

Hot Topics in Food Class Action

Maia Kats

Director of Litigation

Center for Science in the Public Interest

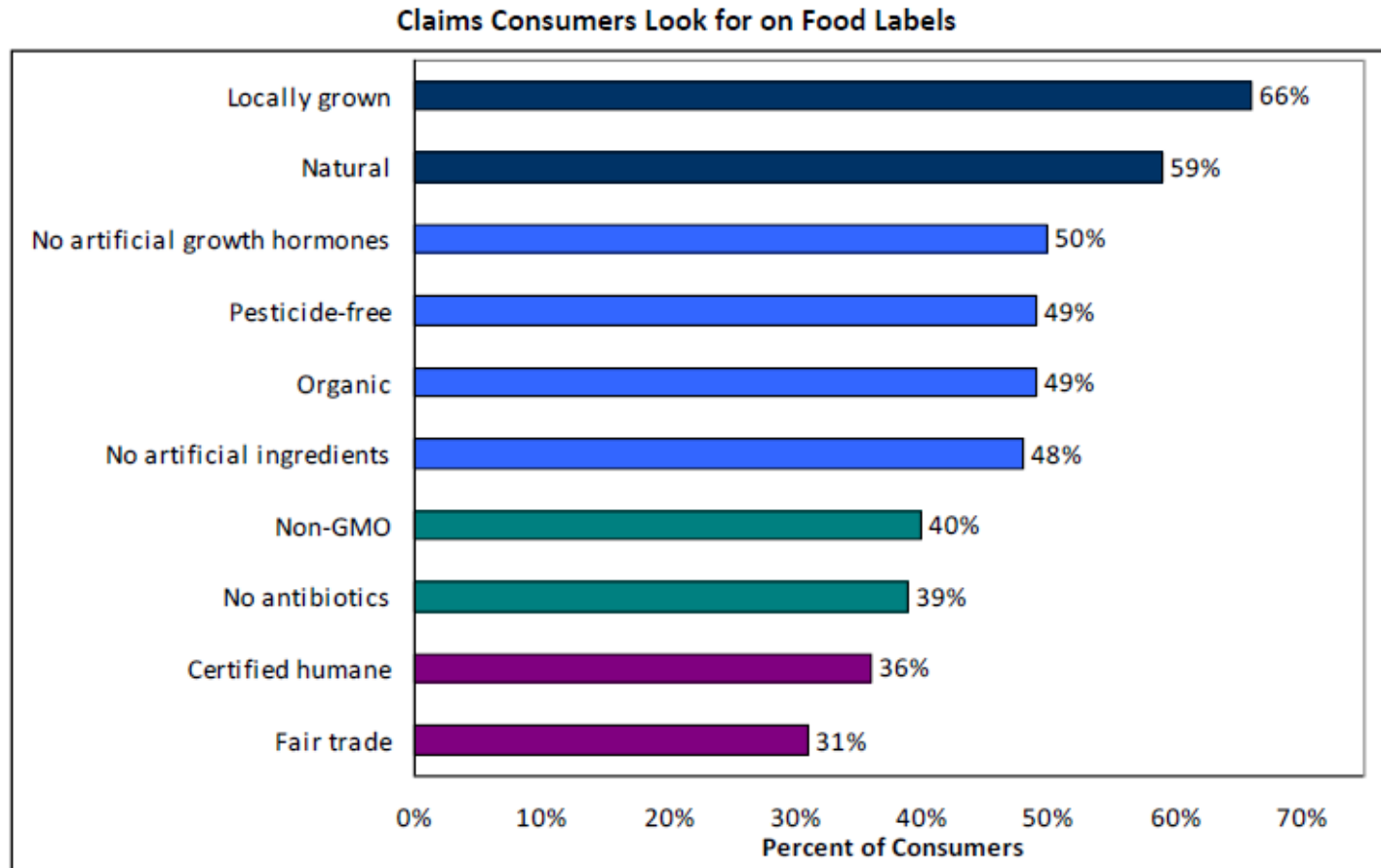


LEADER IN FOOD LABELING LITIGATION

- Principally, CSPI's Litigation Department pursues class claims of false and misleading labeling when such labeling bears on nutrition.
- Early examples include cases against Aunt Jemima's corporate parent for misleading labeling of "blueberry" waffles when the waffles contained no actual blueberries.
- Another early litigation was against Kraft for Capri Sun for labeling it as all "natural," when it was sweetened with high fructose corn syrup.

