PANEL 2

ABA Section of Litigation Food & Supplements Subcommittee and the Products Liability Committee, June 12, 2012

Food Labeling: The Rising Tide of Consumer Fraud Class Actions

David Biderman
Perkins Coie LLP
San Francisco, California

Joren Bass
Perkins Coie LLP
San Francisco, California

Monica Ortiz
Perkins Coie LLP
San Francisco, California

What's Trending? Food Litigation Class Actions: a Look at Preemption and Class Certification by David Biderman, Joren Bass and Monica Ortiz

In the past few years, there has been a dramatic expansion of the number of consumer class action lawsuits using states' consumer protection statutes to challenge health and nutrition claims made during the marketing of food, beverages and supplements. While courts continue to struggle with a consistent approach to handling these suits, trends have begun to emerge. This article discusses recent developments, with an emphasis on how courts are addressing defendants' arguments that these lawsuits are preempted by federal law, and how courts have addressed some motions to certify classes in some cases.

Consumer Class Actions Challenging Food Product Labeling

Lawsuits challenging food product marketing have taken various forms, but generally focus on the allegation that marketing claims violate state consumer protection statutes by claiming the product is something that it (allegedly) is not. The most recent wave of suits has focused on "all natural" claims—challenges to the use of the term "natural," "100% natural," or an equivalent—on the basis that the product contains an ingredient that is not found in nature. Representative suits include claims that products cannot be marketed as "natural" if they contain high fructose corn syrup,[1] a "synthetic" additive,[2] genetically modified organisms (GMOs),[3] or are processed in a manner that removes the "natural" characteristics of the product.[4]

In addition to "all natural" cases, recent suits have alleged that manufacturers' nutrient content and health benefit claims are false or misleading. Such suits include challenges to health benefits offered by probiotics contained in drinks,[5] yogurt[6] and baby formula[7]; breakfast cereals marketed as supporting increased immunity and improved cognitive function[8]; canned fish marketed as a rich and excellent source of Omega-3[9]; and heart benefits offered by various products,[10] among others.[11] And these are just examples.[12]

Preemption of Food Labeling State Law Claims

Defendants whose product labels are alleged to be false or misleading in violation of state consumer protection statutes have responded by arguing that the claims are preempted by federal law, with mixed success. The Federal Food, Drug, and Cosmetic Act ("FDCA")[13] was enacted to "prohibit the misbranding of food".[14] In 1990, the Nutrition Labeling and Education Act (NLEA) amended the FDCA to provide the FDA with specific authority to require nutrition labeling of most foods regulated by the agency.[15] Section 343 of the NLEA prohibits any state from "directly or indirectly establish[ing] . . . any requirement . . . made in the label or labeling of food that is not identical to the requirement of section 343(r). . . ."[16] The purpose of the NLEA's preemption provision was to establish uniformity in the standards for nutritional claims and nutrient information displayed on food labels.[17]

In *Turek v. General Mills, Inc.*,[18] the Seventh Circuit affirmed the dismissal of plaintiff's Illinois consumer protection claims on preemption grounds, holding that the result of plaintiff's claims would be to impose greater labeling requirements than required by NLEA. Plaintiff alleged that General Mills violated Illinois law because the labels of FiberOne and other chewy

bars did not disclose that the fiber identified on product labels was inulin, a fiber derived from chicory root, rather than "natural" fiber. Plaintiff claimed General Mills violated the law because the products' labels did not disclose that inulin fiber allegedly provided fewer health benefits and could be harmful to pregnant or lactating women. The district court held that the plaintiff's attempt to require General Mills to describe the fiber in its products in a particular manner was expressly preempted by the NLEA. As the Seventh Circuit noted when affirming the dismissal, "[t]he information required by federal law does not include disclosing that the fiber in the product includes inulin or that a product containing inulin produces fewer health benefits than a product that contains only 'natural' fiber. . . ."[19]

Other courts have also dismissed actions as preempted by the NLEA where plaintiffs challenged the adequacy of content labels where the FDA expressly regulates the ingredient at issue, including claims of "0g trans fat," "0g Cholesterol," "fat-free" and disclosure of artificial flavorings.[20] The FDA regulates these representations, providing a standard which, if met, establishes that the label is in compliance with FDA regulations.[21] Claims seeking additional or different representations have therefore been found to be expressly preempted. As one court noted, "Plaintiff's claims seek to enjoin the use of the very term permitted by the NLEA and its accompanying regulations. Plaintiff's claims must therefore fail because they would necessarily impose a state-law obligation for trans fat disclosures that is not required by federal law."[22]

