Food Law

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Food litigation has continued to be a hot area in California law. The cases shape the *legal* landscape, driving developments in class-action law in particular. The cases also track changes in the *industry.* Some labeling claims continue apace: slack-fill suits, as well as challenges to the use of the terms "natural," "healthy," and "added sugar," continue to be hotly litigated. Others arise as companies respond to evolving consumer preferences. For example, we see legal challenges to "fresh-pressed" and "cold-pressed" labeling claims related to the increased prevalence of high-pressure processing. The term "milk" used to described plant-based beverages still prompts litigation, despite prior pleading-stage dismissals, perhaps because of the growing ubiquity of products that use cow-milk alternatives. The sustained progression of food law as a practice area seems to be the result of a perfect storm: the reasonable-consumer standard itself, that allows for some indeterminacy regarding what labeling claims may engender liability; the health-conscious and ever-changing preferences of modern consumers; the market-power of small-company disruptors who are adept at responding to, and driving, consumer preferences; and the growing trend for major food companies to acquire, or mimic, those disruptors, putting their big-company deep pockets in play. This collection of cases from 2017 illustrates those big-picture trends, as well as some of the nuts-and-bolts changes in the day-to-day practice of law in this area.

Ninth Circuit Rejects "Administrative Feasibility" Requirement for Class Actions

Briseno v. ConAgra Foods, Inc. **(9th Cir. 2017) 844 F.3d 1121**

In *Briseno v. ConAgra Foods, Inc.*,[1] the Ninth Circuit categorically rejected a defense to class certification especially promising for food companies previously announced by the Third Circuit. In *Carrera v. Bayer Corp.*,[2] the Third Circuit required purported class representatives to demonstrate that it was "administratively feasible" to identify absent class members in order to obtain class certification.[3] Although not referenced explicitly in Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), which sets forth the requirements for class certifications, the Third Circuit nevertheless opined that this requirement was a necessary to tool to ensure that the "class will actually function as a class."[4]

Food companies hailed this requirement as an important procedural safeguard to defend against class actions in the "Food Court" because consumers buy food products for many different reasons (such as taste) not necessarily based on specific labeling claims challenged by plaintiff's counsel (e.g., a cereal may not be "GMO free" as advertised, but many consumers may have bought the product simply for the taste). The purported class in *Briseno* consisted of consumers of Wesson-brand cooking oil who allegedly were deceived by the "100% Natural" labeling when in fact the product was made with genetically modified organisms ("GMO"). In rejecting this new defense, the court in *Briseno* concluded that "Rule 23's enumerated criteria already address the interests that motivated the Third Circuit and, therefore, that an independent administrative feasibility requirement is unnecessary."[5]

In reaching this conclusion, the Ninth Circuit affirmed the district court's class certification of consumers who purchased the challenged product in eleven separate state classes but could not demonstrate "administrative feasibility." The district court thus did not require the class representative to produce, as urged by the defendant, sales receipts of individual consumers or testimony proving the purchase of the product at issue. The Ninth Circuit approved and explained that it was bringing its interpretation of Rule 23 into line with similar holdings in the United States Court of Appeals, Sixth, Seventh and Eighth Circuits.

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1. (9th Cir. 2017) 844 F.3d 1121 (Briseno).
2. *Carrera v. Bayer Corp.* (3rd Cir. 2013) 727 F.3d 300.
3. *Id.* at p. 306-308.
4. *Ibid.*
5. *Briseno, supra*, 844 F.3d at p. 1127.

In rejecting the Third Circuit's reasoning, the Ninth Circuit applied the "[t]raditional canons of statutory construction" and found that the prerequisites of Rule 23 constituted an "exhaustive list."[6] The court explained that imposing this additional, unwritten requirement would "render that manageability criterion largely superfluous," violating the statutory construction canon that a rule should be interpreted to give effect to every clause.[7] The "manageability criterion" of the "superiority" requirement of Rule 23 rendered the new "administrative feasibility" requirement unnecessary because, as explained by the Ninth Circuit, Rule 23 already requires courts to consider how and whether a class action would be superior to other methods for fairly and efficiently adjudicating the dispute.[8]

The court in *Briseno* continued by comprehensively discussing and ultimately dismissing various other policy reasons espoused by the Third Circuit for this new requirement. Perhaps the strongest argument pursued by the defendants in *Carrera* was based on the Due Process clause of United States Constitution, whereby defendants claimed that without the administrative feasibility requirement, they could not fairly defend against claims without knowing specifically how many consumers bought the product. The Ninth Circuit noted, however, that defendants would have a chance to raise individual issues during the claims process of any class action.