2014 Consumer Reports Survey

Relevance: Marketing tracks consumer interest in foods that appears healthy

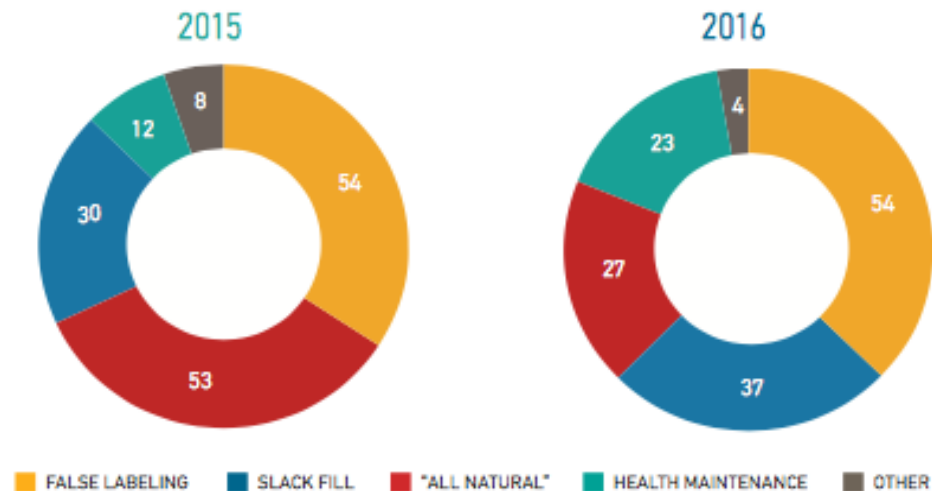


- 2016 CR survey found 73% consumers look for natural labels

2015 & 2016 Trends

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 2



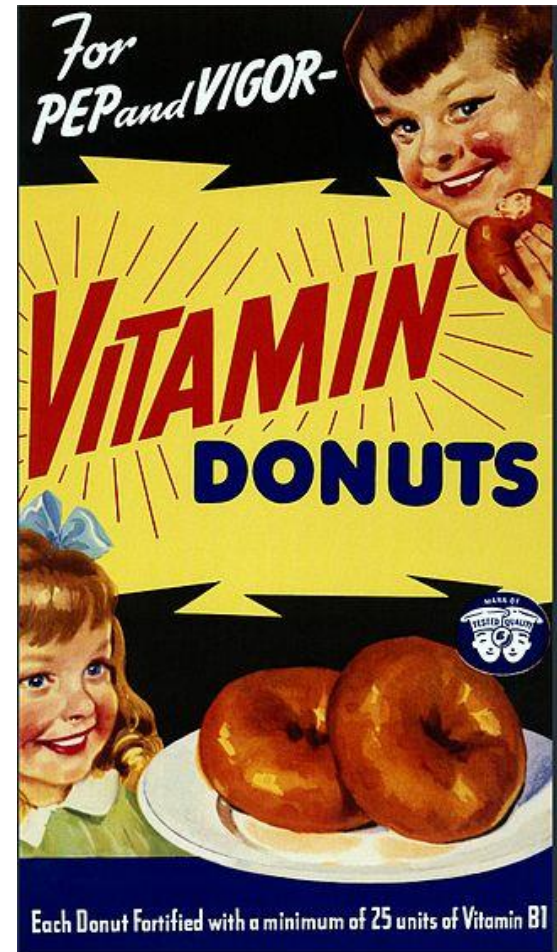
Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

- 100% increase of “health maintenance” claims - express or implied healthful claim
- 50% decrease in “all natural” claims

CSPI Target: False Health Claims

AKA Misleading Health Halos


- Added Sugar
- Characterizing Ingredients
- Protein (“hot” ingredient)
- Fortification of Junk Foods



