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Food and Beverage Class Actions: False Advertising, Deceptive Labels, and Reasonable Consumer Standard

THURSDAY, JULY 1, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Leah Kelman, Partner, **Herrick Feinstein**, Newark, N.J.

P. Renée Wicklund, Senior Of Counsel, **Richman Law & Policy**, Irvington, N.Y.

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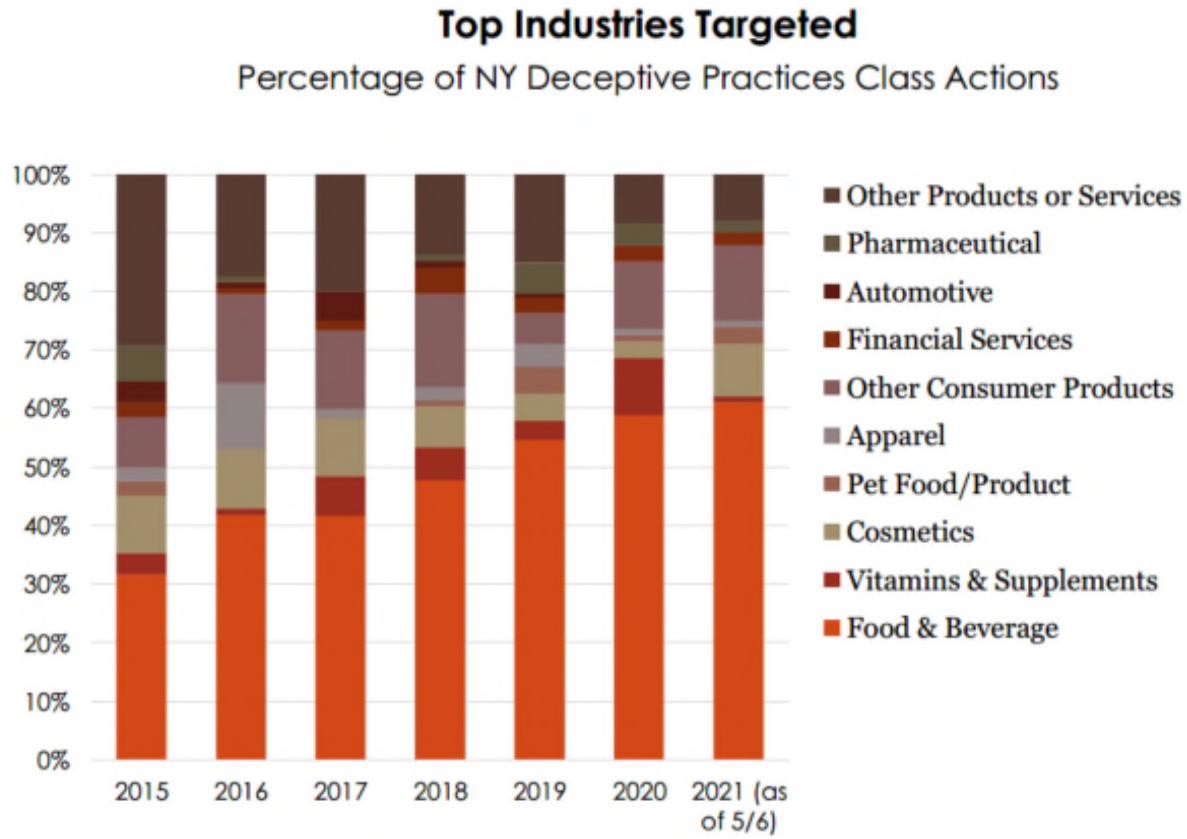
FOOD & BEVERAGE CLASS ACTIONS

LEAH KELMAN, PARTNER AND DEPUTY GENERAL COUNSEL

JULY 1, 2021

DECEPTIVE ADVERTISING/LABELING

- Deceptive Advertising and Labeling
- Claims and Relief
- Preemption & Primary Jurisdiction



New York Civil Justice Institute, May 2021

NATURE OF CLAIMS

- All Natural
- No Preservatives
- Vanilla
- Just a tad sweet
- Hint of Lime
- Recyclable
- No antibiotics
- Made in USA
- Place of Origin
- Healthy
- Flavoring

NATURE OF CLAIMS

- State Consumer Protection Statutes
- Breach of Express and Implied Warranty
- Unjust Enrichment
- Common Law Fraud

NATURE OF CLAIMS: RELIEF SOUGHT

- Injunctive Relief

- Monetary Relief

- Monetary Equitable Relief/Restitution
  - *Phan v. Sargento Foods, Inc.* 2021 WL 2224260 (N.D. Cal., June 2, 2021).

