YEAR IN REVIEW

BCLP'S 2018 FOOD, BEVERAGE, AND SUPPLEMENT LITIGATION ROUNDUP

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2018 WAS ANOTHER ACTIVE YEAR FOR CLASS ACTION LITIGATION TARGETING THE FOOD, BEVERAGE, AND SUPPLEMENT INDUSTRIES.

In this roundup, Bryan Cave Leighton Paisner LLP presents a collection of regulatory developments, key court decisions, and notable settlements that were reached in 2018.

The highlights of this 2018 roundup include:

While the FDA revamped its requirements regarding Nutrition Facts, the industry continues to wait for regulators to define "natural." The lack of a definition of that term continues to spawn a significant number of lawsuits alleging that products bearing that label are not "natural."

Plaintiffs continue to file slack fill cases, despite the continued difficulties they face at the pleading, summary judgment motion, and class certification stages.

California's regulation of cage-free eggs continued to be an issue of nationwide concern for the agricultural industry throughout 2018.

Missouri became the first state to prohibit companies from "misrepresenting a product as meat that is not derived from harvested production livestock or poultry." The statute is being challenged in court on constitutional grounds.

In false advertising and labeling class action cases, there was a rise in plaintiffs' use of consumer survey evidence to establish predominance of common issues as to materiality and reliance on class certification motions.

Following a "price premium" model, plaintiffs also increasingly relied on expert testimony to establish measurable class wide damages.

Litigation targeting beverages that claim to have "no artificial flavors" but simultaneously contain malic and fumaric acid was on the rise.

Proposition 65 expanded to include additional chemicals and internet-specific rules, while the coffee industry awaits the possibility of a safe harbor from its warning requirements.

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NEW FEDERAL LEGISLATION

FDA UPDATES NUTRITION FACTS PANEL REQUIREMENTS

On November 5, 2018, the FDA released non-binding guidance intended to answer questions related to Nutrition Facts and Supplement Facts Label and Serving Size final rules. The rules were finalized in May 2016 and initially set a general compliance date of July 2018. The FDA has extended that deadline to January 1, 2020, for manufacturers with $10 million or more in annual food sales. Manufacturers with less than $10 million in annual food sales have an additional year to comply, until January 1, 2021. The new rules require a revamped Nutrition Facts label that, among other things,

- Increases the type size of certain nutrition information.
- Requires declaring actual amount, in addition to percent Daily Value, of vitamin D, calcium, iron and potassium.
- Requires declaring "Added sugars," in grams and as percent Daily Value, to help consumers understand how much sugar has been added to the product.
- Updates the list of nutrients that are required or permitted.
- Removes "Calories from Fat" because research shows the type of fat is more important than the amount, but continues to include "Total Fat," "Saturated Fat" and "Trans Fat."
- Updates Daily Values for nutrients like sodium, dietary fiber and vitamin D based on newer scientific evidence.
- Updates serving sizes to reflect the amounts that people are actually eating. For packages that are between one and two servings, the calories and other nutrients will be required to be labeled as one serving because people typically consume it in one sitting.

NEW RULE ON BIOENGINEERED FOOD DISCLOSURE

After much anticipation, the Agricultural Marketing Service (AMS) released the final rule establishing the national mandatory bioengineered (BE) food disclosure standard. The proposed rule was initially published in May 2018, generating thousands of comments during the comment period. The final rule was published in the Federal Register on December 21, 2018, and includes significant provisions related to disclosure requirements, administrative provisions, and compliance dates.

KEY COMPONENTS OF THE FINAL RULE INCLUDE:

- The rule defines bioengineered foods as those that contain detectable genetic material that has been modified through certain lab techniques and cannot be created through conventional breeding or found in nature. The rule includes provisions governing how regulated entities can demonstrate that modified genetic material is not detectable, which would eliminate the requirement to disclose. However, if an entity wishes to disclose a food made with ingredients derived from a BE source, where the genetic material does not have detectable modified genetic material, the rule allows for entities to make a voluntary disclosure, creating a voluntary "derived from bioengineering" disclosure.
- The rule defines regulated entities as food manufacturers, importers, and certain retailers who label food for retail sale. The law does not apply to restaurants and similar retail food establishments (e.g. cafeterias, food trucks, airplanes, etc.) or very small food manufacturers, which are defined as food manufacturers with annual receipts of less than $2,500,000. The law does include dietary supplements in the definition of food covered under the standard, so manufacturers and importers of dietary supplements must comply.

