

Food for Thought

2014 Litigation Annual Review

Key Decisions:

- *Astiana v. Ben & Jerry's Homemade, Inc.*
- *Sethavanish v. ZonePerfect Nutrition Co.*
- *Lilly v. ConAgra Foods, Inc.*
- *Ebin v. Kangadis Food Inc.*
- *Caldera v. J.M. Smucker Co.*
- *POM Wonderful LLC v. Coca-Cola Co.*
- *Bishop v. 7-Eleven, Inc.*
- *Jones v. ConAgra Foods, Inc.*
- *Bruton v. Gerber Products Co.*
- *Brazil v. Dole Packaged Foods, LLC*
- *Werdebaugh v. Blue Diamond Growers*
- *Randolph v. J.M. Smucker Co.*

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Food for Thought reports on significant court decisions affecting the food industry. The focus of this edition is on several food-related cases pertaining to class certification; particularly, on district court decisions regarding Rule 23(a) and 23(b) requirements, as well as on ascertainability. Of course, *Lilly* is also included, because of its significance on pre-emption, as is *POM Wonderful*, because of its importance regarding competitor suits for mislabeling.

Astiana v. Ben & Jerry's Homemade, Inc., No. 10-4387, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014)

Plaintiff alleged that Ben & Jerry's Homemade, Inc.'s "all natural" ice cream products contained a synthetic agent and, as a result, the company's advertising that the ice cream products were "natural" was false and misleading. Plaintiff moved to certify a statewide class, but a California judge denied class certification based on ascertainability. Specifically, the court ruled that it was impossible to ascertain whether class members had relied on the allegedly misleading advertising when purchasing defendant's products because some consumers purchased products that did not contain the relevant synthetic ingredient.

Plaintiff, Skye Astiana, filed a proposed class action on behalf of individuals who purchased ice cream products produced by Ben & Jerry's Homemade, Inc., including ice cream, frozen yogurt, and popsicles, which contained alkalized cocoa and were labeled "all natural." Plaintiff alleged that the company was using cocoa that had been alkalized with a "synthetic" agent and, as a result, the defendant misled and deceived consumers by labeling and advertising the products as "all natural." Plaintiff alleged that class members would not have purchased the subject Ben & Jerry's ice cream products had they known they contained alkalized cocoa processed with potassium



carbonate, a man-made ingredient (the alleged “unnatural” ingredient).

Defendant contended that cocoa can be alkalized using one of several alkalis, some of which are “natural” and some of which are “synthetic.” Furthermore, defendant asserted that there was no way to identify which class members purchased which type of ice cream products because, as a wholesale manufacturer, defendant does not maintain records identifying the ultimate customers or their purchases. Thus, according to defendant, it would be impossible to determine which class members bought an ice cream product containing alkalized cocoa processed with a “synthetic” agent instead of an ice cream product containing alkalized cocoa processed with a “natural” agent.

As it relates to ascertainability, the court held it was impossible to determine which consumers’ ice cream products contained synthetic alkalized cocoa. The district court agreed that plaintiff provided no evidence as to which ice cream product contained the allegedly “synthetic ingredient” or that a means exists for identifying the alkali in every class member’s ice cream purchases. In part because she had not identified an ascertainable class, the court ruled that plaintiff had not established that her claims were typical of those of the class. Although the purchasers of defendant’s ice cream products were exposed to the same package labeling, that alone was insufficient to establish that plaintiff’s claims of having been deceived and misled are typical of the claims of the class.

The court also found that plaintiff failed to meet the predominance requirement because she did not offer sufficient damages testimony regarding the amount or manner of damages. Specifically, plaintiff did not offer expert testimony demonstrating that the market price of defendant’s products with the “all natural” designation was higher than the market price of defendant’s products without the “all natural” designation. “Thus, by definition, there is no evidence showing how much higher the price of one was than the other.” Similarly, the court noted that plaintiff failed to present expert testimony showing

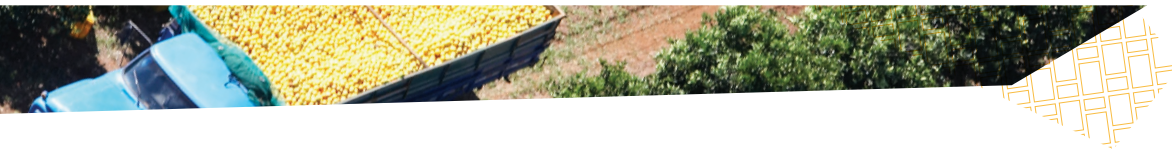
“a gap between the market price of Ben & Jerry’s ‘all natural’ ice cream and the price it purportedly should have sold it for had it not been labeled ‘all natural’—or any evidence demonstrating that consumers would be willing to pay a premium for ‘all natural’ ice cream that was made with cocoa alkalized with a ‘natural’ alkali, and did in fact pay such a premium.”

Given the court’s findings that plaintiff had not identified an ascertainable class, and that common issues did not predominate, the court also found that a class action is not a superior method of adjudication of the controversy.

Sethavanish v. ZonePerfect Nutrition Co., No. 12-2907, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014)

In this “All Natural” food labeling putative class action, the Northern District of California found that plaintiff had Article III standing, but failed to define an ascertainable class. Specifically, although defendant argued that plaintiff did not allege an injury in fact, the court found it sufficient that the complaint alleged plaintiff would not have purchased the product at issue but for the all natural label. However, the court aligned itself with the Third Circuit, concluding that the class was not ascertainable because defendant’s records were insufficient to identify class members. The motion to certify a nationwide class was denied.

Plaintiff’s complaint alleged that the packaging of ZonePerfect’s nutrition bars is misleading because the bars are labeled “All-Natural Nutrition Bars” despite containing ingredients defined as “synthetic” by federal regulations. Plaintiff asserted claims for fraud; unlawful, unfair, and fraudulent business practices; false advertising; violation of the California Consumers Legal Remedies Act; and restitution based on quasi contract. Plaintiff moved to certify a nationwide class and argued that the requirements of Rule 23(a) and 23(b)(3) were satisfied. ZonePerfect argued that plaintiff lacked standing and failed to establish that the proposed class was ascertainable.



Regarding standing, ZonePerfect asserted that plaintiff did not satisfy the first element of Article III standing, requiring that a plaintiff establish an injury in fact. Specifically, ZonePerfect argued that the alleged misrepresentations actually saved her money because plaintiff testified that she purchases nutrition bars that cost more than the product at issue and are not all natural. ZonePerfect also urged the court to reject plaintiff's claim that she valued all natural products because her declaration, pleadings, and deposition testimony contained representations that she purchased, and has always been willing to eat, food with artificial ingredients. The court nonetheless found that plaintiff plead an injury in fact because she asserted that she would not have purchased ZonePerfect bars but for the "all natural" claim on the packaging. The court did not assess the credibility of plaintiff's statements and explained that making such a determination on a motion for class certification would be inappropriate.

