CARLTON FIELDS

Food for Thought: A Review of 2018 Litigation

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2018 Food Industry Decisions with Bite

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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For the Second Time, California Federal Court Declines to Certify Class Action Against Baby Food Manufacturer

Bruton v. Gerber Prods. Co., No. 12-cv-02412-LHK, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018)

Following the Ninth Circuit Court of Appeals' reversal of its order denying class certification in July 2017, the United States District Court for the Northern District of California again denied class certification. The plaintiff, Natalia Bruton, sued the 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). The plaintiff alleged that the 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.

Third Circuit Ascertainability Requirement Puts the Squeeze on Orange Juice Purchasers

In re Tropicana Orange Juice Mktg. & Sales Practices Litig., No. 2:11-cv-07382, 2018 WL 497071 (D.N.J. Jan. 22, 2018)

A New Jersey district court denied certification to a putative class of Tropicana orange juice purchasers from "Members Only" or "Loyalty Card" stores in California, New York, New Jersey, and Wisconsin. The plaintiffs alleged various common law and statutory consumer protection causes of action based on Tropicana's alleged false marketing of its orange juice as "all natural." The court found that the plaintiffs satisfied the four certification requirements of Rule 23(a) but failed to satisfy Rule 23(b)(3) for their damages class or (b)(2) for their fallback injunctive relief class.

District Courts Split on Whether *Bristol-Myers Squibb*'s Specific Personal Jurisdiction Analysis Bars Nationwide Class Actions in Districts Beyond Defendant's Home Venue

Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018)

In re Morning Song Bird Food Litig., No. 3:12-cv-01592-JAH-AGS, 2018 WL 1382746 (S.D. Cal. Mar. 19, 2018)

The ramifications of the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), remain unsettled. In *Bristol-Myers Squibb*, the United States Supreme Court rejected California's "sliding scale approach" to assertions of specific personal jurisdiction. California's Supreme Court had addressed a nationwide mass action and held that California could assert specific jurisdiction over the claims of non-California plaintiffs who were allegedly injured by a pharmaceutical drug outside of California because those claims were of the same variety as those asserted by California residents.

Starbucks Defeats Icy Class Action

Forouzesh v. Starbucks Corp., 714 F. App'x 776 (9th Cir. 2018)

On March 12, the Ninth Circuit affirmed the dismissal of a proposed class action against Starbucks. The lead plaintiff alleged that Starbucks's method of preparing its iced beverages deceives its customers by misrepresenting the amount of liquid a customer receives when he or she orders an iced drink. The plaintiff brought claims of breach of express warranty, breach of implied warranty, negligent misrepresentation, unjust enrichment, fraud, and violations of California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

Under California Law, Individual Class Members Need Not Show Reliance on Allegedly Misleading Statements at Time of Purchase

Bradach v. Pharmavite, LLC, 735 F. App'x 251 (9th Cir. 2018)

In its latest opinion addressing class action claims related to allegedly misleading labels, the Ninth Circuit Court of Appeals held that individual class members need not show they relied on allegedly misleading statements for a proposed class action against supplement manufacturer Pharmavite LLC to proceed. The lawsuit alleged that the heart health claims on the defendant's vitamin E supplements were misleading and violated California's Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA). The plaintiff, Noah Bradach, brought the suit against the defendant on behalf of himself and other Californians. Specifically, the plaintiff alleged he and other consumers purchased the defendant's Nature Made Vitamin E dietary supplements in reliance on the statement "Helps Maintain a Healthy Heart," which appears on the product's label.

Fast-Track to Trans Fat Removal Not Required for "Fast Bites"

Hawkins v. AdvancePierre Foods, Inc., 733 F. App'x 906 (9th Cir. 2018)

The Ninth Circuit, in an unpublished opinion, affirmed the lower court's decision dismissing a lawsuit against a manufacturer of frozen foods because the allegations did not establish that the manufacturer acted unlawfully, unfairly, or fraudulently. The plaintiff, Shovanda Hawkins, brought a putative class action suit on behalf of a nationwide class of consumers who purchased "Fast Bites," a line of microwavable sandwiches manufactured or distributed by the defendant, AdvancePierre Foods Inc. The plaintiff alleged that the product contained partially hydrogenated oil (PHO) and that use of the ingredient in human food violated state law. The plaintiff sued based on violations of California's Unfair Competition Law (UCL) and for breach of the implied warranty of merchantability.

