CARLTON FIELDS

Food for Thought: 2015 Litigation Annual Review

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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 summary judgment.

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Florida District Court Rejects Motion to Strike But Allows Pre-Certification Standing Challenge in Snack Food Labeling Case

Bohlke v. Shearer's Foods, LLC, No. 9:14-CV-80727, 2015 WL 249418 (S.D. Fla. Jan. 20, 2015)

Before class certification hearings occur in the Southern District of Florida, defendants may not challenge plaintiff's class allegations via Rule 12(f) motions to strike but may challenge plaintiff's standing via motions to dismiss.

Sweet Ending for Plaintiffs in Food Labeling Class Action Against Ghirardelli

Miller v. Ghirardelli Chocolate Co., No. 12-cv-04936-LB, 2015 WL 758094 (N.D. Cal. Feb 20, 2015)

A California district court certified a Rule 23(b)(3) food labeling class action against chocolatier Ghirardelli and approved a proposed settlement. The genesis of plaintiffs' claim is that defendant mislabeled its "White Chips" and other products in a way that would mislead consumers into believing that the products contained white chocolate. Plaintiffs also asserted a claim that the "all natural" label was improper because the products contained "genetically modified, hormone-treated . . . or chemically extracted ingredients." As part of the settlement, Ghirardelli agreed to pay $5.25 million into a common fund and agreed to effect certain labeling changes to all products at issue for a period of three years. The named plaintiffs would each receive a $5,000 incentive payment. Other class members would receive between $0.75 and $1.50 depending on the products purchased. Class counsel would receive over $1.5 million in attorney's fees and approximately $87,000 in costs.

Partial Class Certification of "100% Natural" Cooking Oil Consolidated Action Affects 11 States

In re ConAgra Foods, 99 F.Supp. 3d 919 (C.D. Cal. Feb. 23, 2015)

In a consolidated case alleging deceptive and misleading labeling of cooking oil as "100% Natural" although it was made from genetically-modified organisms, the Central District of California granted in part and denied in part plaintiffs' amended motion for class certification. The court denied plaintiffs' motion to certify an injunctive relief class for failure to show Article III standing. Plaintiffs' motion to certify damages classes was granted as to classes for California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, and Texas.

California Court Grants Summary Judgment in Class Action Aimed at 100 Percent Juice & "No Sugar Added" Labels
Major v. Ocean Spray Cranberries, Inc., No. 5:12-CV-03067, 2015 WL 859491 (N.D. Cal. Feb. 26, 2015)

Plaintiff filed a putative class action alleging that Ocean Spray Cranberries, Inc.'s 100 percent juice and "No Sugar Added" products were improperly labeled, which amounted to misbranding and deception, in violation of both California and federal law. Plaintiff sought to certify a statewide class action, appointing herself as the representative. Ocean Spray moved for partial summary judgment. The Northern District of California granted Ocean Spray's motion for partial summary judgment and thereafter denied plaintiff's motion for class certification as moot.

Florida District Court Denies Class Certification Based on Failure to Show Ascertainability
Mirabella v. Vital Pharmaceuticals, Inc., No. 12-62086-CIV-Zloch, 2015 WL 1812806 (S.D. Fla. Feb. 27, 2015)

In *Mirabella,* consumers sued the manufacturer of Redline Xtreme Energy Drink, alleging that the manufacturer concealed the dangerous side effects of the energy drink. Plaintiffs requested relief for (1) violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA); (2) unjust enrichment; (3) breach of implied warranty of merchantability; and (4) violations of the Magnuson-Moss Warranty Act. Plaintiffs sought to certify a nationwide class action on behalf of all U.S. citizens who purchased Redline Xtreme since October 2008. The Southern District of Florida denied class certification because the proposed class was not clearly ascertainable given the product's low price (consumers would not keep receipts), the number of substantially similar products (consumers could not reliably declare class membership), and defendant did not have records identifying individual consumers.

Ninth Circuit Holds Cosmetic Labeling Claims Not Preempted by FDCA, Primary Jurisdiction Appropriately Invoked
Astiana v. The Hain Celestial Group, Inc., 783 F.3d 753, (9th Cir. April 10, 2015)

In April 2015, the Ninth Circuit held in a cosmetic labeling class action that the Food, Drug, and Cosmetic Act (FDCA) did not expressly preempt state causes of action predicated on federal

cosmetics labeling laws and that the primary jurisdiction doctrine was appropriately invoked by the district court. In *Astiana v. Hain Celestial* Group, *et al.*, a group of consumers brought a putative nationwide class action against cosmetic products manufacturers Hain Celestial Group and JASON Natural Products (Hain) alleging that the manufacturers' use of the word "natural" on its products was false and misleading. Hain moved to dismiss plaintiffs' state law claims asserting that they are preempted by the FDCA. Alternatively, Hain argued that the action should be stayed or dismissed under the primary jurisdiction doctrine. The Northern District granted the motion to dismiss and plaintiffs appealed. Judge McKeown wrote for the Ninth Circuit.

