Case Updates and Hot Topics

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Hot! Litigation Topics

Trent Taylor, McGuireWoods LLP

Slack Fill

- A lot of slack fill suits, but not a lot of success for Plaintiffs.
- Several recent denials of class cert.
  - *White v. Just Born, Inc.*, 2018 WL 3748405 (W.D. Mo. Aug. 7, 2018)
  - *Spacone v. Sanford LP*, 2018 WL 4139057 (C.D. Cal. Aug. 9, 2018)

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Slack Fill

- *Daniel v. Tootsie Roll Industries LLC*, 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018)
  - "The law simply does not provide the level of coddling plaintiffs seek. The court declines to enshrine into the law an embarrassing level of mathematical illiteracy."

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Slack Fill – The Starbucks cases

- *Forouzesh v. Starbucks Corp*., 714 Fed. Appx. 776 (9th Cir. 2018)
  - "[N]o reasonable consumer would think . . . That a 12-ounce 'iced' drink, such as iced coffee or iced tea, contains 12 ounces of coffee or tea and no ice."
- *Strumlauf v. Starbucks Corp*., 2018 WL 306715 (N.D. Cal. Jan. 5, 2018)
  - "No reasonable consumer would be deceived into believing that lattes which are made up of espresso, steamed milk, and milk foam contain the promise beverage volume excluding milk foam."

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Glyphosate

- $289 million jury verdict related to Roundup in August 2018
- 8,000 lawsuits in U.S. against Monsanto related to Roundup
- New suits focusing on glyphosate in food and pet food
  - *Doss v. General Mills*, No. 18-cv-61924 (S.D. Fla.)
  - *Parks v. Ainsworth Pet Nutrition LLC*, No. 1:18-cv-06936 (S.D. N.Y.)
  - *Organic Consumers Assoc. v. Ben & Jerry's Homemade Inc*., D.C. Superior Ct)

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Natural claims

- *Maxwell v. Unilever U.S. Inc*., 2018 WL 1536761 (N.D. Cal. march 29, 2018) (granting MTD re: “natural”)
- *Organic Consumers Assoc. v. Sanderson Farms Inc*., 2018 WL 922247 (N.D. Cal. Feb. 9, 2018) (denying MTD re: “natural” related to chicken and residue)
- *Terrazzino v. Wal-Mart Stores, Inc*., 2018 WL 3921301 (N.D. Ill Aug. 16, 2018) (denying MTD re: “natural” related to enriched wheat flour and other ingredients)

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Malic Acid “Natural” claims

- *Allred v. Frito-Lay N.A., Inc*., 2018 WL 1725535 (S.D. Cal. April 10, 2018) (denying MTD re: “natural” related to malic acid)
- *Allred v. Kellogg Co*., 2018 WL 1158885 (S.D. Cal. Feb. 23, 2018) (denying MTD re: “natural” related to malic acid and sodium diacetate)
- *Branca v. Bai Brands LLC*, No. 3:18-cv-00757 (S.D. Cal.) (“natural” claim related to malic acid)

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Healthy claims

- *Zemola v. Carrington Tea Co*., 2018 WL 539142 (S.D. Cal. Jan. 24, 2018) (denying MTD re: "inherently healthy" claim due to high saturated fat content)
- *Bradach v. Pharmavite LLC*, 735 Fed. Appx. 251 (9th Cir. May 17, 2018) (no preemption for "helps maintain a healthy heart")

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Sugar claims

- *Hadley v. Kellogg Sales Co*., 2018 WL 3954587 (N.D. Cal. Aug. 17, 2018) (granting class cert in suit targeting healthy statements for cereal that contained sugar)
- *McMorrow v. Mondelez*, 2018 WL 3956022 (S.D. Cal. Aug. 17, 2018) (granting in part and denying in part "healthy" claim related to belVita biscuits which contained sugar)
- *Wilson v. Odwalla, Inc*., 2018 WL 3830119 (C.D. Cal. July 30, 2018) (dismissing "no added sugar" claim)

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Product Testing Claims

- *Kumar v. Salov North America*, No. 4:14-CV-02411 (N.D. Cal.)
- *Tye v. Wal-Mart* (C.D. Cal.)
- *Wong. v. Trader Joe's*, No. 3:18-cv-00869 (S.D. Cal.)
- *Robinson v. The J.M. Smucker Co.*, No. 3:18-cv-04654 (N.D. Cal.)

