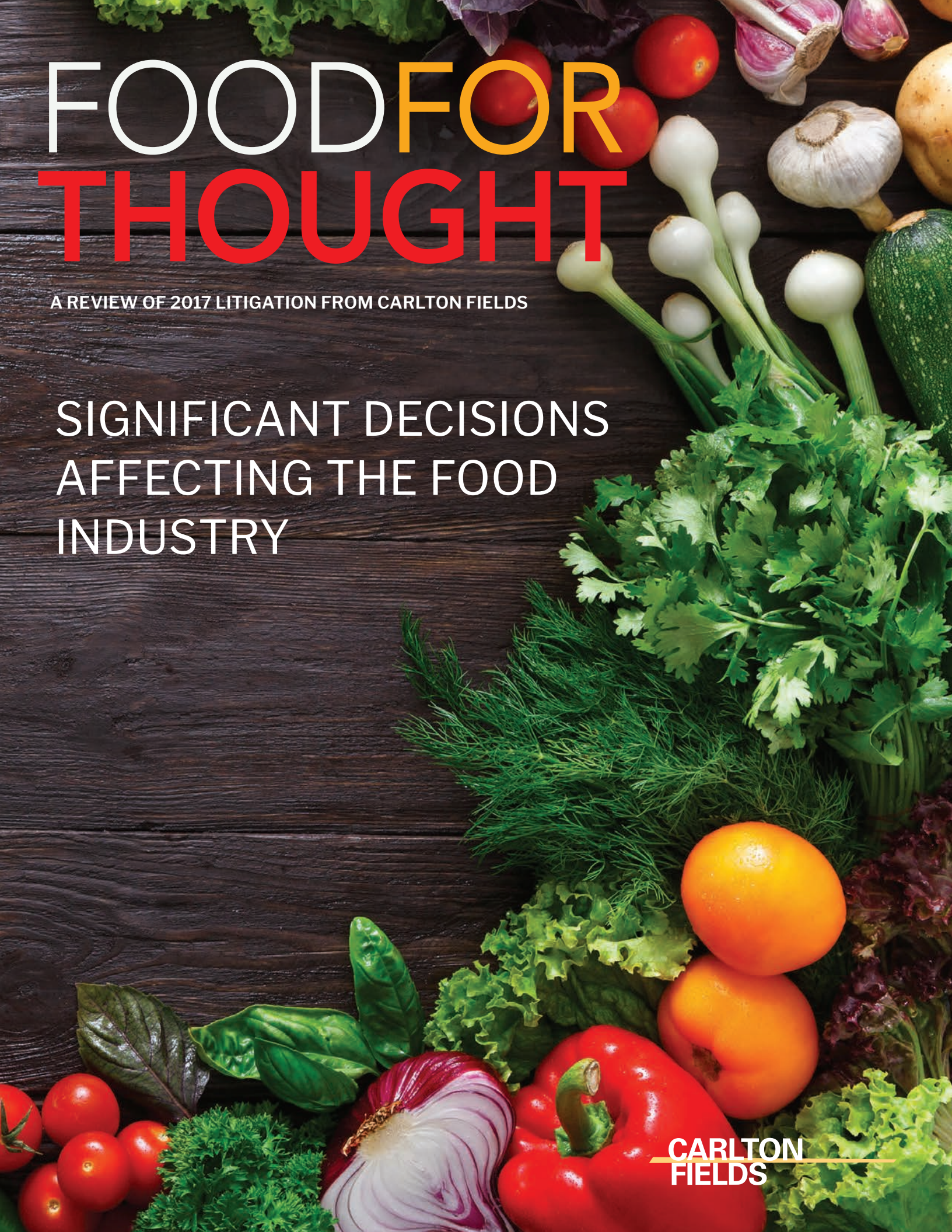

FOOD FOR THOUGHT

A REVIEW OF 2017 LITIGATION FROM CARLTON FIELDS

SIGNIFICANT DECISIONS AFFECTING THE FOOD INDUSTRY

CARLTON FIELDS

FOOD FOR THOUGHT 2017

FOOD FOR THOUGHT is a review of significant court decisions affecting the food, beverage, dietary supplements and personal care products industry. Although many cases in this edition focus on class certification, others relate to motions to dismiss or are otherwise notable. Carlton Fields provides this review on a complimentary basis to clients and friends.

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FOOD, BEVERAGE, DIETARY SUPPLEMENT, AND PERSONAL CARE PRODUCTS GROUP

Companies operating in the food, beverage, and related consumer products industries face increasing and rapidly evolving challenges. Consumers have become more discerning and health-conscious, leading to rising expectations for the goods they purchase, and questions regarding labeling, marketing, and other promotional claims. Against the backdrop of a hyper-competitive market, manufacturers strive to meet this demand for products that are, natural, GMO-free, or organic, and for those that fulfill functional claims. At the same time, the Food and Drug Administration regulates and monitors manufacturers' claims in these industries without strictly defining terms such as "natural," or requiring labels to disclose that food is genetically engineered. As a result, inconsistent state consumer protection laws govern in most cases, many of which are viewed as plaintiff-friendly. All these forces combined have led to an explosion in consumer products liability claims, filed as class action lawsuits in light of the generally low economic damages for any individual consumer.

The Carlton Fields 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 their products. 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 nutritional or health claims of the product; 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.