- The new rule's implementation date of is January 1, 2020, except for small food manufacturers, whose implementation date is January 1, 2021. The mandatory compliance date is January 1, 2022.
- Regulated entities have several disclosure options: text, symbol, electronic or digital link, and/or text message. Additional options such as a phone number or web address are available to small food manufacturers or for small packages.
- The rule does not prescribe a specific size for the disclosure. Regardless of the disclosure option a regulated entity chooses to use, the disclosure must be of sufficient size and clarity to appear prominently and conspicuously on the label, making it likely to be read and understood by the consumer under ordinary shopping conditions.

> "The new rules require a revamped Nutrition Facts label"

SLACK FILL LITIGATION UPDATE

Slack fill filings, which have exploded over the past few years, remained active in 2018. Plaintiffs continue to file consumer lawsuits – typically putative class actions – alleging food packaging is deceptive because it contains empty space, or nonfunctional slack fill, that disguises the amount of product in the package.

While more plaintiffs are surviving early pleading challenges, pleading sufficient facts to advance past the "reasonable consumer" standard applied by most courts, several decisions this past year demonstrate these claims face significant barriers to success at summary judgment and class certification.

- *Bratton v. The Hershey Company*, No. 2:16–cv–4322–C–NKL, 2018 WL 934899 (W.D. Mo. Feb. 16, 2018). After denying Hershey's motion to dismiss last year, the court granted summary judgment against plaintiffs who alleged that empty space—or "slack-fill" —in 4-ounce boxes of Reese's Pieces® and 5-ounce boxes of Whoppers® was misleading. In reaching the conclusion that the plaintiff "was not misled by the packaging," the court relied on the plaintiff's admission that he was aware of approximately how much candy and how much empty space was in each box of Whoppers and Reese's Pieces, and nonetheless continued to purchase the boxes. "Therefore," the court reasoned, "he cannot demonstrate that he was injured by any purportedly deceptive practice by Hershey." Id. at *3.
- *Hawkins v. Nestlé USA, Inc.*, No. 4:17CV205-HEA, 2018 WL 926130 (W.D. Mo. Feb. 16, 2018). The plaintiff alleged that boxes of Raisinets candy contain 45% nonfunctional slack fill. In its motion to dismiss, Nestlé argued that a reasonable consumer would instantly realize the package was half-empty because of its "maraca-like rattle." Id. at *5. The court rejected this argument and denied the motion, holding that Nestlé relied on matters outside of the complaint and plaintiff had pleaded sufficient facts to state claims for violation of the Missouri Merchandising Practices Act and unjust enrichment. Id. at *5-6.
- *Daniel v. Mondelez International, Inc.*, 287 F. Supp. 3d 177 (E.D.N.Y. Feb. 26, 2018). The plaintiff challenged the slack fill in a package of defendant's Swedish Fish candy, claiming the box was deceptively underfilled. Because the plaintiff had no intention to buy the product again in the future, the court dismissed her claim for injunctive relief. The court also dismissed her claims under the FDCA and parallel New York state statutes, holding that "a reasonable consumer acting reasonably would find accurate, clearly visible representations of net weight, serving size, and number of servings to offset any misrepresentations arising from non-functional slack-fill."
- *Daniel v. Tootsie Roll Industries, LLC*, No. 17 Civ. 7541 (NRB), 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018). The plaintiff claimed that the manufacturer of Junior Mints tricked consumers into overpaying for the candy by leaving more than one-third of its boxes full of empty space. In a 44-page decision, the court found plaintiffs did not allege a viable claim for consumer fraud under New York law, holding "reasonable" consumers could have determined the weight and the number of candies from the packaging, and would expect some empty space. Noting that the package clearly disclosed the weight of the candy, the court determined that "the Product boxes provide more than adequate information for a consumer to determine the amount of Product contained therein." "Assuming that a reasonable consumer might ignore the evidence plainly before him attributes to consumers a level of stupidity that the court cannot countenance…The law simply does not provide the level of coddling plaintiffs seek… [and] the Court declines to enshrine into the law an embarrassing level of mathematical illiteracy[,]" the decision explained.
- *White v. Just Born, Inc.*, No. 2:17-cv-04025-NKL, 2018 WL 3748405 (W.D. Mo. Aug. 7, 2018). The plaintiff alleged that boxes of the Hot Tamales and Mike & Ike candy were underfilled, leaving unusable empty space that deceived the consumer into thinking he was receiving more candy than was actually in the package. The plaintiff sought certification of a Missouri class, and two multi-state unjust enrichment classes, on the theory that the actual value of the candy was less than the consumers paid for it. The court declined to certify all three classes, ruling that proving class-wide

