New York Law Journal
GC New York
WWW.NYLJ.COM
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VOLUME 244—NO. 5
THURSDAY, JULY 8, 2010

LITIGATION

Food Litigation: The New Frontier

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More than ever, consumers are seeking out healthier food products from the aisles of the supermarket. Recognizing that health claims can provoke sales, the food industry has responded by characterizing their conventional food products as having nutritional value, doing so by marketing and labeling their products as, among other things: "healthy," "natural," "organic," "low in sodium," and "free of trans-fat." Aggressive consumer advocacy groups have taken advantage of the fact that some product claims have been unsubstantiated or potentially misleading, and have succeeded in having numerous companies change their product labels or their marketing campaigns. Their success has, in turn, emboldened the plaintiffs' bar, which, along with these same groups, has turned to consumer class action litigation against the companies that make food products. In addition to triggering a rash of lawsuits, these Internet-based advocacy groups have become pivotal players in lobbying the Food and Drug Administration (FDA) for greater enforcement and more sweeping regulation of health claims. All indications are that this trend toward more challenges to health claims and more enforcement of regulatory standards will continue unabated.

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The New Environment

Over the past two years, there has been a decided increase in litigation involving allegations of purportedly "unsubstantiated health claims" in labeling and advertising. Plaintiffs, relying primarily on generic state consumer fraud and consumer protection statutes and common law doctrines such as breach of warranty and negligent misrepresentation, are threatening or bringing lawsuits in the form of consumer class actions based on what they claim is "deceptive" labeling and advertising. Some of the complaints may go so far as to allege that statements in product packaging, which may be 100 percent accurate, are nonetheless misleading because they imply certain health and nutritional benefits about a product that contains an allegedly unhealthy ingredient.[1]

GETTY IMAGES

Consumer advocacy groups have been the driving force for much of this litigation. Groups such as the Center for Science in the Public Interest (CSPI), Public Citizen, the Center for Food Safety and the Organic Consumers Association, to name but a few, have used state consumer protection statutes to threaten and/or bring class actions against dozens of food companies, and have successfully compelled dozens of settlements without even filing litigation against their target companies.

Many food manufacturers have averted the uncertainty of litigation by agreeing to (i) eliminate allegedly misleading information (such as Kellogg's agreement to limit its marketing to children in order to avert a lawsuit threatened by numerous consumer advocacy groups) and/or (ii) reduce or eliminate altogether certain ingredients (as PepsiCo, General Mills and Sara Lee did to avert litigation by advocacy groups). The industry's willingness to settle these lawsuits, and the willingness of some companies to pay multimillion dollar settlements, has emboldened these groups and the plaintiffs' bar. For example, Dannon's agreement to establish a $45 million fund to pay consumers for money spent on yogurt that Dannon claimed will

regulate digestion if consumed every day for two weeks (approved by the Northern District of Ohio), encouraged the same lawyers to bring a class action against General Mills (filed in the Southern District of Florida), similarly alleging that General Mills misleads consumers when it claims that its Yo-Plus yogurt regulates digestive health in a way other yogurts do not.

A common thread throughout many of the current litigations against food companies is that consumer advocacy groups first brought and/or threatened lawsuits involving the same allegations of deceptive marketing practices years before the currently pending suits were filed. For example, CSPI is widely credited with initiating the spurt of litigation against products containing high fructose corn syrup (HFCS) with its threatened lawsuit in May 2006 against Cadbury Schweppes and its lawsuit against Kraft regarding the labeling of their respective beverages 7Up and Capri Sun as "natural." In January 2007, within months after the suits were threatened/brought, both companies settled and agreed to cease making the "natural" claim with respect to their HFCS-containing products. A few months later, plaintiffs began filing the current spate of lawsuits involving HFCS, including the actions against Snapple and ConAgra Foods discussed below.

In the past, it was easier to dispose of these claims in short order, and at relatively little expense. The industry had some success in defending these cases on federal preemption grounds, but more and more, courts are rejecting preemption arguments in this context. The industry is currently having some success in obtaining dismissals based on the heightened pleading requirement articulated by the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), but the *Twombly/Iqbal* defense is less likely to defeat consumer action claims as plaintiffs become more sophisticated in their pleadings. The dangers of consumer cases are, of course, magnified by class actions, and the increased willingness of courts to certify classes in food cases is a disturbing legal development.