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Other Recent Targeted Claims

- Real
- Diet
- Fresh
- Value

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Class Issues

- *Davidson v. Kimberly-Clark Corp*., 889 F.3d 956 (9th Cir. May 9, 2018) (finding that consumers can have standing to seek injunctive relief even when the consumer now knows of the deception)
- *In re Hyundai and Kia Fuel Economy Litig*., 881 F.3d 679 (9th Cir. Jan. 23, 2018) (reversing $210 million nationwide settlement due to not adequately considering differences in state law)
  - -rehearing *en banc* granted; oral argument held on Sept. 24

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FDLI: Food Advertising, Labeling, and Litigation Conference: For the Food and Dietary Supplement Industries

Hot Litigation Topics

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Recent Trends

- Companies shifting away from NATURAL claims on packaging.
- Plaintiff’s bar still attacking but looking for new theories.
- Some courts are viewing these claims skeptically and dismissing on plausibility grounds.
- Class Certification wins and big settlements still emboldening plaintiff’s bar.

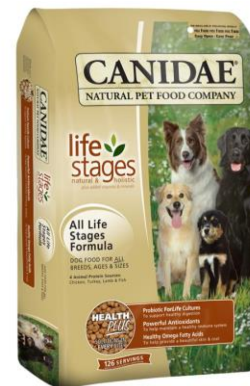
Claims Should Not Meet Plausibility Standard

- "[W]here a Court can conclude as a matter of law that members of the public are not likely to be deceived by the product packaging, dismissal is appropriate." *Rooney v. Cumberland Packing Corp.*, No. 12-CV-0033-H DHB, 2012 WL 1512106 (S.D. Cal. Apr. 16, 2012).
- *Hairston v. S. Beach Beverages Co.*, No. 12- 1492, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012).
  - Plaintiff alleged that an "all natural" label was deceptive because the product contained ingredients that are synthetic or created via chemical processing. Id. at *1.
  - Label did "not simply state that it is 'all natural' without elaboration or explanation." Id. at *4. Instead, "the 'all natural' language [was] immediately followed by the additional statement 'with vitamins' or 'with B vitamins.'" Id. In other words, the "all natural" language did not exist "in a vacuum." Id.
  - "no reasonable consumer would read the 'all natural' language as modifying the 'with vitamins' language and believe that the added vitamins are suppose [sic] to be 'all natural' vitamins." Id. at *5.
- *Goldman v. Bayer*, No. 17-CV-0647-PJH, 2017 WL 3168525 (N.D. Cal. July 26, 2017).
  - Plaintiffs tried to distinguish Hairston "on the basis that ... [there] it was 'manifestly and objectively impossible for the representation to be deceptive,' as [it] involved [a] 'rare' situation where the clarifying disclosures were so clear and conspicuous they could not mislead." Id. at *7. Court dismissed claims without leave to amend, holding that front-facing representations are not deceptive when they are consistent with the "remainder of the label."
- The Ninth Circuit recently in *Ebner v. Fresh, Inc.*, 838 F.3d 958, 966 (9th Cir. 2016) limited the holding in *Williams v. Gerber*.
  - "*Williams* stands for the proposition that if the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception." Here, however, neither the brand name nor the front portion of the "One A Day®" label nor the statement as to the number of "gummies" included (70) can be considered deceptive, and none of these is contradicted by anything on the remainder of the label, which tells a reasonable consumer everything he/she needs to know.

“Natural plus vitamins and minerals”

- *Grimm v. APN Inc*. (Filed February 28, 2017)
- *Van Mourik v. Big Heart Pet Brands* (Filed July 10, 2017)
- *Cervantes v. Canidae (Filed April 11, 2017)*

Cases challenge just the presence of synthetic vitamins and minerals.



