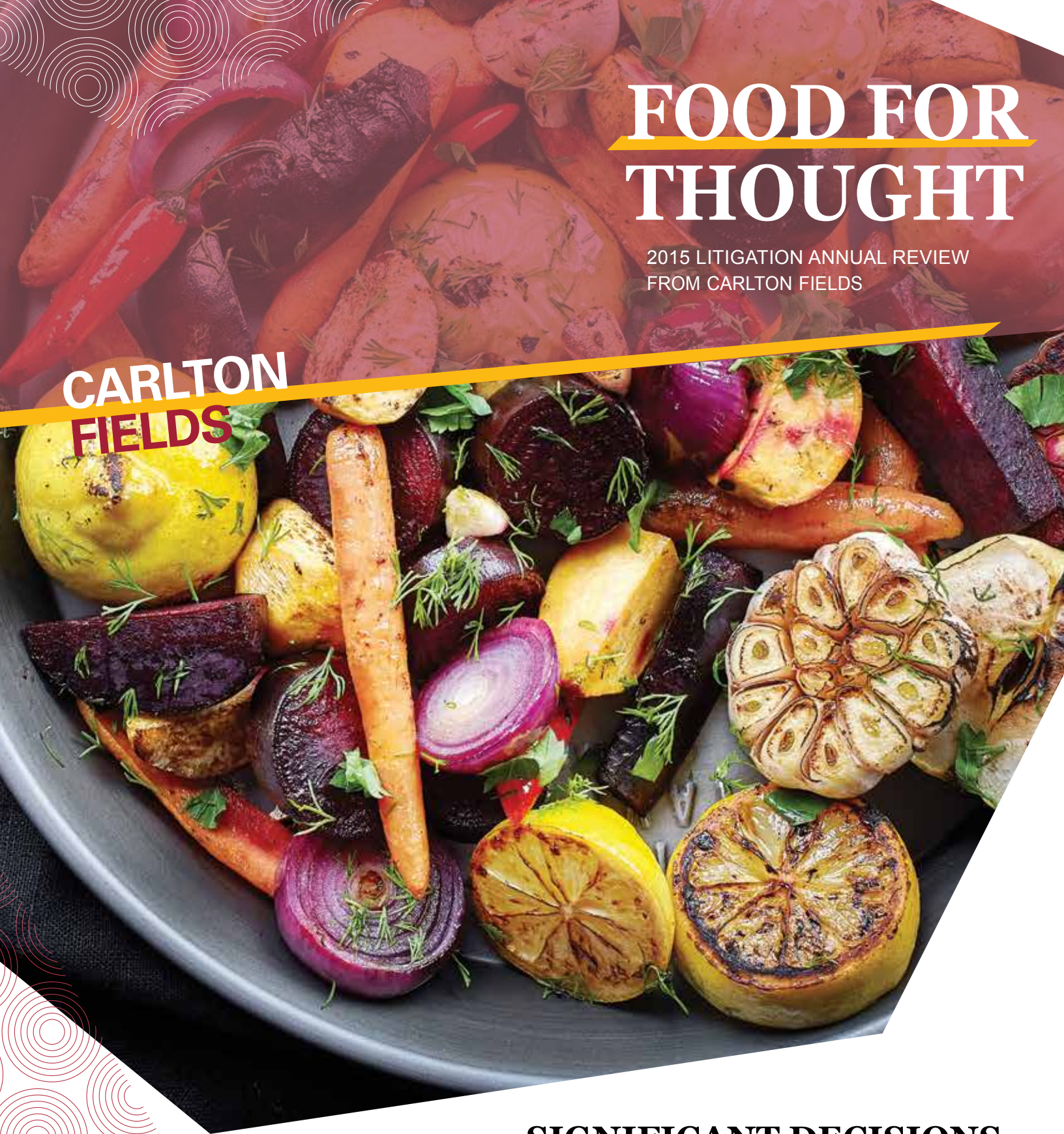
FOOD FOR THOUGHT

2015 LITIGATION ANNUAL REVIEW
FROM CARLTON FIELDS

CARLTON FIELDS



SIGNIFICANT DECISIONS AFFECTING THE FOOD INDUSTRY

FOOD FOR THOUGHT 2015

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. Carlton Fields provides this review on a complimentary basis to clients and friends.

Subscriptions

Changes in address or requests for subscription information should be submitted to: **Peggy Bourque, pbourque@carltonfields.com**.

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)

BY AMY LANE HURWITZ & GARY M. PAPPAS

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.

In *Bohlke v. Shearer's Foods, LLC*, plaintiff sought to represent a Florida class and alternative nationwide class of purchasers of five flavors of defendant's rice chips. Plaintiff alleged that defendant's "all natural" labels were false and misleading because the rice chips contained artificial ingredients. Plaintiff herself had purchased only three of the five rice chip flavors. Defendant moved to strike the nationwide class allegations due to the insurmountable obstacles under Rule 23 of applying the laws of 51 different jurisdictions to the putative class. Defendant also moved to dismiss because plaintiff lacked standing to pursue any claims involving the varieties she did not purchase. Plaintiff responded that both motions were premature until the certification hearing. Plaintiff added that the substantial similarity of the rice chip varieties was sufficient to defeat a standing challenge at this stage in the proceedings.

The district court refused to consider defendant's motion to strike the nationwide class allegations. While observing that district courts in other federal circuits allow such motions, the *Bohlke* court followed Southern District of Florida precedent and applied the requirements of Rule 12(f) strictly. Finding nothing in plaintiff's allegations that was "redundant, immaterial, impertinent, or scandalous," the court summarily denied defendant's motion. The court specifically noted that it was not opining on the merits of class certification and authorized defendant to re-raise the arguments if and when plaintiff moved to certify a nationwide class.

The district court reached a different result, however, on defendant's standing challenge. Again, while observing that district courts in other circuits have held that such issues are more properly raised at the certification stage, the court followed Eleventh Circuit precedent holding that a named plaintiff in a consumer class action cannot raise claims relating to products which she herself did not purchase. Furthermore, citing Southern District of Florida precedent, the court declined to apply the "sufficiently similar" test. Accordingly, the court granted defendant's motion to dismiss, without prejudice, as to the two flavors of rice chips plaintiff herself had not purchased.

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)

BY JARET J. FUENTE

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.

Settlement Approval

The court began its analysis noting that settlement is a "strongly favored" method for resolving disputes, particularly where complex class action litigation is concerned. The court's focus when evaluating such a settlement is strictly guided by whether the settlement is fair, reasonable, adequate, free of collusion and consistent with the named plaintiffs' fiduciary obligations to the class. In so determining, courts bound by the Ninth Circuit consider: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. Moreover, where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court presumes that the settlement is fair and reasonable. In keeping with this framework, the court found the proposed settlement fair, adequate, and reasonable. The court noted that the litigation to date had been "a hard-fought affair." Considering the strength of the plaintiffs' case, the risk, expense, complexity, and likely duration of further litigation—including the risk of maintaining class action

status throughout the trial and successfully proving liability in the face of Ghirardelli's strong denial—the court found that these factors all weighed in favor of approving the settlement.