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Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017).

BY CLIFTON R. GRUHN AND GAIL JANKOWSKI

The Ninth Circuit affirmed certification of putative class actions brought against ConAgra Foods, Inc. (ConAgra) by consumers who claimed that ConAgra's "100% Natural" labels on Wesson cooking oils were false or misleading. The plaintiffs argued that the oils are "not natural" because they are made from bioengineered ingredients, and moved to certify eleven statewide classes of consumers who purchased the oils within the applicable statute of limitations periods. ConAgra opposed class certification on the ground that there was no administratively feasible way to identify members of the proposed classes because consumers could not reliably identify themselves as class members.

The district court rejected ConAgra's argument and held that, at the certification stage, it was sufficient that the class was defined by an objective criterion: whether class members purchased Wesson oil during the class period. The district court therefore certified eleven statewide classes. ConAgra appealed the certification under Rule 23(f).

The crux of ConAgra's argument on appeal was that, in addition to the four requirements of Rule 23(a), plaintiffs must satisfy "a threshold 'ascertainability' prerequisite to certification." In rejecting ConAgra's argument, the Ninth Circuit plainly stated that it has not adopted an "ascertainability" requirement for certification and concluded that, although the parties used the word "ascertainability," they disputed only whether a class proponent must proffer an administratively feasible way to identify class members. Thus, the court addressed only the administrative feasibility issue.

The Ninth Circuit applied a traditional statutory interpretation to Rule 23(a) and, noting that omissions are meaningful, concluded that Rule 23(a)'s list of numerosity, commonality, typicality, and adequacy, was exhaustive and did not include an administrative feasibility requirement. Further, the panel rejected the Third Circuit's position that administrative feasibility is needed to meet the administrative burdens of Rule 23(b)(3) and instead reasoned that the superiority requirement presently achieves that goal. The panel also found unsupported and hypothetical the Third Circuit's position that an administrative feasibility requirement is necessary to protect absent class members and protect against fraudulent claims. The panel instead aligned with the reasoning of the Seventh Circuit – that a standalone administrative feasibility requirement would result in courts considering administrative burdens of class litigation "in a vacuum" and would likely determine the outcome in cases where administrative feasibility is difficult to demonstrate but where no realistic alternative to class treatment exists. Ultimately, the Ninth Circuit stated that it was joining the Sixth, Seventh, and Eighth Circuits in declining to adopt an administrative feasibility requirement under Rule 23.

Pay Attention: A Class Certification Decision You Might Want To Remember

Korolshteyn v. Costco Wholesale Corp., No. 3:15-cv-709-CAB-RBB, 2017 WL 1020391 (S.D. Cal. Mar. 16, 2017).

BY JOSEPH H. LANG, JR. AND D. MATTHEW ALLEN

On March 16, 2017, the Southern District of California certified a class action against the manufacturer of gingko biloba and Costco Wholesale Corporation, the seller.

Plaintiff alleged, on behalf of a putative class of California purchasers of TruNature Gingko, that the product does not provide any mental clarity, memory, or mental alertness benefits. Plaintiff's claims were brought under California's unfair competition law and California's Consumer Legal Remedies Act.

The district court determined that plaintiff's proposed class action satisfied all of the requirements for certification. This was so, in large measure, because plaintiff set the bar for herself to prove that the product was in fact worthless: "According to Plaintiff, anyone who purchased TruNature Gingko suffered the same harm because they would not have purchased TruNature Gingko but for these false statements and as a result paid money for a worthless product." That is, "Plaintiff's entire lawsuit rides on her claim that TruNature Gingko provides no benefits and that the statements on the product labels are false. The answer to these questions will be the same for the entire class. Likewise, the determination of whether the statements on the label are material and likely to deceive a reasonable consumer will be the same for the entire class."

Specifically, plaintiff argued that "TruNature Gingko has no value whatsoever and that any perceived benefits by consumers are merely the result of a placebo effect." The district court concluded that, "[i]f Plaintiff can prove that TruNature Gingko does not have any impact on brain health or memory and therefore does not perform as advertised on the labels and is worthless, the putative class will be entitled to restitution of the full amount they paid for the product."

In reaching its conclusion, the district court distinguished cases where the products at issue "could provide some value to their purchasers even if they did not perform as advertised and for which it strains credulity to argue that no consumers would have purchased them if not for the allegedly false statement." Thus, the crux of plaintiff's allegations is that TruNature Gingko provides zero benefit and is completely worthless.

Nationwide Class Claims Under A Single State's Consumer Protection Laws?