The court, however, agreed that plaintiff failed to define an objectively ascertainable class. ZonePerfect asserted that the records related to purchases of its nutrition bars identified only a small fraction of consumers. As such, ZonePerfect argued that it would be infeasible to determine whether a putative class member actually purchased its products and in what quantity. The argument was based on the Third Circuit's opinion in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). There, the court held that the class was not ascertainable because there was insufficient evidence to show that the retailer records could be used to identify class members. The *Carrera* court also rejected the plaintiff's contention that class membership could be determined based on affidavits by putative class members, reasoning this process deprived the defendant of the opportunity to challenge class membership.

The court acknowledged that the Ninth Circuit courts are split on whether to follow *Carrera's* holding. The Northern District echoed the *Carrera* decision in *Xavier v. Philip Morris USA Inc.*, 787 F.Supp.2d 1075 (N.D. Cal. 2011). But the Northern District and

Southern District reached a different result in *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012) and *Astiana v. Kashi Co.*, 291 F.R.D. (S.D. Cal. 2013). The court found the reasoning of *Carrera* and *Xavier* more persuasive. It further explained "even though there is no requirement that a named plaintiff identify all class members, that does not mean that a named plaintiff need not present some method of identifying absent class members to prevail on a motion for class certification.

Lilly v. ConAgra Foods, Inc., No. 12-55921, 2014 WL 644706 (9th Cir. Feb. 20, 2014)

In Lilly v. ConAgra Foods, Inc., the Ninth Circuit reversed and remanded the dismissal of a consumer class action lawsuit, which alleged that a food company violated California law by misrepresenting the sodium content of sunflower seeds when it focused exclusively on the sunflower kernels without considering the inedible shells. The Ninth Circuit reasoned that even though sunflower seed shells, standing alone, are inedible, flavor "coating" added to the shells is edible. Moreover, state law requiring the inclusion of nutritional information associated with the flavor "coating" added to the shells is not preempted by federal law.

In *Lilly*, plaintiff brought a putative class action complaint against ConAgra Foods, Inc., alleging the sodium content in its David brand sunflower seeds was higher than disclosed on the packaging. Specifically, the plaintiff alleged that the sodium content listed on the nutrition facts panel of the package of seeds either did not disclose the sodium content of "the sunflower seeds *and the shells*" or did not state the "salt content of the sunflower kernels *and shells in equal prominence.*" Plaintiff took the position that the flavor coating placed on the outside of sunflower seed shells is intended to be ingested before the inedible shell is spat out (and the kernel is eaten), and as such, the sodium content of the outer shells must be included on the nutrition



facts panel. Plaintiff argued that by not disclosing the salt content on the outside of the non-ingested seed, ConAgra Foods violated three California statutes: the Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*); the False Advertising Laws (Cal. Bus. & Prof. Code § 17500 *et seq.*); and the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*).

The district court granted ConAgra's motion to dismiss on express preemption grounds, holding that plaintiff sought "to impose an additional sodium labeling requirement that [was] not identical to the" Nutritional Labeling and Education Act (21 U.S.C. § 343) meaning her "state law claims [were] expressly preempted." The Ninth Circuit disagreed.

The court noted that under the statutory and regulatory framework associated with the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301 *et seq.* and the Nutrition Labeling and Education Act of 1990 (NLEA), a food's label is required to include the amount of sodium "in each serving size or other unit of measure." 21 U.S.C. § 343(q)(1)(D). The NLEA also provides that no state may "directly or indirectly establish . . . any requirement for the labeling of food that is not identical" to the federal requirements. 21 U.S.C. § 343-1(a)(5).

Nonetheless, the court rejected ConAgra's argument that the lawsuit was an attempt to force it to include the sodium content of an *inedible* portion of the food, i.e. sunflower seed shells, because it ignored the fact that, although the shells themselves are inedible, the coating placed on the shells is edible. Accordingly, the edible coating, whether "Ranch" flavored, "Nacho Cheese" flavored, or otherwise, must be accounted for in the sodium content calculation.

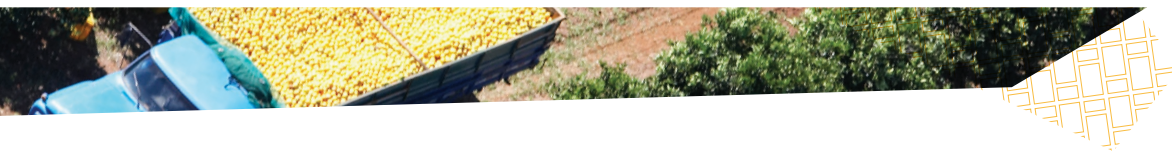
ConAgra Foods attempted to argue in the alternative that dismissal was still appropriate because no reasonable consumer would be deceived by the labeling on its David brand packaging. The Ninth Circuit noted that such an argument was not addressed at the district court level and likely contained questions of fact, not appropriate for a decision on a motion to dismiss. Interestingly, a

California district subsequently distinguished *Lilly* on this basis. In *Weiss v. Kroger Company*, No. CV14-3780-R, 2014 WL 5114608 (C.D. Cal. Aug. 8, 2014), the court noted that *Lilly* was solely concerned with preemption and therefore did not control its analysis of alleged false or misleading advertising and unfair business practices claims under the "reasonable consumer test." In *Weiss*, the defendant seed manufacturer identified the amount of sodium contained in the "edible portion" of the product. The court granted the sunflower seed manufacturer's (and grocer's) motion to dismiss, reasoning that a "reasonable consumer knows that the seed is edible and that the shell is not, and would understand that the edible portion that the label referred to was the seed. Any allegations to the contrary were implausible and therefore subject to Rule 12(b)(6) dismissal.

In *Lilly*, the dissent wrote that the applicable regulation plainly states that the amount of sodium for food labeling purposes is "based on only the edible portion of food, and not bone, seed, *shell*, or other inedible components." 21 C.F.R. § 101.12(a) (6) (emphasis supplied). "Although we might prefer a regulation that includes the shell's absorbed salt and to draw a distinction between an edible 'coating' and an inedible shell, we are nonetheless bound to apply this unambiguous regulation objectively as it has been written."