Fees and Costs

The court also awarded class counsel $1,575,000 in attorney's fees and $87,572.15 in costs. In the Ninth Circuit, the benchmark for an attorney's-fee award is 25% of the total settlement value. When determining the value of a settlement, courts consider both the monetary and non-monetary benefits. In common-fund cases, such as this one, the Ninth Circuit requires district courts to assess proposed fee awards under either the "lodestar" method or the "percentage of the fund" method. The court found the fee request reasonable under both approaches.

First, with respect to the "percentage of the fund" approach, Plaintiffs presented expert testimony that the changed practices required by the settlement for the next three years can be expected to save class members $13.46 million. When added to the $5.25 million, the requested fee represented 8.9% — significantly below the Ninth Circuit's 25 percent benchmark. The court found the requested fee appropriate even if the expert's estimate was deeply discounted.

Second, after applying the percentage method, courts typically calculate the lodestar as a cross-check to assess the reasonableness of the percentage award. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained and the contingent risk presented. Based on the declarations submitted by the plaintiffs' counsel, the court found that the lodestar was approximately $1,711,710, which exceeded the requested fee award of $1,575,000.

Thus, the court found the fee request reasonable under both the "percentage of the fund" approach and the lodestar cross-check. Finally, based on documentation provided, the court found the cost award reasonable.

Incentive Awards

The Ninth Circuit has cautioned that awarding incentives should not become routine practice. However, the court concluded that the incentives proposed here were within the range of such awards that the Ninth Circuit has either affirmed or cited with approval. The court specifically noted that the named plaintiffs merit this incentive, detailing the effort they personally made in pursuing this lawsuit.

Cy Pres Doctrine

The settlement agreement provides that if, after payment of notice, administration, fees, costs, incentives and valid claims, there remains a balance in the common fund, the plaintiffs will ask the court to approve a list of charitable organizations to receive any balance remaining in the settlement fund. The court found that the cy pres doctrine is appropriate for a case like this, where class members who did not make claims cannot be easily located or identified, in order to "put the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class."

Objections to Settlement

The court rejected three objections, finding that all three objectors failed to establish their standing to challenge the settlement because they did not establish they were proper class members. The court also rejected the objections on the merits, dismissing claims of collusion, challenges to the cy pres distribution, and to the attorney's fees.

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)

BY ANGELA T. PUENTES-LEON

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.

Plaintiffs in several consolidated cases allege that from at least June 27, 2007, ConAgra marketed its Wesson brand cooking oils as "100% Natural," when they were actually made from genetically-modified organisms (GMOs). Plaintiffs, consumers residing in 11 states, claim ConAgra's marketing was deceptive and misleading because every bottle of Wesson Oil carried a front label stating that the product was "100% Natural." Plaintiffs

sought to certify 11 statewide classes based on violations of state consumer protection laws, breach of express warranty, breach of implied warranty, and unjust enrichment. The case impacts California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, and Texas.

The court addressed the threshold matter of whether the plaintiffs lacked standing because they suffered no injury. The court held that the data plaintiffs and their damages expert identified provided sufficient "foundational evidence" from which a price premium may be attributed to Wesson oils with the "100% Natural" label. Therefore, the court held the plaintiffs had adequately shown they suffered injury sufficient to confer standing.

The court held plaintiffs met their burden of demonstrating numerosity, commonality, typicality, and adequacy. As to ascertainability, the court held that although many class members will not be identified, likely due to the low price of the product at issue, this purported class is ascertainable because its definition specifies objective characteristics of a class member.

However, the court held that plaintiffs did not meet Article III's standing requirements for an injunctive class. Specifically, the court found plaintiffs did not proffer evidence of a sufficient likelihood that they would be wronged in a similar way. The court noted that plaintiffs' "equivocal" and "speculative" assertions that they "may consider" or "will consider" purchasing Wesson oils in the future if they are not mislabeled were insufficient to satisfy Article III's standing requirements.

Finally, the court analyzed the issue of predominance of class issues versus individual issues. The court noted that the threshold question was "whether each claim sought to be certified under each state requires a showing of reliance and/or causation, and if so, whether such elements may be established on a class wide basis." After a thorough analysis of the applicable law in each state for which class certification was sought, the court held that the consumer protection statutes of each highlighted state either did not require a showing of individualized reliance or that there was an inference of reliance and causation. Therefore, the court granted plaintiffs' motion to certify putative state classes in California (violations of UCL, CLRA, and FAL; and breach of express warranty), Colorado (violation of the CCPA; breach of express warranty; and breach of implied warranty), Florida (violation of FDUTPA), Illinois (violation of the ICFA and unjust enrichment), Indiana (unjust enrichment and breach of implied warranty), Nebraska (unjust enrichment and breach of implied warranty), New York (violation of the GBL and breach of express warranty), Ohio (violation of the OCSPA and unjust enrichment), Oregon (violation of the OUTPA and unjust enrichment), South Dakota (violation of the SDDTPL and unjust enrichment), and Texas (violation of TDTPA). The court denied plaintiffs' motion to certify putative state classes in California (breach of implied warranty), Colorado (unjust enrichment), Florida (unjust enrichment), Indiana (breach of express warranty), Nebraska (breach of express warranty), New York (unjust enrichment), and Texas (unjust enrichment), finding that those claims were not susceptible to classwide proof and that the predominance requirement was not satisfied as to them.

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)

BY JOSHUA E. ROBERTS

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 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.

In *Major*, an individual plaintiff, Noelle Major, brought suit against Ocean Spray Cranberries, Inc. ("Ocean Spray") alleging the "Ocean Spray juices and drinks" she purchased were "unlawfully labeled 'No Sugar Added' or bore improper nutrient content claims, or false representations that the products are free from artificial colors, flavors, or preservatives." Plaintiff argued that Ocean Spray's 100 percent juice labels violate California's Unfair Competition Law, false advertising laws, and the Consumers Legal Remedies Act because they deceptively contain "No Sugar Added" messaging without a statement that the beverages are not "low calorie" products as required by 21 C.F.R. § 101.60(c)(2). Major claimed she relied on the misbranded labels and was deceived into purchasing 100 percent juice products. As such, Ocean Spray was allegedly enriched at the expense of plaintiff and the putative class.

Ms. Major filed a motion for class certification and to be appointed class representative. Ocean Spray moved for partial summary judgment.[1] The *Major* court granted Ocean Spray's motion for partial summary judgment, reasoning:

Plaintiff did not rely on the challenged statements. Plaintiff correctly understood that the products at issue were not low calorie (they were simply 100 percent juice). California law requires plaintiffs to prove reliance, or that the alleged misrepresentations (*i.e.,* consumers were misled because foods not low in calories were falsely represented) motivated their purchasing decision. Here, plaintiff's own deposition testimony established that she never believed defendant's products were low calorie. As such, she could not have been deceived or misled by the fact that the "No Sugar Added" messaging was not supplemented by statements that the beverages were not "low calorie" products.