In contrast, courts have declined to find either express or implied preemption where the ingredient is not expressly regulated by the FDA. Significant for food and beverage litigation, courts have declined to find lawsuits challenging use of the term "all natural" preempted, even though the FDA has a promulgated policy on the term.[23] *Lockwood v. Conagra Foods, Inc.*, provides an instructive example of how courts are approaching the argument that the use of "all natural" on product labels is preempted by the NLEA or the FDCA. There, the defendant marketed "Healthy Choice" pasta sauce as "all natural", which the plaintiff claimed violated California consumer protection statutes because the sauce also contained high fructose corn syrup. The defendant argued that the claim was expressly preempted by the NLEA and impliedly preempted by the FDCA because Congress intended to occupy the field of food labeling.[24] The court rejected both arguments, finding no express preemption because the FDCA does not regulate whether a product containing high fructose corn syrup can be "all natural" and finding no implied preemption where Congress expressly provided "that it *does* not intend to occupy the field of food and beverage nutrition labeling. . . ."[25] Other California courts have similarly refused to find claims challenging "all natural" labeling preempted.[26] As one court explained, since the purpose of the NLEA "is not to preclude all state regulation of nutritional labeling, but to 'prevent State and local governments from adopting inconsistent requirements with respect to the labeling of nutrients'" the absence of any provision regulating the use of "natural" on a food label precludes a finding of preemption.[27]

Similarly, in *Holk v. Snapple Beverage Corp.*, where plaintiff challenged the use of "all natural" on the labels of beverages containing high fructose corn syrup, the Third Circuit considered and rejected the argument that use of the term "all natural" was impliedly preempted.[28] According to the court, the NLEA does not allow for implied preemption: no provision of the act expressly allows for it, nor is there a "clear and manifest" expression by Congress to occupy the field, nor have the FDA communicated its intent to occupy the field of food and beverage labeling, and a reluctance to finding preemption based solely upon the

existence of a comprehensive regulatory scheme.[29] The Third Circuit also rejected implied conflict preemption predicated upon federal agency action taken pursuant to statutorily granted authority, in this case by the FDA in issuing its 1991 policy statement on the term "all natural," holding that the informal policy did not carry the weight of federal law.[30]

Class Certification

Relatively few food and beverage consumer class actions have reached the class certification stage. Most opinions deciding whether to certify a class focus on the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure and the predominance requirement of Rule 23(b)(3).[31] However, because "[t]he commonality and typicality requirements of Rule 23(a) tend to merge"[32] and the predominance requirement is similar to (but "far more demanding") than commonality and typicality,[33] different courts sometimes analyze the same arguments against class certification under different prongs of Rule 23.

It is uncommon for courts to refuse to certify a class based on lack of commonality or typicality alone. For purposes of the Rule 23(a)(3) commonality analysis, for example, "even a single common question will do."[34] Indeed, some defendants do not dispute the Rule 23(a) requirements, arguing instead that even if there is a common question typical of the class, there is no predominance under Rule 23(b).[35] However, many of these cases seek to include multiple products with similar health or benefit claims in the same class, and in those cases, courts *have* denied certification where a named plaintiff has not purchased all the products the plaintiff puts at issue. For example, in *Weiner v. Dannon Company, Inc.*, the court denied class certification finding no typicality because the plaintiff had only purchased one of three products in the case and the other products had different labels, were advertised separately, and involved different health benefits supported by different studies.[36]

Courts have also found a lack of typicality where the class is unlikely to share a named plaintiff's very specific claim. For example, in one case the plaintiffs sued the maker of microwave popcorn for allegedly misleading consumers by labeling popcorn as "no diacetyl added." Plaintiff alleged that she purchased the product in reliance on the statement. The court found no typicality, concluding that there could be "no serious question that the vast majority of putative class members here never read (let alone considered) the [defendant's] statement at issue, do not know what diacetyl is, and do not base their popcorn purchases on diacetyl-related issues."[37] Because the class would include varying rationales for purchasing the product, plaintiff's claim of purchasing popcorn because of "no added diacetyl" was not typical of the class.

Rather than focusing on the requirements of Rule 23(a), the central dispute in class certification for most food and beverage cases comes under the predominance requirements of Rule 23(b). There, a central dispute is whether the state laws at issue require an individual showing of reliance. In *Fitzpatrick v. General Mills, Inc.*,[38] the Seventh Circuit held that predominance was satisfied because that statutory claim did not hinge on whether a particular plaintiff actually relied on the defendant's claims concerning YoPlus yogurt. Rather, the standard was one of whether an objectively reasonable consumer would be deceived; therefore subjecting the plaintiff's claim to class-wide proof. However, the court vacated and remanded

the case because the class was defined in such a way that implicated individual reliance. By contrast in, *Aaronson v. Vital Pharmaceuticals, Inc.*,[39] plaintiff's reliance on the product labeling was an element to most of his claims and by admitting to not having read the label, common issues did not predominate and plaintiff was not typical of the class.