Jail Sentences Send Strong Message to Food Industry
United States of America v. Quality Eggs, LLC, et al., 99 F.Supp. 3d 920 (D. Iowa Apr. 14, 2015)

In April 2015, U.S. District Court Judge Mark Bennett in Sioux City, Iowa, sentenced Austin (Jack) DeCoster and his son Peter to three months in jail for their role in selling contaminated food across state lines. Their company, Quality Egg LLC, was sentenced to a $6.8 million fine and placed on probation for three years.

All About That Base: Claim Against Fat Loss Supplement Maker Fails For Lack of Ascertainability
Karhu v. Vital Pharmaceuticals, Inc., 621 Fed. App'x. 945 (11th Cir. June 9, 2015)

Adam Karhu bought a dietary supplement called VPX Meltdown Fat Incinerator ("Meltdown") in reliance on advertising by Vital Pharmaceuticals, Inc. (VPX) that Meltdown would result in fat loss. Concerned that Meltdown did not in fact result in loss of girth "in all the right places,"[1] if at all, Karhu filed a class action suit in the Southern District of Florida alleging that Meltdown's advertising was false. Karhu's motion for class certification was denied because he could not show that the class itself could be defined in a precise and manageable way—the base upon which any class action claim is constructed.

Certification Unhealthy: Ninth Circuit Vacates Order Certifying Class of Dietary Supplement Purchasers
Cabral v. Supple LLC, 608 Fed. App'x. 482 (9th Cir. June 23, 2015).

The Ninth Circuit vacated a class certification order issued by the Central District of California, finding that common issues did not predominate because plaintiff had failed to demonstrate that the alleged misrepresentation that formed the basis of her suit had been made to all putative class members. Plaintiff alleged that defendant, Supple LLC, violated California's Unfair Competition Law, California's False Advertising Law, and California's Consumer Legal Remedies Act by misrepresenting that its dietary supplement containing glucosamine hydrochloride and chondroitin sulfate "is clinically proven effective in treating joint pain." In certifying a class of all purchasers of the supplement in the State of California since December 2, 2007, the district court held that the

common issue that predominated was whether Supple had misrepresented to the class members that the supplement "is clinically proven effective in treating joint pain." Supple successfully petitioned for leave to appeal to the Ninth Circuit pursuant to Rule 23(f).

Ninth Circuit Holds Food Manufacturers Can Label Honey as "Honey"
Brod v. Sioux Honey Ass'n Cooperative, 609 Fed. App'x. 415 (9th Cir. 2015)

In June 2015, the Ninth Circuit Court of Appeals affirmed a district court's finding that federal law preempts California law to the extent California law prohibits de-pollinated honey from being labeled and sold as "honey."

Rice Capades: Court Certifies a Class of Lead Lawyers Against Defendant Law Firms Who Allegedly Used the Class's Work Product in Rice Litigation
Downing v. Goldman Phipps LLC, Case No. 4:13-cv-206, 2015 WL 4255342 (E.D. Mo. July 14, 2015)

The Eastern District of Missouri certified an unusual class of lawyers and their clients who undertook a collective effort to litigate claims against Bayer related to the purported "contamination" of the U.S. rice supply by Bayer's genetically modified rice. The defendants are law firms that allegedly benefitted from the work performed by the class in state and federal cases against Bayer.

Seventh Circuit Applies "Weak" Ascertainability Requirement, Splits From Third and Eleventh Circuits
Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. July 28, 2015)

A panel from the Seventh Circuit split from the Third and Eleventh Circuits and rejected what it described to be a "heightened" ascertainability requirement under Rule 23(b)(3). In *Mullins v. Direct Digital, LLC*, plaintiff filed a class action complaint alleging that defendant had misrepresented, in marketing materials and on product labels, the purported health benefits of a glucosamine supplement in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and similar laws in nine other states. In certifying the class, the district court rejected defendant's argument that plaintiff's motion for class certification should be denied unless plaintiff could demonstrate a reliable and administratively feasible way to determine class membership and, furthermore, that affidavits from putative class members are insufficient as a matter of law to satisfy this requirement. The Seventh Circuit granted 23(f) review in order to "facilitate the development of the law" on ascertainability, and affirmed the district court's order certifying the class.