***Ebin v. Kangadis Food Inc.,* 297 F.R.D. 561 (S.D.N.Y Feb. 25, 2014)**

Plaintiff claimed that defendant's product labeled "100% Pure Olive Oil" was in fact not pure olive oil, but instead an industrially processed substance known as "pomace." The court found that the requirements of Rule 23(a) were satisfied, despite the facts that not all products at issue contained pomace, and that varying applicable state standards would yield different answers to the question of whether pomace is 100 percent pure olive oil. Additionally, the court found that the proposed class was ascertainable, even though the Southern



District found that the process for identifying class members proposed by the class action administrator was unrealistic in a previous, unrelated case. Finally, the court found that the predominance requirement was satisfied, notwithstanding defendant's argument that some class members may not have sustained injury because their purchase was not influenced by the label.

Plaintiffs in *Ebin v. Kangadis Food Inc.* asserted causes of action for breach of express warranty, breach of implied warranty, and violation of several New Jersey and New York statutes against Kangadis Food Inc., (d/b/a The Gourmet Factory), a food import and distribution company that sold Capatriti olive oil labeled, "100% Pure Olive Oil." Specifically, plaintiffs claimed that the product sold by defendant was not pure olive oil, but was instead an industrially processed substance known as "pomace." Plaintiffs moved to certify a class of New Jersey purchasers and a sub-class of New York purchasers. The court granted plaintiffs' motion. First, the court found that the pre-requisites of Rule 23(a) were met:

- **Numerosity.** Defendant's representations and its more than \$81 million in sales supported the court's finding that plaintiffs satisfied the numerosity requirement.
- **Commonality.** Defendant argued that varying standards in the five states where its olive oil was sold precluded a common answer to the question of whether it was 100 percent pure olive oil. Nonetheless, the court found that there was commonality because the claims were based on the same alleged misrepresentation, which "arguably violate all the varying state requirements."
- **Typicality.** Although not all oil sold by defendant contained pomace, the court found that the typicality requirement was satisfied. The court explained that typicality refers to the nature of the claim of the class representatives and not to the specific facts from which the claims arose, which suggested to the court that whether the oil tins purchased by the class representatives contained pomace was not dispositive.

- **Adequacy:** The court found that the lead plaintiffs demonstrated their commitment to pursue the claims on behalf of class members by responding to extensive discovery and sitting for lengthy depositions during which they acknowledged their responsibility to the class. The court further explained that plaintiffs' counsel won multi-million dollar verdicts or recoveries and was experienced in litigating consumer claims—including claims against food manufacturers.

Next, the court considered defendant's argument that the class was not ascertainable. To support its argument, defendant cited the Southern District's decision in *Weiner v. Snapple Beverages Corp.*, No. 07-cv-8742, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), in which the court denied certification. In *Weiner*, plaintiffs proposed that class members could produce a receipt, produce a product label, or sign a declaration that they purchased Snapple during the class period. The court rejected this as unrealistic because there was no basis to believe that the proposed class members kept such evidence and the proposed class members were also unlikely to remember details of their Snapple purchase, making declarations unreliable.

The *Ebin* court, however, found that the decision in *Weiner* would render class actions against producers almost impossible to bring. The class action administrator in *Ebin* proposed a process similar to the one found inadequate in *Weiner*. Nonetheless, the court found that the class was ascertainable. Although it acknowledged that the ascertainability difficulties were formidable, the court stated that the difficulties should not be made into a device for defeating the action. To support its decision, the court cited the Second Circuit's opinion in *In re Via Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), in which the court stated, "failure to certify an action under 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule."

After finding that plaintiff defined an ascertainable class, the court considered defendant's argument that the predominance requirement was not



satisfied. Specifically, defendant argued that a determination of whether a consumer was actually harmed by its label is individualized. While some members of the class may have purchased the olive oil because of the labeling, others may have bought the product without looking at the label, because they liked the taste, the price, or the container's shape or color. To support its argument, defendant cited a New Jersey Supreme Court decision in which the court concluded that individual class member's reactions to a drug company's advertising would predominate over common questions such as the defendant's behavior. *Int'l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372 (N.J. 2007). It also cited a Southern District of New York decision in which the court held that the class members who purchased automatically renewing satellite radio service did not satisfy the predominance requirement because any customer who wanted their subscription renewed did not suffer an actual injury. *Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62 (S.D.N.Y. 2013).

The court distinguished *Merck & Co.*, stating, "in the case of medicine, the negative impact of individual injury varies far more significantly than the injury incurred from buying an overpriced product alleging to be olive oil, which was actually pomace oil." It also found *Vaccariello* to be unavailing because there were individuals who did not suffer any injury in that case. The court concluded that even class members who actively wanted to buy pomace instead of 100 percent pure olive oil were nevertheless injured because they paid too much for it.

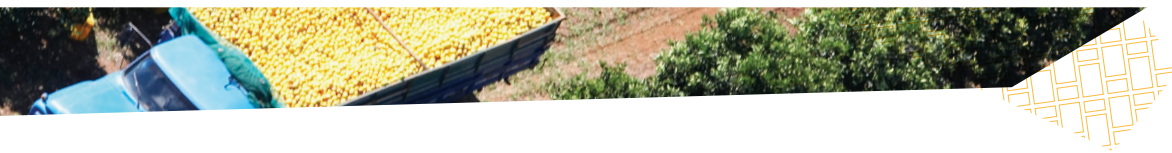
Finally, the court certified a nationwide class for plaintiff's fraud and negligent misrepresentation claims. Although the product at issue was sold in at least five different states, the court found that New York law governed the common law claims and that, even if the court needed to apply the law of numerous states, common issues still predominated. Also, the court surveyed the potential applicable state laws and concluded that there was no material difference that would affect the merits of the class's common law claims at trial.

UPDATE: After the court certified the nationwide class, Kangadis Food Inc. filed for Chapter 11 bankruptcy on June 12, 2014. *In Re: Kangadis Food Inc.*, No. 14-72649 (Bankr. E.D.N.Y.). The bankruptcy action stayed the proceedings in the case. However, Kangadis Food Inc was not owned by the Kangadis family. Instead, the family had a partnership in the form of Kangadis Family Management LLC.

Soon after the bankruptcy stay, class members filed a separate class action against the owners of the now bankrupt Kangadis Foods Inc. *Ebin v. Kangadis Family Management LLC et al*, No. 14-1324 (S.D.N.Y.). In the new lawsuit, which names Kangadis Family Management LLC (KFM) defendant, plaintiffs sought to "impose liability on KFM" for what plaintiffs alleged was the misleading labeling of Capatriti olive oil. On October 23, 2014, a federal judge granted summary judgment in favor of defendants "because plaintiffs have failed to adduce competent evidence from which any reasonable juror could conclude that defendants used their alleged domination of Kangadis Food Inc., as a means to accomplish the fraud here alleged." *Ebin v. Kangadis Family Management LLC et al*, No. 14-1324 (S.D.N.Y. Nov. 26, 2014).