While the decision in *Briseno* may be disappointing for purported class defendants, the opinion was well-reasoned and in line with a majority of the federal circuit courts that have considered this issue. Purported class defendants would be well-advised to focus their opposition to class certification motions on more successful defenses, such as "implausibility" and plaintiffs' inability to develop a credible damages theory.

Orange County Federal Jury Affirms FDA Tracing Technologies in Awarding Damages Against Foreign Supplier of Pomegranate Arils Contaminated with Hepatitis A

Townsend Farms, Inc. v. Goknur Foodstuffs Import Export Company **(C.D. Cal., Apr. 14, 2017, No. 8:15-cv-837) ECF No. 280**

In July of 2013, the U.S. Food and Drug Administration ("FDA") and the Centers for Disease Control ("CDC") used supply chain "traceback/traceforward" and cutting-edge whole genome sequencing ("WGS") technologies to identify defendant Goknur Foodstuffs Import Export Company ("Goknur"), a Turkish supplier of pomegranate arils (a.k.a. the seeds or juice sacs), as the source of a Hepatitis A virus outbreak in the U.S. among Costco members. Hepatitis A virus infections are very rare in the U.S. but very common in Turkey. Approximately 165 consumers of a Townsend Farms "five berry blend" containing the contaminated pomegranate arils were hospitalized, and one required a liver transplant.

Townsend Farms recalled the five berry product under the auspices of the FDA and its recall procedures. The scope of the recall approved by FDA was limited to those Townsend Farms products containing certain lots of pomegranate arils from Goknur. The traceback/traceforward analysis permitted FDA to quickly determine that the Goknur arils in the Townsend Farms product were the "likely" source of the outbreak, but the relatively new WGS technology permitted FDA to confirm this conclusion because consumers of the Goknur arils were exposed to the genetically identical virus.

Townsend Farms brought a recovery action against Goknur, which defended by challenging to the accuracy of FDA's use of WGS in this case. Goknur maintained that the 86% match of virus samples across outbreak victims raised doubt as to liability. Goknur also argued that there was another supplier of pomegranate arils at least partially to blame. Although the court refused to enter into evidence much of the FDA report explaining why Goknur was the source of the Hepatitis A virus, Townsend Farms adduced expert testimony as to the correctness of the WGS technology and the traceback/traceforward analysis, all linking the Goknur arils to the Hepatitis A outbreak.

On April 14, 2017, the jury found Goknur liable on all claims for relief and awarded Townsend Farms the entire $7.5 million in damages claimed on its own behalf. Interestingly, of the $7.5 million awarded to Townsend Farms, $4.8 million was awarded as punitive damages, $2.7 million in costs, and nothing for lost profits.

This case illustrates the importance of new technologies in identifying liability in the food supply chain,

6. *Id*., at p. 1126.
7. *Ibid*.
8. *Id*. at p. 1127.

but also the challenges of gaining the admission of government records and conclusions into evidence.

Northern District of California Certifies Class of Consumers Who Claim Deception as to "Extra Virgin" Labeling of Olive Oil Products

Koller v. Med Foods, Inc. **(N.D. Cal., Aug. 24, 2017, No. 3:14-cv-02400-RS) ECF No. 116**

Although widely reported in the food press as a significant supply chain issue, food fraud is rarely the subject of litigation. In this case, consumers of Bertolli and Carapelli brand "extra virgin" olive oils claimed they were deceived because the oils did not meet standards for the "extra virgin"—the highest quality grade of oil—as represented on the product labeling. The purported class also claimed deception because the oils were not "Made in Italy," as also represented, but rather were a collection of low quality oils from all over the Mediterranean, bottled in Italy and exported from there to the U.S.

The defendants opposed class certification on the ground that Rule 23(b) was not satisfied because common questions of law and fact did not predominate. Defendants argued that individual consumers in the class would have to establish that specific bottles they purchased did not meet standards for extra virgin olive oil and that such issues were inherently not subject to class-wide determination. The court rejected this argument and instead framed the issue as whether defendants "breached any legal obligation to take reasonable steps to ensure its oils meet the standards at least until the 'best by' date."

The court concluded that this theory of liability was susceptible of class determination and thus certified the class under this theory. It also certified a class of consumers who purchased the challenged products on the basis of the allegedly deceptive "Made in Italy" marketing claims.

This case is a novel and important illustration of the challenges involved in establishing food fraud liability and related class certification issues.

Central District of California Denies in Part Motion to Dismiss Denied in Part as to "Fresh Pressed" and "Cold Pressed" Claims

Shane v. Florida Bottling, Inc. **(C.D. Cal. Aug. 9, 2017, No. 2:17-cv-02197)**

Plaintiff Estelle Shane filed a putative class action against a subsidiary of Florida Bottling Inc. ("Lakewood") based on representations that its organic juices are "fresh pressed" and "cold pressed." Shane alleged that the representations are false and misleading because, as the back of the label discloses, the juices are actually pasteurized.