The "No Sugar Added" messaging is factually accurate and conformed to plaintiff's understanding. The court noted the difference between "fruit juice from concentrate" (where the product contains the same ratio of water to sugar solids and other compounds that exist naturally) and "fruit juice concentrate" (which products contain a higher level of sugar than would exist naturally). Here, Ocean Spray's products contained the former, "fruit juice from concentrate." As such, no sugar was actually added and the products did not violate § 10160(c)(2)(ii), which prohibits the use of the term "No Sugar Added" only when the products contain an ingredient containing added sugars "such as concentrated fruit juice." Here, the "No Sugar Added" messaging was accurate, and comported with plaintiff's understanding, as evidenced by her deposition testimony.

After granting Ocean Spray's motion for partial summary judgment, plaintiff's motion for class certification was denied as moot.

[1] The District Court for the Northern District of California decided the motion for summary judgment first, noting that if granted, the certification motion would be rendered 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)

BY JOSHUA E. ROBERTS

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.

In *Mirabella*, individual plaintiffs Adam Mirabella and Kristen Arrendell filed an action against Vital Pharmaceuticals, Inc. as the manufacturer of Redline Xtreme Energy Drink, claiming Vital Pharmaceuticals failed to warn consumers that consuming the product could cause adverse side effects such as chills, sweating, vomiting, convulsions, chest pain, and rapid heartbeat. Plaintiffs alleged violations of FDUTPA, unjust enrichment, breach of implied warranty of merchantability, and violations of the Magnuson-Moss Warranty Act. The plaintiffs requested that the court certify a nationwide class of "All United States Citizens who have purchased the REDLINE Xtreme Energy Drink, during the period extending from October 2008, up to the date notice is provided to the class."

In addition to the requirements specified in Federal Rule of Civil Procedure 23(a), a plaintiff seeking class certification must first establish that the proposed class is "adequately defined and clearly ascertainable." In *Mirabella*, the Southern District of Florida held that the proposed class was not clearly ascertainable "since the class may not be ascertained on the basis of objective criteria." The court noted several factors that supported this conclusion:

1. The nature of the purchase undermined the ascertainability of the putative class. Each Xtreme Energy Drink is sold for less than $3. Purchasers were not likely to retain receipts or other records of purchase.

2. There are a variety of Redline products, including Redline Energy Drink RTD, that are substantially similar to the product at issue. These other products (that are not at issue in this case) contain substantially similar ingredients and are bottled in similar containers. Without physical receipts, would-be class members, based on memory alone, would need to recall whether they drank the product at issue or a substantially similar product. As such, a "subjective memory problem" subsisted. "The 'subjective memory problem' is present when a proposed class of individuals is unascertainable

because there is no good way to identify such individuals and the court cannot expect members of the class to recall the cumulative total of the product which they have consumed."

3. Vital Pharmaceuticals' distribution/sales model increased the likelihood that the class was unascertainable. Defendant sells most of its products through distributors who, subsequently, sell to retailers. Plaintiffs would thus not have adequate documentation to establish the identity of the end of the line consumers, i.e., potential class members.

Plaintiffs argued generally that ascertaining class membership could be accomplished through a nationwide notice program advertised with major media outlets and through use of an experienced third-party administrator. However, the court opined that any proposed protocol for a class administrator would not mitigate the potential subjective memory problem associated with self-identification. As such, the court held that plaintiffs failed to prove the threshold issue of ascertainability and plaintiffs' motion to certify class was denied.

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)

BY GREGORY BOULOS

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.

The opening lines of the opinion made it clear where Judge McKeown stands on "all natural" labels on cosmetic products:

> A product labeled "all natural" or "pure natural" likely evokes images of ground herbs and earth extracts rather than chemicals such as "Polysorbate 20" or "Hydroxycitronellal." This class action alleges that false or misleading product labels duped consumers seeking natural cosmetics into purchasing products that were chock-full of artificial and synthetic ingredients. Although the underlying question of what constitutes a "natural" cosmetic poses a fascinating question, it is not the one we answer.

Judge McKeown then turned to the main issues on appeal: (1) whether federal preemption prevents the district court from deciding when a "natural" label on cosmetic products is false or misleading and (2) whether the primary jurisdiction doctrine prevents the district court from deciding when a "natural" label on cosmetic products is false or misleading.

Preemption

With regard to preemption, the court held that the FDCA does not expressly preempt state causes of action predicated on federal cosmetic labeling laws. The FDCA proscribes any cosmetics labeling that is "false or misleading in any particular." The more specific preemption language prohibits any state or local government from "establish[ing] or continu[ing] in effect any requirement for labeling or packaging of cosmetics that is different from or in addition to, or that is otherwise not identical with" federal rules.

Citing Supreme Court precedent in *Medtronic, Inc v. Lohr* and *Bates v. Dow Agrosciences LLC,* the court explained that the FDCA bars states from imposing new or additional labeling requirements. However, the FDCA is silent with regard to states' ability to provide remedies for violations of federal law. Because the language of the FDCA is "virtually identical" to the statutory text at issue in *Lohr* and *Bates*, the court concluded that the FDCA does not preempt state laws that allow consumers to sue cosmetics manufacturers that label or package their products in violation of federal standards.

Primary Jurisdiction

Next, the court addressed the issue of whether the district court properly dismissed plaintiffs' claims under the primary jurisdiction doctrine. The court held that the district court properly invoked primary jurisdiction, but it erred by dismissing the case without prejudice rather than staying proceedings while the parties (or the district court) sought guidance from the FDA.

Primary jurisdiction is a prudential doctrine that permits courts to determine that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry, rather than the judicial branch. In evaluating primary jurisdiction, the court considers the need to resolve an issue that has been placed by Congress within the jurisdiction of an administrative body's regulatory authority pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that requires expertise or uniformity in administration.

Not all cases that implicate the expertise of federal agencies warrant invocation of primary jurisdiction. Rather, the doctrine is reserved for a limited set of circumstances that require resolution of an issue of first impression, or of a particularly complicated issue that Congress committed to a regulatory agency. The court determined that "[W]ithout a doubt, defining what is "natural" for cosmetics labeling is both an area within the FDA's expertise and a question not yet addressed by the agency."

Nonetheless, the court explained that the action should have been stayed instead of dismissed because the Ninth Circuit has not clearly adopted the doctrine of equitable tolling in primary jurisdiction cases. Staying the action prevents the statute of limitations from running during administrative proceedings that could affect the parties' rights.

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)

BY MARISSEL DESCALZO

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.