Plaintiff's Claim Still Has Some Muscle – Ninth Circuit Reverses Class Action Against Protein Powder Manufacturer Alleging Source of Protein Was Misrepresented

Durnford v. MusclePharm, Corp., 907 F.3d 595 (9th Cir. 2018)

The Ninth Circuit Court of Appeals reversed an order from the Northern District of California that dismissed an action against defendant MusclePharm Corp. alleging false or misleading statements. The plaintiff, Tucker Durnford, alleged that the defendant, a manufacturer of nutritional supplements, made false or misleading statements about the protein in one of its products by engaging in "protein spiking" or "nitrogen spiking." Protein spiking or nitrogen spiking is the practice of inflating measurements of a supplement's protein content using non-protein substances. Specifically, the plaintiff alleged that the defendant used creatine monohydrate and free-form amino acids to inflate protein figures. Thus, according to the plaintiff, the supplement's true protein value was 19.4 grams per serving, rather than 40 grams per serving. The plaintiff also alleged that, in response to an unknown individual's question to the defendant's official Twitter account regarding nitrogen spiking, the defendant denied engaging in that practice and stated that its products were scientifically backed. The plaintiff alleged that the defendant's supplements were misleading and

violated California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA). The plaintiff also brought an action for breach of express warranty premised on the theory that the supplement's label, marketing, and advertising became part of the basis of the bargain at the time of purchase.

Ninth Circuit Reverses Dismissal of Putative Class Action Alleging Misleading Label on Kroger Bread Crumbs

Hawkins v. Kroger Co., 906 F.3d 763 (9th Cir. 2018)

In *Hawkins v. Kroger Co.*, the Ninth Circuit Court of Appeals reversed the district court's dismissal of the plaintiff's putative class action alleging that the defendant, The Kroger Company, sold Kroger Bread Crumbs with packaging that included misleading labels. Specifically, the plaintiff alleged that the product's package stated "0g Trans Fat per serving," when in fact the product contained 0.05 grams of trans fats. The district court granted the defendant's Rule 12(b)(6) motion to dismiss, with prejudice, holding that the plaintiff lacked standing to bring these claims, and alternatively, the plaintiff's labeling claims were preempted by federal law.

No Injury, No Problem? The First Circuit Weighs in on Certification Where Absent Class Members Lack Harm

In re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018)

In *Tyson Foods*, the Supreme Court declined to resolve the issue of whether a class may be certified if it contains members who were not injured and have no legal right to damages. Dealing with this increasingly common issue in class action litigation, the First Circuit recently summarized circuit precedent on the issue — and ultimately reversed a district court decision certifying a class that contained class members who had not suffered any injury.

Belch! Ocean Spray Price Premium Damages Model Passes *Comcast* Scrutiny

Hilsley v. Ocean Spray Cranberries, Inc., No. 3:17-cv-02335-GPC-MDD, 2018 WL 6245894 (S.D. Cal. Nov. 29, 2018)

The Southern District of California certified a food labeling class against Ocean Spray Cranberries Inc. based in part upon a price premium damages model developed by an aptly named Dr. Belch. The plaintiff, a self-proclaimed "health coach" and "label guru," alleged Ocean Spray misrepresented that many of its juice products contained no artificial flavors when in fact they contained malic and fumaric acids, synthetic chemicals that simulate the advertised flavors. She asserted Ocean Spray's juice labels violated various provisions of the California Consumers Legal Remedies Act as well as

other causes of action. The plaintiff sought to certify a Rule 23(b)(3) class of California consumers who purchased any of 12 specified Ocean Spray juices.

Does Cheez-It DecisionEstablish a Concerning Precedent for Packaged-Food Makers?

Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018)

In its newest opinion addressing class action claims related to allegedly misleading labels, the Second Circuit Court of Appeals vacated a decision from the Eastern District of New York granting the defendant's motion to dismiss — effectively validating the claims for deceptive advertising. The plaintiffs, Kristen Mantikas, Kristin Burns, and Linda Castle, alleged that defendant Kellogg Co., maker of Cheez-It crackers, falsely and deceptively labeled its product as "whole grain" or "made with whole grain" despite the product's primary grain ingredient being enriched white flour, not whole grain. The plaintiffs asserted claims for false advertising and deceptive business practices in violation of New York and California consumer protection laws, as well as unjust enrichment under Michigan law. The plaintiffs sought monetary damages and declaratory and injunctive relief on behalf of all putative class members residing in the United States and its territories who purchased the product since May 2010.

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