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Plaintiffs May Be Hard-Pressed In New Olive Oil Cases

By **Claudia Vetesi, Lucia Roibal and Tim Kline** (August 28, 2018, 2:40 PM EDT)

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On Aug. 2, 2018, two lawsuits were filed against Transnational Foods Inc. and J.M. Smucker Co. alleging that certain extra virgin olive oil, or EVOO, products were misleadingly labeled as EVOO when results from a "leading laboratory" "conclusively" established that the products were not in fact EVOO.[1] Because the laboratory tests allegedly concluded that the products were not EVOO, the plaintiffs claim that the defendants' representations that the products were EVOO were false.

Based on the allegedly false and misleading label, the plaintiffs bring claims under California's Consumer Legal Remedies Act, False Advertising Law and California Business and Professions Code section 17200, et seq., and for negligent misrepresentation. The plaintiffs seek restitution, compensatory damages and injunctive relief.

The Olive Oil Wars

Cases against olive oil producers and importers are hardly novel. Indeed, the past decade has seen a flurry of class action suits targeting olive oil producers and importers. The first wave of EVOO suits followed the same pattern: They were based on United States Department of Agriculture marketing standards updated in 2010[2], and a University of California at Davis study conducted in 2010, concluding that most supermarket brands labeled extra virgin failed to meet International Olive Council and USDA standards for extra virgin olive oil.

Cases were dismissed after defendants showed that testing was flawed, sample sizes were limited, testing was inclusive and there were multiple standards for EVOO.[3] Some cases, on the other hand, resulted in class certification and/or settlement.[4]

Transnational and J.M. Smuckers: Will the Second Wave Crash?

Unlike the plaintiffs in the first wave of EVOO lawsuits, the plaintiffs in Transnational and J.M. Smuckers forego use of the International Olive Council and USDA EVOO standards, and instead allege that the olive oil products they purchased were tested by a "leading

laboratory," which "conclusively" established that the products were not in fact EVOO. But, as set forth below, the plaintiffs face an uphill battle in their claims against J.M. Smucker and Transnational.

"Substantiation" Claims Disguised as "Deception"

First, the plaintiffs' reliance on the "leading laboratory" study, as well as their failure to reference any particular EVOO standard, may ultimately spell the demise of their claims under the Ninth Circuit's recent decision in Kwan v. SanMedica International.[5] In that case, the plaintiff brought false representation claims based on the plaintiff's allegation that the defendant's claims regarding the health benefits of its products were false or misleading.

With no facts supporting this claim, however, the plaintiff was merely alleging a lack of substantiation: that the health benefits were not clinically proven. Because California does not provide a cause of action for private citizens alleging that marketing claims lack proper scientific substantiation, the Ninth Circuit affirmed the district court's dismissal of plaintiff's unfair competition law and consumer legal remedies claims.

As in Kwan, the plaintiffs in J.M. Smucker and Transnational conclude — based on an unnamed laboratory test — that these companies' EVOO products are not actually EVOO. With no reference to particular regulations or standards for EVOO and no specific test results, however, these claims appear to be nothing more than lack of substantiation claims. As such, under Kwan, the claims are arguably prohibited.

Consumers' Understanding of EVOO

The plaintiffs may also face plausibility issues at the motion to dismiss stage under Ashcroft v. Iqbal[6] and Bell Atlantic v Twombly.[7] California cases have made clear that statements are only actionable under the UCL, CLRA and FAL if they are likely to deceive a reasonable consumer. But the plaintiffs' blanket assertion that EVOO is not EVOO may not pass muster.

First, although the plaintiffs conclude that the representation of the olive oil as EVOO is a misrepresentation, they allege no facts supporting that claim. While the plaintiffs cite an unidentified laboratory test, they allege no specific test results and no specific standard against which to compare those test results. As such, there are no facts to support a claim that consumers got anything other than what was represented.

Without facts supporting misrepresentation, the plaintiffs also have no basis for deception or reliance on the alleged deception. Moreover, the plaintiffs' allegations that they purchased the products for the purpose of testing the quality of the oil raises the question of whether the plaintiffs could have relied on a representation they believed might be false.

Finally, without any facts supporting an actual misrepresentation, the plaintiffs will have issues with showing any injury. For these same reasons, the plaintiffs will similarly face issues showing the requisite specificity required under FRCP 9(b).

Bigelow and Davidson: No Standing for Injunctive Relief

The plaintiffs may also face serious issues under the Ninth Circuit's recent decisions in Victor v. Bigelow[8] and Khasin v. Bigelow.[9] In those cases, the Ninth Circuit made clear that injunctive standing

in the misbranding context requires plaintiffs to show an intent to purchase the product in the future, along with a belief that the product will continue to be mislabeled.

In J.M. Smucker and Transnational, however, the plaintiffs make no such allegations. Without demonstrating such intent, their claims may be doomed.