In *Weiner v. Snapple Beverage Corp.*, the court denied certification to a class of New York purchasers of Snapple beverages labeled "All Natural" but containing high fructose corn syrup. The plaintiff claimed that the price of each bottle of Snapple was artificially inflated as a result of the allegedly-false "all natural" claim. After the court excluded the plaintiffs' economics expert, who suggested he could identify the "price premium" attributable to the "All Natural" claim, the court denied certification, ruling that the plaintiffs could not establish the predominance of a common factual or legal issues regarding causation and injury. The court concluded that common claims did not predominate since an individualized inquiry would be needed to determine if each individual paid more for "All Natural" Snapple, and how much each person paid.[40]

Predominance has also resulted in an impediment to certification of nationwide classes. In *In re Ferrero Litigation*, concerning allegations that Nutella falsely claimed to be a healthy breakfast food when it contained "dangerous" levels of fat and sugar, the court granted class certification, but limited it to a statewide class, citing predominance as an obstacle to nationwide certification.[41] Similarly, in *Gianino v. Alacer Corporation*, the court found that material variations in state laws precluded a finding of predominance.[42] In contrast, in *Zeisel v. Diamond Foods*, the court certified a nationwide class of consumers who had purchased packaged walnuts containing specific heart-health claims under California's consumer protection statutes.[43] However, because the court in *Diamond Foods* did not conduct choice-of-law or due process analyses or otherwise explain why California's consumer protection statutes should apply to consumers across the country, the opinion should be viewed as an outlier when it comes to the certification of national classes.[44]

Conclusion

Food class action cases have continued to evolve as evidenced by the increase in suits challenging the wide variety of marketing claims companies use to sell their products. As new attacks on product labeling mount, and the courts consider the existing suits working their way towards rulings on motions for class certification, we expect to find greater clarity and consistency, both in how courts address preemption and in how courts resolve questions of commonality, typicality and predominance.

---

[1] *See e.g.*, *Holk v. Snapple Beverage Co.*, 575 F.3d 329 (3d Cir. 2009) (bottled tea); *Von Koeing v. Snapple Beverage Corp.*, 713 F.Supp.2d 1066 (E.D. Cal. 2010) (same); *Ries v. Hornell Brewing Co.*, 2011 WL 3759937 (N.D. Cal. Aug. 25, 2011) (same); *Robinson v. Hornell Brewing Co.*, No. 1:11-cv-02183 (D.N.J. filed Apr. 13, 2011) (class certification denied for lack of standing on claim for injunctive relief because plaintiff claimed even if the labeling changed he would not purchase the bottled beverage again); *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028 (2009) (bottled pasta sauce);

[2] *See e.g.*, *Astiana v. Ben & Jerry's Homemade, Inc.*, 2011 WL 2111796 (N.D. Cal. May 26, 2011) (alkalized cocoa in ice cream and frozen yogurt); Complaint, *Pappas v. Naked Juice Co.*, No. 2:11-cv-08276 (C.D. Cal. filed 2011) (juice containing ascorbic acid and lecithin); Complaint, *Thurston v. Bear Naked, Inc.*, No. 3:11-cv-02890 (S.D. Cal.

filed 2011) (granola containing potassium carbonate, glycerin and lecithin); Complaint, *Larsen v. King Arthur Flour Co.*, No. 3:11-cv-05495 (N.D. Cal. filed 2011) (baking mixes containing ascorbic acid and other additives); Complaint, *Larsen v. Nonni's Foods, LLC*, No. 3:11-cv-04758 (N.D. Cal. filed 2011) (biscotti); *Colucci v. ZonePerfect Nutrition Co.*, No. 3:11-cv-4561 (N.D. Cal. filed 2011) (nutrition bars); Complaint *Larsen v. Trader Joe's Co.*, No. 3:11-cv-5188 (N.D. Cal. filed 2011); Complaint, *Bates v. Kashi Co.*, No. 3:11-cv-1967 (S.D. Cal. filed 2011); Complaint, *Von Kaenel v. Beam Global Spirits & Wine, Inc.*, No. 2:11-cv-07305 (C.D. Cal. filed 2011) (alcoholic beverage labeled "all natural" and "no preservatives" contain sodium benzoate); Complaint, *Lawrence v. Safeway, Inc.*, No. 3:11-cv-06614 (N.D. Cal. filed 2011) (honey wheat and wheat bread contain calcium sulfate and soy lecithin); Complaint, *Dennis v. Tropicana Prods., Inc.*, No. 2:11-cv-07382 (D.N.J. filed 2011) (orange juice heavily processed and added flavor); Complaint, *Yee v. Simply Orange Juice Co.*, No. 12-cv-01170 (N.D. Cal. filed 2012) (same); Complaint, *Anderon v. Jamba Juice Co.*, No. 12-cv-01213 (N.D. Cal. filed 2012) (at home "smoothie kits" containing synthetic ingredients); Complaint, *Garcia v. Nabisco, Inc.*, No. 2:12-cv-00695 (E.D. Cal. filed 2012).