DeCoster and his son owned and operated Quality Egg LLC, which was once among the nation's biggest egg producers, but is no longer in business. Quality Egg LLC, Austin DeCoster, and Peter DeCoster pled guilty to misdemeanors last year. As part of the plea agreement, the individual defendants admitted to introducing

or causing to introduce eggs that contained *Salmonella enteritidis* into interstate commerce. The plea agreements of the individuals state that they did not have any direct involvement in the sale of the contaminated eggs and that neither they nor their employees knew the eggs were contaminated. The company, on the other hand, admitted to giving a $300 cash bribe to a USDA inspector in order to convince the inspector to release "red tagged" eggs into commerce. The company further admitted to selling contaminated and misbranded eggs that were sold with mislabeled processing and expiration dates. Finally, the company admitted to selling eggs contaminated with salmonella.

The sentences are noteworthy because the individuals pled guilty to strict liability crimes. Executives are rarely placed behind bars when found guilty of such crimes. To that end and as reasoning for the sentences, the U.S. District Judge mentioned at sentencing that "There's a litany of shameful conduct, in my view, that happened under their [Austin and Peter DeCoster's] watch." Prosecutors praised the jail sentences, noting that the sentences should send a strong message about the importance of following food safety rules.

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)

BY DAVID E. CANNELLA & GARY M. PAPPAS

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.

Karhu proposed a nationwide class for purchasers of Meltdown and a subclass for New York purchasers. The Southern District denied the motion for class certification because Karhu could not set forth an appropriate method for ascertaining the class. A class is not ascertainable unless the class definition contains objective criteria that allows for class members to be identified in an administratively feasible way.

In his motion for class certification, Karhu proposed that the class members be identified by use of VPX sales data and/or by self-identification by affidavits from prospective class members. As to sales data, VPX sells to retailers and distributors, not to consumers. As such, use of VPX data would not produce an ascertainable class because it would not sufficiently identify consumers who purchased Meltdown from retailers. With respect to self-identification, the Southern District found that Karhu failed to offer a specific proposal as to how such identification would operate and not implicate the problems inherent in such a method. Specifically, VPX's due process rights and those of the legitimate class would be implicated by accepting any affidavits at face value. Attempts to check the veracity of self-identifying affidavits would result in "mini-trials," rendering this method of ascertaining the class administratively unfeasible. The Southern District denied the motion for class certification.

Karhu moved the Southern District for reconsideration in which he set forth, for the first time, a three-step process in which the Meltdown class could be certified by the use of VPX sales data. Specifically, Karhu proposed in this motion for reconsideration that he would (1) use the VPX retail data to identify retailers; (2) then subpoena the third-party retailers and (3) use the documents received from the retailers to identify individual consumers. The Southern District found that this "new" method was not based on new evidence. In other words, Karhu could—and should—have employed the method of issuing third-party subpoenas to retailers and determined consumer identity before he moved for class certification. The Southern District denied the motion for reconsideration.

On appeal, the Eleventh Circuit Court of Appeals affirmed the denial of class certification for lack of ascertainability and the motion for reconsideration. The court held that a defendant's sales records alone are not a sufficient basis for the plaintiff to establish the ascertainability requirement unless the plaintiff also demonstrates that (1) the sales records are useful for identification purposes and (2) the use of such records is administratively feasible. With respect to self-identification as a means to define the class, the plaintiff proposing self-identification must establish that such a method is administratively feasible and not otherwise problematic.

The Eleventh Circuit rejected Karhu's argument that a strict ascertainability requirement conflicted with *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271-72 (11th Cir. 2004). The Eleventh Circuit explained *Klay* stands for the proposition that a concern about case manageability regarding individualized issues of reliance, causation, and damages should not *a priori* preclude class certification. However, the manageability concerns addressed in *Klay* related to concerns a court may face after the class members have been identified. "Ascertainability, by contrast, addresses whether the class members can be identified at all, at least in any administratively feasible (or manageable) way," explained the Eleventh Circuit. "Put differently," the Eleventh Circuit continued, "the manageability concern at the heart of the ascertainability requirement is prior to, hence more fundamental than, the manageability concern addressed in *Klay*."

The Eleventh Circuit affirmed the denial of class certification and the motion for reconsideration.

In his concurring opinion, Judge Martin agreed with the result reached by the majority but cautioned that the holding should be limited to the facts presented here where the plaintiff failed to set forth an appropriate method for determining the class until after his motion for certification was denied. Had Karhu set forth the adequacy of using third-party subpoenas to ascertain members of the class and addressed the concerns inherent in self-identifying affidavits in his motion for class certification, then Judge Martin wrote that Karhu could have adequately argued that the class was ascertainable. Judge Martin cautioned that the holding in this case does not constitute the rejection of affidavits as a legitimate means of class identification in every case.

[1] Meghan Trainor, "All About That Bass (No Treble)" (2014).

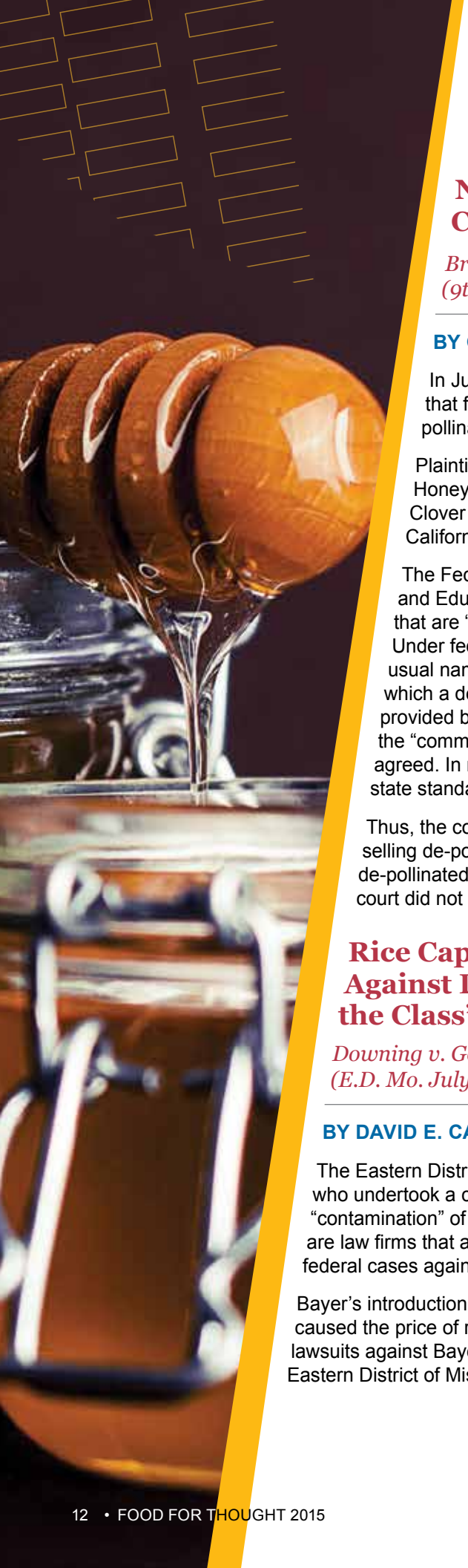
Certification Unhealthy: Ninth Circuit Vacates Order Certifying Class of Dietary Supplement Purchasers

Cabral v. Supple LLC, 608 Fed. App'x. 482 (9th Cir. June 23, 2015)

BY MICHAEL A. GREENFIELD & BEN V. SEESSEL

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).