violation of Missouri's Merchandising Practices Act "will involve predominantly individual inquiries as to whether each class member purchased the candy." Id. at *3. Because most consumers purchase this type of product from a third-party retailer rather than from the manufacturer – at a movie theater, for example – there is no master list to provide common proof of purchase. Each class member will need to demonstrate his own individualized purchase, which makes the class unascertainable. Furthermore, the court found that the "litigation would be dominated by individual inquiries into whether each class member was deceived by any slack-fill in a box before purchasing it. In other words, it would be dominated by causation and knowledge." Because "an individual who knew what he was getting before he purchased one of the candy boxes but chose to purchase it anyway cannot establish that Just Born's retention of the purported benefit was unjust[,]" inquiries into each class member's knowledge prior to purchase would also predominate.

- *Spacone v. Sanford, L.P.*, No. 2:17-CV-02419-AB-MRW, 2018 WL 4139057 (C.D. Cal. Aug. 9, 2018). Spacone asserted "slack fill" claims against Sanford relating to his purchase of Krazy Glue, claiming that the space between the interior of the container and the inner tube of glue constituted nonfunctional slack fill, in violation of California Business and Professions Code Section 12606(b). The U.S. District Court for the Central District of California denied class certification, holding that the plaintiff lacked standing and could not satisfy Rule 23's commonality and typicality requirements. Spacone's case was doomed by his own deposition testimony, in which he denied having been "ripped off" and admitted he did not overpay for the Krazy Glue. Spacone's only injury was that there was not enough glue in the package for him to complete his project, requiring him to return to the store to purchase a second tube. Notwithstanding Spacone's conflicting self-serving declaration, which the court disregarded, the court found that his inconvenience did not constitute an economic injury, and therefore did not satisfy California's statutory standing requirement.
- *Benson v. Fannie May Confections Brands, Inc.*, No. 17-C-3519, 2018 WL 6446391 (N.D. Ill. Dec. 10, 2018). In this case, which involved chocolates packaged in an opaque carton, the plaintiffs raised a novel theory to support their claim that the slack fill in the candy box was nonfunctional. Plaintiffs alleged that the volume of the seven-ounce boxes is 73.201 cubic inches while the volume of the fourteen-ounce box is 103.23 cubic inches. If all of the slack fill space in the seven-ounce boxes were functional, Plaintiffs contended, then the fourteen-ounce box should be exactly twice as large to accommodate both the doubling of the amount of product and the doubling of the required slack-fill. However, because the fourteen-ounce box is less than double the volume of the seven-ounce box, plaintiffs theorized that there

> "the Product boxes provide more than adequate information for a consumer to determine the amount of Product therein"

must be some amount of nonfunctional slack-fill in the seven-ounce boxes. The court rejected this theory and dismissed the claims with prejudice. "There is no basis for determining that a larger box should have proportionately the same amount of slack-fill as a smaller box. Fannie May could be using different machines that have differing levels of precision to fill the boxes or could be using the same machine to fill the boxes but it is a machine that is not able to fill smaller boxes as accurately as larger boxes." Id. at *3.

California's slack fill statute was amended in September 2018, when Governor Jerry Brown signed into law Assembly Bill 2632. The amended law, which is codified at California Business and Professions Code Sections 12606 and 12606.2, includes the following key changes:

- The amended law exempts packaging sold in a mode of commerce that "does not allow the consumer to view or handle the physical container or product." It could be argued that this exempts online sales.
- The amended law exempts product packaging that clearly and conspicuously depicts the product "fill line" on exterior packaging or the immediate product container if visible at point of sale.
- Food containers are now exempt where "[t]he actual size of the product or immediate product container is clearly and conspicuously depicted on any side of the exterior packaging, excluding the bottom, accompanied by a clear and conspicuous disclosure that the depiction is the 'actual size' of the product or immediate product container" and "t] he dimensions of the product or immediate product container are visible through the exterior packaging."

U.S. SUPREME COURT REVIEW OF CALIFORNIA'S CAGE-FREE EGG LAWS

California's regulation of cage-free eggs continued to be an issue of nationwide concern for the agricultural industry throughout 2018. In late 2017, more than a dozen states filed a motion for leave to file a bill of complaint in the United States Supreme Court, which would, if successful, block a California law requiring any eggs sold within the state to come from chickens that have sufficient space to stretch out in their cages.