Forced labor in Supply Chain: Thai Seafood

- *Wirth v. Mars Inc.*, No. SA CV 15-1470-DOC (C.D. Cal. Feb. 5, 2016);
- *Barber v. Nestle USA Inc.*, No. SA CV 15-01364-CJC (C.D. Cal. Dec. 9, 2015).
- 9th Circuit appeal argued December 2017

Forced labor in Supply Chain

- Proposed class actions following 2015 New York Times article titled "Sea Slaves: The Human Misery that Feeds Pets and Livestock," and repeated the article's claim that the company's pet foods contain fish caught by indentured servants working for Thai Frozen Products.
  - The Plaintiffs argued that if the labels disclosed they relied on slave labor to produce their pet food, they would not have purchased the pet food.
- Courts dismissed the both suits finding that companies complied with state laws that require only a limited amount of notification regarding labor practices in its supply chain.
- Courts found California Transparency in Supply Chains Act of 2010 requires any retailer that does business in the state and has annual worldwide gross receipts exceeding $100 million to make specific disclosures on its website about efforts it makes to "eradicate slavery and human trafficking from its direct supply chain."
  - The language of the Supply Chains Act "is impossible to square with plaintiffs' contention that California consumer protection law requires companies to make disclosures beyond what that law requires."
- Appealed to the 9th Circuit, arguing that California's consumer protection laws created a duty to disclose.
- Companies argued both had complied with the state's laws by alerting consumers on their websites.

Wysong: Photographs of Premium Meats

- Allegations that pet food manufacturers use photographs of premium cuts of meat or vegetables to deceive consumers into thinking that the products contain those premium cuts (e.g. a picture of a salmon fillet allegedly means that the can of food contains a salmon fillet)
- Wysong sued Hill's, Big Heart, Purina, Ainsworth, Walmart, and Mars
- *Wysong Corp. v. APN Inc. et al.*, case number 2:16-cv-11821 (E.D. Mich.)
- Case dismissed with prejudice – 6th Circuit affirmed

Kind Suit Alleging Ingredients Mislead

- Kind sued in New York for allegedly misleading consumers about ingredients in two of the snack food maker's products
- *Song v. Kind LLC et al.*, 1:18-cv-04982 (E.D.N.Y.)
- The suit alleges:
  - the ingredient panel falsely conveys that the bars are made from start to finish and directly from whole fruit ingredients because they all use collective names to refer to their components.
  - several varieties of "Pressed by Kind" bars and "Fruit Pieces" packets describe their ingredients in terms of whole fruit, even though they were processed and treated in ways that would come as a surprise to shoppers and that least one bar makes claims that are mathematically impossible.
  - Kind products include "pineapple" as an ingredient, but fail to specify that pineapple is typically dried through a process that increases its sugar content. Similarly, the suit alleges at least four Kind products contain sour or tart cherries that are sugared during the drying process.
- According to the suit, pineapples and tart cherries are dried through a process called "osmotic dehydration" that uses a super-sugary solution to draw water out of the fresh fruit and increase its sugar content.
- At least one Kind product makes claims about its contents that suggests added vitamin C was omitted from the ingredient list, the suit claims. The Mango-Apple-Chia Pressed bar says it has 25 percent of the daily value of vitamin C, but that level would be impossible from fruit alone, suggesting that ascorbic acid was added, the suit said.

Muscle Milk Classes Certified

- Classes and subclasses of consumers certified in suit against Cytosport, Inc., the makers of Muscle Milk, alleging that the company's product labels overstate the nutritional benefits of the brand's protein supplements.
- Plaintiffs alleged ready-to-drink shakes' nutritional fact listing overstated how much protein was in them and that Muscle Milk protein powder was labelled "lean" or "lean lipid" even though the powders weren't any more lean than similar products.
  - The judge said the plaintiffs met the necessary requirements to certify California UCL and FAL nationwide classes insofar as they relate to protein content statements on the protein shakes and the leanness claims on the powder labels.
  - "The fact that some products were purchased in one state rather than another should be immaterial to the choice of law under the facts of the present case, because the alleged misconduct occurred entirely in California," the judge said. "Defendant points to no state with a greater interest in enforcing its laws under the facts of this case."
- Related Florida and Michigan subclasses also were granted certification.
- *Clay et al. v. Cytosport Inc.*, 3:15-cv-00165 (S.D. Cal.)