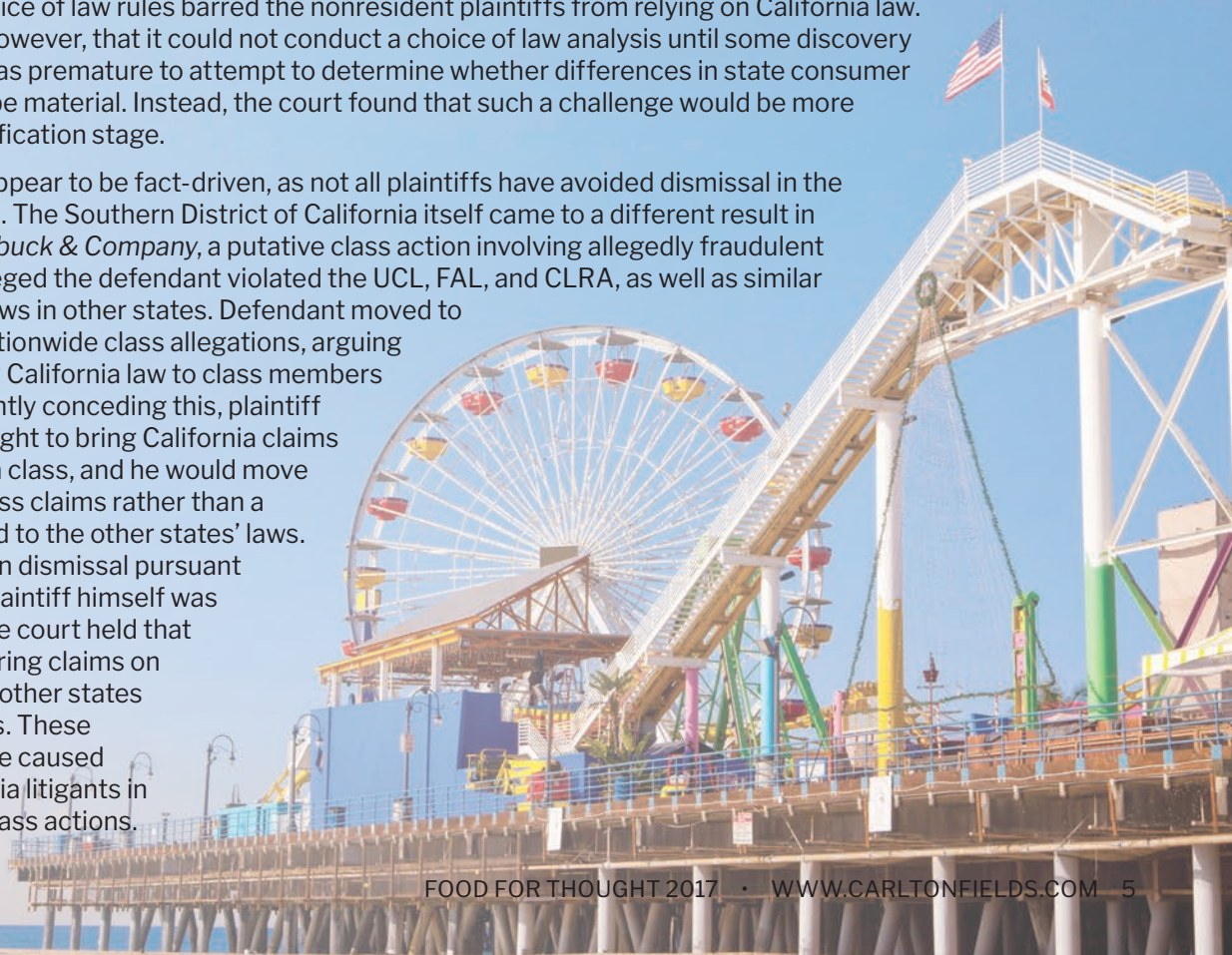
Azar v. Gateway Genomics, LLC, No. 15-cv-02945 AJB (WVG) (S.D. Cal. April 25, 2017).
Gerstle v. American Honda Motor Company, No. 16-cv-04384 (N.D. Cal. April 25, 2017).
Azimpour v. Sears, Roebuck & Company, No. 15-cv-02798 (S.D. Cal. April 26, 2017).

BY CHRISTINE A. STODDARD AND KRISTIN ANN SHEPARD

A flurry of recent consumer protection cases in California federal courts led to mixed results for defendants attempting to dismiss nationwide class claims based on the state's choice of law rules. The U.S. District Court for the Southern District of California recently addressed the issue in *Azar v. Gateway Genomics, LLC*, in which plaintiff brought a putative nationwide class action alleging, *inter alia*, violations of California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) in connection with the purchase of an early detection gender test. The defendant moved to dismiss the nationwide claims, relying on *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) and arguing the claims should be governed by the consumer protection statutes of the relevant jurisdictions. In *Mazza*, the Ninth Circuit vacated a class certification order after finding California's consumer protection statutes could not be applied to members of a nationwide class who made purchases in jurisdictions with materially different laws. The Southern District acknowledged that California federal courts have disagreed about whether to apply *Mazza* at the pleading stage, but ultimately determined that it would defer addressing the choice of law issue until class certification. The court emphasized that the plaintiff was herself a California resident who allegedly made a purchase and suffered an injury in the state, and the court was not yet able to determine whether California's choice of law rules would bar all or any of plaintiff's claims.

The Northern District of California came to a similar conclusion in *Gerstle v. American Honda Motor Company*, in which plaintiffs filed a putative class action that also alleged violations of state consumer protection statutes, this time related to allegedly defective vehicle Bluetooth systems. Defendant also relied on *Mazza* in moving to dismiss, arguing California's choice of law rules barred the nonresident plaintiffs from relying on California law. The court concluded, however, that it could not conduct a choice of law analysis until some discovery had taken place, as it was premature to attempt to determine whether differences in state consumer protection laws would be material. Instead, the court found that such a challenge would be more appropriate at the certification stage.