Missouri, Iowa and 11 other states allege that "California has single-handedly increased the costs of egg production nationwide by hundreds of millions of dollars each year" due to its stringent regulations prohibiting confinement of egg-laying hens. The complaint contends that California's requirements violate the Constitution's interstate commerce clause. The lawsuit also alleges that California's regulations are preempted by the Egg Products Inspection Act

"The controversy arises out of California's Proposition 2, a 2008 ballot measure that requires the state's farmers give each egg-laying hen at least 116 square inches of space."

(EPIA), a federal law requiring uniformity of labeling, standards, and other provisions allowing for free movement of eggs and egg products in interstate commerce. To support their claims, plaintiffs rely on a study from an economist concluding that the price of a dozen eggs has increased nationwide between 1.8 percent and 5.1 percent since January 2015 due to California's requirements.

The controversy arises out of California's Proposition 2, a 2008 ballot measure that requires the state's farmers give each egg-laying hen at least 116 square inches of space. Proposition 2 specifically forbids a person in California "from tether[ing] or confin[ing]" certain animals, including egg-laying hens, on a farm, "for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." The measure passed with nearly two-thirds of the vote. Though referenced colloquially as the "cage-free egg law," the measure does not specifically prohibit the confinement of egg-laying hens in cages. Farmers may satisfy its requirements by reducing the number of chickens in each cage.

In 2010, California legislators expanded the law to require that all eggs sold in California comply with Proposition 2, not just those produced in the state.

"Though referenced colloquially as the "cage-free egg law," the measure does not specifically prohibit the confinement of egg-laying hens in cages."

These provisions, which became effective in 2015, were met with immediate challenge both within and outside California.

First, several California egg farmers brought suit alleging that Proposition 2 is unconstitutionally vague. These challenges ultimately did not succeed.

Then, in 2014, the state of Missouri and five others challenged the law in federal district court. The district court dismissed the case on standing grounds, ruling that the states failed to show that the law would harm their citizens, instead of a mere potential for future damages to some egg producers. The Ninth Circuit Court of Appeals affirmed the dismissal in 2016, leading the other states to pursue an unsuccessful petition for certiorari in 2017.

In December 2018, the Department of Justice (DOJ) filed an amicus brief in the case supporting California's position and urging the Supreme Court to decline exercising its discretion to hear the case. "[California's egg laws] are not preempted by the EPIA, because USDA's egg-grading standards do not address confinement conditions for egg-laying hens," Solicitor General Noel J. Francisco wrote in the brief. Unless the Supreme Court disagrees with the DOJ's recommendation, the question will likely be left to egg producers to make their case in district courts.

In addition to facing constitutional scrutiny, California's egg regulations have sparked litigation against retailers. In March 2018, the Animal Legal Defense Fund sued Trader Joe's in California state court, claiming the grocery chain has been deceptive in the labeling of its eggs. The complaint, which was filed on behalf of a consumer, contends that Trader Joe's falsely advertises its eggs with images suggesting that the "hens who lay its private label, cage-free eggs are free to roam outdoors, under the sun and in green pastures." Instead, according to the lawsuit, the cage-free eggs actually come from industrial hen houses, where chickens do not have access to the outdoors. The case subsequently settled, with Trader Joe's agreeing to remove the misleading images from their egg cartons

Regardless of how the Supreme Court handles the case, a substantive decision will determine whether the federal government has final say on food and animal-welfare standards and whether states have authority to regulate the treatment of animals outside their borders when it comes to food sold in their states.

Meanwhile, in November 2018, California voters adopted a new proposition that phases in additional standards for confinement of egg-laying hens, requiring that by 2010, egg-laying hens must be given 1 square foot (144 square inches) of floor space each, on the way to being cage-free by 2022. The new law has not been addressed in the Supreme Court briefing to date.

MISSOURI FIRST STATE TO INSTITUTE LAW ON "FAKE MEAT"

In August 2018, Missouri passed a law prohibiting companies from "misrepresenting a product as meat that is not derived from harvested production livestock or poultry." The law goes into effect January 1, 2019. Plant-based meat substitutes must include a prominent statement on the front of the package, immediately before or immediately after the product name, that the product is "plant-based," "veggie," "lab-grown," "lab-created" or a comparable qualifier. A violation of the law will result in a possible fine up to $1,000 and or imprisonment for one year.

