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

Court Trims Frito-Lay "All Natural" MDL But Rejects Preemption and Primary Jurisdiction Defenses

In *In re Frito-Lay North America, Inc. All Natural Litigation*, No. 1:12-md-02413 (E.D.N.Y.), a federal judge in New York trimmed several claims in a multidistrict case accusing Frito-Lay of deceptively labeling as "all natural" various brands of chips and dips made with genetically modified organisms. The court dismissed federal Magnuson-Moss Warranty Act claims, state warranty claims under Florida and New York law, and intentional misrepresentations claims under Florida, New York, and California law. The court also dismissed PepsiCo from the suit entirely, saying it cannot be held liable in its capacity as Frito-Lay's parent. The court did, however, allow some California and Florida consumer protection claims to proceed. The court rejected Frito-Lay's preemption argument, finding that FDA's nonbinding guidance on the meaning of the term "natural" is not entitled to preemptive effect. The court also refused to dismiss claims based on products the named plaintiffs did not buy, concluding this is an issue of "class standing" that should be addressed at the class certification stage. Finally, the court found the case fell within "the traditional realm of judicial competence" and was not barred by the primary jurisdiction doctrine. The court noted that other district courts have declined to invoke the primary jurisdiction doctrine in other recent "natural" labeling cases and that "even if the FDA were to formally define the term 'natural,' it 'would not dispose of plaintiffs' state law claims." Order.

Court Trims Claims in Gerber Baby Food Labeling Suit

In *Bruton v. Gerber Products Co.*, No. 5:12-cv-02412 (N.D. Cal.), a California federal court dismissed several claims from a putative class action accusing Gerber of misbranding and deceptively labeling its baby foods. Plaintiff

challenged Gerber's use of the word "healthy" and phrase "100% natural" on the label, claims that the products are a good or excellent sources of vitamins and minerals, and sugar content claims. The court dismissed all claims challenging Gerber's use of the word "natural" on its labels, finding the phrase "Made with 100% Natural Fruit" does not plausibly imply that the entire product is natural, as well as Plaintiff's warranty and unjust enrichment claims. The court also dismissed all claims regarding Gerber products the Plaintiff did not buy and websites she did not see. On the other hand, the court ruled the Plaintiff can proceed with California consumer protection claims regarding the labeling of products she did buy. The court rejected Gerber's preemption arguments, concluding that California law incorporates, and thus does not conflict with, the FDA's food labeling requirements, and that Congress did not intend to bar all state law claims regarding food labeling. The court also rejected Gerber's primary jurisdiction argument, finding that the issue is not novel or highly complex and that courts are well equipped to determine whether conduct is misleading. The court dismissed the warranty and unjust enrichment claims with prejudice and all other claims without prejudice. Order.

Settlement Approved in Kellogg's Brain-Boosting Cereal Advertising Class Action

In *Dennis v. Kellogg Co*., No. 09-CV-1786-IEG (WMC) (S.D. Cal.), a federal judge gave final approval to a $4 million class settlement between Kellogg Co. and a group of consumers who claimed Kellogg could not substantiate claims made in ads and product labels that its Frosted Mini-Wheats cereal is clinically proven to improve children's attentiveness. The Ninth Circuit court of appeals previously overturned a prior settlement in the case that would have given $5.5 million in food to charities that feed the indigent, finding that such a distribution was not sufficiently related to the class members and the claims at issue. The revised settlement creates a $4 million cash fund for class members, with any unclaimed balance going to various consumer protection groups. Order.

Court Allows ConAgra's Butter Labeling Suit to Proceed

In *Allen v. ConAgra Foods, Inc.*, No. 3:12-cv-01279-JST (N.D. Cal.), the court denied ConAgra's motion to dismiss plaintiff's complaint, which alleges that ConAgra falsely labels and markets its Parkay Spray as "fat free" and "calorie free." Noting that the validity of defendant's labeling under FDA regulations turns on whether the product is deemed a "spray type" fat or oil or a "butter, margarine, oil, [or] shortening," the court found the plaintiff sufficiently alleged the product is a liquid butter substitute, which would render ConAgra's labeling

a violation of federal law. The court rejected ConAgra's preemption argument, finding the plaintiff was only seeking to hold ConAgra to existing FDA regulations and was not seeking to impose any labeling requirements different from federal law. The court also rejected ConAgra's primary jurisdiction argument, concluding that the matter did not require the FDA's regulatory expertise and was appropriate for resolution by the courts. Finally, the court denied ConAgra's request to transfer the case to the District of Nebraska. Order.