Naked Juice

- Recent settlement of EDNY complaint
- Manufactured by PepsiCo, Naked Juice labels emphasized high profile ingredients over predominant ingredients
- Gave the false impression that, for example, kale blazer was as nutritious as pressed kale
- Contained 34 g of sugar (8+ teaspoons)
- Positive effort by PepsiCo

THE ONLY KALE,
KALE WOULD DRINK
IF KALE DRANK KALE

TWEETS BY KALE 

LEARN MORE 



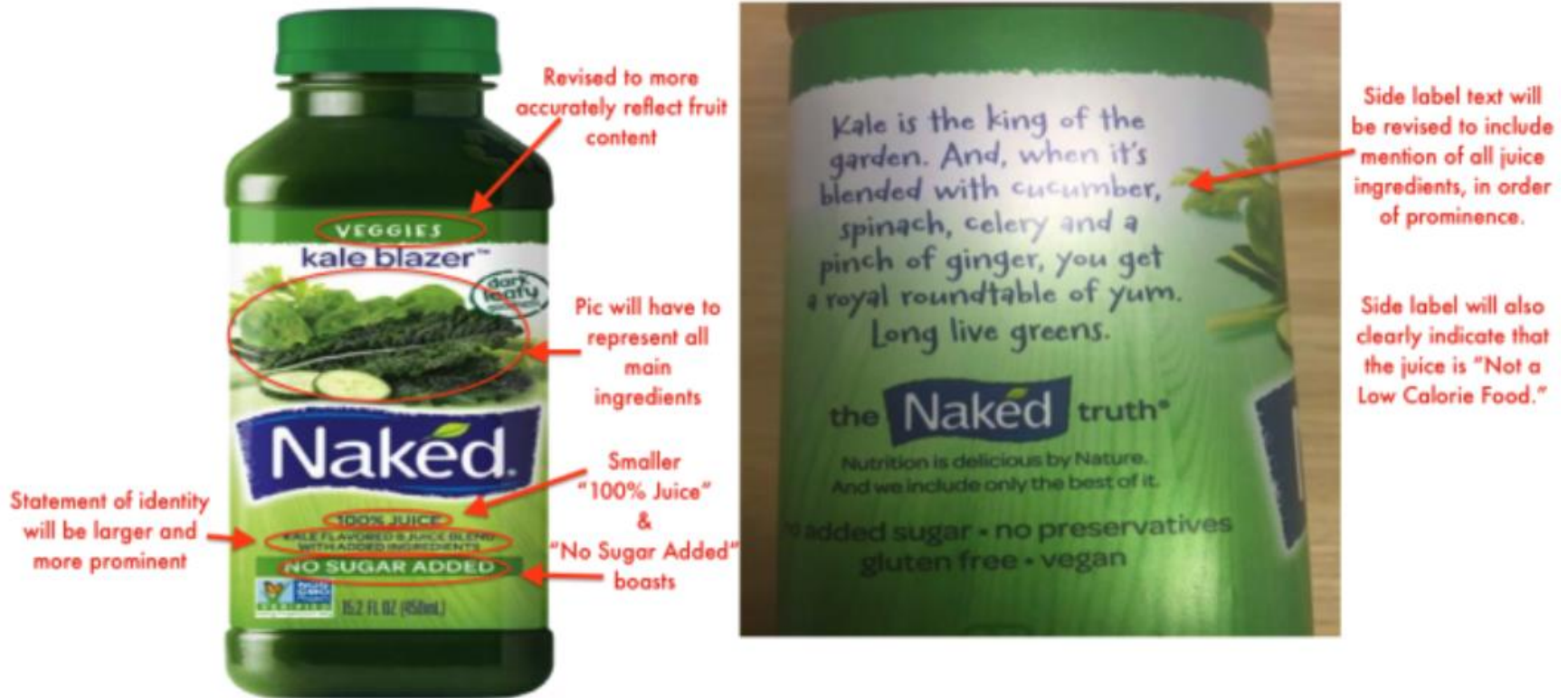
kale blazer



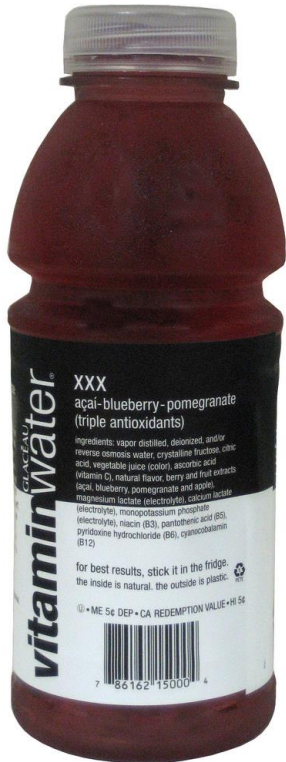
endorsed by kale
loved by all™



Remedy of Transparent Labeling



Vitaminwater – Added Sugar



- EDNY litigation settled in 2016
- Manufactured by Coca-Cola, “vitaminwater” implies vitamins and water
- 32 grams of sugar per serving (8 teaspoons)
- An average adult woman, according to the AHA, should cap her added sugar intake at about 6 tsp per day. Men at 9 tsp.
- Settlement provides for conspicuous labeling “with sweeteners” on PDP and bans the use of “vitamins + water = all you need” claim
- Also prohibits labeling of various health claims like, keeps you healthy as a horse.

Cheerios Protein – Added Sugar & Protein



- Ongoing litigation in NDCal
- Cheerios Protein effectively marketed as all the goodness of Cheerios with the benefit of more protein
- But has only a smidgen more protein and 16 or 17x the added sugar
 - 33% sugar by weight
 - 66% of added sugar cap per day for women per AHA guidelines – not taking into account “overpour” averages

Characterizing Ingredients

- 21 CFR § 102.5 provides:
 - The common or usual name of a food shall include the percentages of any characterizing ingredient(s) or component(s) when the proportion of such ingredient(s) . . . in the food has a material bearing on price or consumer acceptance or *when the labeling or the appearance of the food may otherwise create an erroneous impression that such ingredient(s) or component(s) is present in an amount greater than is actually the case.*
- 21 CFR § 101.18 provides:
 - The labeling of a food which contains two or more ingredients may be misleading by reason (among other reasons) of the designation of such food in such labeling by a name which includes or suggests the name of one or more but not all such ingredients, even though the names of all such ingredients are stated elsewhere in the labeling.

Plum Baby Foods Collaboration - Characterizing Ingredients

- Agreement with Plum wherein it agreed to label its pouches by predominant ingredients (with the exception of water for texture)
- So a product that has apple puree as the lead ingredient by weight will be named Apple Kale, for example, instead of via a different labeling and naming protocol that would have named it Kale Quinoa, for example.
- Same predominance principle with imagery



Nutrition Facts	
Serving Size 1 Pouch (113g)	
Servings Per Container 1	
Amount Per Serving	
Calories 80	
Total Fat	0.5g
Saturated Fat	0g
Trans Fat	0g
Cholesterol	0mg
Sodium	20mg
Potassium	200mg
Total Carb	17g
Dietary Fiber	2g
Sugars	11g
Protein	3g
% Daily Value	
Protein 19% • Vitamin A 60%	
Vitamin C 40% • Calcium 6%	
Iron 6% • Vitamin E 20%	

INGREDIENTS: ORGANIC APPLE PUREE, ORGANIC BANANA PUREE, WATER, ORGANIC PUMPKIN PUREE, ORGANIC PASTEURIZED GREEK YOGURT (ORGANIC SKIM MILK), ORGANIC SKIM MILK, ORGANIC QUINOA, ORGANIC POMEGRANATE JUICE CONCENTRATE, CHIA SEEDS, ORGANIC ACEROLA FRUIT EXTRACT, NATURAL FLAVOR, DL-ALPHA TOCOPHERYL ACETATE (VITAMIN E), CITRIC ACID.
CONTAINS: MILK