Missouri's Department of Agriculture issued formal guidance regarding the new statute that acknowledges the statute is ambiguous as to its application to lab-created meat products – which are widely considered the new frontier in food innovation: "Because lab-created products have not yet reached the marketplace, MDA may need to refine or expand this guidance once the products are fully developed. Because they are expected to have more similarity to products derived from harvested production livestock or poultry than plant-based products, the risk of misrepresentation likely will be greater in lab-created products. Manufacturers of lab-created products are encouraged to work with MDA on appropriate labels before attempting to sell lab-created products in Missouri."

> Because lab-created products have not yet reached the marketplace, MDA may need to refine or expand this guidance once the products are fully developed.

Shortly after the statute was passed, vegan-brand Tofurky and food-advocacy group Good Food Institute filed suit in the U.S. District Court of the Western District of Missouri seeking an injunction preventing the law from being enforced. The American Civil Liberties Union of Missouri and the

Animal Legal Defense Fund are also supporting the lawsuit. The complaint alleges that the statute is unconstitutional, violating the Free Speech Clause of the First Amendment, the Dormant Commerce Clause and the Due Process Clause. The plaintiffs contend that the law is "a content-based, overbroad, and vague criminal law that prevents the sharing of truthful information and impedes competition by plant-based and clean-meat companies in the marketplace . . . [nor does it] protect the public from potentially misleading information." The State of Missouri recently answered the complaint.

NOTABLE CLASS RULINGS AND SETTLEMENTS

2018 saw several significant class certification developments in the food, beverage and supplement space, raising a host of interesting issues. Notably, consumer survey evidence seemed to be the key to plaintiffs' ability to establish predominance of common issues as to materiality and reliance on allegedly false advertising or labeling. Plaintiffs also relied heavily on expert testimony to establish measurable classwide damages, often based on some form of a "price premium" model, to satisfy the U.S. Supreme Court's Comcast test.

Significant decisions and settlements included:

- *Koller v. Deoleo Settlement*. In April 2018, the parties settled this putative class action alleging that the defendant's claim that its olive oil was "imported from Italy" was deceptive. Under the settlement, the defendant agreed to pay $7 million and change its packaging by discontinuing this claim on the label unless its products are only manufactured by using olives grown and pressed in Italy. The settlement was preliminary approved, but is now being challenged on appeal.
- *Mooney v. Monster Beverage Settlement*. In this class action filed in state court in San Diego, Plaintiffs allege that during the relevant time periods, Defendants' Hansen's Natural Juices and Smoothies products were labeled as being "natural" even though they contained synthetic or artificial ingredients and/or added colors. The parties agreed to a class settlement of $3 million. The court approved the final settlement in September 2018.
- *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 326 F.R.D. 592 (N.D. Cal. June 26, 2018). Plaintiffs alleged that defendants defrauded consumers "by selling Canada Dry Ginger Ale with the phrase "Made From Real Ginger" emblazoned on its packaging when, in fact, Canada Dry does not contain the type of, or amount of, ginger consumers would expect. Instead, Canada Dry contains a ginger derivative, ginger oleoresin. Plaintiffs allege that as a result of this misleading packaging, Dr. Pepper was wrongfully able to charge a 4% price premium on Canada Dry." Id. at 598. The court granted plaintiffs' motion to certify a class of Canada Dry consumers in California, holding that the plaintiff presented the common question of whether a reasonable consumer would likely be deceived by the beverage label and advertising, and common issues predominated. The defendant argued that plaintiffs could not establish predominance because the evidence showed different people interpreted the claim "Made From Real Ginger" differently. The court rejected this and held that a uniform interpretation is not required and the proper standard is whether reasonable consumers are likely to be misled. The court found that plaintiffs met this burden based on survey evidence, which found that 78.5% of respondents believed "Made From Real Ginger" meant made from ginger root. Defendants unsuccessfully moved for leave to appeal the decision.
- *Hadley v. Kellogg Sales Company*, 324 F. Supp. 3d 1084 (N.D. Cal. Aug. 17, 2018). Plaintiff sought certification of four California subclasses of purchasers of Kellogg's cereal and cereal bar breakfast products. The court granted and denied class certification in part, concluding that plaintiff had established the requirements for class certification for several proposed subclasses challenging health claims on the labels of the products at issue, but rejecting plaintiff's attempts to certify a subclass challenging a representation of "wholesome goodness" statement made only on the back of packaging of cereal bars. While plaintiff satisfied Rule 23(b)(3)'s predominance requirement with respect to creating a viable damages model for the various affirmative misrepresentation claims, the court declined to certify a subclass based on an omission theory of liability due to plaintiff's failure to present a viable damages model. The alleged omission was that these breakfast products are high in sugar. Relying on an expert, plaintiff attempted to establish a damages model based

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on Kellogg's "advantage realized" – in other words, the additional sales resulting from this deceptive omission. The court rejected this model because it involved non-restitutionary disgorgement (i.e. Kellogg's profits) while only restitutionary damages are available under California's unfair competition and false advertising law. This decision emphasizes the importance of parsing each individual misrepresentation or theory of liability, as not all claims should be certified.