The Ninth Circuit began its analysis by noting that, in cases based on misrepresentations, "it is critical that the misrepresentation in question be made to all class members." In the instant case, however, the appellate court found that the record did not support a determination that the alleged misrepresentation was seen or received by all class members and, therefore, failed to satisfy this standard. On the contrary, the court found that the misrepresentation was not made in all advertising for the supplement, and "[w]hile some deviations from precise wording … might not be fatal to class certification, advertisements that did not declare the [supplement] to be 'clinically proven effective in treating joint pain' are a far cry from advertisements that did." Accordingly, the court held that the district court abused its discretion in certifying the class and vacated the certification order. In vacating the order, the Ninth Circuit also refused plaintiff's request to "expand the misrepresentation to a claim that the [supplement] has some efficacy," limiting itself to the issue that was actually before the district court.



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)

BY GREGORY BOULOS

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."

Plaintiffs brought a claim against Sioux Honey Association Cooperative ("Sioux Honey") alleging that Sioux Honey violated California law by selling See Bee Clover Honey, which is de-pollinated, as "honey." The Northern District of California dismissed the action as preempted by federal law.

The Federal Food, Drug, and Cosmetic Act, as amended by the Nutrition Labeling and Education Act, preempts state food labeling laws that impose requirements that are "not identical" to federal labeling regulations. 21. U.S.C. § 343-1(a)(3). Under federal law, de-pollinated honey must be labeled with the "common or usual name of the food, if any …" because de-pollinated honey is not "a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of title 21 of the U.S. Code.The district court decided that the "common or usual name" of de-pollinated honey is "honey," and the Ninth Circuit agreed. In reaching its conclusion, the district court considered dictionary definitions, state standards of identity, and voluntary U.S. Department of Agriculture regulations.

Thus, the court explained that California law prohibits manufacturers from labeling and selling de-pollinated honey as "honey," while federal law requires manufacturers to label de-pollinated honey as "honey." Given the conflict, the Ninth Circuit held that the district court did not err in finding that California's law is preempted.

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)

BY DAVID E. CANNELLA & D. MATTHEW ALLEN

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.

Bayer's introduction of genetically modified rice into the U.S. domestic rice supply allegedly caused the price of rice to plummet. Thousands of rice farmers and other producers filed lawsuits against Bayer, and the federal court actions were consolidated into an MDL in the Eastern District of Missouri.

The MDL court appointed co-lead counsel for the plaintiffs, who in turn directed over 30 law firms and other professionals. A common-benefit trust fund ("the CBF Trust") was established to compensate the attorneys for services rendered for all of the plaintiffs. The court's order provided that a certain percentage of any recovery in the MDL cases would be set aside to cover attorney's fees and costs.

Defendant law firms opposed the creation of the CBF Trust and alternatively sought recovery of millions of dollars in fees that they claimed as reimbursement for their own common-benefit fees. The MDL court ordered that $72 million be paid in attorneys' fees. The CBF Trust recovered only $56.5 million of this amount. The named plaintiffs, three firms that incurred legal fees and advanced expenses, brought claims for unjust enrichment and quantum meruit against the defendant law firms. In an ironic twist given their usual role in asserting that classes should be certified, the defendants opposed class certification.

Defendants argued that there were insufficient class members to satisfy the numerosity requirement under Rule 23(a)(1) because they formed a single joint venture to undertake the collective representation of the rice producers. The court rejected this argument because the defendants litigated their multiple claims as a class and not as a single joint venture, and under Missouri law, there was no equal right of control of the litigation among the different law firms.

The court also rejected the defendants' argument that Rule 23(b)(3) predominance was not satisfied. It held that individualized fact-finding would not be required because the class plaintiffs pooled resources to achieve the prosecution and ultimate settlement of the MDL claims. As such, the class plaintiffs would not need to show that each individual class member provided or paid for specific things. Rather, the class members could show that they jointly incurred the expenses that conferred a benefit on the defendants.

Finally, the court concluded that class resolution was superior to other available methods for the fair and efficient adjudication of the case because the class members lack any interest in individually prosecuting separate actions. Accordingly, the defendants were hoisted on their own petard.

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)

BY BEN V. SEESSEL & MICHAEL A. GREENFIELD

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.

The panel began its analysis by stating that the law in the Seventh Circuit on ascertainability is that a class must be "defined clearly and based on objective criteria," *i.e.*, that there is no requirement to demonstrate "administrative feasibility" like there is under the purported "heightened" ascertainability requirement in

the Third and Eleventh Circuits. It stated that this "'weak' version of ascertainability" is the "well-established" law in the Seventh Circuit and, further, suggested that a misinterpretation of the requirement had led to a "doctrinal drift" with respect to the law on ascertainability, including decisions by district courts within the Seventh Circuit.

The panel then described the three ways in which a plaintiff might run afoul of the "weak" ascertainability requirement: (1) failing to clearly define a class; (2) defining the class on subjective criteria; and (3) defining class membership based on success on the merits—a "fail safe" class whereby a plaintiff who succeeds on the merits would be included in the class but one who does not would be excluded and thus not bound by the judgment. In the panel's view, the proposed class definition in this case, which simply included purchasers of Direct Digital's product within the applicable statute of limitations periods, was sufficient and satisfied the ascertainability requirement, notwithstanding that Direct Digital may have no records with respect to its retail customers and most purchasers likely would not have kept their receipts.

The panel was particularly concerned with the effect of the Third and Eleventh Circuit's application of the ascertainability requirement on cases involving low cost goods or services, where consumers are not likely to retain proof of purchase. In this regard, the court was critical of these courts' rejection of the use of class member affidavits to determine class membership.

The panel further addressed four policy concerns identified by courts employing a "heightened" ascertainability requirement: (1) administrative convenience, which the court stated is more appropriately addressed in assessing superiority, where it will be measured against the benefits of employing the class action device; (2) unfairness to absent class members because they may be bound by the judgment without receiving notice, to which the court responded by stating that class action notice is the best notice practicable and, further, that absent class members would have no real way of recovering on low value claims without the class action mechanism; (3) that it is unfair to bona fide class members whose claims will be diluted, to which the court responded that claims rates are low, such that the funds to be recovered by other class members will not be diluted by any fraudulent claims, merely the unclaimed residuary will be diminished and, furthermore, that administrative processes could be put in place to weed out fraudulent or mistaken claims; and (4) due process to defendants, to which the court responded that defendants could present individual defenses to class members' claims at other stages of the litigation, including the damages phase.