Shane asserted eight causes of action against Lakewood, including breach of express and implied warranty; unlawful, unfair, and fraudulent business practices in violation of California's Unfair Competition Law ("UCL"),[9] False Advertising Law ("FAL"),[10] and Consumer Legal Remedies Act ("CLRA"),[11] and for restitution based on a theory of quasi-contract or unjust enrichment.

The district court granted in part and denied in part Lakewood's motion to dismiss. The court granted the motion with respect to Shane's claims under the UCL, FAL, and CLRA, finding that Shane failed to plead with the particularity required under Rule 9(b) because Shane did not allege when or where she bought the Lakewood juices, included in the complaint a picture of a product Shane did not allege she had purchased, and did not limit the class period by the statute of limitations associated with each cause of action or limit the putative class to customers who purchased in California. Accepting Lakewood's argument that it has used different labels over time, the court concluded that the pleading deficiencies prevented Lakewood from determining "whether it can permissibly assert a variety of potential defenses, including laches and statute of limitations" and dismissed the UCL, FAL, and CLRA claims with leave to amend.[12]

The district court rejected Lakewood's arguments that its use of the terms "cold pressed" and fresh pressed" was neither false nor misleading. With the respect to the term "fresh pressed," the district court rejected Lakewood's arguments based on FDCA implementing regulations and Lakewood's registered trademarks. Lakewood argued that the term "fresh"

9. Cal. Bus. & Prof. Code § 17200.
10. Cal. Bus. & Prof. Code § 17500.
11. Cal. Civ. Code § 1770.
12. Order re Mot. Dismiss, *Shane v. Florida Bottling, Inc.* (C.D. Cal. Aug. 9, 2017, No. 2:17-cv-02197) at p. 8.

when used in connection with the term "pressed" means "only that a food product was pressed while still fresh," analogous to the terms "fresh frozen" and "frozen fresh" in FDCA implementing regulation 21 C.F.R. § 101.95(b).[13] The court disagreed, finding that permissible use of the term "fresh pressed" is not addressed in section 101.95(b); rather, the question of liability turned on whether the use of the term "fresh" on the juice labels "suggest[s] or imp[ies]" that the ingredients are "unprocessed or unpreserved" as set forth in section 101.95(a).[14] That determination, the court held, is a fact question that depends on whether the term "fresh pressed" implies to consumers that a food is not processed or preserved. With respect to its trademarks, Lakewood argued that, because it holds registered trademarks in the term "fresh pressed," its use of the mark is presumptively not deceptive. The district court found the argument unsupported, noting that "a number of courts have acknowledged that a plaintiff may have a valid claim under state consumer protection laws notwithstanding that the defendant holds a registered trademark covering a challenged label or advertisement."[15]

Lakewood's defense of its use of the term "cold pressed" fared no better. Lakewood argued that Shane could not credibly contend that the term "cold pressed" was misleading based on Lakewood's use of pasteurization because the complaint used the term "cold pressed" to describe how juice is extracted and not how it is sterilized. The court disagreed, citing at length excerpts from the complaint describing, e.g., that "[i]n contrast to pasteurized juices, cold pressed juices are processed with a technology, called High Pressure Processing, that uses high pressure instead of heat thereby maintain[ing] most of the juice's nutrients and living enzymes, which otherwise get destroyed by heat."[16]

The court also rejected Lakewood's argument that no reasonable consumer could be misled because the back labels disclose that the juices are pasteurized. The court held that the issue presented a fact question, agreeing with plaintiff that consumers' familiarity with the terms "cold pressed" and "fresh pressed" was relevant to deception. "[T]here is no reason to believe consumers are anywhere near as familiar with the terms 'cold pressed' and 'fresh pressed' in the context of fruit juice products as they are with 'diet' sodas or sugary breakfast cereals such that a reasonable consumer would look to the ingredients list on the side or back label to investigate a fanciful claim made on the front label."[17]

As to the remaining claims of the complaint, the court dismissed Shane's claims for breach of implied warranty and for injunctive relief, but denied Lakewood's motion to dismiss Shane's claims for breach of express warranty and for quasi-contract. Shane's breach-of-implied-warranty claim failed because the complaint's "allegations do not in any way tend to show that the Juices 'did not possess even the most basic degree of fitness for ordinary use,'" or "make 'promises or affirmations of fact' that suggest the Juice can be used for a particular purpose, such as being part of a 'healthy and balanced breakfast.'"[18] Shane's injunctive-relief claim failed because she did not plead any intent to purchase the product in the future. Shane's breach-of-express-warranty and quasi-contract claims survived for the same reasons that her false-advertising and unfair-competition claims survived.