- *Broomfield v. Craft Brew Alliance, Inc.*, 2018 WL 4952519 (N.D. Cal. Sept. 25, 2018). Plaintiffs claim that the packaging of Kona beer six- and twelve-packs deceive consumers into believing that Kona beer is brewed in Hawaii, when in fact it is brewed in several other states. Based on that mistaken belief, plaintiffs allege they paid more for the beer than they otherwise would have paid. While Kona has a Hawaiian brewery that makes beer in Hawaii, all of its bottled and canned beer, as well as its draft beer sold outside of Hawaii, are brewed in Oregon, Washington, New Hampshire, Tennessee, and Colorado. The labels of each Kona beer list the locations of Kona's breweries, as does Kona's website. The beer packaging, however, features Hawaiian imagery and each bottle includes an image of a map of Hawaii that marks the location of the Kona Brewing Co. Brewery on the Big Island. Kona's marketing and advertising also heavily features Hawaiian themes. The court granted class certification of a Rule 23(b)(2) injunctive relief class and a 23(b)(3) damages class, finding that both types of relief were appropriate on a classwide basis, and individual issues predominated. As in several other recent decisions, the court relied heavily on a consumer survey demonstrating that the majority of consumers understood the packaging the mean that the beer was brewed in Hawaii, and that they prefer to purchase beer brewed in Hawaii than the mainland, which demonstrates materiality.

The court also credited defendant's price premium damages model, which was supported by an expert declaration. The defendant filed a petition to appeal the decision, which is pending.

- *Schneider v. Chipotle Mexican Grill, Inc.*, – F.R.D. –, 2018 WL 4700353 (N.D. Cal. Sept. 29, 2018). Plaintiffs brought suit against Chipotle for falsely and misleadingly advertising its food products as "non-GMO" when certain food products contained ingredients that came from animals that fed on genetically modified feed. Plaintiffs sought restitution which is the "difference between the market price actually paid by consumers and the true market price that reflects the impact of the unfair, unlawful, or fraudulent business practices." Plaintiffs' damages expert used a survey to measure the impact of the "non-GMO" claims. The court concluded that the "supply-side" analysis presented by the plaintiffs was sufficient to prove standing because their expert report based its price on "actual prices that Chipotle charged for their food items," which was sufficient to link the "measured willingness to pay to the real-world marketplace in which Chipotle's products were sold." The court recognized that while the expert's report will be subject to many challenges on cross-examination, it was sufficient to satisfy the Comcast standard for class certification.

- *Hilsley v. Ocean Spray Cranberries, Inc.*, 2018 WL 6300479 (S.D. Cal. Nov. 29, 2018). Partial certification was granted to a consumer class accusing Ocean Spray of falsely advertising that certain juice-based beverages contain "no artificial flavors." The beverages at issue contained malic and fumaric acid, which are artificial flavoring chemicals that simulate fruit flavors. Despite Ocean Spray's contention that plaintiffs failed to present evidence on how the malic and fumaric acid functioned as flavors in the products, as opposed to acidity stabilizers, the court refused "to make a determination on the merits of the case which is not proper at class certification." The court granted certification as to violations of California consumer protection laws, but stopped short of certifying the breach of contract and express and implied warranty claims because plaintiffs could not show "vertical privity" or a contractually binding relationship between the plaintiffs and Ocean Spray given that all class members purchased the products in retail stores.

NOTABLE COURT OF APPEALS DECISIONS

- *Durnford v. MusclePharm Corp.*, 907 F.3d 595 (9th Cir. 2018). In this class action, plaintiffs claimed that the protein content in MusclePharm's supplement was falsely inflated by "nitrogen spiking." The Ninth Circuit explained that the FDCA's implementing regulations preempt a misbranding theory premised on the supplement's use of nitrogen-spiking agents to inflate the measurement of protein for the nutrition panel. Conversely, the court held that the FDCA does not preempt a misbranding theory premised on the label's allegedly false or misleading implication that the supplement's protein came entirely from two specifically named, genuine protein sources. As such, the court revived the plaintiffs' California statutory claims as well as their claim for breach of express warranty.