Caldera v. J.M. Smucker Co., No. 12-4936, 2014 WL 1477400 (C.D. Cal. April 15, 2014)

In this consumer class action, plaintiff moved to certify two monetary relief classes and two injunctive relief classes. Plaintiff alleged that the labels on J.M. Smucker products misled customers into believing that they were healthy when they contained trans fat and high fructose corn syrup. The Central District of California found that plaintiff failed to satisfy the predominance requirement because she did not establish that damages may be proven on a class-wide basis. Plaintiff presented no evidence showing that damages could be calculated based on the difference between the market price and true value of the product. The motion to certify the monetary relief classes was therefore denied. The motion



to certify injunctive relief classes was also denied because plaintiff failed to explain why her injunctive relief claims could not be pursued in her individual action.

Plaintiff in *Caldera* brought a consumer class action against J.M. Smucker Company on behalf of individuals who purchased Crisco Original Shortening, Crisco Butter Flavor Shortening, and Uncrustables Sandwiches—the packaging of which allegedly misled customers into believing they were healthy, when, in fact, they contained trans fat. Moreover, Uncrustables contain high fructose syrup. Plaintiff asserted claims for violation of the unlawful, fraudulent, and unfair prongs of the California Business and Professions Code. Furthermore, plaintiff asserted claims for breach of express warranty, breach of implied warranty, and violation of California’s False Advertising Law and Consumer Legal Remedies Act. Plaintiff sought to certify four separate classes—one monetary relief and one injunctive relief class for the Crisco products, as well as one monetary relief and one injunctive relief class for the Uncrustables product.

The court found that plaintiff failed to satisfy the predominance requirement regarding the monetary relief classes because she failed to establish that damages may be proven on a class-wide basis. Plaintiff sought restitutionary damages, the proper measure of which is the difference between what the plaintiff paid and the value of what she received. Although plaintiff intended to rely on J.M. Smucker’s California sales data to prove damages, the court explained that the sales data alone would be an appropriate measure of damages only if no class member received any benefit from the products.

Specifically, while restitution may be proven on a class-wide basis by computing the effect of unlawful conduct on the market price of the product at issue, as the court explained, this measure of restitution requires the plaintiff to produce evidence that attaches a dollar value to the consumer impact or advantage to defendant caused by the unlawful business practice. Plaintiff did not offer any evidence showing that damages could be calculated based

on the difference between the market price and product’s true value. Indeed, by plaintiff’s own admission, she received some benefit from the products. She was, therefore, not entitled to a full refund of the purchase price. The court added: “[i]n reality, the true value of the products to consumers likely varies depending on individual consumer’s motivation for purchasing the products at issue.”

Plaintiff also failed to explain why her injunctive relief claims could not be pursued in her individual action. Accordingly, the court denied her motion to certify the injunctive relief classes and ordered her to show cause why using the class action mechanism was necessary.

POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014)

POM Wonderful claimed that Coca-Cola’s label contained misrepresentations, which caused injury to POM’s sale of its competing product. Although Coca-Cola argued that POM’s claims were moot because its labels complied with the FDCA, the U.S. Supreme Court disagreed and explained that neither the FDCA nor the Lanham Act bars competitor lawsuits like the one brought by POM. The FDCA acts as a statutory floor for food label compliance, while market and commercial interests can impose greater restrictions if further protections are deemed necessary. After this decision, the industry remains sheltered from consumer class actions that are based on the Lanham Act or on violations of the FDCA. But consumer class actions based on allegedly misleading labels will continue to challenge the industry. While the court never explicitly references the theory, it is likely that consumers will argue that there is room to bring claims without FDCA preemption after the POM decision.

The Supreme Court’s decision in *POM Wonderful LLC v. Coca-Cola Company* had the potential to redefine the consumer class action landscape regarding claims for the deceptive labeling of food products. Instead, the decision narrowly focused on actions brought by and against industry competitors



for such mislabeling, creating little impact on consumer-driven suits.

POM brought a claim against Coca-Cola under the Lanham Act, arguing that Coca-Cola misrepresented the content of its pomegranate juice, causing injury to POM's sales of its competing product. The Lanham Act allows a private entity to sue another private entity for unfair competition arising from allegedly false or misleading product descriptions. POM's contention was that Coca-Cola's product, Minute Maid Pomegranate Blueberry Juice, actually contained only "0.3% pomegranate juice and 0.2% blueberry juice," and was therefore deceptively labeled.

Coca-Cola asserted that its product's label complied with the federal Food, Drug, and Cosmetic Act (FDCA), rendering POM's argument moot. The FDCA provides exclusive authority to bring suit to only the United States, prohibits private suits, and preempts certain state laws on misbranding. The members and circuit courts agreed with Coca-Cola that the FDCA and its regulations precluded POM's challenges to the labeling under Lanham.

The Supreme Court disagreed, finding no statutory provision or Congressional interpretation that suggested the FDCA's precedence over similar statutes. The court found that the FDCA and Lanham Act are "complementary and have separate scopes and purposes." Furthermore, the court held that neither statute "discloses a purpose by Congress to bar competitor lawsuits like the one brought by POM. The court was able to reconcile the Lanham Act and the FDCA—as Lanham covers commercial interests and the FDCA covers health and safety concerns. In this manner, the FDCA acts as a statutory floor for food label compliance, while market and commercial interests can impose greater restrictions if further protections are deemed necessary.

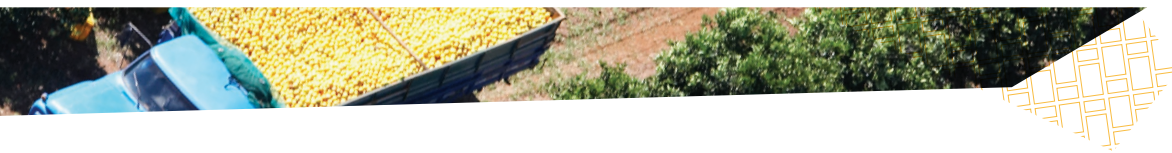
Nothing in the Lanham Act suggests that a consumer can bring an action as a competitor in the market. Thus, a consumer who believes he was deceived by a label into purchasing a product may have a private cause of action, but no remedy under

the Lanham Act. The *POM* decision also upholds the notion that the FDCA preempts state law consumer claims under the FDCA. As a result, after *POM*, the industry remains sheltered from consumer class actions that are based on the Lanham Act or on violations of the FDCA.