The Seventh Circuit's decision is in direct conflict with the law in the Third Circuit (under *Carrera v. Bayer Corp., Marcus v. BMW of North America, LLC.*, and other cases) and the Eleventh Circuit, which require that the feasibility of ascertaining class membership be analyzed at the class certification stage (the Third Circuit, moreover, made clear in *Carrera* that this analysis must be "rigorous"). As we reported, the Eleventh Circuit, in *Karhu v. Vital Pharmaceuticals, Inc.*, recently held that ascertainability requires plaintiff to demonstrate that a class definition "contains objective criteria that allows for class members to be identified in an administratively feasible way" and affirmed the denial of class certification where plaintiff had "failed to propose a realistic method of identifying" individuals in 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)

BY ANGELA T. PUENTES-LEON

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.

Specifically, plaintiffs alleged that Del Monte's canned tomato products included labels with 1) a statement and symbol indicating that the products "contain antioxidants," despite failing to meet the minimal FDA nutrient requirement for that statement; 2) a statement that the product was a "natural source" of lycopene, a nutrient for which the FDA had not established a daily value; and 3) a statement that the products contained "no artificial flavors or preservative," although they contain ingredients such as calcium chlorida, citric acid, high fructose corn syrup, and carmine. Plaintiffs also

alleged that the labels on Del Monte's SunFresh and FruitNaturals fruit products were misleading because the packaging was similar to packaging for fresh products, the product was placed in the refrigerated cases, and the labels stated that the products "must be refrigerated" and are "fresh."

Del Monte conceded that the plaintiffs met the numerosity requirement of Rule 23. Similarly, Del Monte did not contest adequacy of the class representative or class counsel. Del Monte did contest the remaining Rule 23 requirements.

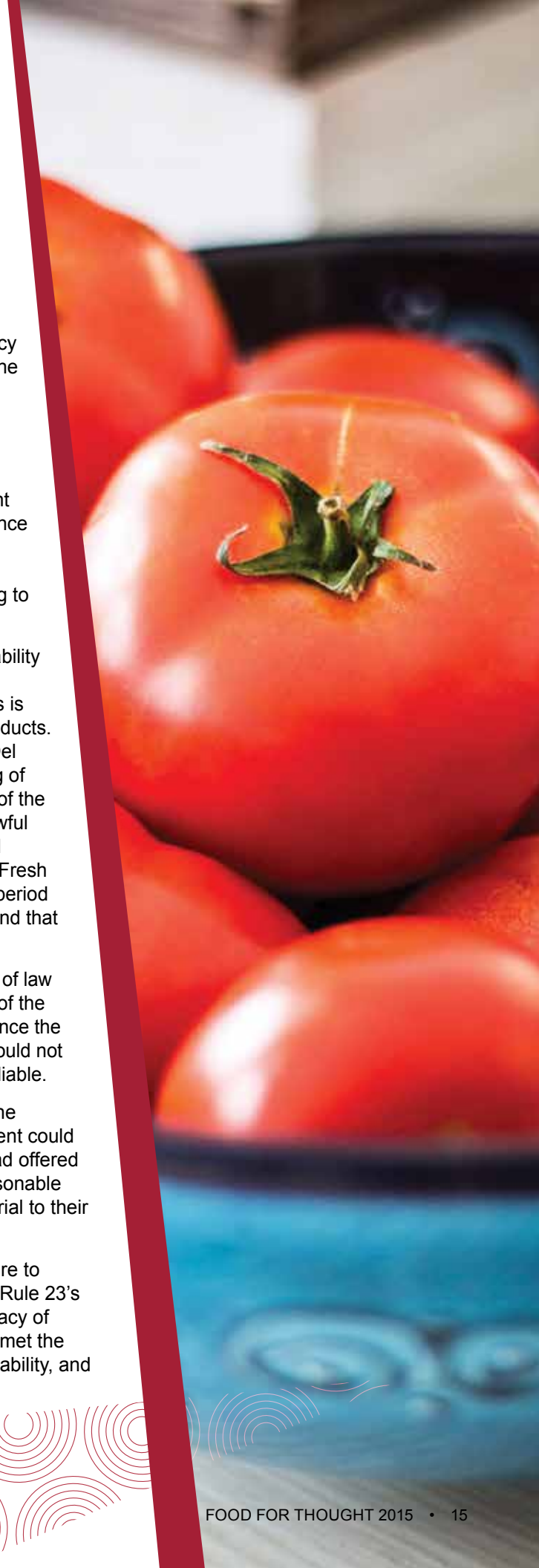
The court held that plaintiffs did not satisfy Rule 23's typicality requirements. Specifically, regarding Del Monte's tomato products, the court found that the class representatives met the typicality requirements as to the antioxidant claims, but not as to the statement of "no artificial flavors or preservatives" because there was no evidence that both class representatives had a claim as to that statement. Regarding Del Monte's fruit products, the court held that the class representatives met the typicality requirements for the claims relating to the FruitNaturals products, but not as to the SunFresh product line.

Additionally, the court held that plaintiffs did not satisfy the ascertainability requirements of Rule 23. Plaintiffs contended that all Del Monte products bear the same unlawful statements and, therefore, the class is ascertainable because it is all persons who purchased one of the products. But the court found significant evidence to refute those allegations. Del Monte pointed to various discrepancies in the labeling and packaging of the products at issue, showing that the products that are the subject of the lawsuit did not all have the same labels and the same allegedly unlawful statements. And because plaintiffs' proposed class definition covered purchases of any products within the Del Monte canned tomato, SunFresh fruit, and FruitNaturals fruit product lines throughout the entire class period and allegations of alleged false labeling and packaging, the court found that the variability in the claims impacted ascertainability.

The court also found that plaintiffs failed to show "there are questions of law or fact common to the class" as required by Rule 23. Again, because of the great variations, at least half the challenged products would not evidence the violations alleged. Thus, the purchase of one of the products alone would not equate to membership in a class of persons to whom Del Monte was liable.

Finally, the court held that the plaintiffs failed to offer evidence that the materiality of the allegedly unlawful, deceptive or misleading statement could be shown on a classwide basis. The court found that the plaintiffs had offered no valid means by which classwide proof could be made that a "reasonable consumer" would find the challenged statement deceptive and material to their purchasing decision.

In all, the court denied plaintiffs' motion for class certification for failure to meet all the requirements of Rule 23. Although plaintiff met some of Rule 23's threshold requirements for class certification (i.e. numerosity, adequacy of representation, and some degree of typicality), the plaintiffs had not met the remaining requirements (common questions of law or fact, ascertainability, and typicality).



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)

BY DAVID L. LUCK

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.

The court recounted the United States Supreme Court's decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S.Ct. 547 (2014), in which the Supreme Court held that a defendant removing under CAFA need only include "a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Id.* at 554. The district court also reiterated Dart Cherokee's rule that when a plaintiff challenges a defendant's amount-in-controversy allegations, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." *Id.* at 553-54.