N.D. of California Finds Plaintiffs in Del Monte Case Didn't Meet All Rule 23 Requirements
Kosta v. Del Monte Corp. 308 F.R.D. 217 (N.D. Cal. July 30, 2015)

In *Kosta*, the court denied plaintiffs' motion for class certification. Plaintiffs filed the putative class action alleging that the labels on certain Del Monte Food, Inc. canned tomato products and SunFresh and FruitNaturals fruit products (and Del Monte's advertising of those products) violated the Food, Drug, and Cosmetics Act (FDCA), as adopted by California in Sherman Law, Cal. Health & Safety Code section 109875, et seq. (Sherman Law). Plaintiffs alleged that Del Monte had intentionally misbranded its products in violation of federal and California law.

California District Court Finds CAFA's Amount-in-Controversy Requirement Satisfied and No Local Controversy Alleged; Denies Motion to Remand
Clay v. Chobani LLC, No. 14CV2258 (BEN) (DBH), 2015 WL 4743891 (S.D. Cal. Aug. 10, 2015)

The Southern District of California denied a plaintiff's motion to remand a putative class action removed pursuant to the Class Action Fairness Act (CAFA), where the plaintiff had alleged that the primary defendant's product, Chobani yogurt, had become "the best-selling brand of Greek yogurt in the United States"; had annual revenues estimated at $1 billion in 2012; and had "collected tens of millions of dollars" in California alone (as the result of allegedly deceptive sales practices). Notwithstanding those allegations, the plaintiff contested CAFA jurisdiction, primarily by contending that the $5 million aggregate amount-in-controversy requirement was not satisfied.

Defects More Than Cosmetic: Beauty Product Purchasers Fail to Satisfy Rule 23
In re Avon Anti-Aging Skincare Creams & Prods. Mktg. & Sales Practice Litig., No. 1:13-cv-00150, 2015 WL 5730022 (S.D.N.Y. Sept. 30, 2015)

The Southern District of New York recently denied class certification in a consolidated putative class action against a cosmetics company for breach of contract, false advertising, unfair competition, deceptive acts and practices, and other violations of state law. Plaintiffs alleged the company made false claims regarding its anti-aging products and sought to certify multiple classes of purchases, nationwide and in two states, with additional subclasses based on whether consumers had purchased products online or through sales representatives.

Organic Food Act Doesn't Preempt Certain State Law Mislabeling Claims
Quesada v. Herb Thyme Farms, Inc., 62 Cal.4th 298 (Cal. 2015)

On December 3, 2015, the California Supreme Court unanimously held that state law claims of intentional mislabeling of produce as organic are not preempted by the Organic Food Act of 1990 (7 U.S.C. §§ 6501-6522). In *Quesada v. Herb Thyme Farms, Inc.,* plaintiff alleged the "Fresh Organic" label was misleading because the packages include herbs processed from both USDA-certified organically processed farms as well as conventional non-organic farms. While the Organic Food Act regulates organic labeling, the California Supreme Court interpreted the Act's mislabeling sanctions narrowly, finding that because Congress used express language preempting matters relating to

organic product processing, but no similar "language of exclusivity" for organic labeling misuses, state law claims and remedies can survive. In fact, the court went a step further by finding such state law claims promote, rather than hinder, Congress' intent to play a more peripheral role in food labeling oversight – a longstanding matter of local concern.

Court Denies Food Manufacturer's Preemption Arguments
McMahon v. Bumble Bee Foods, LLC, No. 14-cv- 03346, 2015 WL 7755428 (N.D. Ill. Dec. 12. 2015)

In *McMahon*, the plaintiff claimed that Bumble Bee engaged in deceptive conduct when it sold various seafood products with labels that indicated they were an "excellent source of omega-3." Specifically, plaintiff alleged that Bumble Bee made impermissible qualitative statements about the quantity of omega-3 acids in Bumble Bee's chunk white tuna in water, chunk white tuna in oil, and albacore tuna in water. Plaintiff sought recovery under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFDBA); the Illinois Food, Drug and Cosmetic Act (IFDCA); and a variety of common law claims including unjust enrichment.

For ongoing class action developments and trends affecting the food industry, visit Classified: The Class Action Blog.

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