[3] *Briseno v. Conagra Foods, Inc.*, No. 2:11-cv-05379, (C.D. Cal. filed 2011) (cooking oil made from genetically modified plants); Complaint, *Bevans v. General Mills, Inc.*, No. 2:12-cv-249 (D.N.J. filed 2012) (cereal containing GMO corn); *Pappas*, No. 2:11-cv-08276 (juice containing GMO soy); Complaint, *Zuro v. Frito-Lay North America*, 1:12-cv-00885 (E.D.N.Y. filed 2011) (various corn tortilla chips contain GMO); *Gengo v. Frito-Lay North America*, 1:12-cv-00408 (E.D.N.Y. filed 2011) (same).

[4] *See, e.g.*, Complaint, *Brod v. Sioux Honey Ass'n Cooperative*, No. 1200291 (Cal. Super. Ct. filed 2012) (processing removes a natural key ingredient (pollen) rending honey not "natural" as advertised); Complaint, *Ross v. Sioux Honey Ass'n Cooperative*, No. 12-cv-1645 (N.D. Cal. filed 2012) (same); Complaint, *Cardona v. Target Corp.*, 12-cv-01148 (C.D. Cal. filed 2012) (same); Complaint, *Gallant v. General Mills, Inc.*, No. BC481325 (Cal. Super. Ct. filed 2012) (Greek Yogurt not naturally strained and contains milk product concentrate to thicken substance); Complaint, *Taradejna v. General Mills, Inc.*, No. 12-cv-00993 (D. Minn. filed 2012) (same); *Hawkins v. General Mills, Inc.*, No. 12-cv-03306 (C.D. Cal. filed 2012) (same).

[5] Complaint, *Bahn v. Yukult Honsha Co., Ltd.*, No. 12-cv-01634 (N.D. Cal. filed 2012) (challenging advertisement of product as beneficial to human health and helping balance the digestive system).

[6] *See, e.g.*, *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279 (11th Cir. 2011) (digestive health benefits of YoPlus yogurt); *Weiner v. Dannon Co.*, 255 F.R.D. 658 (C.D. Cal. 2009) (digestive health benefits of Activia yogurt).

[7] Complaint, *Siddiqi v. Gerber Prods. Co.*, No. 12-cv-1188 (C.D. Cal. filed 2012) (challenging probiotics advertised to support healthy infants like breast milk by maintaining a healthy immune system, brain and eye development and as a nutritious alternative to cow's milk for toddlers).

[8] Complaint, *Weeks v. Kellogg Co.*, No. CV 09-08102 (C.D. Cal. filed 2009); Complaint, *Dennis v. Kellogg Co.*, No. 09-CV-01786 (S.D. Cal. filed 2009).

[9] Complaint, *Ogden v. Bumble Bee Foods, LLC*, No. 12-cv-01828 (N.D. Cal. filed 2012).

[10] *See, e.g.*, *Zeisel v. Diamond Foods, Inc.*, No. 3:10-cv-01192 (N.D. Cal. filed 2010) (challenging claims related to heart benefits from walnuts).

[11] Complaint, *Maxwell v. Unilever United States, Inc.*, No. 5:12-01736 (N.D. Cal. filed 2012) (flavanoid antioxidants in Lipton tea); Complaint, *Avoy v. Sunsweet Growers, Inc.*, No. 12-cv-01769 (N.D. Cal. filed 2012) (antioxidant content in dried fruit).

[12] Some beverage companies have also faced lawsuits challenging the source and origin of their products. *See, e.g.*, *In re Pepsico, Inc. Bottled Water Marketing & Sales Practices Litig.*, 588 F. Supp. 2d 527 (S.D.N.Y. 2008) (allegation Aquafina bottled water labels falsely represented that the water came from a "mountain source").

[13] 21 U.S.C. § 301 *et seq.*

[14] *See Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1116 (N.D. Cal. 2010)

[15] 21 U.S.C. §§ 343, 343-1.