Fortification of Junk Food – Prohibited

21 CFR 104.20(a) provides

- . . .The addition of nutrients to specific foods can be an effective way of maintaining and improving the overall nutritional quality of the food supply. However, random fortification of foods could result in over- or underfortification in consumer diets and create nutrient imbalances in the food supply. It could also result in deceptive or misleading claims for certain foods. The Food and Drug Administration does not encourage indiscriminate addition of nutrients to foods, **nor does it consider it appropriate to fortify fresh produce; meat, poultry, or fish products; sugars; or snack foods such as candies and carbonated beverages. . . .**
- Stay tuned

Whole Grains



Dietary Supplements



Contact

- Maia Kats, Director of Litigation
 - mkats@cspinet.org

Class Actions in a Time of Less Regulation

And perhaps dramatically different
class action laws...

Meet the Presenters

Maia Kats, Director of Litigation
Center for Science in the Public Interest
Mkats@cspinet.org



Anthony Anscombe, Partner
Sedgwick LLP
Anthony.anscombe@SedgwickLaw.com



Jonathan Berman, Partner
Jones Day
Jberman@JonesDay.com



FDA priorities for the next few years

- No reason to expect less emphasis on food safety
- Less money for enforcement?
- Policy to foster innovation in food/beverage industry?

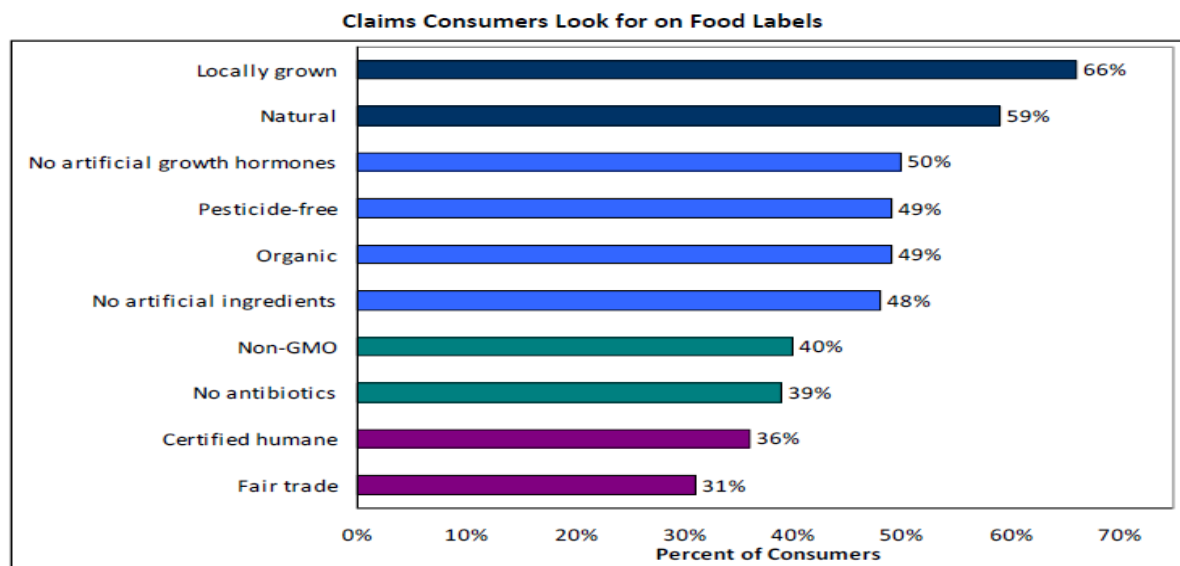
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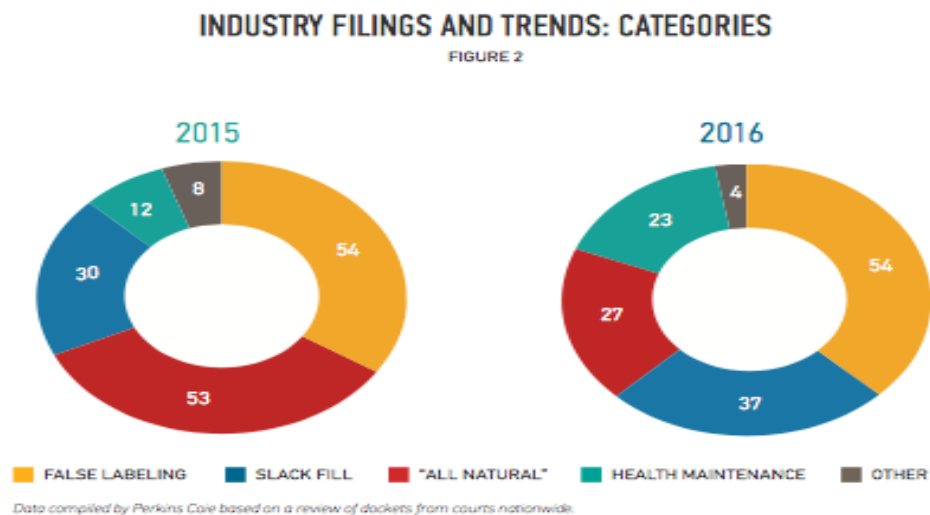
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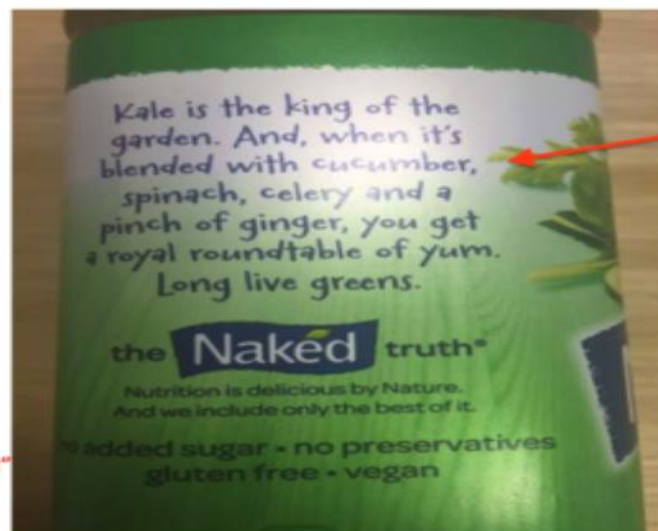
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Trans Fat	0g
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Sodium	20mg
Potassium	200mg
Total Carb	17g
Dietary Fiber	2g
Sugars	11g
Protein	3g
% Daily Value	
Protein 19% • Vitamin A 60%	
Vitamin C 40% • Calcium 6%	
Iron 6% • Vitamin E 20%	