The results, however, appear to be fact-driven, as not all plaintiffs have avoided dismissal in the face of such challenges. The Southern District of California itself came to a different result in *Azimpour v. Sears, Roebuck & Company*, a putative class action involving allegedly fraudulent sale prices. Plaintiff alleged the defendant violated the UCL, FAL, and CLRA, as well as similar consumer protection laws in other states. Defendant moved to dismiss or strike the nationwide class allegations, arguing plaintiff could not apply California law to class members in other states. Apparently conceding this, plaintiff argued that he only sought to bring California claims on behalf of a California class, and he would move to certify multistate class claims rather than a nationwide class related to the other states' laws. However, this resulted in dismissal pursuant to Article III; because plaintiff himself was a California resident, the court held that he lacked standing to bring claims on behalf of consumers in other states based on other statutes. These differing outcomes have caused uncertainty for California litigants in consumer protection class actions.



A Damages Class Is Certified, But No Standing for Declaratory and Injunctive Class

Langan v. Johnson & Johnson Consumer Companies, Inc., No. 3:13-CV-1470 (JAM), 2017 WL 985640 (D. Conn. Mar. 13, 2017).

BY DAVID L. LUCK AND D. MATTHEW ALLEN

A representative plaintiff who purchased Aveeno sunscreen products and baby bath products brought putative class actions against the products' manufacturer, Johnson & Johnson, in the United State District Court for the District of Connecticut. Both of plaintiff's asserted classes challenged Aveeno's product labeling under the Connecticut Unfair Trade Practices Act (CUTPA) and the similar consumer protection laws of several other states and the District of Columbia.

As to the sunscreen products, the plaintiff challenged Aveeno's statements that they contained "100% naturally sourced sunscreen ingredients" and provided "natural protection." As to the baby bath products, the plaintiff challenged Aveeno's statements that they consisted of a "natural oat formula."

The plaintiff sought to certify a Rule 23(b)(2) class for declaratory and injunctive relief regarding the sunscreen products. However, the district court denied certification, holding that the plaintiff lacked Article III standing because she was now aware of the defendant's allegedly deceptive advertising/marketing claims, would no longer be deceived by them, and had testified in her deposition that she did not intend to buy the products again.

As the district court explained, "[i]f a plaintiff seeks prospective injunctive relief, then she must show that she is 'likely to suffer future injury' from the challenged conduct." Because this plaintiff would suffer no future injury because of the defendant's allegedly deceptive advertising/marketing, "an injunction requiring defendant to remove any misleading claim from the products would be of no benefit to plaintiff personally." The representative plaintiff must personally have standing, if she does not, the class fails. For this reason, the district court denied certification regarding the plaintiff's proposed Rule 23(b)(2) class concerning Aveeno's sunscreen products.

In the process, though, the court recognized that some other federal district courts had reached a different standing conclusion on similar facts, reasoning that precluding a plaintiff from suing for injunctive relief after the plaintiff has become aware of the allegedly misleading advertising would defeat the purpose of state consumer protection statutes that authorize such plaintiffs to pursue injunctive relief. In response to those contrary decisions, the *Langan* court reasoned that "[r]egardless of the salutary purpose of consumer protection statutes, they cannot alter the bedrock requirements for federal constitutional standing." Further, in federal court, the objectives of those laws may still be vindicated, in proper cases, through actions seeking money damages.

Regarding the plaintiff's challenge to the "natural oat formula" baby bath product labeling, she sought certification of a Rule 23(b)(3) class for money damages. The district court agreed that certification was proper as to this proposed class, which sought to proceed under the similar consumer protection laws of Connecticut and 17 other U.S. jurisdictions.

First, there was no real dispute as to numerosity. The proposed class clearly involved millions of dollars and thousands of customers.

Second, Rule 23(a)'s commonality requirement was met because the class members suffered the same alleged injury from violations of the same, or substantially similar, consumer protection laws. Per the district court, the "natural oat formula" labeling claim was "indisputably made to the whole class," and the plaintiff's experts – whom the court refused to exclude on *Daubert*/F.R.E. 702 grounds – provided evidence that the "natural oat formula" advertising claim was material to reasonable consumers and led them to pay a price premium. The typicality requirement was satisfied for the same reasons.

Adequacy was also satisfied despite the representative plaintiff's preexisting friendship with one of her legal counsel. The district court recognized that this type of non-intimate, non-financial acquaintance between the representative plaintiff and one of her lawyers did not create a fundamental conflict between her and the other class members. Further, the representative plaintiff's general knowledge of the suit and review of the operative complaint before filing were sufficient to apprise her of the action.

Rule 23(b)(3)'s predominance and superiority requirements were also satisfied. As to predominance, the class members' claims were subject to generalized proof regarding the reasonably perceived nature of the defendant's advertising claims; the defendant's own internal documents recognized the significance of this labeling/advertising and the fact that consumers were willing to pay a premium for "natural" products; and the consumer-protection laws of the relevant jurisdictions were substantially similar.

As to superiority, a class action was the best means of resolving this dispute because "the relatively modest damages that might be recovered by any single consumer would likely make the cost of individual litigation prohibitive."

Finally, the district court rejected an "ascertainability" argument asserted by the defendant. According to the court, it was administratively feasible to identify the class members through affidavits of purchase.

Objectively Non-Flushable? The Northern District of California Certifies Consumer Class Regarding Charmin Freshmates

Pettit v. Proctor & Gamble Co., No. 15-CV-02150-RS, 2017 WL 3310692 (N.D. Cal. Aug. 3, 2017).