Northern District of California Stay of "Natural" Class Action Based on Use of Xanthan Gum

Rosillo v. Annie's Homegrown Inc. **(N.D. Cal. Oct. 17, 2017, No. 17-cv-02474-JSW) 2017 WL 5256345**

Plaintiff Lisa Rosillo filed a putative class action against Annie's Homegrown Incorporated ("Annie's") based on its use of the term "natural" with respect to its "Annie's Naturals" products that contain xanthan gum. Rosillo brought eleven claims under federal, California, and New York law. Annie's moved to stay and for dismissal. District Court Judge Jeffrey S. White granted the motion to stay and denied the motion to dismiss without prejudice.

Judge White granted the stay pursuant to the primary jurisdiction doctrine, considering four factors set forth in *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*[19]: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority,

13. *Ibid.* (quoting Lakewood's motion).
14. *Id.* at p. 9.
15. *Ibid.*
16. *Id.* at p. 10 (quoting complaint).
17. *Id.* at p. 11.
18. *Id.* at p. 11.
19. (9th Cir. 2002) 307 F.3d 775, 781.

(3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.

Analyzing the first factor, Judge White noted that "California's consumer protection statutes do not require a consumer to show that a given product was misbranded under federal law" and that courts have declined to stay cases pending FDA actions for that reason.[20] Judge White, however, agreed with courts that "have recognized that FDA guidance on the term 'natural' is relevant to the question of how a reasonable consumer would understand that term."[21] Accordingly, Judge White found that "because the FDA is currently considering an issue that is highly relevant to the central dispute in this case, … the first *Syntek* factor weighs in favor of a stay."[22]

The second and third factors also favored a stay because, the court held, "it cannot be denied that Congress has, through the Food, Drug and Cosmetic Act … subjected food labeling to a comprehensive regulatory framework administered by the FDA."[23]

Finally, Judge White favored a stay of the case under the fourth *Syntek* factor because awaiting guidance from the FDA "will help ensure that there are not conflicting judicial rulings, indirectly resulting in a patchwork of disclosure requirements which would require manufacturers to print different labels for different states."[24] Disagreeing with plaintiff that the prospect of regulation was speculative, Judge White found it likely that the FDA would address the use of "natural" within a short period of time.

Central District of California Dismisses Dismissal with Prejudice of Putative Class Action Challenging Blue Diamond's Use of the Term "Almond Milk"

Painter v. Blue Diamond Growers **(C.D. Cal. May 24, 2017, No. 2:17-cv-2235)**

Plaintiff Cynthia Cardarelli Painter sued Blue Diamond Growers ("Blue Diamond") under California's UCL, FAL, and CLRA. Painter alleged that Blue Diamond falsely markets its almond beverages as being nutritionally superior to dairy milk, even though the beverages lack many of the essential nutrients and vitamins present in dairy milk, and that Blue Diamond's use of the term "milk" constitutes misbranding under the FDCA and California's Sherman Law. Central District of California Judge Stephen V. Wilson granted Blue Diamond's motion to dismiss with prejudice, finding Painter's challenges to Blue Diamond's labeling practices were pre-empted by the FDCA and that Painter had failed to allege that a reasonable consumer was likely to be deceived by the representations.

With respect to preemption, the court held that Blue Diamond's use of the term "almond milk" complies with the FDCA's requirement that food "be labeled in a way that accurately describes 'the basic nature of the food or its characterizing properties or ingredients.'"[25] Any more stringent labeling requirement imposed under California's Sherman Law would violate the FDCA's broad preemption provision, "which prohibits a state from directly or indirectly establishing food label requirements not identical to federal requirements."[26]

With respect to deception, the court found the allegation that reasonable consumers would be misled by the use of the term "almond milk" was "particularly implausible," meriting dismissal with prejudice at the pleading stage. The court cited in support three decisions making the same determination as a matter of law in lawsuits involving soy, almond, and coconut milk.[27] "By using the term 'almond milk,'" the court concluded, "even the least sophisticated consumer would know instantly the type of product they are purchasing."[28]

Central District of California Finds that Purchasers of Potato Chips Cannot Show Reliance Sufficient To Withstand Summary Judgment

Wilson v. Frito-Lay North America, Inc. **(N.D. Cal. 2017) 260 F.Supp.3d 1202**

Plaintiffs Markus Wilson and Doug Campen filed a putative class action against defendant Frito-Lay North America, Inc., for its use of the terms "0g Trans Fat" and "Made with All Natural Ingredients"