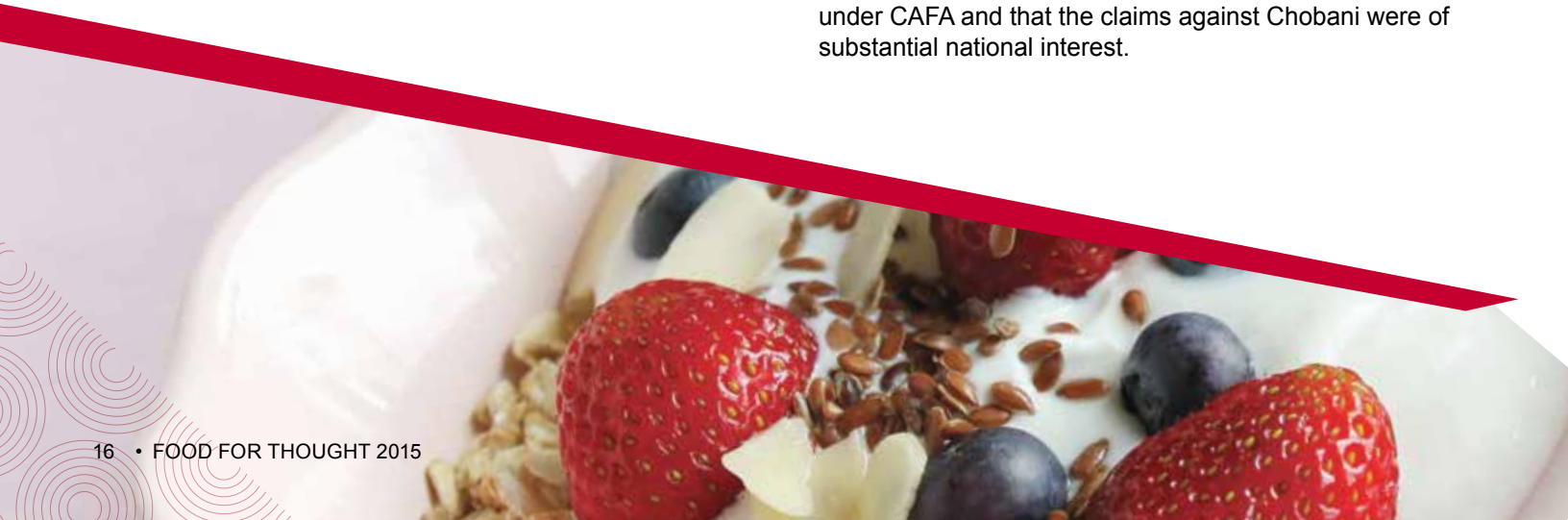
In this case, the court determined that CAFA's $5 million aggregate amount-in-controversy requirement had been satisfied for three primary reasons:

1. Plaintiff's complaint itself contained the requisite allegations to plausibly contend that CAFA's $5 million aggregate amount-in-controversy requirement had been satisfied;
2. Chobani had submitted two declarations from its pertinent executive officer, explaining that Chobani's revenues for sales of the challenged yogurt products in California for the four-year proposed class period far exceeded $5 million and, indeed, exceeded $5 million for even a single year's worth of revenues in California; and
3. Plaintiff failed to provide competent evidence to oppose these points.

In addition, the court rejected the plaintiff's attempt to invoke CAFA's "local controversy" exception, explaining that the exception is intended to preclude CAFA jurisdiction when the putative class raises only a "local controversy," rather than an interstate case of potential national importance. The court also noted that Ninth Circuit precedent indicated that the "local controversy" exception does not apply "when an allegedly defective product is sold in all fifty states, but a class action is only brought on behalf of an in-state class against an out-of-state manufacturer and a few in-state retailers." In rejecting the plaintiff's attempt to invoke the "local controversy" exception, the district court reasoned:

1. Chobani was the leading Greek yogurt producer in the country—selling its product in all 50 states;
2. plaintiff had sought to restrict her putative class to California claimants; and
3. plaintiff had tacked on two nominal local retailers (Safeway and Vons grocery stores) in addition to the primary, national defendant—Chobani.

The court also concluded that reliance on CAFA's "local controversy" exception would be improper for another reason. That is, an identical class action against Chobani had already been filed and was still pending in New York federal court and it included a California subclass alleging the same claims. The court therefore determined the matter was not a true local controversy under CAFA and that the claims against Chobani were of substantial national interest.



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)

BY CHRISTINE A. STODDARD & KRISTIN ANN SHEPARD

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.

The court discussed the requirements of Federal Rule of Civil Procedure 23, but declined to address numerosity, commonality, typicality, and adequacy under Rule 23(a) because it found that plaintiffs failed to satisfy the predominance requirement of Rule 23(b)(3) and the implied prerequisite of ascertainability. First, with regard to purchases made through sales representatives, plaintiffs argued that the common "Falsity Question" of whether the defendant made false scientific claims in its brochures would predominate. However, the brochures changed every two weeks, many contained subjective statements related to appearance rather than biology, and sales representatives were under no obligation to distribute the brochures to customers—who may never have even seen them. Thus, unlike in a case where uniform misrepresentations are made to all consumers on a product label, the court found that plaintiffs here could not show common issues would predominate.

Next, because the defendant did not keep records of individual customers making purchases through sales representatives, plaintiffs also failed to satisfy ascertainability. Although plaintiffs argued that class members could be identified through claim forms in conjunction with receipts, UPC codes, or affidavits, the court found these options inadequate. It noted that consumers were unlikely to remember what they purchased, there was no evidence to suggest putative class members would still have such records, and the risk of "false positives" was significant. Moreover, even if the consumers could be identified, whether they saw the alleged misrepresentations could not be determined.

As for Internet purchasers, the court held that a choice of law provision in favor of New York in the terms and conditions on defendant's website precluded certification of a Nebraska subclass. As for claims under New York's consumer protection statute, that court noted that even though defendant's online representations were more consistent than those in the brochures, predominance was still lacking because individualized inquiries would be required to prove causation. Furthermore, plaintiffs had not shown the existence of a common contract for purposes of their class-wide breach of contract claim. The court also held that plaintiffs lacked standing to bring a claim for a forward-looking injunction since they were unlikely to buy the products again.

Organic Food Act Doesn't Preempt Certain State Law Mislabeling Claims

Quesada v. Herb Thyme Farms, Inc., 62 Cal.4th 298 (Cal. 2015)

BY MARK A. NEUBAUER & ANGELA T. PUENTES-LEON

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.

Federal preemption has often been a defense to consumer class actions. The weakness of the Organic Food Act in not clearly preempting state law may be unique to that statute. But consumer goods manufacturers and distributors should expect more fights over the federal preemption defense. Whether this ruling will be limited to just that federal act or will have broader implications remains to be seen.

This new decision opens the door for other state law organic mislabeling claims. Consumer goods manufacturers should expect even more litigation over advertising statements – and review their labels with that in mind. Ultimately the U.S. Supreme Court will have the last word.

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)

BY ANGELA T. PUENTES-LEON

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.