Preemption Based on Existing Government Standards

Although arguing preemption is generally an uphill battle where there are no mandatory regulations, given the various government and industry standards, the plaintiffs are asking the court to regulate where the government has declined to do so.

Class Certification

Should the case reach the class certification stage, the plaintiffs may encounter additional problems in demonstrating commonality and predominance. First, there is currently no common understanding of the meaning of EVOO. The various industry standards and understanding of what constitutes EVOO will make it difficult to demonstrate commonality and predominance. Additionally, the plaintiffs may face hurdles in putting forth a viable damages model that measures "price premium" under Comcast v. Behrend.[10]

Plaintiffs Bar: Shifting Legal Theories from Regulatory Violations to "Deception"

Gen. 1.0 Cases

As discussed above, these two EVOO cases come after nearly a decade of class actions targeting olive oil producers and importers, and represent a new wave of EVOO misbranding cases. This new wave of cases is part of a larger trend within the plaintiffs bar.

In the first-generation food misbranding cases that started in 2009, class action lawyers predicated their suits on alleged violations of U.S. Food and Drug Administration labeling rules. The cases started with a focus on the FDA's "natural" policy, with the allegation that consumers were deceived because this ingredient or that processing agent was listed as a synthetic on USDA's list of permissible "organic" ingredients. The trend later expanded to other FDA labeling rules, such as "health" claims, "nutrient content" claims, etc.

The feature common to all these cases was an underlying regulatory violation, i.e., the defendant allegedly violated a technical FDA (or USDA) labeling rule that, while not itself privately actionable, was "borrowed" to state a violation of California's UCL. Ultimately, these cases were largely unsuccessful, because they were too technical in nature, and the plaintiffs failed to show consumers were deceived. The plaintiffs also failed to put forth viable damages models that could isolate the alleged "price premium," or overpayment based on the challenged statements.

Gen. 2.0 Cases

Unlike the previous cases, these second-generation claims are not focused on specific FDA violations. In fact, there are often no labeling violations alleged at all. For example, several recent cases were filed targeting "healthy" claims: They challenge as deceptive the manufacturer's "image" advertising on the theory that various label terms (such as "real fruit," "healthy satisfying breakfast" and "no Trans Fat")

make the products appear healthy when they lead to obesity, diabetes, etc. See, e.g., Hadley v. Kellogg.[11]

These are, fundamentally, omissions and failure-to-warn claims, with the plaintiffs bar attempting to blame the food industry for the obesity epidemic, and stealing a page from the playbook of the Big Pharma "failure-to-warn" and Big Tobacco cases. In effect, plaintiffs want courts to order manufacturers to carry Surgeon General-like health warnings.

The most recent olive oil complaints in J.M. Smucker and Transnational again follow this pattern: The plaintiffs have moved away from any reliance on the UC Davis study or International Olive Council and USDA standards, instead relying on a test performed by a "leading laboratory." Indeed, the complaint does not cite to a specific test at all; it merely states that the product failed what appears to be an unidentified standard for EVOO.

The complaints also make no attempt to provide the test results, identify any applicable EVOO standards or provide any details explaining why the products are not EVOO. These cases, however, have an important twist: They are lack of substantiation cases camouflaged as false representation claims. As such, they run afoul of Kwan, as discussed above.

Conclusion

The pleading deficiencies in J.M. Smucker and Transnational are likely curable. But ultimately the cases should be barred under Kwan as "lack of substantiation" claims that are not cognizable under California law.

Whether the defendants are able to obtain dismissal of the cases at the pleadings stage remains to be seen. Courts often view consumer deception as a fact issue that requires discovery, so whether the cases proceed may depend in large part on whether the judges agree that the cases are disguised "substantiation" claims.

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[1] See Young v. Transnational Foods Inc., Case. No. 3:18-cv-04564 (N.D. Cal.); Robinson v. J.M. Smucker Co., Case No. 3:18-cv-04654 (N.D. Cal.).

[2] 75 Fed. Reg. 22363.

[3] See, e.g., Jessani et al. v. Monini North America Inc., Case No. 1:17-cv-03257, (S.D.N.Y.) (dismissed Aug. 3, 2017).

[4] See, e.g., Koller v. Med Foods Inc. et al., Case No. 3:14-cv-02400 (N.D. Cal.) (certifying class on Aug. 24, 2017, and granting preliminary approval of settlement on Apr. 16, 2018).

[5] Kwan v. SanMedica International, No. 15-15496.

[6] Ashcroft v. Iqbal, 566 U.S. 652 (2009).

[7] Bell Atlantic v Twombly, 550 U.S. 544 (2007).

[8] Victor v. Bigelow, No. 16-16639 (9th Cir.), argued Nov. 15, 2017.

[9] Khasin v. Bigelow, No. 16-16641 (9th Cir.), argued Nov. 15, 2017.

[10] Comcast v. Behrend, 133 S. Ct. 1426 (2013).

[11] Hadley v. Kellogg, Case No. 5:16-cv-04955 (N.D. Cal.).