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20. *Rosillo v. Annie's Homegrown Inc*. (N.D. Cal. Oct. 17, 2017, No. 17-cv-02474-JSW) 2017 WL 5256345 at p. *2.
21. *Id*. at p. *3.
22. *Ibid*.
23. *Id*. at p. *3.
24. *Id*. at p. *3.
25. Order re Mot. Dismiss, *Painter v. Blue Diamond Growers* (C.D. Cal. May 24, 2017, No. 2:17-cv-2235) at p. 3.
26. *Ibid*.
27. *Id*. at p. 4.
28. *Ibid*.

on several Frito Lay products, including potato chips, Cheetos Puffs, and Corn Chips. Plaintiffs claimed that the representations misled consumers in violation of the UCL, FAL, and CLRA. Northern District of California Judge Jon S. Tigar granted summary judgment in Frito Lay's favor.

The district court's decision turned on the named plaintiffs' failure to demonstrate that they relied on the challenged representations. As to plaintiff Markus Wilson, the court concluded, "Mr. Wilson's deposition testimony shows that he only saw the '0 grams trans fat' label once, on a single package of Lay's Classic potato chips, which he purchased at the instruction of a lawyer for purposes of this lawsuit."[29] Wilson's testimony on re-direct denying that he made the purchase for the purpose of filing a lawsuit did not create a fact issue because the court struck the testimony as resulting from improper leading by Wilson's counsel.

As to plaintiff Doug Campen, Judge Tigar agreed with Frito-Lay that Campen abandoned his "0 grams Trans Fat" claim when he failed during deposition to identify the representation as one of the label statements he was challenging. Neither Campen's earlier unverified interrogatory responses nor his post-deposition declaration that he had not abandoned the claim were sufficient to revive the claim or otherwise create a fact issue. Even had it credited that evidence, the court held, Campen's claim would nonetheless fail because no evidence in the record established that Campen had relied on the "0 grams Trans Fat" statement on Frito–Lay's packaging when he made his purchases.

Campen's deposition testimony was likewise fatal to his "Made with All Natural Ingredients" claim. As the court summarized, "Mr. Campen testified repeatedly that he did not purchase the products because of the 'all natural' label, but rather because of their taste." In so holding, the court agreed with Frito-Lay that Campen's testimony about what he thought the all-natural label meant—that Frito-Lay's chips "were 'healthier' in comparison to other products"—was not equivalent to testimony that he relied on the statement.[30] "Just because Mr. Campen testified that he thought the 'all natural' label meant that the chips were 'healthier' than other chips," the Court observed, "it does not follow that Mr. Campen relied on the 'Made with All Natural Ingredients' label when purchasing the chips."[31]

Central District Finds Expert's Conjoint Analysis Insufficient to Support Restitution Damages for Class Certification

Morales v. Kraft Food Grp., Inc. **(C.D. Cal. June 9, 2017, LACV14-04387 JAK) 2017 U.S. Dist. LEXIS 97433**

In another "natural" case, plaintiff Claudia Morales alleged on behalf of a putative class that Kraft Foods Group engaged in false advertising by labelling its shredded cheese "natural" when the cheese in fact contained added colors. In three motions, Kraft moved to exclude the testimony of Morales' damages expert Dr. Bodapati, to decertify the class, and for summary judgment. Judge John Kronstadt found the expert's testimony admissible, but granted Kraft's motions to decertify the class and for summary judgment.

In deciding the motion to exclude, the court discussed at length the parties' positions on the expert's use of conjoint analysis to determine damages, but ultimately found that each of Kraft's criticisms went to the weight, and not the admissibility, of the expert's testimony.[32] Judge Kronstadt summarily rejected Kraft's contention that "[t]he Ninth Circuit has held that the only proper model for the calculation of damages for a false advertising claim is a 'price premium' theory," noting that "courts frequently admit evidence based on a conjoint analysis under *Daubert*."[33]

The court reversed its prior determination that the damages could be calculated on a class-wide basis using Dr. Bodapati's methodology. In so holding, the court rejected Kraft's arguments that the proposed model did not satisfy the standard identified by the U.S. Supreme Court in *Comcast Corp. v. Behrend*.[34] But the court agreed with Kraft that Dr. Bodapati's analysis could not accurately calculate restitution damages because it measured only consumer willingness to pay, and "[did] not provide any insight into the money received by [Kraft] in connection with

29. *Wilson v. Frito-Lay N. Am., Inc.* (N.D. Cal. 2017) 260 F.Supp.3d 1202, 1210.
30. *Id.* at p. 1214.
31. *Ibid.*
32. *Morales v. Kraft Food Grp., Inc.* (C.D. Cal. June 9, 2017, LACV14-04387 JAK) 2017 U.S. Dist. LEXIS 97433 at p. *45 (citing *Kennedy v. Collagen Corp.* (9th Cir. 1998) 161 F.3d 1226, 1230).
33. *Id.* at p. *40 (collecting cases).
34. *Comcast Corp. v. Behrend* (2013) 133 S. Ct. 1426.