BY D. MATTHEW ALLEN AND DAVID L. LUCK

Using the familiar "reasonable consumer standard" that applies in many jurisdictions regarding allegedly deceptive sales practices, a judge of the Northern District of California recently certified a class action of California consumers who purchased Charmin/Proctor & Gamble's "Freshmates" brand of "flushable" bathroom wet-wipes between April 6, 2011, and August 3, 2017.

The class claims centered on the allegation that Freshmates were not "flushable" as advertised because they were not compatible with municipal sewers and wastewater systems and did not properly degrade in the environment. On that basis, the class alleged violations of California's Unfair Competition Law, Legal Remedies Act, and False Advertising Law, as well as common-law claims for negligent misrepresentation, fraud, deceit, and/or misrepresentation.

The defendant resisted certification on the overarching basis that the class could not establish a uniform understanding of "flushable" across its membership. This assertion supported the defendant's arguments that the commonality, typicality, adequacy, predominance, and superiority certification elements were lacking.

However, the district court rejected the significance of that contention because the "reasonable consumer" standard is objective (not subjective) and, thus, does not require the representative plaintiff to prove a uniform definition of "flushable" across the class membership. Instead, it was sufficient that the plaintiff offered a consumer survey and other evidence that gave "rise to a probability that a significant portion of the relevant consumers acting reasonably could be misled" by the product's advertisement as "flushable," even if all of them did not share the same understanding of the adjective "flushable."

The court also rejected arguments about the fact that the class included purchasers of different versions of the Freshmates product. According to the court, all that mattered was that the plaintiff presented evidence that all of these versions – regardless of composition – were purportedly similar in that they were not "flushable" as advertised.

Another notable aspect of this decision was that the defendant made a lack-of-ascertainability argument to preserve that point for later appellate proceedings. It did so because the Ninth Circuit – unlike several other circuits – "does not require a class proponent [to] proffer an administratively feasible way to identify class members" as part of a Rule 23 certification analysis. Perhaps Proctor & Gamble intends to alter that Ninth Circuit precedent through an *en banc* request or, eventually, through a *certiorari* petition to the United States Supreme Court.

Finally, the district court clarified that injunctive relief remained an available remedy despite the representative plaintiff's testimony that she would never again purchase defendant's product. Per the court, that testimony did not deprive the plaintiff of standing to pursue the injunction against the product's "flushable" labeling because she nevertheless "has a cognizable interest in a market where prices are not distorted by any misrepresentations.

Ninth Circuit Tolls Rule 23(f) Deadline, Revives Aphrodisiac Class Action

Troy Lambert v. Nutraceutical Corp., 870 F.3d 1170 (9th Cir. 2017)

BY PAUL G. WILLIAMS, KRISTIN ANN SHEPARD AND ADRIANA PEREZ

Within 10 days after the district court decertified a Rule 23(b)(3) aphrodisiac dietary supplement class for failure to show a class wide method for calculating damages, plaintiff orally advised the court of his intention to seek reconsideration. The district court then set a 10-day deadline for filing a motion for reconsideration — in other words, 20 days after the decertification order. Plaintiff complied with the court's schedule. The district court denied the motion for reconsideration, and plaintiff filed a Rule 23(f) petition within 14 days of the order denying reconsideration.

In a matter of first impression, the Ninth Circuit held that the Rule 23(f) deadline — which allows a litigant to seek an interlocutory appeal of a district court's order granting or denying class certification within 14 days after the order is entered — is procedural, not jurisdictional. Thus, the deadline can be tolled as a result of additional equitable circumstances to allow a good faith litigant to have her day in court. In doing so, the Ninth Circuit split from other circuits that strictly construe the language of Rule 23(f). In finding that the motion for reconsideration equitably tolled the 14-day Rule 23(f) deadline, the court reasoned that the plaintiff acted in good faith in following the district court's order regarding timing of the motion for reconsideration, and that motions for reconsideration also cause delay yet are frequently given the benefit of equitable tolling; the court further noted that Rule 23(f) review of certification decisions may in fact increase the level of certainty for litigants by providing appellate guidance on the certification issue prior to trial.

Second, the Ninth Circuit panel reversed the decertification order for abuse of discretion, holding that as long as a method for calculating damages has been proposed, uncertainty regarding the amount of damages does not prevent class certification. Because plaintiff proposed that class damages be calculated by multiplying the average retail price by the number of units sold, his failure to provide evidence of the average retail price was not fatal to certification.

How Sweet it Is…for Plaintiff Bringing Class Action Against Baby Food Manufacturer

Bruton v. Gerber Products Company, 703 Fed. Appx. 468 (9th Cir. 2017)

BY ANGELA T. PUENTES-LEON

The Ninth Circuit Court of Appeals reversed and remanded a lower court's order denying class certification and granting defendant, Gerber Foods Company's motion for partial summary judgment. Plaintiff Natalia Bruton sued defendant on behalf of herself and other Californians based on alleged violations of California's Unfair Competition Law (UCL), False Advertising Law (FAL), Consumers Legal Remedies Act (CLRA), Song-Beverly Consumer Warranty Act, and Magnuson-Moss Warranty Act (MMWA). Plaintiff alleged that defendant violated federal and state law by making false and misleading claims on food labels, specifically, that certain baby food products included claims about sugar and nutrient content that were not permitted under Food and Drug Administration regulations incorporated into California law.