Nonetheless, consumer class actions based on allegedly misleading labels will continue to challenge the industry. The Supreme Court's decision in *POM* made this clear, noting that its decision does not change state consumer protection laws or consumer suits. And, while the court never explicitly referenced the theory, it is likely that consumers will argue that the *POM* decision leaves room to bring claims without FDCA preemption. This theory posits that the FDCA is only a floor to deceptive labeling and there may be room for consumer enforcement in order to ensure enhanced compliance by the industry. In the end, the industry still faces steep hurdles defending food label consumer class actions. The *POM* decision did not necessarily open the door to class actions as many had feared, but it may have provided some degree of encouragement for consumers to continue to bring deceptive labeling claims.

Bishop v. 7-Eleven, Inc., No. 12-02621, 2014 WL 1620946 (N.D. Cal. Apr. 21, 2014)

A Northern District of California judge was tasked with examining whether potato chip labels that included the language "0g Trans Fat" and "No Cholesterol" were deceiving in nature and the chips at issue misbranded. Because the causes of action upon which plaintiff relied required an economic injury and actual reliance, the court found that plaintiff lacked standing. Plaintiff did not argue that the labels were actually misleading because of the language they contained, but instead argued that the labels were misleading because they did not include disclosures mandated by the Food, Drug, and Cosmetic Act. The court did not accept this argument and dismissed plaintiff's putative class action with prejudice.



In *Bishop*, plaintiff attempted to bring a class action against 7-Eleven by alleging that 7-Eleven's package labeling was unlawful, deceptive, and misbranded the potato chips at issue in violation of California law. Specifically, plaintiff claimed that the packaging of several varieties of 7-Eleven Select potato chips was misleading and deceptive where it contained language indicating that the potato chips contained "0g Trans Fat" and "No Cholesterol." The court initially dismissed plaintiff's claims for failure to adhere to Rule 9's requirement of a clear and particular account of the alleged fraud. Given a second attempt to plead his case, plaintiff ultimately failed, and the court dismissed the complaint with prejudice.

The court focused on whether plaintiff had sufficiently alleged an injury-in-fact mandated by standing jurisprudence under Article III. This concern was heightened by California law's requirement of establishing an economic loss, by showing that plaintiff (1) spent money due to the unfair competition; (2) lost money or property; or (3) was denied money to which he or she is entitled. Additionally, California courts require the purchase to be the "result of" the deception; this, plaintiff could not establish.

The court found that plaintiff failed to plead an injury-in-fact necessary for Article III standing. Because plaintiff could not show a false statement or misrepresentation, there was no actionable claim. And because the lack of disclosure was insufficient to confer standing on plaintiff, the court dismissed the claim with prejudice.

Plaintiff based his argument on disclosures that he claimed were mandated by the Food, Drug, and Cosmetic Act but that were missing from 7-Eleven's packaging. These disclosures relate to the amount of fat, saturated fat, cholesterol, or sodium over a threshold level per serving. The court found that plaintiff failed to allege that the product contained an amount of any of these criteria exceeding the threshold level.

Jones v. ConAgra Foods, Inc., No. 12-0163, 2014 WL 2702726 (N.D. Cal. June 13, 2014)

*Plaintiffs unsuccessfully sought to certify three prospective classes of purchasers of foods produced by ConAgra Foods. The denial of certification demonstrates that the testimony of the named plaintiff matters and is often outcome determinative. Here, the named plaintiffs failed to testify that they actually were misled by the allegedly misleading statements on ConAgra's labels. Nor did they testify that they would ever purchase the products again, even though they were seeking injunctive relief. The court also ruled that class members could not be ascertained or identified through sworn testimony or memory, apparently following the Third Circuit's decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).*

In *Jones*, plaintiffs attempted to bring a putative class action against ConAgra Foods for violations of California's unfair competition law, false advertising law, and consumer legal remedies act. They challenged three primary product lines: Hunt's tomatoes, PAM cooking spray, and Swiss Miss cocoa, alleging that the product label claims of "100% Natural," and "free of artificial ingredients," as well as "Natural Source of Antioxidants," were misleading. Plaintiffs asserted that the products were not all natural, included artificial ingredients, and failed to adhere to FDA guidelines regarding the listing of antioxidant claims.

The named plaintiffs' testimony doomed their class certification case on standing, typicality, adequacy, and (b)(2) injunctive relief grounds.

Out of the gate, ConAgra challenged the standing of two of the named plaintiffs. Regarding the named plaintiff for the class of purchasers of Hunt's products, the court noted that plaintiff testified in deposition that he did not rely on the label claims in making his purchase. Nonetheless, on cross-examination, class counsel rehabilitated him sufficiently to demonstrate reliance on the label claims. The named plaintiff who purchased Swiss



Miss products, however, lacked standing because she testified in deposition that she did not think the statements on the Swiss Miss packaging were misleading.

ConAgra also challenged whether the plaintiffs satisfied the Rule 23(a) typicality and adequacy requirements. It succeeded as to two of the three named plaintiffs. The plaintiff seeking to represent PAM purchasers was typical of only a portion of the proposed class because she did not testify that the legality of the labeling was a factor in her purchasing decision when the complaint alleged that the labels were unlawful under FDA regulations. The plaintiff seeking to represent Swiss Miss purchasers likewise failed as to both typicality and adequacy because, as noted, she did not claim she was misled by package statements.

The court also considered the appropriateness of class certification under Rule 23(b)(2), where the primary relief sought was declaratory or injunctive. Here, ConAgra's primary argument regarding all three prospective classes was that the named plaintiffs lacked standing because none indicated that they would purchase the product again if the alleged conduct were to stop. The court agreed that the named plaintiffs must express an intent to purchase the products in the future in order to possess standing to bring injunctive and declaratory relief claims. Because the named plaintiffs did not do so, they lacked standing.

Plaintiffs' claims also failed the implicit ascertainability requirement. Because the challenged products were commonly purchased and relatively inexpensive, the court was persuaded that it would be hard to identify class members who did not keep receipts. It rejected plaintiffs' argument that declarations or memory of class members would be enough to identify class members. It found that, even if it indulged the assumption that class members were honest, they likely would not remember which products they purchased during the lengthy class period and whether those products bore the challenged label statements. The court ruled that "common sense" informed it that absent

class members may not remember these details, even if the named plaintiffs did.