Bumble Bee argued that plaintiff's claims pursuant to IFDCA were preempted and that his claim for unjust enrichment was not a viable cause of action under Illinois law. Bumble Bee also argued that, in the alternative, the case should be stayed until January 1, 2016, the effective date of the Food, Drug and Cosmetic Act's (FDCA) recently adopted rule concerning omega-3 nutrients. The court disagreed with Bumble Bee, finding that plaintiff's claim pursuant to the IFDCA was not preempted.

The court provided background regarding a food manufacturer's obligations given applicable regulations concerning statements about a food product's nutritional value. The FDCA permits food manufacturers to state that a product is an "excellent source of" or "high in" a nutrient only if the product contains at least 20 percent of the recommended daily intake (RDI) or the daily reference value (DRV). Food manufacturers can state a product is a "good source" of a nutrient if it contains 10 to 19 percent of that nutrient's RDI or DRV. If the FDA has not established an RDI or DRV for a particular nutrient, food manufacturers cannot make qualitative statements about it unless they submit a notification to the FDA and receive its approval. A food manufacturer's failure to comply with both federal and state regulatory requirements regarding qualitative statements about the nutritional value of a food product may result in that product being deemed as "misbranded."

The FDA has not established an RDI or DRV for omega-3 nutrients. Although the FDA has a process by which a food manufacturer can seek FDA approval to make qualitative statements about a particular nutrient, and three separate food manufacturers had sought FDA approval as to omega-3 nutrients, Bumble Bee was not one of them. The three manufacturers separately submitted nutrient content claims notifications to the FDA, claiming that the food and nutrition board of the Institute of Medicine (IOM) of the National Academy of Sciences published a report that qualified as an authoritative statement concerning the RDI for omega-3s. The FDA

did not act on those three requests within 120 days. Therefore, on April 9, 2006, it became permissible for the submitting manufacturers to use their proposed labels stating their products were "high in" or an "excellent source of" omega-3s.

However, on November 27, 2006, the FDA published a proposed rule whereby, going forward, food manufacturers could not make qualitative statements about their products' omega-3 content. In its proposed rule, the FDA rejected the IOM report as an authoritative statement. The omega-3 rule was not finalized until April 28, 2014, and its implementation was delayed until January 1, 2016.

As to preemption, the court disagreed with Bumble Bee's argument that the FDCA expressly preempts plaintiff's state law claims. Bumble Bee did not contend that plaintiff's IFDCA claim was substantively different than an FDCA claim because Bumble Bee acknowledged that the IFDCA expressly adopted the FDCA, and the accompanying rules promulgated by the FDA. Instead, Bumble Bee alleged that plaintiff's state law claim was inconsistent with federal law, and therefore preempted, because plaintiff was beginning an enforcement claim under current law instead of waiting until the new omega-3 rule took effect on January 1, 2016. The court opined that Bumble Bee misconstrued plaintiff's complaint because plaintiff was not seeking to enforce the omega-3 rule that becomes effective in 2016, but instead was seeking to enforce provisions of the FDCA that are effective now—and were when plaintiff filed his complaint. Plaintiff alleges Bumble Bee's products were misbranded under existing law because Bumble Bee did not submit an application to the FDA for permission to make statements about omega-3s; and that it did not have license to make the claims because of the filings by, and approvals to, the three food manufacturers that did seek FDA approval. Furthermore, the court held there was no basis to infer that the FDA intended to invalidate the existing regulatory requirements governing omega-3 statements by deferring the implementation of the more stringent regulation. Thus, the court ruled that because the state requirements and the current FDCA requirements are one and the same, and neither was disturbed by the FDA's decision to delay implementation of the omega-3 rule, plaintiff's state claim does not fall within the purview of the FDCA's preemption provision.

Similarly, the court rejected Bumble Bee's request to stay the case until the day the new omega-3 rule becomes effective. Again, the court stated that Bumble Bee was relying on the faulty premise that the plaintiff was seeking to enforce the regulatory requirements of the new omega-3 rule. The court stated if Bumble Bee was not authorized to make the omega-3 statements pursuant to the current regulations, the court would have the power to enjoin Bumble Bee from selling misbranded products. Nonetheless, from a practice standpoint, the court found it unnecessary to stay the case because the case is at the motion to dismiss stage and the court cannot provide affirmative relief to the plaintiff. At this late stage, there is no risk of the court entering an injunction against Bumble Bee that would force it to remove omega-3 statements from its labels before January 1, 2016.

Finally, the court also rejected Bumble Bee's argument that unjust enrichment was not an independent cause of action under Illinois law because it requires the plaintiff to prove unlawful conduct. The court opined that Illinois case law describes unjust enrichment as an independent claim. Furthermore, even if the unjust enrichment claim was not independent, it does not stand alone here and is not being asserted as an independent cause of action, but a derivative claim to plaintiff's allegations that Bumble Bee violated the IFDCA.

Key Contacts

Amy E. Furness
Shareholder, Miami
Manufacturing and
Raw Materials
afurness@carltonfields.com
305.539.7253

Chris S. Coutroulis
Shareholder, Tampa
Food, Beverage,
Dietary Supplement, and
Personal Care Products
ccoutroulis@carltonfields.com
813.229.4301

Angela T. Puentes-Leon
Shareholder, Miami
Food, Beverage, Dietary Supplement, and
Personal Care Products
apuentes-leon@carltonfields.com
305.539.7408

CARLTON FIELDS

Carlton Fields 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 product 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.

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.

For more information, visit our website at www.carltonfields.com.

Atlanta
One Atlantic Center
1201 W. Peachtree Street | Suite 3000
Atlanta, Georgia 30309-3455
404.815.3400 | fax 404.815.3415

Hartford
One State Street | Suite 1800
Hartford, Connecticut 06103-3102
860.392.5000 | fax 860.392.5058

Los Angeles
2000 Avenue of the Stars
Suite 530, North Tower
Los Angeles, California 90067-4707
310.843.6300 | fax 310.843.6301

Miami
Miami Tower
100 S.E. Second Street | Suite 4200
Miami, Florida 33131-2113
305.530.0050 | fax 305.530.0055

New York
Chrysler Building
405 Lexington Avenue | 36th Floor
New York, New York 10174-0002
212.785.2577 | fax 212.785.5203

Orlando
450 S. Orange Avenue | Suite 500
Orlando, Florida 32801-3370
407.849.0300 | fax 407.648.9099

Tallahassee
215 S. Monroe Street | Suite 500
Tallahassee, Florida 32301-1866
850.224.1585 | fax 850.222.0398

Tampa
Corporate Center Three
at International Plaza
4221 W. Boy Scout Boulevard | Suite 1000
Tampa, Florida 33607-5780
813.223.7000 | fax 813.229.4133

Washington, DC
1025 Thomas Jefferson Street, NW
Suite 400 West
Washington, DC 20007-5208
202.965.8100 | fax 202.965.8104

West Palm Beach
CityPlace Tower
525 Okeechobee Boulevard | Suite 1200
West Palm Beach, Florida 33401-6350
561.659.7070 | fax 561.659.7368