In April 2017, the Ninth Circuit issued an unpublished opinion reversing and remanding several of the district court's decisions. But, at defendant's request, the Ninth Circuit granted rehearing and withdrew its previous decision on the matter, including the partial dissent filed with it, and issued the new decision in July 2017 reversing the lower court's decision and remanding the case accordingly.

The Ninth Circuit held that the district court erred in dismissing plaintiff's claim for unjust enrichment. However, it noted that, at the time of the district court's decision, California's case law was uncertain and inconsistent as to whether unjust enrichment could be a standalone cause of action. However, since the district court's decision the California Supreme Court clarified the law and allowed independent claims for unjust enrichment to proceed. In light of the clarification, the Ninth Circuit reversed the district court's dismissal and remanded for consideration of whether there were other grounds on which plaintiff failed to state a cause of action for unjust enrichment.

Similarly, the Ninth Circuit also noted that the district court's decision that the class could not be certified because it was not "ascertainable" was issued prior to the Ninth Circuit's decision in *Briseno v. ConAgra Foods, Inc.*, 844 F. 3d 1121 (9th Cir. 2017). In *Briseno*, the court held there was no separate "administrative feasibility" requirement for class certification. *Id.* at 1123. As a result, the district court's decision denying class certification on those grounds was in error. The Ninth Circuit reversed the district court's decision on class certification and remanded for further consideration of whether class certification was appropriate.

Next, The Ninth Circuit affirmed summary judgment in favor of defendant on plaintiffs' claims that the labels were deceptive and in violation of the UCL, FAL, and CLRA. The court held that the labels in the record, which included defendant's labels and defendant's competitors' labels, did not support plaintiffs theory. Specifically, the court found that the competitors' labels made the same illegal claims as defendant's labels and that, as a result, a reasonable jury could not conclude that defendants' labels were likely to deceive members of the public that defendant's produces were better than those of its competitors. Furthermore, plaintiff's use of the FDA warning letters did not indicate that defendants' competitors' labels complied with the FDA requirements and, as a result, did not support plaintiff' theory of deception. As a result, the Ninth Circuit found no issue of material fact for trial and affirmed the district court's summary judgment on that issue.

Finally, the Ninth Circuit held that the district court erred in granting summary judgment to defendant on plaintiff's claims that the labels were unlawful under the UCL. The UCL's unlawful prong "borrows" predicate legal violations and treats them as independently actionable under the UCL. The UCL's unlawful prong, in turn requires the reasonable consumer test only when it is an element of the predicate violation. In this case, the predicate violation was California's Sherman Law, which incorporates the standards set by FDA regulations. And, because the court found that the FDA regulations do not include a requirement that the public be likely to experience deception, it reversed the district court's grant of summary judgment on plaintiff's claims that the labels violated the UCL.

Claim Dismissed Against Brand for Deceptive Label, but Retailer May Still Pay

Eidelman v. Sun Prod. Corp., No. 16-cv-3914 (NSR) (S.D.N.Y. September, 25, 2017).

BY ADRIANA A. PEREZ

A negligent misrepresentation claim against laundry detergent brand The Sun Products Corp., for an allegedly deceptive label was dismissed by a New York federal district judge, while an unjust enrichment claim against retailer Costco Wholesale Corp., was allowed to proceed. Plaintiff asserted that a Sun Products laundry detergent label stating, "from the #1 Detergent Brand Recommended by Dermatologists for Sensitive Skin," was deceptive because it touted a dermatological recommendation without clarifying which detergents within the brand were actually recommended. Plaintiff asserted claims of negligent misrepresentation, unjust enrichment, and injunctive relief. The district court granted defendants' motion to dismiss in part, dismissing the claim of negligent misrepresentation without prejudice and dismissing the claim for injunctive relief with prejudice. The court allowed the claim for unjust enrichment to proceed.

The court dismissed the claim of negligent misrepresentation because the plaintiff did not establish a special relationship between himself and Sun Products that would warrant such a claim. A special relationship exists if the party making the representation held or appeared to hold a unique or special expertise, if there was trust or confidence between the parties, or if the speaker was aware of the use to which the information would be put and supplied it for that purpose. Further, there is a rebuttable presumption that an advertisement is generally insufficient to establish such a relationship.

Plaintiffs argued that a special relationship existed between it and Sun Products because Sun Products' website claimed there was "clinical proof" of the benefits of its detergent and the label on the detergent indicates "it is from the '#1' brand recommended by dermatologists for sensitive skin." However, the court could not find that the volume or content of Sun Products' representations plausibly alleged a special relationship, and thus, the plaintiff's negligent misrepresentation claim could not overcome the presumption that advertisements are generally insufficient to establish a special relationship.

Plaintiff also alleged that Costco was unjustly enriched because plaintiff paid an inflated price for the detergent, which was exclusively sold at Costco, due to Sun Products' deceptive and misleading label. Costco argued it could not be held liable under a cause of action for consumer deception absent allegations that it participated in the misleading activities. The court disagreed with Costco because plaintiff's unjust enrichment claim was only for the premium plaintiff was purportedly induced to pay by the deceptive label. The court held because plaintiff alleged a separate claim of unjust enrichment against Costco as the recipient of the premium paid for the possibly mislabeled detergent, the plaintiff plausibly alleged a claim for unjust enrichment.

