Food for Thought: A Review of 2017 Litigation

CLASS ACTIONS | LITIGATION AND TRIALS | MASS TORT AND PRODUCT LIABILITY | MAY 24, 2018


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2017 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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Ninth Circuit Parses "Administrative Feasibility" and "Ascertainability" – Refuses to Acknowledge Either as a Prerequisite to Class Certification

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

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

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

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

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

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

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

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

that the plaintiff was herself a California resident who allegedly made a purchase and suffered an injury in the state, and the court was not yet able to determine whether California's choice of law rules would bar all or any of plaintiff's claims.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff's putative class action alleged that defendant Mott's violated FDA regulations and California's Sherman Law and Unfair Competition Law when it labeled and sold its 100 percent apple juice with the label "No Sugar Added," which plaintiff

claimed misled consumers into thinking the juice had fewer calories than its competitors. For some reason, Plaintiff sought issue-specific class certification on liability only pursuant to Rule 23(c)(4). The district court denied plaintiff's motion for class certification after allowing plaintiff to provide supplemental briefing on how the claims would proceed if liability was determined on a class-wide basis. The circuit court affirmed.

Ninth Circuit Says Plaintiff Might Get Fooled Again

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

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

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

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

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

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

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

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