- *Sonner v. Schwabe N. America, Inc.*, -- F.3d --, 2018 WL 6786616 (9th Cir. 2018). The Ninth Circuit reversed a lower court's grant of defendant's summary judgment involving claims regarding defendant's ginko biloba supplement. The Ninth Circuit noted that this opinion is intended to address a circuit split among the California district courts regarding what type of evidence is required to survive summary judgment in false advertising cases. The Ninth Circuit noted that the district court improperly shifted the burden to plaintiff when it required plaintiff not only to present evidence to support its case, but also to come forward with evidence that undermined the defendant's scientific evidence. The Ninth Circuit went onto explain that any arguments as to the reliability, credibility, or validity of scientific evidence go to the weight that the fact-finder should give to the evidence, "an inquiry that is not proper at the summary judgment stage." The Ninth Circuit rejected the Fourth Circuit's decision in In re GNC Corp., 789 F.3d 505 (4th Cir. 2015), restating again that a plaintiff need not "fatally undermine the defendant's evidence," in addition to producing affirmative evidence, in order to survive summary judgment.

The Ninth Circuit noted that the district court improperly shifted the burden to plaintiff when it required plaintiff not only to present evidence to support its case, but also to come forward with evidence that undermined the defendant's scientific evidence.

- *Zakaria v. Gerber Products Co.*, -- Fed. Appx. --, 2018 WL 5977897 (9th Cir. 2018). The Ninth Circuit affirmed class decertification due to plaintiffs' failure to provide an adequate basis to calculate restitution under California's consumer protection statutes, including actual damages under the CLRA. Plaintiffs claimed that Gerber deceptively marketed its baby formula as the "1st and Only" formula to protect against allergies. The court decertified the class because plaintiffs' expert failed to 1) account for marketplace realities and supply-side considerations that would affect the product's pricing, which according to California law must be a part of class-wide restitution and damages models; and 2) provide evidence that a higher price or "premium price" was actually paid because of the allegedly deceptive labeling.
- *Hodson v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018). The Ninth Circuit affirmed the district court's dismissal of plaintiff's consumer protection claims in a putative class action alleging that the defendant, a chocolate manufacturer, had a duty to disclose its labor practices on its products' labels. The court held that in the absence of any affirmative misrepresentations by the manufacturer, the manufacturer did not have a duty to disclose the child or slave labor practices at issue, even though they were reprehensible, because they were not defects that affected the central function of the chocolate products. By contrast, the court explained, a manufacturer would have a duty to disclose that a computer chip corrupts the hard drive, or a laptop screen that goes dark, because these are features affecting the product's central function. Absent a duty to disclose, plaintiff could not maintain claims based on California's Consumer Legal Remedies Act, unfair competition law and false advertising law.
- *Mantikas v. Kellogg Company*, 910 F.3d 633, 2018 WL 6494356 (2d Cir. 2018). The Second Circuit reversed the district court's grant of defendant's motion to dismiss. The products at issue were Cheez-It crackers that were labeled "whole grain" or "made with whole grain." The plaintiff alleged that these statements were false and misleading because they lead a reasonable consumer to believe that the grain in the Cheez-Its was predominately whole grain (as opposed to grain from white flour). The Second Circuit found the plaintiff had adequately stated a claim and was careful to distinguish the case from other false advertising cases. For example, the Second Circuit noted that this case is unique from other labeling cases that may claim to be "full of fruits and vegetables" because here, a consumer would expect the "primary" ingredient in Cheez-Its to be some form of grain (and would not expect the primary ingredient to be vegetables). Also, it is worth noting that the Cheez-It containers included accurate labeling on the nutrition panel and the ingredients list. The Second Circuit, however, rejected the argument that the labeling is not false because of correct information on the rest of the box. The Second Circuit explained that the nutrition panel and ingredients list should complement, not contradict, the claims made on the front of the box.

INDUSTRY CONTINUES TO WAIT FOR "ALL NATURAL" RULE

Another year has gone by without long-awaited rulemaking from the FDA regarding a definition of "natural" that would potentially dispose of numerous lawsuits involving this issue nationwide. In late 2015, the FDA announced it was considering establishing a

formal definition of "natural" in human food labeling. The FDA's longstanding policy regarding the term "natural" interpreted it to mean that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food. However, this policy left open several questions, and lawsuits claiming confusion and deceit by "natural" product labels have continued to flood the courts for several years. The FDA invited comments from the public, and received thousands of comments until the comment period closed in 2016. The anticipation led many courts to stay lawsuits

> Consumers have called upon the F.D.A. to help define the term 'natural' and we take the responsibility to provide this clarity seriously.

pending a final rule, or to dismiss cases based on the primary jurisdiction doctrine. However, the agency has still not issued the long-awaited rule.