INGREDIENTS: ORGANIC APPLE PUREE, ORGANIC BANANA PUREE, WATER, ORGANIC PUMPKIN PUREE, ORGANIC PASTEURIZED GREEK YOGURT (ORGANIC SKIM MILK), ORGANIC SKIM MILK, ORGANIC QUINOA, ORGANIC POMEGRANATE JUICE CONCENTRATE, CHIA SEEDS, ORGANIC ACEROLA FRUIT EXTRACT, NATURAL FLAVOR, DL-ALPHA TOCOPHERYL ACETATE (VITAMIN E), CITRIC ACID.
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Whole Grains



Dietary Supplements



Why do the vast majority of F&B Consumer Class Actions Cite FDA?

When FDA is not an agency with
inherent expertise on consumer
behavior?

Pom Wonderful v. Coca Cola, 134 S.Ct. 2228 (2014)

- “The FDCA statutory regime is designed primarily to protect the health and safety of the public at large.”
- FDA has “near exclusive enforcement authority.”
- “The FDA, however, does not have the same perspective or expertise in assessing market dynamics that day-to-day competitors possess. Competitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators.”
- Compliance with CFR did not mean label wasn’t deceptive.

Consumer fraud complaints rely on

- **FDA regulations:** See, e.g., 21 C.F.R. §161.190 (tuna fill); §100.100 (slack fill); §101.65 (“healthy”)
- **Policy statements, guidance:** See, e.g., Guidance re “Evaporated Cane Juice;” informal definition of “natural” (1993)
- **Scientific judgments:** See, e.g., hazards of added sugars, trans fats.

