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 Rulings

Court Dismisses Most of plaintiff's Claims Based on Regulatory Violations

Victor v. R.C. Bigelow, Inc., No. 13cv2976 (N.D. Cal.): In a putative class action alleging claims under California's CLRA, FAL, and UCL that the defendant's tea products are misbranded and misleading because they make improper health claims that they "deliver[] healthful antioxidants," Judge Orrick granted in part and denied in part the defendant's motion to dismiss. The court had previously granted in part a motion to dismiss and found that the amended complaint failed to address the frailties in the previous version.

Relying on decisions by other courts in the district, the court first rejected the defendant's argument that the plaintiff could only assert a claim under the unlawful prong of the UCL if he could allege that he subjected himself to criminal liability by purchasing the challenged products. Rather, plaintiff alleged sufficient injury by alleging that he would not have purchased the product but for the allegedly unlawful label.

The court found that the plaintiff had not sufficiently pleaded a claim under the fraudulent prong of the UCL, the CLRA, or the FAL because he failed to allege how the phrase "delivers healthful antioxidants" was false or misleading. The plaintiff pleaded only that he was misled to believe that the claims were legal and were supported by scientific evidence capable of regulatory acceptance. He did not plead that the phrase "delivers healthful antioxidants" was false or that the products did not contain antioxidants. The court reiterated that "the mere fact that a statement violates a regulation is insufficient to show that it is also misleading."

Finally, the court held without much discussion that the plaintiff failed to state a claim under the unfair prong of the UCL because he had not pleaded any additional facts to address the court's previous concerns that (a) he failed to explain how the subject representations "offend[] an established public policy or is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to

consumers", and (b) failed to allege that the utility of the conduct did not outweigh the alleged harm. Order.

Court Dismisses MSG Claims in Part on Preemption Grounds

Peterson v. Conagra Foods Inc., No 13cv3158 (S.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, and CLRA, as well as breach of express warranty, the plaintiff claimed that the defendants misrepresent their Chef Boyardee Mac & Cheese products as having "No MSG" and "No MSG Added" when in fact they contain MSG or contain ingredients that create MSG during processing. The court granted in part and denied in part the defendant's motion to dismiss on preemption grounds. First, the court found that the claims were not preempted as of November 2012, relying on an informal FDA statement from November 2012 clarifying its position on MSG labeling and bringing the plaintiff's claims within the sphere of labeling violations that would make the products misbranded under the FDCA. However, the court found that the plaintiff's claims were preempted to the extent they reached time periods prior to November 2012, ruling that the informal statement clarified a previously ambiguous regulation and could not be applied retroactively. Order.

Court Partially Dismisses Case Involving "All Natural" and "Reduced Fat" Claims

Hall v. Diamond Foods, Inc., No. 14cv2148 (N.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, CLRA, and for unjust enrichment, the plaintiffs claimed that the defendant falsely labels and advertises its Kettle and Tias! chips as, among other things, "all natural," "reduced fat," or "40% reduced fat" when, in fact, they contain only 33% less fat than the defendants' other chips, and contain synthetic ingredients such as citric acid, maltodextrin, and color additives. The court granted in part and denied in part the defendant's motion to dismiss. Regarding the "reduced fat" claims, the court first noted that the plaintiffs are required to plead reliance and failed to do so to the extent they did not specify which statements they relied upon. Regarding the "all natural" claims, the court refused to decide at the pleadings stage whether a reasonable consumer would be misled by the alleged misrepresentations, and rejected the defendant's argument that the plaintiffs had failed to define what "all natural" means, because the plaintiffs relied on the dictionary definition of those words and cited a 2007 consumer study regarding what consumers understand "natural" to mean. The court also held that the defendant could not rely on a contrary ingredients list to avoid a false labelling claim. Next, the court turned back to the reliance pleading argument and held that the plaintiffs had also failed to plead reliance as to any promotional or website materials that were alleged to be misleading. Finally, the court allowed a quasi-contract claim to stand, finding that this was a viable restitution-based claim. Order.

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Court Dismisses ECJ Claims Due to Lack of Reliance

Swearingen v. Pacific Foods of Oregon, Inc., No. 13cv4157 (N.D. Cal.): In a putative class action alleging claims under California's UCL and CLRA that the defendant's almond milk and other products are misbranded and misleading to the extent they list ECJ as an ingredient rather than sugar, Judge Donato granted the defendant's motion to dismiss. Relying on other decisions in the district, the court held that the plaintiffs had failed to allege the requisite reliance and rejected the plaintiffs argument that they did not need to plead reliance because their claims were strict liability labeling violations. As with other decisions in the district, the court rejected the "illegal products" theory as well. Order.

Court Denies Class Certification of Natural Claims

In re Conagra Foods, No. 2:11cv05379 (C.D. Cal.): In a putative class action alleging claims under 12 states' consumer protection laws, as well as breach of express warranty, based on the claim that the defendants label their cooking oils as "100% Natural" when in fact they contain GMOs, the court denied plaintiffs' motion for class certification.

First, the court implicitly addressed *Comcast* damages in ruling on the defendant's motion to strike the declaration of plaintiffs' damages expert, who opined that a price premium theory could be established through use of hedonic regression and conjoint analysis methodologies. The court concluded that, because the expert failed to identify specifically how he would apply these methodologies to the facts of the case, such as identifying the particular variables or comparator products he would use, the expert's testimony amounted to "no damages model at all." On that basis, the court struck the testimony.

The court went on to address a motion to strike the declaration of the plaintiff's GMO expert, who opined both that foods containing GMO ingredients are not "natural," and on what the meaning of the word "natural" is. The court struck only the latter testimony, finding that it would be unhelpful to the jury because "natural" is a commonly understood term and because the expert lacked expertise in analyzing consumer reactions or beliefs.