NATURE OF CLAIMS: RELIEF SOUGHT

- *McGee v. S-L Snacks National*, 982 F.3d 700 (9th Cir. 2020)
- **Background**: Plaintiff alleged Pop Secret contains partially hydrogenated oil, "a food additive banned in many parts of the world because it is the only dietary source of artificial trans fat," which (according to McGee) "causes cardiovascular heart disease, diabetes, cancer and Alzheimer's disease." Plaintiff claimed she was injured by this in three ways: the amount of trans fat she consumed in Pop Secret (1) "caused her economic injury because she believed she was purchasing a safe product when she was not"; (2) "caused her physical injury by harming her heart and blood vessels"; and (3) substantially increased her "risk of heart disease, diabetes, cancer, and death." Based on these allegations, Plaintiff's Complaint asserted several claims including violations of California's Unfair Competition Law, nuisance, and breach of the implied warranty of merchantability, and sought, among other things, restitution, disgorgement, and injunctive relief.
- **Holding**: "absent some allegation that [the defendant] made false representations," the plaintiff suffered no injury as a result of her purchase. Likewise, because the plaintiff had not plausibly alleged that the product was worth less than the price she paid for it, she could not claim an injury on an "overpayment" theory either.

NATURE OF CLAIMS

- State Consumer Protection Statutes (NY)
  - NY Gen. Bus. Law 349: "**[d]eceptive** acts or practices in the conduct of any business, trade or commerce"
  - NY Gen. Bus. Law 350: "**[f]alse advertising** in the conduct of any business, trade or commerce[.]"
  - To state a claim under either section, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice."
    - Conduct is materially misleading if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances."

NATURE OF CLAIMS

- **State Consumer Protection Statutes (California)**
  - CA Unfair Competition Law ("UCL") (Cal. Bus. Prof. Code 17200)
    - prohibits any "unlawful, unfair or fraudulent business act or practice."
  - CA False Advertising Law (Cal. Bus. Prof. Code 17500)
    - prohibits "unfair, **deceptive**, untrue, or misleading **advertising**."
  - Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code 1750)
    - prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770.

NATURE OF CLAIMS

- Cal. Bus. & Prof. Code § 17533.7 provides, in part, as follows:
- It is unlawful for any person, firm, corporation, or association to sell or offer for sale in this state any merchandise on which merchandise or on its container there appears the words “Made in U.S.A.,” “Made in America,” “U.S.A.,” *or similar words* if the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