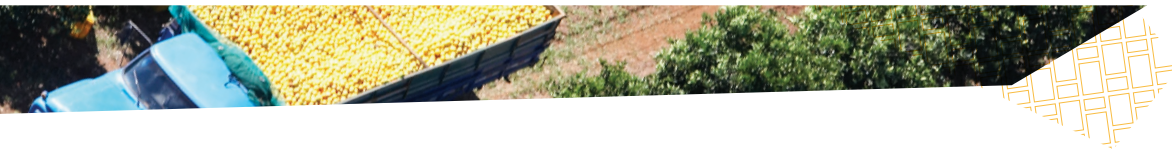
Plaintiffs' class certification case also foundered on the Rule 23(b)(3) predominance requirement. The court held that individual questions predominated over common ones because individual determinations of reliance and materiality would have to be made for each putative class member's claim pursuant to California law, which required a showing of actual injury. In addition, plaintiffs failed to present a model that identified damages stemming from the alleged conduct for the entire class. Although plaintiffs asserted that each class member could recover restitution damages, the court found their model "deeply flawed" because of the sheer breadth of the product lines and varieties at issue in the case.

Bruton v. Gerber Products Co., No. 12-2412, 2014 WL 2860995 (N.D. Cal. Jun. 23, 2014)

In Bruton, the Northern District of California denied plaintiff's motion for class certification because plaintiff failed to define an ascertainable class. The proposed class consisted of persons who purchased 69 different types of baby food products over the course of four years.

Plaintiff alleged Gerber made prohibited nutrient content claims on products intended for children under the age of two. She further alleged that, contrary to federal requirements regarding products of a certain caloric value, Gerber failed to accompany "No Added Sugar" and "No Added Refined Sugar" labels with a disclosure statement warning of the products' high caloric value.

Citing the Third District's opinion in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), Gerber argued that the class was not ascertainable because Gerber and the third party retailers who sold the products at issue did not keep records of who purchased the products. Under *Carrera*, class members could not submit affidavits in order to join the class because this method does not allow defendants to challenge



class membership. On this issue, the court noted that “[w]hile [Carrera] may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit . . . In this circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description.”

Ultimately, however, the court determined that it was not feasible to reliably determine class membership with self-identification through affidavits. Gerber sold multiple versions of the products at issue and the labels changed throughout the class period. Some of those labels did not contain the challenged statements. Moreover, Gerber submitted evidence demonstrating that at certain times there were products with two different labels for sale in one store—such that on a given day one consumer may have purchased a product with a challenged label while another purchaser of the same product did not. The court distinguished these facts from those in *Werdebraugh v. Blue Diamond Growers*, No. 12-2724, 2014 WL 2191901 (N.D. Cal. May 23, 2014) and *Brazil v. Dole Packaged Foods, LLC*, No. 12-1831, 2014 WL 2466559 (N.D. Cal. May 30, 2014) in which it certified classes where the allegedly misleading labels were consistent throughout the class period.

Brazil v. Dole Packaged Foods, LLC, No. 12-1831, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014)

The Northern District of California decertified a damages class in a case involving Dole products containing an “All Natural” label because plaintiff’s expert, Dr. Capps, submitted a damages model that was flawed in several respects. The model did not control for factors such as advertising, convenience of packaging, and other claims made on the products’ labels. Furthermore, the model was based on assumptions about competing products that were either false or untested. A portion of the model was also based on an unrelated study that had no relation to the products at issue. The court, however,

denied Dole’s motion to decertify the injunctive relief class, finding that the class was ascertainable.

Dole Packaged Foods moved to decertify in this consumer class action where the court previously certified a damages and injunctive relief class. Plaintiff alleged that several of Dole’s products contained the label statement, “All Natural,” which plaintiff alleges is misleading because all products at issue contain ascorbic acid (commonly known as Vitamin C) and citric acid, both allegedly synthetic ingredients. At the time the court certified the two classes, it accepted a damages model based on a “before-and-after” regression analysis, which would have compared the differences in sales of Dole’s products before-and-after it began using the “All Natural” label. However, plaintiff’s expert, Dr. Capps, later determined that a before-and-after regression analysis would be impossible, and instead based his damages model on a hedonic regression analysis. Hedonic regression analysis attributes the impact that various product attributes have on price.

Dole challenged Dr. Capps’ regression model for several reasons. The court was unconcerned about Dr. Capps’ use of hedonic analysis as opposed to before-and-after analysis because the methodology was capable of isolating the impact on price traceable to Dole’s labeling claim. Additionally, the court took no issue with the way in which Dr. Capps controlled for Dole’s brand loyalty. Although the damages model bundled all non-Dole brands into a single category, the court found that bundling dissimilar brands into the same category for coding purposes simplified the task. The court, however, agreed with Dole’s arguments that the damages model failed to control for other variables, contained errors, and improperly relied on an unrelated study on yogurt.

At the time the court certified the class, it approved a model that could control for variables such as Dole’s advertising expenditures, the prices of competing and complementary products, the disposable income of consumers, and population. Dr. Capps, however, admitted that he did not control for advertising. He explained that there was no need



to control for advertising because it was reflected as part of the retail price of Dole's products. But the court explained, "It is precisely because advertising expenditures 'would be reflected in the retail price' that a model would need to control for it." The court surmised that Dr. Capps could not control for advertising expenses for lack of data, but explained that insufficient data only favors a finding that the regression model is incapable of accomplishing its objective.

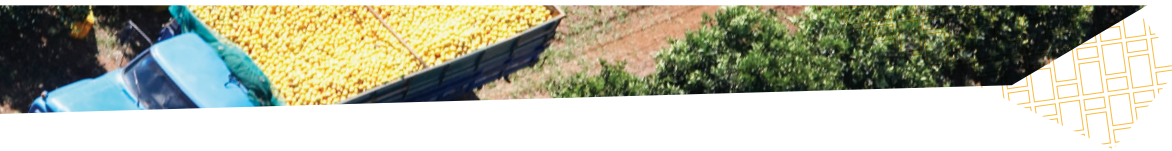
The court also expressed concern that many of Dr. Capps' assumptions about the competing products on which his model relied were either false or untested. He chose not to corroborate many assumptions he made about the regional and private label brands he included in his model. Instead, Dr. Capps relied on his experience and a website to conclude that all the non-Dole products, except for one, contained no "All Natural" label claims. He could not confirm that he had researched all of the products that were part of the model. The court found that this methodology did not satisfy *Comcast Corp. v. Behrend*, 133 S. Ct.. The court reasoned that if the model is unsure whether the non-Dole products actually made an "All Natural" labeling claim, the court cannot know whether the price premium the model generated was based on Dole's labeling claim rather than some other factor.

Furthermore, the court was concerned about the model's failure to account for the possibility that some products make multiple labeling claims. For example, the model did not account for packages that contain both an "All Natural" claim and a "No Sugar Added" claim, leaving the court unsure how much of the resulting price premium derives from which labeling claim. Similarly, the model did not account for the differences in how products are packaged. Dole pointed out that consumers may be willing to pay a premium for fruit products packaged in a certain way—such as fruits packaged in cups and sold as four-packs. The model made no distinction between a pack of four four-ounce fruit cups and a 16-ounce can of the same fruit. There was no control for packaging convenience in the model.