the sale of the Product."[35] Because the model bore "only on the claimed loss to Plaintiffs," it was "insufficient to establish a basis for calculating restitution."[36] Noting that injunctive relief remained available, the district court decertified only the Rule 23(b)(3) class and directed the parties to file supplemental briefing "as to whether the Class should be recertified under [R]ule 23(b)(2)."[37]

The court granted Kraft's motion for summary judgment as to damages for the same reasons, finding that "Plaintiffs have not provided adequate evidence to support their request for restitution."[38] But the court did *not* grant Kraft's motion for summary judgment as to the CLRA claims, finding that Dr. Bodapati's expert testimony created a triable issue as to whether Kraft's "natural cheese" representations were "material" to consumers' decisions to purchase the products.[39]

Ninth Circuit Finds Challenge to San Francisco's "Sugar-Sweetened Beverage" Ordinance Likely to Succeed on Merits

***Am. Beverage Ass'n v. City & Cty. of San Francisco* (9th Cir. 2017) 871 F.3d 884**

In June 2015, the City and County of San Francisco passed an ordinance that required advertisements for sugar-sweetened beverages to include the following statement: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes and tooth decay. This message is from the City and County of San Francisco."[40] The warning had to be set off with a rectangular border and occupy 20 percent of any "SSB Ad."[41]

The American Beverage Association, the California Retailers Association, and the California State Outdoor Advertising Association (collectively "the Associations"), challenged the ordinance on First Amendment grounds and moved for a preliminary injunction. The district court denied the request for preliminary injunction, but the Ninth Circuit reversed finding that the Associations were likely to succeed on merits of their First Amendment claim and injunctive relief was otherwise warranted.[42]

The Associations' First Amendment challenge was likely to succeed, the court explained, because the disclosures required by San Francisco's ordinance were not "purely factual and uncontroversial" and were not unduly burdensome.[43] A compelled disclosure that is "literally true but nonetheless misleading … is not purely factual" within the meaning of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985),[44] which sets forth the applicable standard.[45] The court found that the factual accuracy of San Francisco's ordinance was, "at a minimum, controversial" because it conveyed the message that sugar-sweetened beverages contribute to obesity, diabetes, and tooth decay regardless of quantity consumed or lifestyle choices, a message contrary to FDA statements that added sugars are generally recognized as safe and can be part of a healthy diet.[46] Moreover, the warning was "misleading" and, in that sense, "untrue" because it was required only on advertisements for sugar-sweetened beverages and not on advertisements for products with equal or greater amounts of added sugars and calories.[47]

The court further held that the ordinance unduly burdened protected speech because the required warning "overwhelms other visual elements in the advertisement" such that the "advertisement can no longer convey its message."[48] The court took note of declarations from "major companies manufacturing sugar-sweetened beverages stating that they will remove advertising from covered media if San Francisco's ordinance goes into effect," and rejected the district court's conclusion that the affidavits were "self-serving" and "not credible."[49] The court found the remaining elements of the preliminary-injunction test—irreparable harm, the balance of hardships, and public interest—all favored the Associations.

Judge Nelson concurred in the result because "the City has not carried its burden in demonstrating that the twenty percent requirement at issue here would not deter certain entities from advertising in their medium of choice."[50] She would have decided the case on that

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35. *Id.* at p. *75.
36. *Id.* at p. *76.
37. *Id.* at p. *83.
38. *Id.* at p. *84.
39. *Id.* at p. *86.
40. S.F. Health Code, § 4203(a).
41. "An 'SSB Ad' includes any advertisement or logo that "'identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use' that is posted on billboards, structures, or vehicles, among other things." *Am. Beverage Ass'n v. City & Cty. of San Francisco* (9th Cir. 2017) 871 F.3d 884, 888 (quoting SF Health Code § 4202).
42. *Id.*
43. *Id.* at p. 895.
44. (1985) 471 U.S. 626.
45. *Am. Beverage, supra,* 871 F.3d at p. 893 (quotations omitted).
46. *Id.* at p. 895.
47. *Ibid.*
48. *Id.* at p. 897.
49. *Id.* at p. 897, fn. 11.
50. *Id.* at p. 899.

question alone, and reversed and remanded "without making the tenuous conclusion that the warning's language is controversial and misleading."[51]

Central District Declines to Dismiss Slack-Fill Suit Despite Net-Weight Disclosures on Front of Label

Escobar v. Just Born Inc. **(C.D. Cal. June 12, 2017, No. CV 17-01826 BRO (PJWx) 2017 WL 5125740**

Plaintiff Stephanie Escobar sued defendant Just Born, Inc. ("Just Born"), asserting that the rectangular cardboard packaging of Just Born's Mike and Ike® and Hot Tamales® brand candy products (the "Products") constituted misleading and deceptive advertising under the UCL, CLRA, and FAL and breached express and implied warranties of merchantability. Just Born moved to dismiss for lack of standing and failure to adequately plead facts. Judge Beverly Reid O'Connell denied the motion entirely.