PREEMPTION

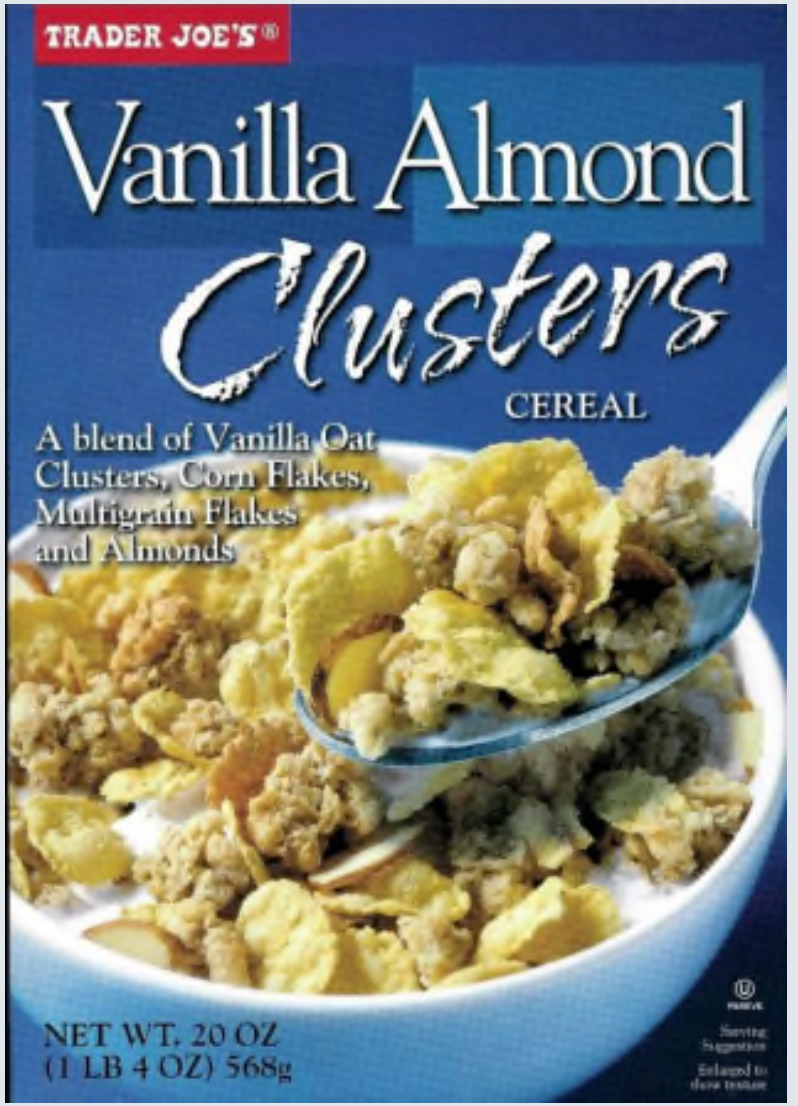
- The doctrine of preemption derives from the Supremacy Clause of the United States Constitution and provides that state laws in conflict with federal law have no force and effect. *See* *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007); U.S. Const. art. VI, cl. 2.
- Preemption may be either express or implied. *See* *Anderson*, 508 F.3d at 191.
- Express preemption occurs when Congress' intent to preempt state law is "explicitly stated in the statute's language." *See* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).
- Implied preemption occurs where compliance with both federal and state regulations is impossible, or where state law "stands as an obstacle to the accomplishment of the full purposes and objectives" of Congress. *Anderson*, 508 F.3d at 191–92 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).
- The preemption doctrine applies to state statutory and common law. *Nemphos v. Nestle Waters N. Am., Inc.*, 775 F.3d 616, 624 (4th Cir. 2015).

PREEMPTION

- *Webb v. Trader Joe's Company*, --- F.3d ---, 2021 WL 2275265 (9th Cir. June 4, 2021).
- Plaintiff's Claim: Poultry products included unlawfully large amounts of retained water, thereby causing consumers to pay more for economically adulterated and misbranded products.
- The federal Poultry Products Inspection Act (PPIA) regulates the retained water data collection process and label production for covered poultry products.
- Determination: Because Webb's state law claims seek to impose requirements "in addition to" those outlined in the PPIA, her claims are preempted.

PREEMPTION

- *Robie v. Trader Joe's,* 20-cv-07355 (N.D. Cal. June 14, 2021)
- Plaintiff's Claim: Plaintiff alleges that Trader Joe's labels its Almond Clusters cereal as "Vanilla Flavored With Other Natural Flavors" which causes consumers like herself to believe that the Product will contain an appreciable amount of vanilla from the vanilla plant and non-vanilla, natural flavors
- Determination: FDA defines "natural flavor". "….Natural flavors include the natural essence or extractives from plants listed in §§ 182.10, 182.20 [and others]."