Court Refuses to Enjoin New Meat Labeling Regulations

In *American Meat Institute v. United States Department of Agriculture*, No. 13-CV-1033 (KBJ) (D.C.D.C.), a federal judge denied a request by meat and poultry groups in the United States, Mexico, and Canada to enjoin the U.S. Department of Agriculture's efforts to implement new meat labeling regulations. While the old rules required just the listing of the country of origin for each beef or poultry product, the new rules require that labels disclose where each step of the production process took place, including the birth, raising, and slaughtering of livestock. The court denied the requested injunction after concluding the plaintiffs likely could not show the new labeling rules violate the First Amendment by compelling speech. The court found the new labeling rules are "of a strictly factual nature," are "reasonably related to the government's interest in preventing deception of consumers," and do not create an undue burden. Order.

Court Allows Ensure Health Shakes Deception by Omission Claim to Proceed

In *Otto v. Abbott Laboratories Inc.*, No. 5:12-cv-01411-SVW-DTB (C.D. Cal.), a federal court denied Abbott's motion to dismiss a proposed false advertising class action regarding its Ensure health shakes, finding the Plaintiff sufficiently alleged an economic loss. Abbott advertises its Ensure health shakes as helping people over 40 "rebuild strength." Plaintiff claims Abbott deceptively failed to disclose that the drinks have been shown to rebuild muscle strength only in individuals with sufficient vitamin D levels. Plaintiff, who has borderline-deficient vitamin D levels, claims he would not have bought the drinks, or would have paid less, had he known this information. Rejecting Defendant's standing argument, the court concluded that Plaintiff alleged a sufficient economic injury

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to proceed on the deception by omission claim. Order.

NEW FILINGS

Fenerjian v. Nong Shim Company, et al., No. 3:13-cv-04115 (N.D. Cal.): On behalf of a putative nationwide class of consumers, the plaintiff alleges that four South Korean companies and their U.S. subsidiaries violated federal and state antitrust and consumer protection laws by conspiring to artificially inflate the price of ramen noodles. Complaint.

Pitco Foods v. Non Shim Company, et al., No. 5:13-cv-04148 (N.D. Cal.): On behalf of a putative nationwide class of direct purchasers, the plaintiff alleges that four South Korean companies and their U.S. subsidiaries violated federal and state antitrust and consumer protection laws by conspiring to artificially inflate the price of ramen noodles. Complaint.

Mateel Environmental Justice Foundation v. B&G Foods, et al., No. CGC-13-534016 (Cal. Super., San Francisco County): Plaintiff alleges that defendants failed to give clear and reasonable warnings that their maple syrup contains lead. Complaint.

Smedt v. The Hain Celestial Group, Inc., No. 5:12-cv-03029 (N.D. Cal.): Plaintiff alleges that Hain Celestial violated various California consumer protection laws by listing "evaporated cane juice" as an ingredient in its coconut-flavored drink products, making "all natural" claims where its veggie straws include a coloring additive, and making allegedly unauthorized trans-fat claims on various potato chip brands. Plaintiff seeks a California class. The court previously dismissed a prior version of the plaintiff's complaint. *See* Perkins Coie Food Litigation Newsletter August 20, 2013. Amended Complaint.

Swearingen v. Pacific Foods of Oregon, Inc., No. 13-cv-04157 (N.D. Cal.): Plaintiffs allege that Pacific Foods' labeling of various products as containing "evaporated cane juice" instead of sugar violates various California consumer protection statutes. Plaintiffs seek a nationwide class. Complaint.

Green v. Chobani, Inc., No 3:13-cv-02106 DMS DHB (S.D. Cal.): Plaintiff's putative class action alleges that Chobani negligently manufactured and distributed mold-tainted Greek yogurt. Complaint.