Blue Buffalo Settlement

- In December 10, 2015, Blue Buffalo agreed to pay $32 million to settle multi litigation in Missouri filed by consumers accusing the pet food maker of lying about the ingredients in its kibble.
- Blue Buffalo was sued over its True Blue Promise label, which claimed the pet food is healthy and made with the best ingredients, specifically with no poultry byproducts and artificial preservatives.
- Blue Buffalo said the impurities in its pet food were the fault of a supplier.
- The plaintiffs cited testing done by Purina that allegedly shows the byproducts comprise up to a quarter of Blue Buffalo's kibble.
- In March 2017, Blue Buffalo's ingredient supplier was indicted for misbranding and adulterating its chicken products

Power Bar Settlement

- The maker of Power Bar agreed to a $9 million settlement to end a proposed class action in New York federal court accusing the company of misleading customers about the protein content of its ready-to-drink shakes.
- According to the suit, while the packaging and marketing for the shakes proclaims that each bottle contains 30 grams of protein, testing commissioned by Gregorio's attorneys found that the shakes only contained between 26.9 and 28.3 grams each, making the labels misleading.
- In addition, Premier has agreed to reevaluate its formula and manufacturing specifications and work with its co-manufacturers to minimize the variation in protein content in the shakes.

Update on Classwide Damages at Class Certification: Advertising Matters

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Update on Classwide Damages at Class Certification

Advertising matters

- Many false advertising class actions are defeated at the motion to dismiss or class certification

- *Comcast v. Behrend*: classwide damages model must identify damages stemming from defendant’s wrongdoing—across class
- Plaintiffs are testing the waters with various damages models
- Any guidance on applicable damages models in false advertising matters?

Bases for Damages in California Law

Advertising matters

- Most false advertising matters are filed in federal district court of the Ninth Circuit and assert California law

California Law	Restitution	Actual Damages	Punitive Damages
False Advertising Law (“FAL”)	√		
Unfair Competition Law (“UCL”)	√		
Consumers Legal Remedies Act (“CLRA”)	√	√	√

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Three Common Classwide Damages Models

Advertising matters

- Full Refund
  - Full price paid for the product
- Disgorgement of Profits
  - Profits gained from alleged false advertising
- Price Premium
  - Difference between the price paid and value received

The Narrowing of Classwide Damages Models

Advertising matters

- District courts split on specific classwide damages models
- Ninth Circuit ruling in *Chowning v. Kohl's* (June 2018)
  - False advertising matter (FAL, UCL, CLRA)
  - Plaintiff alleged that Kohl's price advertising was misleading
  - District Court denied class cert and found no claim for restitution
  - 9th Circuit affirms, and rejects all but one damages model, including:
    - Full refund
    - Disgorgement of profits
  - Ruling: proper measure of restitution is *price paid less value received*

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Chowning Is Consistent With Food Law Decisions

Classwide damages models

- *Chowning v. Kohl's* (C.D. Cal.; 9th Cir. 2018)
  - Proper measure of restitution in FAL/UCL/CLRA is price premium
- *Brazil v. Dole* (9th Cir. 2016)
  - Price premium is a valid measure of damages in mislabeling
- *Werdebaugh v. Blue Diamond* (N.D. Cal. 2014)
  - Proper measure of restitution in mislabeling is compensation for difference in product as labeled and product received

Classwide Damages Case Study

- *Hadley v. Kellogg* (N.D. Cal., Aug. 17, 2018)
  - Judge Lucy Koh
  - Decisions in various other high-profile false advertising matters
- How did classwide damages issues play out?
  - Plaintiff’s expert methodologies
  - Defendant’s strategies for rebutting

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Hadley v. Kellogg (N.D. Cal.)

Claims and classes

- Plaintiff alleges Kellogg's packaging and advertising of breakfast cereals and cereal bars is misleading
  - Describes as "healthy" when they contain "excess added sugar"
  - Claims excess sugar causes metabolic syndrome, cardiovascular disease, Type 2 diabetes and other morbidity
  - Complaint lists 30 products with various challenged statements
  - Claims violations of California's FAL / UCL / CLRA, breach of express warranty, breach of implied warranty of merchantability
- Order granting/denying in part motion for class certification

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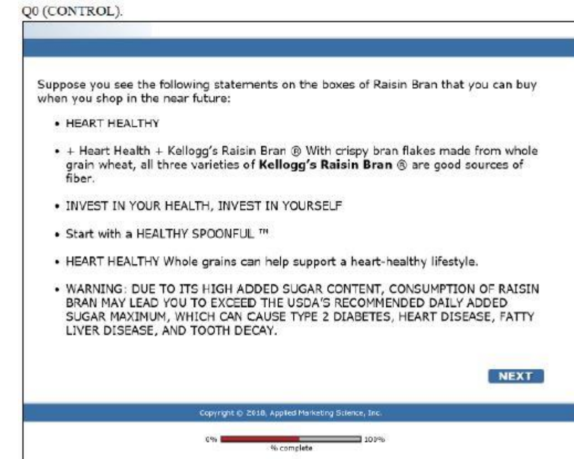
Hadley v. Kellogg (N.D. Cal.)