With respect to standing, Just Born argued that Escobar "cannot plead a cognizable injury because she received precisely the amount of product promised" on the Products' packaging via the net weight disclosure on the front panel of each carton.[52] The court disagreed, finding that plaintiff alleged that Just Born promised Escobar more than she received "by the design and size of the box itself," regardless of whether the packing disclosed the net weight.[53]

Just Born also argued that Escobar lacked standing to seek injunctive relief because she could no longer be misled by the packaging now that she was aware of the slack-fill and, alternatively, because she did not plead that she intended to purchase the product again. Noting that courts had taken divergent positions on the issue, Judge O'Connell found that Escobar's knowledge of the slack-fill did not preclude standing because she would nonetheless suffer the harm of loss of faith "in Defendant's Product packaging, and thus avoid purchasing the Product."[54] Judge O'Connell also noted that Escobar did not "expressly allege that she will no longer purchase the candy products."[55]

Just Born also argued that Escobar could not adequately plead deception under the reasonable-consumer standard because the cartons disclosed the net weight of each product on the front label. The court rejected the argument finding, first, that accurately disclosing net weight does not necessarily override the message conveyed by the size of the carton: "the fact that the Products' packaging accurately indicated that a consumer would receive 141 grams or 5 ounces of candy does not, on its own, indicate to a reasonable consumer that … 35.7% of the box is empty."[56] The court found significant Escobar's allegation that the Products—sold at movie theaters—"are kept in a glass enclosure" preventing consumers from shaking or manipulating the box prior to purchase "to ascertain whether the box is filled to the brim with Product."[57] The court distinguished slack-fill decisions where the packaging, labeling, or opportunity-to-handle gave the consumer a reasonable expectation of the products contents beyond the weight.[58]

Judge O'Connell also rejected Just Born's contention that Escobar could not plausibly allege deception based on a violation of the FDA's slack-fill regulations. The court found that Escobar's contention that Escobar must plead that she had "knowledge/awareness of the FDA slack-fill regulation at the time of sale" was unsupported by precedent.[59] Moreover, the court noted, Escobar *had* pled awareness of California and federal law.[60]

Finally, the court found that Escobar had adequately pled "why the alleged slack-fill [wa]s nonfunctional or deceptive."[61] As the court summarized, Escobar claimed that the slack-fill did "not protect the contents of the package; that "[n]either the heated glue application nor the sealing equipment require slack-fill during the manufacturing process"; that the Product settles "'immediately at the point of filling the box' rather than 'during subsequent shipping and handling'"; that the carton is not "part of a reusable container with any significant value to the Products

51. *Ibid.*
52. *Escobar v. Just Born Inc.* (C.D. Cal. June 12, 2017, No. CV1701826BROPJWX) 2017 WL 5125740, at p. *4 (quoting motion to dismiss) (emphasis in original).
53. *Ibid.*
54. *Id.* at p. *6.
55. *Ibid.*
56. *Id.* at p. *9.
57. *Id.* at p. *10.
58. *Id.* at pp. *9-10 (citing *Ebner v. Fresh, Inc.* (9th Cir. 2016) 838 F.3d 958; *Bush v. Mondelez Int'l, Inc.* (N.D. Cal. Dec. 16, 2016, No. 16-cv-02460-RS) 2016 WL 7324990; *Hawkins v. UGI Corp.* (C.D. Cal. May 4, 2016, No. CV-14-08461-DDP-JCX) 2016 WL 2595990).
59. *Id.* at p. *11.
60. *Ibid.*
61. *Id.* at p. *12 (italics omitted).

independent of its function to hold the candy product"; and that Just Born could "easily increase the quantity of candy product" or "decrease the size of the containers" by 35.7%.[62] The court pointed to the same allegations in finding that Escobar had pled that the slack-fill is non-functional with the particularity required under Rule 9(b). Nor did Rule 9(b) require Escobar to "specify the particular address or date on which she purchased the Products"; it was sufficient to allege that "a misleading statement was made throughout the class period."[63]

In A Not For Publication Opinion, The Ninth Circuit Rejects Lack Of Ascertainability As Basis For Denial Of Class Certification For Baby Food Purchasers, And Reverses Summary Judgment By Citing Product Labels As Evidence Of Deception, But Class Certification Denied on Remand Due to Lack of A Viable Damages Model

