

Food for Thought: Brazil v. Dole Packaged Foods, LLC

February 23, 2015

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

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). *Read more significant court decisions affecting the food industry in [Food for Thought: 2014 Litigation Annual Review](#).*

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