In a statement provided to the New York Times in early 2018, an FDA Commissioner hinted that a final rule would be forthcoming: "Consumers have called upon the F.D.A. to help define the term 'natural' and we take the responsibility to provide this clarity seriously. We will have more to say on the issue soon." Julie Creswell, Is It 'Natural'? Consumers, and Lawyers, Want to Know, N.Y. Times (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/business/natural-food-products.html. It remains to be seen whether a final rule will issue in 2019.

PROPOSITION 65 AND FOOD SAFETY

Proposition 65, officially known as California's Safe Drinking Water and Toxic Enforcement Act, requires the State to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm. This list is updated each year and has grown to include approximately 800 chemicals. In 2018, the following four chemicals were added.

- Gentian violet (Crystal violet)
- Nickel (soluble compounds)
- N-Nitrosohexamethyleneimine
- TRIM® VX

Proposition 65 requires businesses to provide a "clear and reasonable" warning before exposing consumers to a listed chemical. This warning can be given by a variety of means, including placing a label

> The Attorney General Office's annual report of Proposition 65 settlements indicates that in 2018 court-approved judgments and out-of-court settlements totaled $40,301,799.

on a consumer product. Once a chemical is listed, businesses have 12 months to comply with warning requirements.

Businesses with less than 10 employees or instances where the consumer exposure is low enough to pose no significant risk of cancer, birth defects or other reproductive harm are exempt from the statute's warning requirements.

In June 2018, the State proposed a regulation that would exempt coffee, which contains acrylamide, from the required warnings. In August 2018, the FDA issued a statement in support of the proposed exemption. In October 2018, the California court of appeals granted a stay in Starbucks' Proposition 65 civil penalties trial in light of the proposed regulation. As we head into 2019, the coffee industry continues to await the possibility of a Proposition 65 safe harbor.

Proposition 65 is enforced by the California Attorney General's Office, and lawsuits against businesses purportedly in violation of the warning requirements may also be filed by a district attorney, city attorney, consumer advocacy group, private citizen, or a law firm. Penalties for violating Proposition 65's warning requirements can be as high as $2,500 per violation per day.

In 2018, the law was amended to impose specific internet disclosure requirements. For internet sales, the warning must be displayed on-line, by a specific hyperlink on the product display page, or otherwise prominently displayed prior to completion of a purchase.

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Significant decisions and settlements relating to Proposition 65 and food safety include:

- *Post Foods, LLC v. Superior Court*, 235 Cal. Rptr. 3d 641 (Cal. 2018). The Court of Appeals held that the federal Nutrition Education Act, which promotes a diet including whole grains, preempts Proposition 65 insofar as it would require a warning label on cereal due to the natural presence of acrylamides in cooked grains.
- *Coffelt v. The Kroger Co.*, No. EDCV 16-1471 JGB (KKx), 2018 WL 296577 (C.D. Cal. Aug. 17, 2018). Plaintiff moved for class certification in his action stemming from a listeria outbreak linked to frozen

produce manufactured by CRF Frozen Foods LLC, repacked by The Pictsweet Co. and sold under The Kroger Co. brand. Plaintiff contended that the proposed class is united by claims that each of the items they bought were unfairly made, packaged, distributed and sold, meaning the revenues the companies earned were unlawful and should be refunded. Defendants filed a motion for summary judgment or, in the alternative, for an order striking the class allegations. Summary judgment was granted in favor of the defendants, as the court found plaintiff lacked standing because he could not show that he purchased aminated product.

- *In re: Hepatitis A Cases Settlement*. Starting around June 2016, Hawaii residents began testing positive for hepatitis A virus. The number of cases increased and the Hawaii Department of Health identified raw scallops served at Genki Sushi restaurants as the source of the outbreak. The Department then called for widespread vaccinations. A class action lawsuit was filed against Genki Sushi asserting claims for strict liability and negligence. Plaintiffs sought damages for physical injury and economic loss arising from obtaining IG immunization shots and vaccinations in response to the Department's alert. Genki Sushi reached a $4.5 million settlement with plaintiffs before the end of the year.

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