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IN PRACTICE

CONSUMER PROTECTION

Wrapping the Class Action Label Around Food Packaging Claims

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Makes you well all over ... cures all aches and pains ....” In the late 19th and early 20th centuries, “snake oil” advertisements for cure-alls and medical miracles peppered newspapers — unregulated and unchecked.

Fast forward to the 21st century: an environment with the Federal Trade Commission, state attorneys general and state consumer protection statutes to oversee consumer communications. Early advertising’s only surviving artifact is the use of adjectives to evoke positive inferences, such as “superior,” “genuine,” “unique” and “natural.” In turn, this adjectivally-based product labeling has precipitated a new trend: food labeling class actions.

A nationwide wave of class-action suits over the past two years zero in on a single word or phrase in product ads or labeling, such as “100 percent pure,” “original,” “classic,” “nutritious” or “less [sodium or sugar].” The aggressive stance of the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1, et seq., (CFA) has fueled the trend in this state, allowing for both state and private enforcement of its provisions.

Regulatory oversight and consumer protection laws have reined in the snake oil advertisements, but now we’re quibbling over adjectives and “crunchberries.”

In the last two years alone, class-action lawyers filed lawsuits regarding the following, among others:

• “All natural” to describe products containing high-fructose corn syrup (*Robinson v. Hornell Brewing Co*., No. 11-2183, 2012 WL 1232188 (D.N.J. April 11, 2012));

• “100 percent Pure Squeezed Orange Juice,” when it allegedly is “heavily processed, pasteurized and flavored” and “manipulated in a laboratory to extend shelf-life” (*In re: Simply Orange Orange Juice Mktg. and Sales Prac. Litig*., --- F. Supp. 2d ----, 2012 WL 2175765 (U.S. Jud. Pan. Mult. Lit., June 11, 2012) (centralization in New Jersey federal court of six pending cases against Tropicana));

• “Natural” deodorant containing “natural ingredients” and providing “natural protection,” while allegedly containing synthetic and artificial ingredients (*Trewin v. Church & Dwight*, No. 12-14291 (complaint filed Mar. 9, 2012) (D.N.J.));

• “Less Sodium” labeling on higher-priced soup, when it had sodium content equal to that of regular soup (*Smajlaj v. Campbell Soup Co*., No. 10-1332, 2011 WL 1086764 (D.N.J. Mar. 23, 2011));

• Statements about a butter substitute’s nutritional content and health benefits, enabling it to “command a premium price” (*Young v. Johnson & Johnson,* No. 11-4580, 2012 WL 1372286 (D.N.J. Apr. 19, 2012)); *Compare Yumul v. Smart Balance*, 733 F. Supp. 2d 1117 (C.D. Cal. 2010);

• A chocolate hazelnut spread’s ads that it is a healthy breakfast food *In re Nutella Mktg. and Sales Prac. Litig.,*; and

• A nutritional drink that is “clinically shown” to help strengthen the immune system. (*Scheuerman v. Nestle Healthcare Nutrition*, No. 10-3684, 2012 WL 2916827 (D.N.J. July 17, 2012)).

Abuse of the Class-Action Device

A class action is intended to be a “means of providing a procedure that is fair to all parties and promotes judicial efficiency.” *In re Cadillac V8-6-4 Class Action,* 93 N.J. 412, 435-36 (1983)). Some product-labeling decisions show that this consumer litigation trend is

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abusing the class device and consumer protection laws because the cases present no "wrongs" to remedy and are unfair to the companies they target.

For example, a consumer alleged that colorful "crunchberries" on Cap'n Crunch cereal boxes, combined with use of the word "berry," suggested the product contains real fruit. *Sugawara v. Pepsico*, No. 08-01335, 2009 WL 1439115 (E.D. Cal. May 21, 2009). The court granted the defendant's motion to dismiss, noting:

> This Court is not aware of, nor has Plaintiff alleged the existence of, any actual fruit referred to as a "crunchberry." Furthermore, the "Crunchberries" depicted are round, crunchy, brightly-colored cereal balls, and the [box] clearly states both that the Product contains 'sweetened corn & oat cereal' and that the cereal is 'enlarged to show texture.' Thus, a reasonable consumer would not be deceived into believing that the Product contained a fruit that does not exist ... For these same reasons, another court has previously rejected substantially similar claims directed against the packaging of Fruit Loops cereal [referring to *McKinnis v. Kellogg USA*, No. 07-2611, 2007 WL 4766060 (C.D. Cal. 2007)].

Is this case really what legislators envisioned when they enacted state consumer protection statutes?

Consumers who invoke the class action for claims as to which "no reasonable consumer would be deceived into believing" abuse consumer protection laws and the class-action device.

The Rules, Choice of Law, Manageability And Standing

F.R.C.P. 23(b)(3) and *R*. 4:32-1(b)(3) require plaintiffs to demonstrate that "questions of law or fact predominate over any questions affecting only individual members." To evaluate predominance, courts look at each cause of action and identify the applicable substantive law. Where actual conflicts exist among the state laws for a claim, New Jersey has adopted the "most significant relationship" choice of law test to identify the state having the most significant relationship to each of plaintiff's claims. If more than one state's laws would apply to a putative class, a court must consider whether variations in state laws present insurmountable obstacles that render class-action litigation unmanageable.