Claims and classes

- California purchaser <u>classes</u>:
  - Raisin Bran ("heart healthy")
  - Smart Start ("heart healthy" + "lightly sweetened")
  - Frosted Mini-Wheats ("nutritious" + "lightly sweetened")
  - Nutri-Grain Soft-Baked Breakfast Bars ("wholesome goodness" + "no high-fructose corn syrup")
- Nutri-Grain bars class <u>not certified</u>
  - "Wholesome goodness" appeared only on back panel of packaging, in small font, in the middle of a block of text
  - Not sufficiently prominently displayed to warrant inference of <u>classwide exposure</u>

Hadley v. Kellogg (N.D. Cal.)

Damages models



- Deceptive omission theory of liability
  - Claim hides/omits information on “high sugar content,” distorting market demand
  - “Advantage realized” damages model
    - “Test” and “Control” survey groups not/exposed to sugar warnings
    - Attempts to measure additional sales Kellogg would have made due to omission of sugar warnings—leads to unjust enrichment
    - Court finds this effect is unrelated to any class-wide remedy
- Affirmative misrepresentation theory of liability
  - Claim challenged statements are misleading
  - Damages models: “conjoint analysis” and “hedonic regression”

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Hadley v. Kellogg (N.D. Cal.)

Conjoint analysis

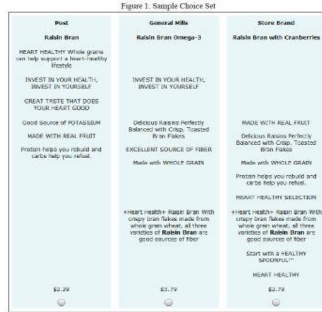

Figure 1. Sample Choice Set

- Conjoint analysis criticized as failing to satisfy *Comcast*
  - <u>Survey</u> asks respondents to choose between hypothetical products with various brands, flavors, labeling statements and price
  - Defendant claims package depictions are unrealistic and analysis looks only at the <u>demand</u> side (subjective willingness to pay)
  - Plaintiff claims use of “market prices” accounts for the <u>supply</u> side
- Court accepts plaintiffs’ reasoning—even though it is not economically sound
  - <u>Competitive</u> pressures may prevent charging a premium price
  - Company may have alternative objectives in <u>pricing strategy</u> (e.g. sell more products, improve distribution network, fit marketing niche)

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Hadley v. Kellogg (N.D. Cal.)

Hedonic regression

$$logP(Cereal) = \sum_{n=1}^{N} (\beta_n * z_n) + \varepsilon$$

- Hedonic regression criticized as failing to satisfy *Comcast*
  - Plaintiff's expert proposes a regression analysis of price controlling for brand, promotions and nutrient content (IRI scanner data)
  - Defendant's expert points to serious problems, including:
    - Lack of controls (e.g. advertising, calories per serving, saturated fat and cholesterol, taste, whole grain)
    - Fails to identify when purchase with/out challenged statements
    - Fails to account for products with multiple labeling claims
- Court did not offer an opinion on the hedonic regression analysis
  - Since the court accepted the conjoint analysis, Plaintiffs already have a viable theory for classwide damages under *Comcast*

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Strategies

Classwide damages

- Classwide damages likely to focus on price premium models
  - Conjoint survey, hedonic regressions, combinations
- *Comcast* classwide damages issues (predominance) continue to make headway
  - Isolate damages due to the challenged conduct, measure across class
- *Daubert* criticisms of damages methods at class cert must be severe
  - Gatekeeper to exclude “junk” science not meeting reliability standards
  - Survey evidence admissibility threshold is low in Ninth Circuit
  - Ninth Circuit: faults in an expert’s use of a particular methodology goes to the weight, not the admissibility, of the testimony

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Questions?

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