The court then denied the plaintiff's cross-motion to strike the defendant's expert, who opined that the "100% natural" labelling had no material effect on consumer purchasing decisions, finding that the alleged flaws in his methodology went to the weight not the admissibility of the evidence.

At last turning to the class certification motion, the court first addressed injury standing, finding that the plaintiffs' purchase of other GMO-containing cooking oils did not deprive them of standing, although it "seriously undercut their claim[s]." The court also noted that even without their damages expert or proof

of purchase price, they might be able to prove damages by using data from Information Resources, Inc. to determine prices in their regions, combined with evidence of what portion of the price constituted a price premium.

Regarding ascertainability, the court noted the split in authority as to whether the inability to identify putative class members in a class of consumers of low-priced products makes the class unascertainable. It sided with the courts find such classes ascertainable because the subject class was definable by "objective characteristics," without specifying what those "objective characteristics" were. The court also rejected the defendant's argument that the class was overbroad and could contain individuals who never read or relied upon the accused representations, because all putative class members were, in fact, exposed to the same representations insofar as every bottle of oil contained the same statements.

Moving to the Rule 23(b) requirements, the court followed many previous opinions finding that the plaintiffs' lacked Article III standing to seek injunctive relief because they could not show an intent to purchase the products in the future and thus lacked the requisite threat of harm.

Regarding the proposed damages class, the court focused on predominance. The court noted that although reliance and causation might be determined on a class-wide basis as to the California CLRA claims, due to the causation inference, the plaintiffs had not shown the same ability under their breach of express warranty claim or under the remainder of their consumer protection claims based on other states' laws.

Turning to damages, the court relied on its reasoning in striking the plaintiffs' damages expert's testimony in finding that they had failed to show a workable damages theory. In addition, the court pointed out that under *Comcast*, the price premium theory was not adequately tied to their theory of liability because although their expert proposed to demonstrate that the "100% Natural" labeling caused consumers to pay a price premium, he did not identify how the price premium paid related to the consumers' belief that the products were non-GMO. Indeed, he testified that he believed that "non-GMO" and "100% Natural" were not equivalent. Thus, the court found that the plaintiffs' claims lacked predominance because of their failure to demonstrate that causation and reliance could be established on a class wide basis and because they failed to establish a workable damages theory.

Ultimately, although the court denied class certification of any class for the reasons discussed above, the court did so without prejudice and provided plaintiffs with an opportunity to address the causation and reliance, among other, deficiencies noted in the Order within 30 days. Order.

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Court Approves Final Settlement of Quaker Oats settlement

In re: Quaker Oats Labeling Litig., No. 5:10-cv-00502-RS (N.D. Cal.): In a putative class action alleging various federal and state claims pertaining to the defendant's inclusion of partially hydrogenated oils in Quaker Oats products, the court granted final settlement approval as requested and entered final judgment. We previously wrote about the preliminary settlement approval here. In the final approval order, the court attorney's fees in the amount of $760,000 pursuant to the settlement agreement, California's Private Attorney General statute, and the fee shifting provisions of the CLRA, finding that counsels' rates were supported by competent evidence of comparable attorneys' rates in the district and in the Southern District of California. The court also awarded $750 each per class representative as incentive awards. Order.

Court Grants Preliminary Approval of Red Bull Settlement

Careathers v. Red Bull N. Am. Inc., No. 1:13cv369 (S.D.N.Y.): In a putative class action alleging claims under multiple state consumer protection statutes, breach of express warranty, and unjust enrichment, claiming that the defendant falsely marketed its energy drinks by suggesting that they were a superior source of energy beyond caffeine and contained functional benefits that they did not have, the parties moved for preliminary approval of settlement. The proposed terms include: The settlement class consists of all persons who purchased at least one Red Bull beverage dating back to January 1, 2002. Each class member to submit a valid claim will have the choice to receive either a $10.00 reimbursement or free Red Bull products to be selected by the class member up to a $15.00 retail value. The defendant will establish a settlement fund of $13 million in cash and free products—with an initial $6.5 million being cash, to be supplemented if necessary to satisfy any valid cash claims—and will be used to pay for class administration and notice. Any remnants will be disbursed first in pro rata shares to any valid claimants, or if the remainder is less than $100,000, then it shall be distributed in cy pres to a charitable organization "mutually agreed upon by the parties." In addition to the settlement fund, the defendant will pay separately for attorneys' fees in an amount not to exceed $4,750,000, and class representative incentives of up to $5,000 per representative. The defendant will also withdraw or revise the challenged marketing claims. Complaint.

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New Filings

Scarola v. That's How We Roll LLC, No. 9:14cv80983 (S.D. Fla.): Putative class action alleging claims under Florida's Deceptive and Unfair Trade Practices Act, Magnusson-Moss, negligent misrepresentation, breach of express warranty, and unjust enrichment, claiming that the defendant misrepresents its chips as "all natural" when they contain GMO ingredients, such as white corn, corn oil, and toasted corn germ. Complaint.

Jinju Sushi Inc. v. Farmers Rice Coop., Inc., No. BC553043 (L.A. Super.): Putative class action claiming that the defendants misrepresented their rice as premium rice blends such as "New Crop", "New Variety", "New Rose," "Imperial Rose," and "U.S. No. 1 Extra Fancy" when in fact the rice was mostly "flush rice," or "broken, used, or recycled rice." Further, the plaintiff alleges that the rice was often stored in a manner in which it could be contaminated with foreign substances such as insects, rodents, bird remains, and black mold. Complaint.