The court dismissed plaintiffs' claim for injunctive relief on two grounds. First, plaintiff did not respond to defendant's argument and therefore it was deemed abandoned. Second, the court noted that an injunction is a remedy and not a cause of action.

Liability-Only Class Certification Denied for Claims That "No Sugar Added" Juice Labels Misled Consumers Into Thinking the Juice Had Fewer Calories

Rahman v. Mott's LLP, 693 Fed. Appx. 578 (9th Cir. 2017)

BY OLGA SUAREZ VIEIRA

Plaintiff's putative class action alleged that defendant Mott's violated FDA regulations and California's Sherman Law and Unfair Competition Law when it labeled and sold its 100 percent apple juice with the label "No Sugar Added," which plaintiff claimed misled consumers into thinking the juice had fewer calories than its competitors. For some reason, Plaintiff sought issue-specific class certification on liability only pursuant to Rule 23(c)(4). The district court denied plaintiff's motion for class certification after allowing plaintiff to provide supplemental briefing on how the claims would proceed if liability was determined on a class-wide basis. The circuit court affirmed.

In his motion for class certification, plaintiff claimed he could satisfy the requirements for an injunction class under Rule 23(b)(2) or a damages class under Rule 23(b)(3). Instead, and apparently without sufficient justification, plaintiff sought certification under Rule 23(c)(4) which provides that a class may be brought with respect to particular issues "when appropriate." The court held that "[c]ertification of an issues class under Rule 23(c)(4) is 'appropriate' only if it 'materially advances the disposition of the litigation as a whole.'"

Unconvinced that issues-only certification on liability would materially advance the disposition of the entire case based on the initial brief, the district court provided plaintiff with an opportunity to submit supplemental briefing. The court asked plaintiff to specify how damages would be resolved after liability under his proposed certification plan. Upon review of the supplemental briefing, the court found plaintiff failed to articulate sufficient grounds for proceeding with certification on liability only. Accordingly, the court denied certification of the purported class, noting "a district court is not bound to certify a liability class merely because it is permissible to do so."

The circuit court affirmed the district court's denial of class certification, finding there was no abuse of discretion in denying the motion.

Ninth Circuit Says Plaintiff Might Get Fooled Again

Davidson V. Kimberly-Clark Corporation, 873 F.3d 1103 (9th Cir. 2017)

BY MARK A. NEUBAUER AND JASON R. BROST

Last week the Ninth Circuit reopened a key avenue in consumer false advertising class actions – injunctive relief. A growing number of trial courts had dismissed those claims, reasoning that plaintiffs who know of the alleged fraud aren't at risk of being fooled again. No more. In *Davidson v. Kimberly-Clark Corporation*, the Ninth Circuit held that a plaintiff who alleges that so-called "flushable wipes" are not actually flushable has standing to sue the seller of these wipes for injunctive relief, despite the fact that the allegations in the complaint make it clear that she no longer believes the product's labels.

The plaintiff asserted claims under California's Unlawful Competition Law (UCL) and False Advertising Law (FAL). While the Ninth Circuit rejected all of the reasons the trial court used to dismiss the complaint, its most striking finding deals with the plaintiff's standing to seek injunctive relief. Injunctive relief can be costly to a defendant — not because it has to pay money to the plaintiff, but because it has to change its advertising and marketing, with literally millions upon millions of products caught in the stream of commerce and subject to either recall and repackaging or destruction. Early elimination of the injunctive claim takes that leverage away from plaintiffs so defendants often moved to dismiss the injunctive claims on standing grounds.

Numerous district courts have found that similar plaintiffs lack standing to seek injunctive relief because, as one district court put it, "plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and, therefore, are not capable of being harmed again in the same way." The Ninth Circuit rejected this basic argument, finding that there was "an actual and imminent, not conjectural or hypothetical threat of future harm" to the plaintiff, and holding that "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." It was sufficient, the court found, that the plaintiff alleged that she still wants to buy such products if they are actually flushable, but that, if she were to see this representation on the defendants' products in the future, she "could not rely on that representation with any confidence." According to the court, this was enough of a threatened injury to establish standing. The court also opined that, if it found that this plaintiff lacked standing, no plaintiff asserting similar false advertising claims could get injunctive relief in federal court, despite the fact that the UCL specifically provides for such relief, thus gutting that statute.

Injunctive relief is also important in these class actions as an individual plaintiff can win the injunction even without class certification; while the large damage awards only come into play if the class is actually certified by the court. This new ruling thus eliminates one method of limiting the risk of these consumer class actions in the Ninth Circuit and plaintiffs are sure to cite this new ruling in false advertising cases in federal courts across the country. Whether other circuits will follow the Ninth Circuit's lead remains to be seen.

Summary Judgment Affirmed in False 'GMO' Advertising Class Action Against Chipotle

Reilly v. Chipotle Mexican Grill, Inc., 711 Fed. Appx. 525 (11th Cir. 2017)

BY ANGELA T. PUENTES-LEON

The Eleventh Circuit Court of Appeals affirmed the district court's summary judgment in favor of defendant, Chipotle Mexican Grill, Inc. Plaintiff Leslie Reilly sued defendant on behalf of herself and other Floridians, based on alleged violations of Florida's Deceptive and Unfair Trade Practice Act (FDUTPA) and allegations of unjust enrichment. Specifically, plaintiff alleged that Chipotle falsely advertised that it had eliminated genetically modified (GMO) ingredients from its menu, despite using meat from animals that were given GMO feed and dairy products from farms that give their animals GMO feed. Plaintiff further alleged consumers paid a premium for products that were not non-GMO.

