Food Litigation Newsletter
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About

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

Please visit our website at perkinscoie.com/foodlitnews/ for more information.

This newsletter aims to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

Recent Significant Developments and Rulings

California Court of Appeal Clarifies Reach of "Reasonable Consumer" Standard in Food Labeling Cases

Simpson v. The Kroger Corp., B24205 (Cal. Ct. App.): The California Court of Appeal affirmed dismissal of a claim that Challenge Butter With Canola or Olive oil were mislabeled as "butter" and should have been labeled as a "spread" under California's Milk and Milk Products Act (MMPA). The trial court dismissed, finding that the MMPA claims preempted by federal regulations allow "nonstandardized butter." Plaintiffs originally argued that the products could not be labeled "butter" because they contained ingredients other than those in butter's standard of identity. But during the appeal—in response to defendant's argument that the products satisfied federal standards defining "butter" — plaintiffs argued instead that the labels overstated the butter content in a manner confusing to the reasonable consumer. The Court of Appeal rejected this argument and affirmed dismissal. The court explained that because the defendant's labels truthfully described the products' ingredients, no "reasonable consumer" could have been misled: "The labels of the products here clearly informed any reasonable consumer that the products contain both butter and canola or olive oil. . . . No reasonable person could purchase those products believing that they had purchased a product containing only butter." Order.

Court Denies Motion to Dismiss in Part Food Labeling Class Action Involving Heart Health and "Fresh" Claims

Ang v. Bimbo's Bakeries, Inc., No. 13cv1196 (N.D. Cal.): In a case involving the labeling of Thomas' English Muffins, Sara Lee bread, and various Entenmann products, the court denied the majority of defendant's motion to dismiss. According to the court, the complaint adequately alleged particularity under

Rule 9 and satisfied pleading requirements for injury and reliance. In addition, the court held that claims that the American Heart Association's Heart Check mark is a "paid endorsement" must be disclosed as such, but is not. The court also allowed the complaint to move forward on products the plaintiffs did not purchase, although it made clear that the products must be substantially similar to the products plaintiff did purchase. Order.

Court Dismisses Vague and "Conclusory" Allegations in Complaint Against Welch Foods

Park v. Welch Foods, Inc., 12cv6449 (N.D. Cal.): Plaintiffs filed a 40-page, 230-paragraph complaint against Welch Foods, alleging that a wide variety of Welch juices and juice products violate California consumer protection statutes. The court dismissed all of the claims without prejudice finding that despite its length, the complaint provides no detail of the actual statements plaintiffs' saw and relied upon, and only "conclusory" allegations about the "unlawfulness" of the defendants' labels. Order.

Court Dismisses as "Ridiculous" Plaintiffs' Claims that Strawberry and Raspberry Newtons Contain Whole Fruit

Manchouck v. Mondelez International, dba Nabisco, No. 13cv2148 (N.D. Cal.): Plaintiffs claimed that Nabisco's representations that Strawberry and Raspberry Newton cookies were "made with real fruit" violated California's consumer protection statutes because the cookies were made with pureed strawberries and raspberries, rather than solid fruit. The court granted Nabisco's motion to dismiss, with prejudice. The court concluded that the claims "strained credulity" and that "[i]t is ridiculous to say that consumers would expect snack food 'made with real fruit' to contain only 'actual strawberries or raspberries,' rather than these fruits in a form amenable to being squeezed inside a Newton." Order.

Court Dismisses Complaint Attacking Partially Hydrogenated Vegetable Oils

Simpson v. California Pizza Kitchen, 13cv0164 (S.D. Cal.). Plaintiff alleged that defendants' frozen pizza products contain trans-fatty acids (TFAs) in the form of partially hydrogenated vegetable oils (PHVOs), an ingredient she claims is not safe for consumption at any level. The court granted the motion to dismiss without prejudice. First, the court found that plaintiff lacked standing, because she had not alleged that consuming five frozen pizzas over a year-long period would expose her to the alleged risks associated with consuming PHVO. Further,

because she consumed the pizzas—which disclosed the ingredient on its labels—the count found that she had received the benefit of her bargain, and had therefore suffered no economic injury. The court also denied plaintiff's public nuisance and UCL claims, finding that TFAs are "generally regarded as safe" under FDA regulations and could not therefore qualify as "adulterated" as alleged by plaintiff. Order.