Legal theories used to co-opt FDA positions

- California's UCL (B&PC 17200) prohibits “unlawful” conduct.
- FDA positions alleged to support claims of “fraud,” “deceptiveness” under state consumer fraud acts.
- Deceptive trade practice acts – (CLRA, IDTPA) – ascribing to goods features they do not have.

Is there a disconnect between FDA guidance and how it gets used in litigation?

- F&B class litigation focuses on consumer perceptions, has minimal relationship to public health (i.e., FDA's core mission.)
- Consumers do not read FDA regs/positions, not influenced by them.
- Regs, position statements often turn on legal interpretations/policy judgments, not on empirical evidence of how consumers understand products or what is “material” to their purchasing decision

Guidance for Industry – ECJ (May, 2016)

Goal: “accurate and consistent labeling”

ECJ is “**false and misleading**” under 403(a)(1)
based on:

- a) CFR definitions of “juice,” “sugar”
- b) Expert views of “fruits and vegetables”
- c) Codex Alimentarius standards

NOT considered: what consumers actually read, understand, care about.

Crystal Ball -

- Rigorous analysis by courts of level of deference, if any, accorded to FDA positions.
- Increased awareness within FDA as to how its statements may be used in civil litigation.
- FDA policy, favoring innovation, may impose fewer restrictions on commercial speech.

Weight given to agency decisions?

- “*Chevron*” – high deference given to agency interpretations of statutes they enforce, provided those interpretations adopted through formal processes;
- “*Auer/Seminole Rock*” – high def given to agency interpretations of its own regulations;
- Concerns about separation of powers – See dissents in *Perez v MBA* (2015), *Decker v NEDC* (2013)

Careful Scrutiny by Courts of basis for, and significance of FDA pronouncements

- *Pom Wonderful* type analysis
- “false and misleading” 403(a)(1) ≠ deceptive under UCL, state CFAs.
- What did FDA look at, what process did it follow, what weight does it give its own statements?
- How well does FDA’s analysis track consumer experience?
- - Consider ECJ in different products, on different labels...

Careful wording of public statements...

- Congress, White House - hostile to class actions
- Increased sensitivity to how FDA statements will be used.
- See, e.g., disclaimers on ECJ Guidance; statements in connection with seeking comment on “natural.”

Less restriction on commercial speech?

Diet plays very important role in health, disease prevention.

“The bottom line is this: if food producers can’t sell their products based on a truthful claim about its nutritious value, then that doesn’t leave a lot of incentive for them to develop those kinds of products in the first place.”

- Scott Gottlieb at GMA, 2005



For the class action bar...

LAISSEZ BON
TEMPS
ROULER!!!

The Future of Food Label Class Actions

Why There Will Always Be Food Label Class Actions

- Everyone eats
- Marketing departments
- Lots of regulations



Denny Crane

What These Cases Are About

About money.

They're always about money.

Gemelas v. Dannon Co. Inc.

\$45,000,000

More Recent Settlements

- Starkist – tuna **\$8 million (+ \$4 m in vouchers)**
- Cumberland – Stevia **\$1.5 million**
- Kashi – GoLean Crunch **\$4 million**
- Trader Joe's **\$3.375 million**
- CytoSport – Muscle Milk **\$1 million**
- Bear Naked **\$325,000**
- PopChips – chips **\$2.4 million**
- Naked Juice – juices **\$9 million**

Key Defenses

Merits: No deception

Class cert: No common proof of injury or damages

Garrett v. Bumble Bee Foods

“Plaintiffs have failed to ... establish[] that Bumble Bee’s use of the ‘excellent source’ claim and the AHA heart check logo was in violation of the Unfair Competition Law.”

H.R. 985 – “Fairness in Class Action Litigation”

- Ascertainability
- Fees linked to class recovery
- Stay of discovery
- Automatic appeal of class certification

Thank You!

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Center for Science in the Public Interest
Mkats@cspinet.org

Anthony Anscombe, Partner
Sedgwick LLP
Anthony.anscombe@SedgwickLaw.com

Jonathan Berman, Partner
Jones Day
Jberman@JonesDay.com



Sedgwick_{LLP}

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