The district court initially granted in part and denied in part defendant's motion to dismiss. The district court held that plaintiff had not failed to allege a threat of real or immediate injury to give her standing to pursue injunctive relief under FDUTPA. The district court allowed the plaintiff to proceed on her claims for monetary relief under FDUTPA, and for unjust enrichment.

However, Chipotle succeeded when it moved for summary judgment on the ground that plaintiff lacked standing to sue for violations of FDUTPA and for unjust enrichment. The district court entered summary judgment against plaintiff's claim of unjust enrichment, but the plaintiff did not contest that ruling on appeal and the district court deemed it abandoned. However, the plaintiff did appeal the district court's summary judgment in favor of defendant on the FDUTPA claims and, similarly appealed the district court's dismissal of plaintiff's motion to stay a ruling on the motion for summary judgment.

The Eleventh Circuit held, to prevail under FDUTPA, plaintiff had to prove the existence of a deceptive act or unfair practice, causation, and actual damages. And, that to prove actual damages, she had to establish that there was a difference between the value of the product she received and the value of the product she should have received. In this case, the evidence (in the form of bank records and testimony of the plaintiff herself) showed that she had suffered no actual loss. And, because FDUTPA does not provide for recover of speculative losses, the plaintiff could not succeed on her claim. As a result, the Eleventh Circuit declined to address plaintiff's argument that she was deceived by the advertising because proof of actual damages is necessary to sustain the FDUTPA claim. An absence of this element of the claim entitled defendant to summary judgment.

Finally, the court held that the district court did not abuse its discretion when it entered summary judgment in favor of the defendant before ruling on plaintiff's motion to stay. The court held that the lower court was not required to stay the ruling on the motion for summary judgment when the plaintiff had not provided good reasons to justify her request. Although the nonmovant in a summary judgment may request a continuance to take discovery pursuant to Rule 56(d), the rule requires that the nonmovant "show by affidavit or declaration that that, for specified reasons, she cannot present facts essential to justify its opposition to summary judgment." In this case, plaintiff merely asserted that discovery could lead to supplemental briefing and could be used in opposition to summary judgment, but she did not file any affidavits or declarations explaining why she waited three months after filing her opposition to the summary judgment to file the motion to stay.

Which Comes First Standing or Class Certification? Northern District of Illinois Weighs In

Muir v. Nature's Bounty, Inc., Case No. 15-9835 (N.D. Ill. Sept. 28, 2017)

BY THADDEUS EWALD

The Northern District of Illinois recently waded into the conflict between standing and class certification when it held that a putative class representative must demonstrate standing to assert each claim before the motion for class certification. In the case, plaintiff Michael Muir filed a putative class action against herbal supplement manufacturer Nature's Bounty for claims related to an alleged misrepresentation regarding an ingredient's prevalence in the supplement. Muir proposed three distinct classes: (1) a nationwide class of every consumer who had purchased the supplement within the last four years; (2) purchasers in states with similar consumer fraud statutes allegedly violated by the misrepresentation; and (3) Illinois purchasers of the supplement. The court dismissed the proposed nationwide and multi-state consumer classes.

The court dismissed the nationwide class claims because Muir could not maintain a nationwide class applying the law of Illinois. As a federal court sitting in Illinois, the court applied Illinois choice of law rules, which are based on a "most significant relationship" test. In consumer fraud actions, where a plaintiff purchases a product in his home state based on representations he received in his home state, the test directs application of the home state's substantive law. Here, that test required application of the law of the state where the consumer purchased the herbal supplement because the "representation" that the supplement contains a certain percentage of an ingredient occurs on the bottle, which was located in the state where the consumer purchased the supplement. The court also ruled that a potential conflict existed among the various states' substantive laws on unjust enrichment claims because some states required a "direct benefit" to the defendant from a plaintiff's purchase.

Next, the court dismissed the multi-state consumer class because Muir lacked standing to assert claims pursuant to non-Illinois state consumer fraud laws. The court acknowledged that other Northern District of Illinois judges have split on the question of whether a named plaintiff must demonstrate his or her own standing under various states' laws identified in a complaint, or whether the unnamed class members' standing suffices. It analyzed Supreme Court precedent in *Amchem* and *Ortiz*, as well as Seventh Circuit precedent in *Payton v. County of Kane*, before reaching this conclusion. It read *Amchem* and *Ortiz* as consistent with the "ordinary primacy of the standing question" and the "general rule that a plaintiff must establish her own standing." And while *Payton* lends some support to the argument that standing questions may be delayed until class certification, the court distinguished that case on its facts. Whereas in *Payton* the named plaintiffs had the very same claims as unnamed class members and sued pursuant to the same state statute, Muir's individual claim under the Illinois Consumer Fraud Act was different from those unnamed class members' claims under their respective state consumer fraud laws. Because Muir could not demonstrate standing under the non-Illinois state consumer fraud laws, the court dismissed the multi-state class claims without prejudice.

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