CARLTON FIELDS

Food for Thought: 2014 Litigation Annual Review

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Food for Thought reports on significant court decisions affecting the food industry. The focus of this edition is on several food-related cases pertaining to class certification; particularly, on district court decisions regarding Rule 23(a) and 23(b) requirements, as well as on ascertainability. Of course, *Lilly* is also included, because of its significance on pre-emption, as is *POM Wonderful*, because of its importance regarding competitor suits for mislabeling.

Food for Thought: A Review of 2014 Litigation (PDF)

***Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-4387, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014)**
Plaintiff alleged that Ben & Jerry's Homemade, Inc.'s "all natural" ice cream products contained a synthetic agent and, as a result, the company's advertising that the ice cream products were "natural" was false and misleading. Plaintiff moved to certify a statewide class, but a California judge denied class certification based on ascertainability. Specifically, the court ruled that it was impossible to ascertain whether class members had relied on the allegedly misleading advertising when purchasing defendant's products because some consumers purchased products that did not contain the relevant synthetic ingredient.

***Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014)**
In this "All Natural" food labeling putative class action, the Northern District of California found that plaintiff had Article III standing, but failed to define an ascertainable class. Specifically, although defendant argued that plaintiff did not allege an injury in fact, the court found it sufficient that the complaint alleged plaintiff would not have purchased the product at issue but for the all natural label. However, the court aligned itself with the Third Circuit, concluding that the class was not ascertainable because defendant's records were insufficient to identify class members. The motion to certify a nationwide class was denied.

***Lilly v. ConAgra Foods, Inc.*, No. 12-55921, 2014 WL 644706 (9th Cir. Feb. 20, 2014)**
In Lilly v. ConAgra Foods, Inc., the Ninth Circuit reversed and remanded the dismissal of a consumer class action lawsuit, which alleged that a food company violated California law by misrepresenting

the sodium content of sunflower seeds when it focused exclusively on the sunflower kernels without considering the inedible shells. The Ninth Circuit reasoned that even though sunflower seed shells, standing alone, are inedible, flavor "coating" added to the shells is edible. Moreover, state law requiring the inclusion of nutritional information associated with the flavor "coating" added to the shells is not preempted by federal law.

***Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y Feb. 25, 2014)**
Plaintiff claimed that defendant's product labeled "100% Pure Olive Oil" was in fact not pure olive oil, but instead an industrially processed substance known as "pomace." The court found that the requirements of Rule 23(a) were satisfied, despite the facts that not all products at issue contained pomace, and that varying applicable state standards would yield different answers to the question of whether pomace is 100 percent pure olive oil. Additionally, the court found that the proposed class was ascertainable, even though the Southern District found that the process for identifying class members proposed by the class action administrator was unrealistic in a previous, unrelated case. Finally, the court found that the predominance requirement was satisfied, notwithstanding defendant's argument that some class members may not have sustained injury because their purchase was not influenced by the label.

***Caldera v. J.M. Smucker Co.*, No. 12-4936, 2014 WL 1477400 (C.D. Cal. April 15, 2014)**
In this consumer class action, plaintiff moved to certify two monetary relief classes and two injunctive relief classes. Plaintiff alleged that the labels on J.M. Smucker products misled customers into believing that they were healthy when they contained trans fat and high fructose corn syrup. The Central District of California found that plaintiff failed to satisfy the predominance requirement because she did not establish that damages may be proven on a class-wide basis. Plaintiff presented no evidence showing that damages could be calculated based on the difference between the market price and true value of the product. The motion to certify the monetary relief classes was therefore denied. The motion to certify injunctive relief classes was also denied because plaintiff failed to explain why her injunctive relief claims could not be pursued in her individual action.

***POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014)**
POM Wonderful claimed that Coca-Cola's label contained misrepresentations, which caused injury to POM's sale of its competing product. Although Coca-Cola argued that POM's claims were moot because its labels complied with the FDCA, the U.S. Supreme Court disagreed and explained that neither the FDCA nor the Lanham Act bars competitor lawsuits like the one brought by POM. The FDCA acts as a statutory floor for food label compliance, while market and commercial interests can impose greater restrictions if further protections are deemed necessary. After this decision, the industry remains sheltered from consumer class actions that are based on the Lanham Act or on violations of the FDCA. But consumer class actions based on allegedly misleading labels will continue to challenge the industry. While the court never explicitly references the theory, it is likely

that consumers will argue that there is room to bring claims without FDCA preemption after the POM decision.

Bishop v. 7-Eleven, Inc., No. 12-02621, 2014 WL 1620946 (N.D. Cal. Apr. 21, 2014)
A Northern District of California judge was tasked with examining whether potato chip labels that included the language "0g Trans Fat" and "No Cholesterol" were deceiving in nature and the chips at issue misbranded. Because the causes of action upon which plaintiff relied required an economic injury and actual reliance, the court found that plaintiff lacked standing. Plaintiff did not argue that the labels were actually misleading because of the language they contained, but instead argued that the labels were misleading because they did not include disclosures mandated by the Food, Drug, and Cosmetic Act. The court did not accept this argument and dismissed plaintiff's putative class action with prejudice.

Jones v. ConAgra Foods, Inc., No. 12-0163, 2014 WL 2702726 (N.D. Cal. June 13, 2014)
Plaintiffs unsuccessfully sought to certify three prospective classes of purchasers of foods produced by ConAgra Foods. The denial of certification demonstrates that the testimony of the named plaintiff matters and is often outcome determinative. Here, the named plaintiffs failed to testify that they actually were misled by the allegedly misleading statements on ConAgra's labels. Nor did they testify that they would ever purchase the products again, even though they were seeking injunctive relief. The court also ruled that class members could not be ascertained or identified through sworn testimony or memory, apparently following the Third Circuit's decision in Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013).

Bruton v. Gerber Products Co., No. 12-2412, 2014 WL 2860995 (N.D. Cal. Jun. 23, 2014)
*I*n Bruton, the Northern District of California denied plaintiff's motion for class certification because plaintiff failed to define an ascertainable class. The proposed class consisted of persons who purchased 69 different types of baby food products over the course of four years.

Brazil v. Dole Packaged Foods, LLC, No. 12-1831, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014)
The Northern District of California decertified a damages class in a case involving Dole products containing an "All Natural" label because plaintiff's expert, Dr. Capps, submitted a damages model that was flawed in several respects. The model did not control for factors such as advertising, convenience of packaging, and other claims made on the products' labels. Furthermore, the model was based on assumptions about competing products that were either false or untested. A portion of the model was also based on an unrelated study that had no relation to the products at issue. The court, however, denied Dole's motion to decertify the injunctive relief class, finding that the class was ascertainable.

Werdebaugh v. Blue Diamond Growers, No. 12-2724, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014)
After certifying a damages class against Blue Diamond Growers for allegedly mislabeling its

products as containing evaporated cane juice and being "All Natural," the Northern District of California decertified the class. The court initially accepted plaintiff's proposed regression model as an appropriate damages model, but the models submitted by plaintiff's expert failed to isolate the price premium attributable to the labels used by Blue Diamond. Also, the models failed to control for advertising. The court also refused to accept an alternative damages figure based on a separate study, finding no correlation between the study and Blue Diamond's liability. The court ultimately decertified the class for failure to satisfy the predominance requirement because plaintiff failed to put forth evidence that damages could be determined and attributed to plaintiff's theory of liability on a class-wide basis.

***Randolph v. J.M. Smucker Co.*, No. 13-CIV-80581, 2014 WL 7330430 (S.D. Fla. Dec. 22, 2014)**
Plaintiff filed a purported class action against the producer of cooking oils containing "All Natural" designations on their labels, seeking relief for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), false and misleading advertising, unjust enrichment, and breach of express warranty. The court declined to certify the class holding that, despite plaintiff's satisfaction of the commonality and typicality prerequisites, the putative class was not ascertainable and plaintiff failed to satisfy Rule 23(b)(3)'s predominance inquiry.

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