Silver Bullet Defense No More

A string of recent decisions, as well as the stated policy of the Obama administration disfavoring implied preemption in the food context, demonstrate that preemption is now unlikely to succeed as a strategy for defendants facing consumer fraud and common law claims based on allegedly deceptive or misleading labeling. Most notably, in August 2009, the U.S. Court of Appeals for the Third Circuit, in *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009), reversed the district court's dismissal of the case, and reinstated state law putative class action claims for consumer fraud and breach of warranty based on Snapple's use of the term "all natural" on the label of beverages that contained HFCS.

The Third Circuit rejected the district court's analysis, refusing to find that Congress regulated the food, beverage and juice fields so comprehensively that there was no role for the states. The Third Circuit also concluded that the FDA's (i) policy statement regarding use of the term "natural" and (ii) letters to the effect that some form of HFCS may be classified as "natural," lack the force of law required to preempt conflicting state laws. Thus, it is clear that the food industry cannot rely on preemption as a surefire defense.

Heightened Pleading

Defendants have had some success in obtaining dismissals based on a plaintiff's failure to meet the heightened pleading standard established by the Supreme Court in *Bell Atlantic v. Twombly*, and amplified by *Ashcroft v. Iqbal*. *Twombly* and *Iqbal* hold that: (i) a court need not accept as true assertions of mere legal conclusions; and (ii) a complaint must state a plausible claim for relief based on a defendant's misconduct, and not just the mere possibility that a defendant's actions constituted misconduct, in order to survive a motion to dismiss. Notwithstanding this success, *Twombly/Iqbal* will not immunize the food industry in the long term, as better pleaded complaints will survive *Twombly/Iqbal* attacks.

In September 2009, General Mills obtained the dismissal of a consumer class action based on *Twombly* and *Iqbal*. *Wright v. General Mills*, No. 08cv1532, 2009 U.S. Dist. LEXIS 90576 (S.D.Cal. Sept. 30, 2009) was a putative class action involving allegations that marketing claims that the Nature Valley granola bar and chewy trail mix bar products were "100% natural" were false, misleading and deceptive because those products contained HFCS. General Mills sought dismissal under FRCP 12(b)(6) based on: (i) field and conflict preemption; (ii) the primary jurisdiction doctrine; and (iii) plaintiff's failure to meet the *Twombly/Iqbal* pleading standard. The Southern District of California rejected General Mills' preemption and primary jurisdiction doctrine arguments, but dismissed the complaint under *Twombly* and *Iqbal*, finding that the "sparse allegation of injury-in-fact does not meet the *Twombly* and *Iqbal* pleading standard." Id. at *14. Recently, the Northern District of California dismissed, under *Twombly* and *Iqbal*, a putative class action against Unilever for "deceptive[ly]" marketing its "I Can't Believe It's Not Butter," finding plaintiffs' allegations to be "mere conclusion[s]," and their legal theory "implausible." *Rosen v. Unilever*, No. C 09-02563 JW, 2010 U.S. Dist. LEXIS 43797 (N.D.Cal. May 3, 2010).

Earlier this year, however, the U.S. District Court for the Central District of California denied a motion to dismiss on *Twombly/Iqbal* grounds in *Zupnik v. Tropicana*,[2] finding that the "complaint details what representations were made, how they were made, and why they are false" (citing nineteen allegations in the complaint), and pointing out that the complaint "also includes pictures of the allegedly false or misleading labels and advertisements." *Zupnik v. Tropicana*, No. 2:09-cv-06130-DSF-CT slip op. at 4 (C.D.Cal. Feb. 1, 2010). Thus, better pleaded consumer fraud complaints have already, and will continue to, survive *Twombly/Iqbal* attacks.

Class Certification

Because individual damages in consumer fraud cases are often nominal, the key to plaintiffs' attorneys' interest is the prospect of obtaining class certification. Defendants have attempted to oppose class certification in these food marketing cases by arguing that individual questions necessarily predominate over common questions of law and fact (see FRCP 23(b)(3)), because class members must establish individual reliance on the allegedly misleading representation. Some of those attempts have been frustrated by courts which have rejected the necessity for plaintiffs to prove traditional reliance under specific state consumer fraud statutes and for certain common law claims.

