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 Some of Plaintiff's Claims In Pretzel Class Action

Figy v. Frito-Lay North America Inc., No. 3:13-cv-03988 (N.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, and CLRA, claiming that defendant's pretzel products are misrepresented as being "Made with All Natural Ingredients" when in fact they contain "artificial, synthetic and unnatural ingredients," the court granted in part and denied in part defendant's motion to dismiss.

Addressing standing over non-purchased products, the court adopted the "substantial similarity" test, finding that plaintiffs had sufficiently pleaded substantial similarity because all products at issue were pretzels, distinct only in shape and not in any other characteristic, and that they all contained the same alleged misrepresentations and unnatural ingredients. However, as to Article III standing to pursue injunctive relief, the court agreed that plaintiffs had failed to plead or present sufficient evidence demonstrating the threat of future harm and dismissed those claims without prejudice.

The court also dismissed claims involving non-California residents who made non-California purchases, agreeing with defendant that the presumption against extraterritoriality applies where none of the alleged conduct or injuries occurred in California. The court also dismissed all of plaintiffs' remaining class claims without prejudice because plaintiffs had not pleaded an alternative California-specific subclass.

The court also rejected plaintiffs' argument that they were not required to plead reliance under the UCL's unlawfulness prong, and then rejected plaintiffs' claim that they had alleged reliance on the "salability" of the products, as opposed to any actual misrepresentation. The court reiterated its position that the "mere alleged violation of the underlying regulations is insufficient to state a claim under the UCL," and dismissed the misbranding claims with prejudice.

Finally, addressing whether plaintiffs had adequately pleaded deception and injury under Rule 9(b), the court agreed that plaintiffs had failed to plead that a reasonable consumer would be deceived by the "all natural" representations because they failed to provide any detail as to why the offending ingredients were not, in fact, natural. Thus, the court dismissed all of these claims without prejudice. Order.

Courts Increasingly Rely on FDA Notice to Stay or Dismiss ECJ Claims

Swearingen v. Amazon Preservation Partners, Inc., No. 13-cv-4402 (N.D. Cal.): In a putative class action alleging claims under California's UCL and CLRA, and breach of implied warranty, based on the allegedly misleading use of the phrase "organic evaporated cane juice" rather than "sugar" in products' ingredients lists, the court granted defendants' motion to stay the ECJ claims and to dismiss the implied warranty claim. First, the court dismissed the breach of implied warranty of merchantability claim without leave to amend, noting that plaintiffs had pleaded only that the goods were misbranded or misrepresented, not that they were unfit for consumption. Second, the court stayed the remaining ECJ claims under the primary jurisdiction doctrine, citing the March 5, 2014 FDA Notice and the numerous recent similar decisions in the Northern District of California. Order.

Saubers v. Kashi Co., No 3:13-cv-00899 (S.D. Cal.): In a putative class action alleging claims under California's Sherman FDC Law, UCL, FAL, and CLRA, New Jersey's Truth-in-Consumer Contract, Warranty, and Notice Act, and Consumer Fraud Act, and common law unjust enrichment and restitution claims, based on allegations that 75 of defendant's products are misbranded or misleading to the extent they list ECJ as an ingredient rather than sugar, the court granted defendant's motion to dismiss without prejudice under the primary jurisdiction doctrine. As have many other courts, thecCourt cited the FDA's March 5, 2014 Notice indicating that the agency intends to revise its guidance on ECJ, and pointing out that plaintiffs' "claims rely heavily, if not entirely, on the premise that the FDA has concluded that 'evaporated cane juice' is not the common or usual name for any sweetener." The court also cited the numerous similar decisions in the Northern District as support for the dismissal. Order.

Gitson v Trader Joe's Co., No. 3:13cv1333 (N.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, and CLRA based on claims that defendant's products are misleading and misbranded to the extent they label some products as containing evaporated cane juice, among other claims, the court denied certification for interlocutory appeal, refused to strike plaintiffs' nationwide class allegations, and granted a stay of the ECJ claims based on primary jurisdiction. The court also denied without prejudice defendant's motion to dismiss, and invited defendant to refile once the stay was lifted.

First, the court found that plaintiffs' nationwide class allegations should not be stricken at this stage, citing the Ninth Circuit's *Mazza* decision. The court explained that although *Mazza* held that plaintiffs could not bring nationwide claims under California's consumer protection statutes, this did not foreclose certifying a California-only class or a consumer class action proceeding under the laws of multiple states. The court also refused to certify for interlocutory appeal its previous decision that plaintiffs had standing to pursue an action based on products they did not purchase. Finally, the court granted a stay of plaintiffs' ECJ claims under the primary jurisdiction doctrine, following numerous other decisions in the district, based on the FDA's March 2014 notice. The court also stayed all other claims in the interim to preserve judicial and party resources. Order.

Court Dismisses Sunflower Seed Class Action Without Leave to Amend

Weiss v. The Kroger Co., No. 2:14cv03780 (N.D. Cal.): In a putative class action alleging claims under California's CLRA, FAL, and UCL for false advertising of the sodium content of sunflower seeds by failing to count the sodium content in the shell coating, the court granted defendants' motion to dismiss without leave to amend. The court distinguished the case from *Lily v. Conagra* insofar as the case involves only one flavor of coating and the instant packaging did not include any instructions indicating that the consumer should place the whole shell in her mouth. Further, the labelling in the instant case specifically identified the amount of sodium in the "edible portion" of the product, unlike in *Lily*. This fact alone rendered the plaintiffs' claims implausible, according the court, because a reasonable consumer would understand that the shell was the non-edible portion of the product. Plaintiffs thus failed to plausibly allege that they had been misled. The court also held that the claim "There's a whole lot of goodness contained in each and every tiny sunflower seed. Grab a handful and enjoy," did not constitute a health claim but rather was non-actionable puffery. Order.

New Filings

Clemente v. Whole Foods Market Inc., No. 140801271 (Phila. Ct. C.P.): Putative class action alleging claims under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, and breach of express and/or implied warranty, claiming that Whole Foods misrepresents its 365 Everyday Value Plain Greek Yogurt as having 2 grams of sugar per serving when, in fact, it contains at least 11.4 grams of sugar per serving. Complaint.

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Mirto v. Organic Milling LLC, No. BC553780 (L.A. Super.): Putative class action alleging claims under California's UCL, FAL, and CLRA, as well as breach of express warranty, claiming that defendant misrepresents its cereal products as being "100% Natural" when in fact it contains GMO ingredients such as corn, soy, and rapeseed, and also contain other synthetic and "heavily processed" ingredients, such as canola oil, soy protein isolate, and evaporated cane juice. Complaint.

Knox v. Whole Foods Market Inc., No. 1:14cv13185 (D. Mass.): Putative class action alleging claims for breach of warranty under Magnusson-Moss and Massachusetts law, unjust enrichment, negligence, and seeking declaratory and injunctive relief, claiming that defendant's 365 Everyday Value Plain Greek Yogurt products are misrepresented as containing 2 grams of sugar per serving when in fact they contain 11.4 grams. Complaint.

Vandenberg v. Medora Snacks LLC, No. 9:14cv81010 (S.D. Fla.): Putative class action alleging claims under Florida's DUTPA, as well as Negligent Misrepresentation, Breach of Express Warranty, violation of Magnusson-Moss, and Unjust Enrichment, claiming that defendant's Popcorners Corn Chips products are misrepresented as "All Natural" when in fact they contain unnatural, synthetic, and/or artificial ingredients such as maltodextrin and dextrose. Complaint.