PREEMPTION

A WORD ON SLACK FILL

- *Critcher v. L'Oréal*, 959 F.3d 31 (2d Cir. 2020).
- The Second Circuit affirmed the dismissal of a putative class action alleging that the net weight disclosures on packaging for certain L'Oréal moisturizers and cosmetics were false and misleading because the products did not dispense the full amount of product listed on the containers.
- The Southern District of New York dismissed plaintiffs' claims, holding that (1) the claims were preempted by the federal Food Drug and Cosmetic Act (FDCA), which requires product packaging to disclose the net weight of products regardless of the amount that is accessible through the dispensing mechanism; and (2) a "reasonable consumer would know that a container that dispenses a viscous cosmetic through a pump will not dispense all of the cosmetic." 2019 WL 3066394 (S.D.N.Y. July 11, 2019).
- The Second Circuit affirmed the district court's holding on preemption grounds, stating that if plaintiffs were permitted to move forward with their claims, they would be using state law to impose labeling requirements on top of those already mandated by federal law, "which is exactly what the FDCA does not permit." 959 F.3d at 36

PRIMARY JURISDICTION

- The primary jurisdiction doctrine “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]” *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

PRIMARY JURISDICTION

- Courts often consider:
  - (1) whether the central issues lie within the conventional experience of judges or the agency's particular field of expertise;
  - (2) whether the case involve a matter particularly within the agency's discretion;
  - (3) the risk of inconsistent rulings; and
  - (4) any prior similar applications to the agency.

PRIMARY JURISDICTION

Holve v. McCormick & Co., 2020 WL 6809118 (W.D.N.Y.) (natural)

Walker v. B&G Foods, 2019 WL 3934941 (N.D. Cal.) (trans fat)

Silva v. Hornell Brewing Co., 2020 WL 8079823 (E.D.N.Y.) (natural)

