD, 2018 WL 6245894 (S.D. Cal. Nov. 29, 2018)

BY GARY M. PAPPAS AND RYAN P. FORREST

The Southern District of California certified a food labeling class against Ocean Spray Cranberries Inc. based in part upon a price premium damages model developed by an aptly named Dr. Belch. The plaintiff, a self-proclaimed "health coach" and "label guru," alleged Ocean Spray misrepresented that many of its juice products contained no artificial flavors when in fact they contained malic and fumaric acids, synthetic chemicals that simulate the advertised flavors. She asserted Ocean Spray's juice labels violated various provisions of the California Consumers Legal Remedies Act as well as other causes of action. The plaintiff sought to certify a Rule 23(b)(3) class of California consumers who purchased any of 12 specified Ocean Spray juices.

The court dispensed with Ocean Spray's arguments as to Rule 23(a) requirements and devoted the majority of its attention to the predominance requirement of Rule 23(b)(3). As we have blogged about here and here, this inquiry asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the class-defeating individual issues.

The plaintiff argued that liability under her statutory consumer fraud claims satisfied predominance because the claims centered on an objective standard that did not require proof of individual reliance: whether Ocean Spray's representations that its juices did not contain artificial flavors were likely to deceive a reasonable customer. Ocean Spray's only response on the liability issue was that the plaintiff did not prove the artificial ingredients in its juices were actually flavors. The court agreed with the plaintiff, finding Ocean Spray's argument was an improper attempt to tread into the merits of the dispute at the class certification stage.

Next, the court conducted a rigorous analysis — as required by *Comcast Corp. v. Behrend* — as to whether the plaintiff's damages model for restitution to the class was consistent with her liability theory that Ocean Spray's misrepresentations caused consumers to pay more than they otherwise would have. Such price premium damages models must link the consumer price differential to the defendant's allegedly deceptive labeling to be acceptable, as we have blogged about here and here.

The plaintiff proffered two damages models. The first, prepared by an expert named Dr. Goedde, was based solely on a survey of California juice prices unrelated to Ocean Spray products. Dr. Goedde found customers paid a price premium of 25 percent for all-natural juice products. The court rejected this model because it was untethered to the plaintiff's legal theories or Ocean Spray's alleged misrepresentations and thus failed to satisfy *Comcast*.

Enter Dr. Belch, who proffered consumer survey results based on the contingent valuation methodology. The results purported to show customers preferred Ocean Spray's juices without artificial flavoring and that they were willing to pay a premium of 61 cents to obtain such juices. The plaintiff then provided Dr. Belch's survey to Dr. Goedde, who applied Dr. Belch's findings to Ocean Spray's actual unit sales during the class period to arrive at a restitution figure. The court found that this Belch-Goedde model satisfied the predominance requirement and *Comcast* because it accounted for both the consumer class demand and Ocean Spray supply-side factors in the market.

On the strength of the Belch-Goedde model, the court certified a Rule 23(b)(3) class under the plaintiff's statutory consumer fraud claims.

Does Cheez-It Decision Establish a Concerning Precedent for Packaged-Food Makers?

Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018)

BY ANGELA T. PUENTES-LEON

In its newest opinion addressing class action claims related to allegedly misleading labels, the Second Circuit Court of Appeals vacated a decision from the Eastern District of New York granting the defendant's motion to dismiss — effectively validating the claims for deceptive advertising. The plaintiffs, Kristen Mantikas, Kristin Burns, and Linda Castle, alleged that defendant Kellogg Co., maker of Cheez-It crackers, falsely and deceptively labeled its product as "whole grain" or "made with whole grain" despite the product's primary grain ingredient being enriched white flour, not whole grain. The plaintiffs asserted claims for false advertising and deceptive business practices in violation of New York and California consumer protection laws, as well as unjust enrichment under Michigan law. The plaintiffs sought monetary damages and declaratory and injunctive relief on behalf of all putative class members residing in the United States and its territories who purchased the product since May 2010.

The district court granted the defendant's motion to dismiss for failure to state a claim, holding that the whole grain labels on the front of the package would not mislead a reasonable consumer. Specifically, the district court held that the statements "made with whole grain" and "whole grain" on the label of the product were not misleading because both statements were factually accurate. In fact, the district court stated that the ingredient list clearly showed whole grain flour as the second or third ingredient, and the nutrition facts label showed how much of the total grain in the product was whole grain versus enriched white flour. And, because the district court held that the plaintiffs failed to show the packaging was misleading, they similarly could not demonstrate injury and therefore lacked standing to pursue injunctive relief. The court also dismissed, and the plaintiffs did not appeal, plaintiffs' claims for unjust enrichment pursuant to Michigan law for lack of standing. The district court did not consider the defendant's argument that the plaintiffs' claims were preempted by federal law, dismissing all counts of the complaint on other grounds.

The Second Circuit disagreed and rejected the lower court's reasoning, stating that the court misapplied the principle that an allegedly misleading statement must be viewed "in light of its context on the product label or advertisement as a whole." Rather, the district court concluded that the disclosures on the side of the box did not render the plaintiffs' allegations of deception implausible. Here, the plaintiffs alleged that the communications on the front of the package were misleading "because they communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, whole grain." And, although the disclosure on the front of the package accurately set forth both the presence of whole grain as an ingredient in the product and the amount of whole grain in the product, it was nonetheless misleading because it inaccurately implied that whole grain was the only or most predominant grain in the product. The Second Circuit held that reasonable consumers should not have to look beyond the representations on the front of the box to verify the accuracy of the claims because consumers expect that the ingredient list confirms other representations on the packaging or provides additional detail in support of the statements on the packaging.

The court rejected the defendant's argument that the plaintiffs' case was rightfully dismissed because several district courts had dismissed cases on the pleadings where consumers alleged that product labels stating a food was "made with" an ingredient misled them to believe that the stated ingredient was a major or predominant ingredient. The court held that those cases differed from the case at bar because they involved allegations of deceptive labeling that led consumers to believe that the product

contained a significant quantity of a particular ingredient. Here, the plaintiffs alleged that the label was deceptive because it implied that most or all of the grain in the product was whole grain rather than enriched white flour. Furthermore, in the cases cited by the defendant, the plaintiffs alleged they were misled about the quantity of an ingredient that was obviously not the predominant ingredient. In the case at bar, the plaintiffs alleged they were misled about the prominence of whole grain as an ingredient in the product. Thus, the representations made by the defendant on the packaging would "plausibly lead a reasonable consumer to conclude that the product's grain ingredient was entirely, or at least predominantly, whole grain."

Thus, the Second Circuit held that the plaintiffs' claims were facially plausible because the plaintiffs adequately alleged factual content that allowed the court to draw the reasonable inference that the defendant was liable for the misconduct alleged. As a result, the court vacated the district court's order and remanded the case for further proceedings.

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