Bruton v. Gerber Products Co. **(9th Cir. April 19, 2017, No. 15-15174), on remand, Case No. 5:12-cv-02412 (N.D. Cal. Feb. 13, 2018)**

In this putative class action against Gerber Products Company ("Gerber"), plaintiff Natalia Bruton ("Bruton") alleged "that labels on certain Gerber baby food products included claims about nutrient and sugar content that were impermissible under FDA regulations incorporated into California law." Bruton asserted claims under California's UCL, FLA, CLRA, Song-Beverly Consumer Warranty Act,[64] Magnuson-Moss Warranty Act,[65] and for restitution based on unjust enrichment/quasi-contract. Plaintiff argued deception based on the fact that competitor products made no such claims (in compliance with FDA regulations), leading consumers to believe that the Gerber products were healthier.

In three separate orders challenged on appeal by Bruton, Judge Lucy Koh: (1) dismissed Bruton's claims for unjust enrichment/quasi-contract; (2) denied class certification; and (3) denied Bruton's motion for partial summary judgment and granted summary judgment to Gerber. In an unpublished opinion, the Ninth Circuit reversed on all issues and remanded for further proceedings. Although an unpublished opinion may not be cited as precedent,[65] this one may nevertheless be instructive as to how the Ninth Circuit views common food law issues pertaining to "ascertainability" as an element of class certification, and what proof is sufficient for consumer deception.

This opinion is also significant because we have the results of further proceedings after remand in the district court. On remand, Judge Koh again denied class certification due to a label change and the fact that the proposed damages model wasere legally flawed. Thus, plaintiffs' claims were examined by the Ninth Circuit and twice reviewed by the district court judge, butand thus far, have failed.

In the original proceedings, Judge Koh denied Bruton's motion for class certification on the basis that Bruton's proposed class—which included individuals who had purchased 69 different types of Gerber products over a six-year period—was not "ascertainable." The Ninth Circuit reversed based on its decision in *Briseno*,[67] which, as discussed above, held that a court could not deny class certification based on requirements not enumerated in Rule 23.

The Ninth Circuit also reversed the grant of summary judgment to Gerber, embracing Bruton's argument that "the combination of (a) the presence of the claims on Gerber's products (in violation of FDA regulations), and (b) the lack of claims on competitors' products (in compliance with FDA regulations), made Gerber's labeling likely to mislead the public into believing that Gerber' products were of a higher quality than its competitors' products."[68] The Ninth Circuit cited Bruton's own testimony as to deception, as well as FDA Warning Letters and Gerber and competitor product labeling. While Ninth Circuit authorities cited by Judge Koh in granting summary judgment had rejected self-serving plaintiff declarations and required affirmative proof of consumer deception (such as consumer survey evidence), the Ninth Circuit here explained that "[t]he key evidence is the labels."[69]

Defense counsel in future cases may note that this analysis seems contrary to the Ninth Circuit's earlier observation that "a few isolated examples of actual deception are insufficient"[70] and improperly substitutes a "reasonable judge" standard for the "reasonable

62. *Ibid*. (quotations omitted).
63. *Id*. at p. *13.
64. Cal. Civ. Code § 1790 *et seq.*
65. 15 U.S.C. § 2301 *et seq*.
66. Ninth Circuit Rule 36-3.
67. *Briseno, supra*, 844 F.3d at pp. 1126-1127.
68. *Bruton v. Gerber Prod. Co.* (9th Cir. 2017) 703 F. App'x 468, 470–471.
69. *Id*.
70. *See e.g. Clemens v. DaimlerChrysler Corp.* (9th Cir. 2008) 534 F.3d 1017, 1026 (although consumer surveys are not required, "a few isolated examples of actual deception are insufficient").

consumer" test. In other words, by comparing the Gerber label to other labels, the Ninth Circuit presupposed admissible evidence that consumers compared the two labels, focused on the language in question (or lack of language), came to the same conclusion as the judge, and bought the product based on this conclusion.

On remand, Judge Koh again denied class certification, but instead of citing lack of ascertainability, noted the lack of a viable damages model as required by *Comcast Corp. v. Behrend* (2013) 133 S.Ct. 1426. Judge Koh reviewed the three accepted damages models—full refund, price premium, and regression analysis—and ruled that plaintiff's evidence was lacking as to all three. The full refund model failed because plaintiffs received some value. Plaintiff failed to demonstrate that any price premium was due to the alleged refund. And the regression analysis model—which compares sales before and after use of the challenged claims—failed because it would be too difficult to determine when consumers were buying products with either of the labels.