Although the foregoing was sufficient for purposes of decertifying the damages class, the court delved into Dr. Capps' apparent inconsistent representations in another consumer class action, *Lanovaz v. Twinings N. Am., Inc.*, No. 12-26460, 2014 WL 1652338 (N.D. Cal. Apr. 24, 2014). In *Lanovaz*, Dr. Capps stated that regression analysis was not possible because the challenged labels were on the products at issue over the entire class period. Although the same was true in *Brazil*, Dr. Capps nonetheless used hedonic regression analysis. Dr. Capps attempted to reconcile his positions in *Lanovaz* and *Brazil* by explaining that the dependent variable in *Lanovaz* was units sold, whereas he examined the impact of a particular attribute on price in *Brazil*. The court was not satisfied with Dr. Capps' explanation. In both cases, the model had to show the price premium attributable to defendant's use of the challenged label.

Also, the court found that *Comcast* would bar the court from considering the portion of the model that relied on Professor Anstine's study evaluating the price premium of the "All Natural" label claim on yogurt, as nothing in the study addressed Dole's products. Accordingly, the court concluded that plaintiff did not satisfy the predominance requirement because the proposed damages model failed to provide a means of showing damages on a class-wide basis through common proof. The damages class was therefore decertified.

The injunctive relief class, however, was not decertified because the court found that the class was ascertainable. The class members only needed to remember whether they purchased any of the challenged products, all of which bore the labeling claim during the class period. Thus, the method of identifying class members did not involve the same reliability concerns present in *Bruton v. Gerber Products Co.*, No. 12-2412, 2014 WL 2860995 (N.D. Cal. Jun. 23, 2014).



***Werdebaugh v. Blue Diamond Growers*, No. 12-2724, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014)**

After certifying a damages class against Blue Diamond Growers for allegedly mislabeling its products as containing evaporated cane juice and being “All Natural,” the Northern District of California decertified the class. The court initially accepted plaintiff’s proposed regression model as an appropriate damages model, but the models submitted by plaintiff’s expert failed to isolate the price premium attributable to the labels used by Blue Diamond. Also, the models failed to control for advertising. The court also refused to accept an alternative damages figure based on a separate study, finding no correlation between the study and Blue Diamond’s liability. The court ultimately decertified the class for failure to satisfy the predominance requirement because plaintiff failed to put forth evidence that damages could be determined and attributed to plaintiff’s theory of liability on a class-wide basis.

In *Werdebaugh*, plaintiff brought a class action against Blue Diamond, alleging that its package labeling was unlawful, deceptive, and misbranded in violation of California law. Specifically, plaintiff alleged that the packaging of several Blue Diamond products listed evaporated cane juice as the sweetener used when the ingredient was actually sugar. Also, the packaging included the statement “All Natural” when, in fact, the products contained synthetic ingredients.

The court initially certified a damages class. In doing so, it accepted the regression model proposed by plaintiff’s expert as an appropriate damages model under *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). Thereafter, plaintiff submitted two different regression analyses conducted by his expert, Dr. Capps. Plaintiff also submitted an alternative damages figure based on a separate study. Defendants then moved to decertify the class, arguing that the damages models did not satisfy *Comcast*. The court agreed.

A regression model purporting to serve as evidence of damages in a class action must measure only those damages attributable to the defendant’s conduct. Plaintiff was thus required to present a damages methodology that could determine the price premium attributable to Blue Diamond’s use of the “evaporated cane juice” and “All Natural” label statements. Preliminarily, the court approved Dr. Capps’ proposed “before-and-after” regression analysis, which would have compared the differences in sales of Blue Diamond’s products before-and-after it began using the labeling language at issue. However, Dr. Capps later concluded that it would be impossible to conduct a before-and-after analysis. Instead, his first and second damages models relied on a hedonic regression analysis, which considers the price impact associated with various product attributes—including product labels. In addition to the hedonic price regression analysis, Dr. Capps presented an alternative damages figure based on a 2007 study conducted by Professor Jeffrey Anstine. The Anstine study found a price premium of roughly 40 percent for yogurt labeled “All Natural.”

Defendant argued, in part, that the regression models used by Dr. Capps were flawed because (1) the model conflated the effect of the alleged mislabeling with the value of Blue Diamond’s brand; (2) the model failed to control for other key factors impacting price; and (3) Dr. Capps’ reliance on the Anstine study failed *Comcast*.

The court found that the first damages model submitted by Dr. Capps improperly conflated the alleged misleading label with the value of Blue Diamond’s brand. The report assumed that none of Blue Diamond’s competitors used the challenged labeling claims. Dr. Capps corrected for problems caused by his assumption by collapsing the Blue Diamond “brand” and “label” into a single variable. As a result, the court concluded that the first model could not isolate the harm attributable only to the labeling claim, but instead reflected the joint effect of both the labeling claims and the value of Blue Diamond’s brand. Accordingly, the court found



that Dr. Capps' first model failed to establish that damages could be determined and attributed to plaintiff's theory of liability on a class-wide basis.

Furthermore, when the court granted plaintiff's motion for class certification, Dr. Capps represented that his regression model would control for variables such as advertising, seasonality, income, and regional price differences. But when the damages models were submitted and Blue Diamond moved to decertify, the court found that plaintiff failed to show how Dr. Capps' damages models controlled for advertising. Dr. Capps' first model asserted that it controlled for advertising and promotions "via the quarterly and year dummy variables." But Dr. Capps failed to explain how these variables control for the impact of advertising on the price premium. In a separate declaration, Dr. Capps argued that hedonic regression analysis did not need to control for advertising because he was trying to measure the price premium, and not how advertising impacted the price premium. The court, however, stated, "it is precisely because advertising may impact the price premium that Dr. Capps' damages model must control for advertising." Thus, the court found that both the first and second damages models failed to control for advertising.

The court also considered the alternative damages model based on the Anstine study. It rejected Dr. Capps' attempts to rely on the study and explained that nothing in the study purports to measure the price premium attributable to Blue Diamond's use of "evaporated cane juice" and "All Natural" labels on the products at issue. The court ultimately found that there was no connection between the Anstine study and Blue Diamond's liability.