[16] 21 U.S.C. § 343-1(a)(5).

[17] *See* H.R. Rep. No. 101538, at *13 (1990), *reprinted* in 1990 U.S.C.C.A.N. 3336, 3342.

[18] *See Turek*, 754 F.2d 956 (N.D. Ill. 2010) *aff'd* 662 F.3d 423 (7th Cir. 2011).

[19] 662 F.3d at 427.

[20] *Henderson v. Gruma Corp.*, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011) (guacamole and bean dip trans fat and cholesterol labeling); *In re Ferrero Litig.*, 794 F. Supp. 2d 1107 (S.D. Cal. 2011) (dismissing claim of deceptive labeling by omission of artificial flavoring where label listed vanillin as an artificial flavor in the ingredient list); *Kuenzig v. Kraft Foods*, 2012 WL 366916 (M.D. Fla. Feb. 3, 2012); *see also Dvora v. General Mills, Inc.*, 2011 WL 1897349, at *4 (C.D. Cal. May 16, 2011) (state claims alleging misleading label of "total blueberry pomegranate" on breakfast cereal preempted under NLEA which permits a manufacturer to use the name and image of fruit to describe the characterization of flavor even where product does not contain any of that fruit or any fruit at all); *Mills v. Giant of Maryland LLC*, 441 F.Supp.2d 104 (D.D.C. 2006) *aff'd* 508 F.3d 11 (D.C. Cir. 2007) (plaintiff's request to require warning labels on milk product preempted by NLEA).

[21] 21 C.F.R. § 101.62(d)(1)(i)(A) (cholesterol); 21 C.F.R. 101.9(c)(2)(iii) (trans fat); 21 U.S.C. § 343(k) (artificial flavor).

[22] *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111, 1119-1123 (C.D. Cal. 2010); *see also Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1116 (N.D. Cal. 2010).

[23] Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed.Reg. 60,421, 60,466 (Nov. 27, 1991) ([T]he agency has considered 'natural' to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected there.") *cf* Food Labeling: Nutrient Content Claims, General Principle, Petitions, Definition of Terms, Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed.Red. 2,302, 2,397 (Jan. 6, 1997) ("Because of resource limitations and other agency priorities, FDA is not undertaking rulemaking to establish a definition for 'natural' at this time.").

[24] *See Lockwood*, 597 F.Supp.2d 1028 at 1030-1034.

[25] *Id.* at 1032.

[26] *See Astiana*, 2011 WL 2111796 at *8; *Briseno*, No. 2:11-cv-05379, Dkt. 54 (C.D. Cal. Nov. 23, 2011) (denying motion to dismiss, declining to find FDA non-binding policy on GMOs/bioengineered food as having any preemptive effect on California consumer protection state law claims).

[27] *Astiana*, 2011 WL 2111796 at *8-10.

[28] *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336, 338-339. The court did not consider express preemption, finding that argument waived. *Id.*

[29] *Id.*

[30] *Id.* at 340-341.

[31] To establish "commonality", the plaintiff must show that "there are questions of law or fact common to the class". Fed. R. Civ. P. 23(a)(2). "Typicality" requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id.* R. 23(a)(4). Predominance requires the court to find "that questions of law or fact common to the class members predominate over any questions affecting only individual members." *Id.* R. 23(b)(3).

[32] *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982).

[33] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997).

[34] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011) (internal quotation marks and brackets omitted).

[35] *See, e.g., Johnson v. General Mills, Inc.*, 275 F.R.D. 282, 288 (C.D. Cal. 2011) (typicality); *Zeisel*, 2011 WL 2221113, at *7 (commonality).

[36] 255 F.R.D. 658, 665 (C.D. Cal. 2009); *see also Red v. Kraft Foods, Inc.*, 2011 WL 41599833, * 14 (C.D. Cal. 2011) (denying motion to certify class challenging "13 products with 57 different iterations of packaging purchased by consumers over an 11-year period.")..

[37] *Fine v. Conagra Foods, Inc.*, 2010 WL 3632469, at *3 (C.D. Cal. Aug. 26, 2010).

[38] 635 F.3d 1279 (2011).

[39] No. 3:09-cv-01333, Dkt. 76 (S.D. Cal. Fed. 3, 2010).

[40] *Weiner*, 2010 WL 3119452 at *5-10.

[41] 278 F.R.D. 552 (2011).

[42] No. 8:09-cv-01247, Dkt. 109 (Fed. 27, 2012)

[43] 2011 WL 2221113 (N.D. Cal. 2011)

[43] *See generally id*.

91004-1117/LEGAL23510637.1