In *Lockwood v. ConAgra Foods Inc.*, 597 F.Supp.2d 1028 (N.D.Cal. 2009), plaintiffs filed a putative class action under California's Unfair Competition Law, Business and Professions Code, alleging that ConAgra's marketing of its "Healthy Choice" pasta sauce as "all natural" was misleading because it contained HFCS and HFCS is not produced by a natural process.

After denying defendant's motion to dismiss on preemption grounds, the Northern District of California rejected ConAgra's attempt to strike plaintiffs' class allegations as a matter of law, although the court agreed to reconsider certification on a fully briefed motion. ConAgra argued that individual questions necessarily predominate because each class member must establish reliance on the allegedly misleading advertising. Id. at 1035. The district court rejected the need for actual reliance, concluding that "[i]f a misrepresentation is material, an inference of class-wide reliance may be inferred." Id. (ConAgra later settled the case).

More recently, the Southern District of Florida granted class certification in *Fitzpatrick v. General Mills*, 263 F.R.D. 687 (S.D.Fla. 2010) for plaintiffs' claim under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA). In *Fitzpatrick*, plaintiffs alleged that the advertised digestive benefits of eating Yo-Plus yogurt are unsubstantiated, false, misleading, and reasonably likely to deceive the public, because Yo-Plus does not provide any digestive health benefits that cannot be obtained from eating normal yogurt. In granting class certification, the district court held that consumer fraud claims under FDUTPA do not require plaintiffs to demonstrate reliance. Id. at 694. Instead, under FDUTPA, "each plaintiff is required to prove only that the deceptive practice would—in theory—deceive an objective reasonable consumer." Id. at 695.

The increased willingness of courts to certify classes in these cases is one of the greatest litigation risks facing the food industry.

FDA Enters the Fray

In much the same way consumer advocacy group action has paved the road for civil litigation, consumer advocacy groups have prompted the FDA to act on the regulatory front. In an Oct. 27, 2005, letter to then (acting) Commissioner Andrew von Eschenbach, CSPI chastised the FDA for lacking "the ability (or possibly even desire)" to address and remedy what it alleges is misleading food labeling. With the arrival of the Obama administration, and spurred on in no small part by the activity and aggressive lobbying of consumer advocacy groups, the FDA has now emerged as a civil litigation driver.

In May 2009, the FDA warned General Mills that ads promoting Cheerios as a food that can "lower your cholesterol four percent in six weeks" violates the Food, Drug and Cosmetic Act because only FDA-approved drugs are allowed to make such claims. The FDA warned General Mills that if it refused to "correct the violations," it risked having Cheerios boxes seized by federal agents right off store shelves. Within two weeks of the FDA's warning letter to General Mills regarding Cheerios, the first putative class action was filed in the U.S. District Court for the District of New Jersey, alleging that plaintiffs had purchased Cheerios based on these health claims—*In re Cheerios Marketing & Sales Practices Litigation*, MDL 2094.

In February and March of this year, the FDA sent similar warning letters to 20 more food manufacturers regarding what it perceives to be deceptive practices and misbranding, specifically focusing on companies' allegedly misleading claims regarding the health benefits of their products (many of the allegedly misleading statements are similar to the types of health claims that CSPI pointed to in the above-referenced Oct. 27, 2005 letter). As was the case with General Mills, the FDA set the stage for plaintiffs' lawyers as a number of these companies have already been sued for the alleged violations specified in the FDA's warning letters.

Conclusion

A new era of scrutiny of product marketing and labeling in the food industry is here to stay. Increasingly, food companies are becoming regular defendants in litigation over marketing claims that allegedly overstate the nutritional value of food products. It is too early to know whether such claims will resonate with juries or be upheld on appeal. While food companies can lessen the risk of litigation by choosing not to make health claims that they are unprepared or incapable of defending, it may be impossible to eliminate the risk of litigation entirely.

1 In the putative class action *McClure v. General Mills*, No. 10 cv 5015 (S.D.N.Y. June 29, 2010), the plaintiff alleges that "[s]tatements on the front of Defendant's packaging [of its fruit snacks] that convey healthfulness are deceptive when the actual ingredients include dangerous partially hydrogenated oil." Id. at ¶16.

2. *Zupnik v. Tropicana* is strikingly similar to a consumer fraud case brought four years earlier by CSPI against Tropicana relating to another one of its juices.

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