Court Allows "All Natural" Claims to Proceed Against Blue Diamond Chocolate Almond Milk

Werdbaugh v. Blue Diamond Growers, No. 12cv2724 (N.D. Cal.): The court denied defendant's motion to dismiss a complaint alleging that Blue Diamond's Chocolate Almond Milk is falsely labeled as "all natural" because it contains preservatives and other synthetic chemicals; lists ECJ as an ingredient rather than "sugar"; and makes unlawful health claims on the corporate website. After the named plaintiff abandoned claims based on products he did not purchase and claims based on statements on the website, the court denied the motion and allowed "all natural" and ECJ claims to proceed. The court rejected the argument that the FDCA impliedly preempts California's labeling laws, finding that because California's laws are identical to federal requirements, private enforcement is not inconsistent with federal law. The court also refused to find express preemption, ruling that listing "evaporated cane juice" as an ingredient violates a number of express provisions of FDA regulations. Similarly, although the court expressed some skepticism about the "all natural" claims, the court found those claims not preempted. Finally, the court rejected efforts to strike claims related to un-purchased products and national class allegations, leaving those determinations for development on a fuller record. Order.

Court Dismisses Soy Milk Claims as Not Misleading To Reasonable Consumer

Gitson v. Trader Joe's Co., 13cv1333 (N.D. Cal.): Plaintiffs' complaint alleged labeling violations of eight "purchased" products, including yogurt, soy yogurt, candy and enchilada sauce. The complaint included allegations that the products are misbranded because the labels list ECJ and contain additives or preservatives. The court dismissed claims based on products the plaintiffs did not purchase. The court further found that no reasonable consumer would conclude that soy milk labeled as "lactose and dairy free" and an "alternative to dairy milk" comes from a cow. The court also dismissed with leave to amend the ECJ claim, explaining that the products' Nutrition Facts panel clearly disclosed the presence of "sugar" in the products. Order.

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Court Dismisses In Part Evaporated Cane Juice Claims Against Wallaby Yogurt

Morgan v. Wallaby Yogurt Co., No. 13cv0296 (N.D. Cal.): The court granted in part, and denied in part, defendant's motion to dismiss plaintiffs' complaint that alleged that various Wallaby yogurt products were mislabeled by listing ECJ as an ingredient. The court rejected Wallaby's primary jurisdiction defense, explaining that determining whether a label is misleading is within the court's abilities. The court also turned back defendant's preemption defense. The court did, however, dismiss plaintiffs' claims that the listing of ECJ as an ingredient was an "unfair" practice under California consumer protection law, because plaintiffs had not sufficiently alleged how that listing would deceive a reasonable consumer. Order.

NEW FILINGS

Richards v. Safeway, No. 13cv4317 (N.D. Cal.): Plaintiffs allege that frozen waffles labeled "100% Natural" contain an allegedly "synthetic" ingredient, sodium acid pyrophosphate. Complaint.

Swearingen v. Attune Foods, No. 13cv4541 (N.D. Cal.): Plaintiffs allege that Attune's chocolate bars, Erewhon crackers and cereals, and Uncle Sam's cereals are "misbranded" because the labels list ECJ as an ingredient rather than sugar. Complaint.

Marty v. Anheuser-Busch Cos., No. 13cv23656 (S.D. Fla.): Plaintiff alleges that Anheuser-Busch has misled consumers and charged a premium price for Beck's beer, which the complaint alleges is marketed as a high quality German beer, when it is manufactured in the U.S. with domestic ingredients. Complaint.