Finally, the court addressed plaintiff's argument that the issues with Dr. Capps' damages model could not defeat class certification. Plaintiff argued that the only issue at the class certification stage is the soundness of the methodology used by the expert. The court disagreed, stating, "[t]o the contrary, the court is obligated to do more than rubberstamp a proposed damages class merely because a plaintiff's expert purports to have used a peer reviewed methodology such as a regression

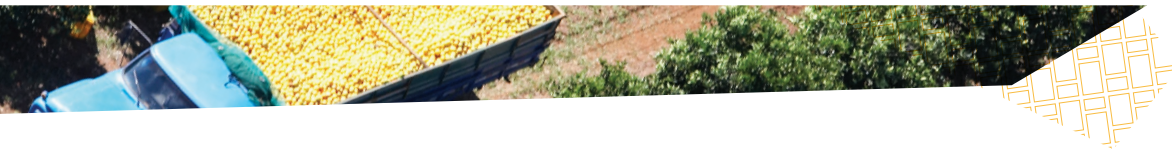
analysis." For further support, the court pointed to *Comcast*. There, the Supreme Court noted that the mismatch between the damages model and the plaintiff's liability case made class certification inappropriate under Rule 23(b)(3).

Plaintiff also relied on two Ninth Circuit opinions, *Leyva v. Medline Inst. Inc.*, 716 F.3d 510 (9th Cir. 2013) and *Jimenez v. Allstate Ins. Co.* 765 F.3d 1161 (9th Cir. 2014), to argue that individual questions as to damages could not independently defeat class certification. However, the court explained that *Leyva* and *Jimenez*, when read in conjunction with *Comcast*, set forth the principle that "so long as the damages can be determined and attributed to a plaintiff's theory of liability, damage calculations for individual class members do not defeat certification." The court did not decertify the damages class because of the need for individualized damages calculations. Rather, it decertified the class because plaintiff failed to put forth evidence that damages could be determined and attributed to plaintiff's theory of liability on a class-wide basis. As such, the court concluded that the predominance requirement was not satisfied.

Randolph v. J.M. Smucker Co., No. 13-CIV-80581, 2014 WL 7330430 (S.D. Fla. Dec. 22, 2014)

Plaintiff filed a purported class action against the producer of cooking oils containing "All Natural" designations on their labels, seeking relief for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), false and misleading advertising, unjust enrichment, and breach of express warranty. The court declined to certify the class holding that, despite plaintiff's satisfaction of the commonality and typicality prerequisites, the putative class was not ascertainable and plaintiff failed to satisfy Rule 23(b)(3)'s predominance inquiry.

Plaintiff commenced an action on behalf of herself and others similarly situated, alleging J.M. Smucker Co. engaged in false, unfair, deceptive and/or misleading trade practices by misrepresenting to



consumers that its Crisco oils were “All Natural,” when they were, in fact, made from genetically modified organisms (GMOs) and processed with chemicals. Plaintiff alleged that because of such misrepresentations, she and others similarly situated, were damaged by overpaying for a nonexistent “All Natural” attribute.

At the class certification stage, Smucker opposed certification on four grounds: (1) the proposed class was not ascertainable under Rule 23(a); (2) plaintiff could satisfy neither the commonality requirement under Rule 23(a)(2), nor the predominance requirement of 23(b)(3); (3) plaintiff could not satisfy the typicality requirement; and (4) plaintiff had not offered a competent damages model to assess damages on a class-wide basis.

As to the first ground, the court held that plaintiff failed to demonstrate that the putative class was ascertainable. The court determined that plaintiff’s objective criteria, “whether an individual purchased a Crisco product containing the alleged misrepresentation ‘All Natural,’” was difficult to ascertain because there were nine different Crisco oils, only four of which contained the challenged statement. Additionally, the challenged statement was not placed uniformly throughout the class period. “Based on these facts, the likelihood that an individual would recall not only which specific kind of oil, but also, when that oil was purchased, complicates identification of the putative class.” The court further reasoned that “taking the aforementioned variations in Crisco products in conjunction with the fact that the challenged product is a low-priced consumer item, of which the normal consumer likely does not retain significant memory about, the likelihood of a potential class member being able to accurately identify themselves as a purchaser of the allegedly deceptive product, is slim.”

As a last resort, plaintiff offered an alternative method for ascertaining the class at issue—through retailer records. The court declined to apply this approach because plaintiff had not demonstrated the administrative feasibility of identifying class membership through this avenue.

The court disagreed with Smucker on the commonality issue, finding that whether the ‘All Natural’ label is deceptive is an issue common to all class members.

In an attempt to satisfy the typicality requirement, plaintiff asserted the existence of a single misrepresentation: Crisco oils are not “All Natural,” despite being labeled as such. Smucker argued that plaintiff’s definition of “natural” was atypical and idiosyncratic. The court disagreed, noting that the Food and Drug Administration has repeatedly declined to adopt a formal rule that would define the term “natural.” In the court’s view, the fact that plaintiff’s definition of “All Natural” may differ from that of other class members was insufficient to defeat the typicality requirement.

On predominance, Smucker argued that the lack of consensus surrounding the definition of “natural” and the fact that the product, cooking oil, is used to cook or bake, rather than consumed directly, made it difficult to determine whether the inclusion of “All Natural” on the label would be deceptive to the reasonable consumer on an objective, non-individualized basis. The court concluded plaintiff had not demonstrated that an objectively reasonable consumer would agree with her interpretation of “All Natural” (especially since the majority of defendant’s products did not bear the challenged labeling during the class period), thus predominant issues succumbed to individualized issues of fact.

Lastly, the court rejected plaintiff’s argument that damages could be calculated through a hedonic regression. The court reasoned that “a plaintiff must actually demonstrate, through evidentiary proof, that class-wide damages are capable of measurement, not simply assert that it is so” and concluded that plaintiff failed to satisfy this requirement.

About Carlton Fields Jordan Burt

Carlton Fields Jordan Burt has represented major manufacturing companies in product liability litigation in state and federal courts nationwide for more than 30 years. Our members have handled hundreds of jury trials, mass actions and class actions on behalf of leading manufacturers that operate in a wide variety of industries, including automotive; tobacco; pharmaceutical and medical device; chemical; sports equipment; aviation; and food, dietary supplement, and personal care products.

The firm's food, beverage, dietary supplement, and personal care products group represents domestic and foreign food, beverage, dietary supplement, and personal care product manufacturers in products liability litigation. We focus on defending class action lawsuits, consumer fraud claims, and personal injury and wrongful death actions allegedly stemming from the use of our clients' products. For example, we have represented: a food manufacturer in the defense of a FDUTPA putative class action arising out of the sale and advertisement of probiotic yogurt and claims that challenged the product's nutritional or health claims; an energy drink manufacturer in class action litigation asserting claims for deceptive and unfair advertising and marketing; and a food manufacturer in a proposed consumer fraud class action regarding the use of the word "natural" in granola bar labeling and advertising.

As a full service law firm, we also provide our food, beverage, dietary supplement, and personal care product industry clients with legal services in matters related to intellectual property, labor and employment, internal investigations, real property, and other areas.

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