In most cases, New Jersey's "most significant relationship" test warrants application of 50 states' laws on *each* plaintiff's and class member's claim. However, this yields discovery and trial manageability problems as well as predominance of individual legal issues (although not all jurisdictions agree on this point: *see In re POM Wonderful Mktg. and Sales Prac. Litig.*, 2012 WL 44900860 (C.D. Cal. Sept. 28, 2012) (adopting classwide inference of reliance)).

The food labeling class-action trial judge would face a near-impossible task of instructing the jury on the relevant law of multiple jurisdictions, with the plaintiff having the burden of "demonstrating 'a suitable and realistic plan for trial of the class claims.'" *Smith v. Merial Ltd.*, No. 10-439, 2012 WL 2020361, at *4 (D.N.J. June 5, 2012). In the food labeling situation, the plaintiff confronts evidentiary hurdles in proving individual consumer reliance and causation on ads and labels (a prerequisite to common-law fraud and most states' consumer protection laws). The range of possible complications is broad.

For example, what if claims asserted by a putative class require proof of injury-in-fact under certain states' consumer protection laws? Will the case devolve into a series of hundreds of mini-trials? That would seem to be the inevitable result if one takes *Walmart v. Dukes* to its logical conclusion in the class-action product-labeling context (131 S. Ct. 2541, 2551 (2011) (a class cannot be certified unless plaintiffs can provide significant proof that each class member's claim can be resolved in "one stroke" by litigating an issue they all share)). But if a product label's "capacity to mislead" makes it actionable (e.g., under the CFA), could an ingredient list on the label serve to correct a message that consumers infer from the rest of the packaging? Furthermore, if parties settle on a class basis before trial, how would consumers prove class membership? With a receipt from a food product purchased years ago?

In addition to the predominance and manageability requirements, courts are finding other ways to prevent abuse of class actions and consumer protection laws. For example, a plaintiff last year alleged he was misled for more than a decade by labels touting "all natural" ingredients that tricked him into buying iced tea with high-fructose corn syrup. The court denied class certification because plaintiff failed to demonstrate standing to pursue injunctive relief: "[M]erely seeing a label that Plaintiff believes is incorrect or ... could be misleading to others is not the kind of concrete adverse effect or injury necessary to create a cognizable case or controversy required by Article III." *Robinson*, 2012 WL 1232188, at *5, 7.

Last month, plaintiffs who alleged that a cereal manufacturer misrepresented the cholesterol-lowering and heart attack reduction health benefits of its product lacked standing to pursue consumer fraud claims against the manufacturer where those plaintiffs had continued to eat the cereal for various reasons, including ingredients, taste, crunchiness and convenience: "[H]ence, the [alleged] misrepresentation did not alter their selection of purchasing" the product and they could not establish quantifiable damages for either return of purchase price or benefit-of-the-bargain losses. *In re Cheerios Mktg. and Sales Prac. Litig.*, No. 09-cv-2413, 2012 WL 3952069, at *1, 13 (D.N.J. Sept. 10, 2012).

Final Thoughts

Pending CFA amendments would materially alter the landscape for product labeling class actions: (1) A-3333/S-2855 would make them far less economically attractive to plaintiffs, since the bill would make fees and treble damages discretionary rather than mandatory, would cap legal fees at the greater of $150,000 or one-third of the judgment, and would require proof of detrimental reliance on the product label; and (2) A-1401 would require plaintiffs to make written refund requests at least 35 days before filing suit. These amendments would stem the tide

of these product-labeling class-action suits. In the interim, F.R.C.P. 9 and Rule 4:5-8's particularity pleading requirements for fraud-based claims (*Crozier v. Johnson & Johnson Consumer Companies, Inc*., 2012 WL 4507381 (D.N.J. Dept. 28, 2012)) and the nonactionable status of promotional, subjective puffery (*Hammer v. Vital Pharm., Inc*., 2012 WL 1018842 (D.N.J. Mar. 26, 2012)) are defenses to consider for companies targeted by these consumer claims.

If plaintiffs sue for injunctive relief to enjoin certain language on labels (*e.g*., *In re Nutella Mktg. and Sales Prac. Litig*., 804 F. Supp. 2d 1374 (U.S. Dist. Panel Mult. Dist. Litig. Aug. 16, 2011)), the results would adversely impact manufacturers who already invested in million-dollar ad campaigns.

In the wake of this trend, companies and their advertising firms should revisit their product labels' language. This is especially important for health-related product manufacturers, as food-related consumer class actions lead the pack in the product-labeling lawsuit spike and as manufacturers could soon find themselves subject to the first laws mandating labels in the U.S. for genetically-modified foods (if California's Proposition 37 passes on Nov. 6).

Consumer protection laws helped solve the abuses of snake oil salesmen, but the laws themselves are now being abused. Were lawsuits over crunchberries and hazelnut spreads really what lawmakers envisioned for private enforcement of statutes like the CFA? ■