DEVELOPMENTS IN FOOD AND BEVERAGE CLASS ACTION

P. Renée Wicklund

Senior Counsel

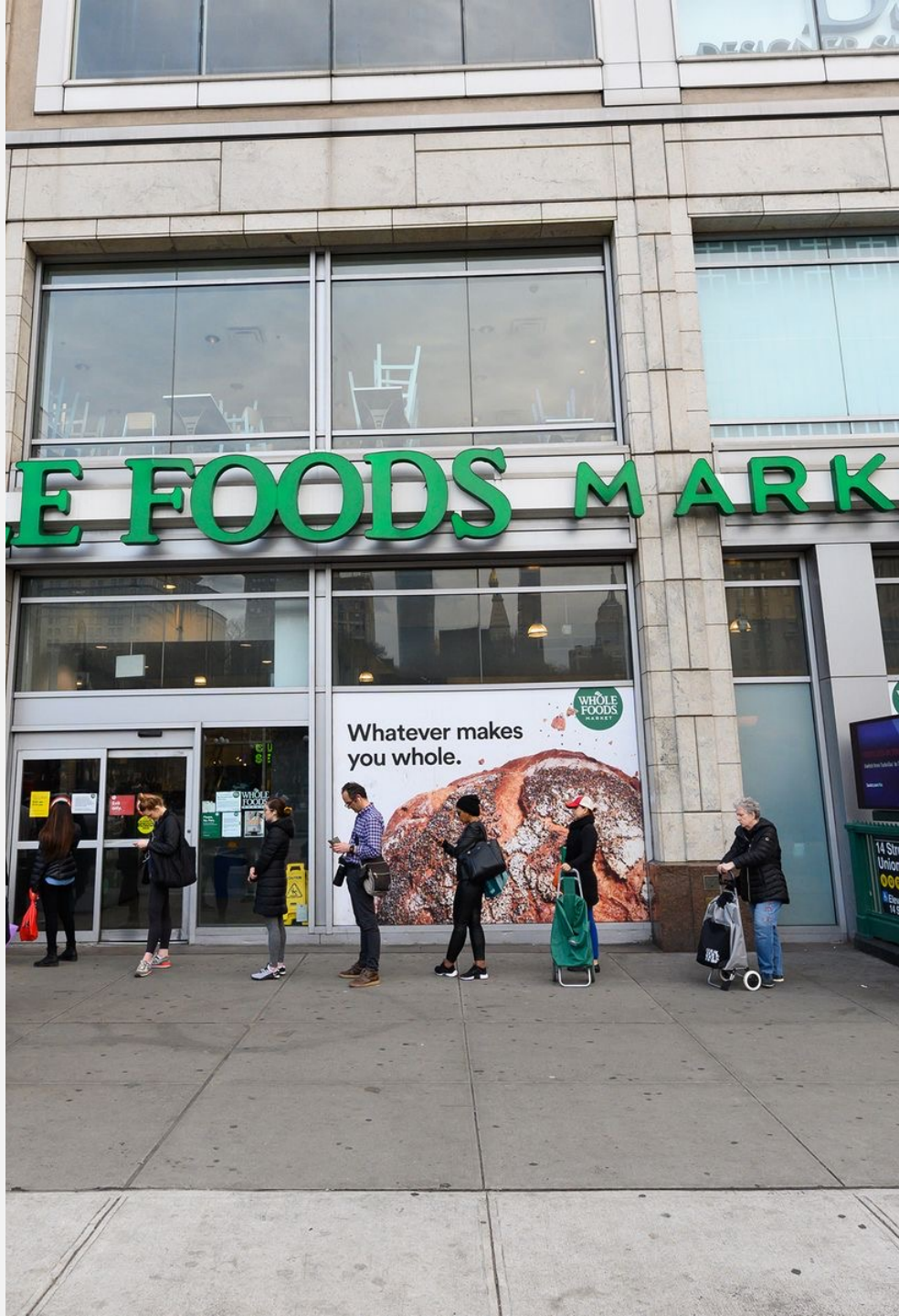
Richman Law & Policy

THE "REASONABLE CONSUMER" STANDARD

To prevail on a claim for deceptive advertising/labeling, a plaintiff must plead and prove that a subject statement or label is **likely to deceive reasonable consumers**.

To prove that the relevant labels are likely to deceive reasonable consumers, plaintiffs must prove "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 972-73 (7th Cir. 2020)

Often the issue is fought on a motion on the pleadings: The defendant argues that, as a matter of law, the challenged statement or claim (sometimes illustration) would not deceive a reasonable consumer.



PLAUSIBILITY

Another way to frame the question is one of plausibility.

- Is it plausible that a reasonable consumer would be deceived by the statement or claim?
- The Court in *Bell v. Publix* considered this principle to "stem directly from the motion to dismiss standard, which requires that a claim to relief be 'plausible on its face' to survive dismissal."
- A claim is facially plausible when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

PLEADING PLAUSIBILITY

How does the inquiry into plausibility become something other than the court's instinct?

A federal judge may read a label differently than a parent of four children who is trying to make the best food choices in a half-hour cobbled together for grocery shopping.

1. Named plaintiff or plaintiffs were deceived.
2. Increasingly, survey evidence.

CONTEXT

Every statement or claim falls within a larger packaging or advertising.

> "[I]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial." *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019).

"Fruit chews"

1. Gummy vitamins? Candy snack food? Dehydrated apples with cinnamon?
2. Surrounded by pictures of real fruit? Photos, or cartoons? Suggestive, or merely descriptive?
3. Sober font to inform parents, or fun font to attract kids?

Context factors include prominence of representation, location on packaging, accompanying illustrations, type of CPG, even color of volume.

Often this inquiry is too fact-intensive for even summary judgment and requires expert data.

AMBIGUITY—ANOTHER MATTER OF CONTEXT

What happens when an allegedly deceptive statement, claim, or other feature on the front label is clarified by an accurate ingredient list or disclaimer on the back?

If such clarification appears elsewhere, will the allegedly deceptive statement, claim, or other feature be deemed "not deceptive" or not ambiguous as a matter of law?

WILLIAMS V. GERBER PRODUCTS CO., 552 F.3D 934 (9TH CIR. 2008).

Action by parents challenging packaging features used to sell "fruit juice snacks," including

- the product **description**,
- **pictures** of fruits on the packaging, and
- **statements** that the snacks were made with "fruit juice and other all natural ingredients."

According to the parents, the packaging suggested that all the pictured fruits were actually contained in the products, and that all the ingredients were natural.

The trial court dismissed the complaint on the grounds that the packaging statements were not likely to deceive a reasonable consumer, in part because the ingredient list, printed on the side of the box, showed artificial ingredients and almost nothing fruit-based.

The Ninth Circuit reversed:

> We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. The ingredient list on the side of the box appears to comply with FDA regulations and certainly serves some purpose. **We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception.** Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.

552 F.3d at 939-940.

BELL V. PUBLIX SUPER MARKETS, 982 F.3D 468 (7TH CIR. 2020).

Front of label states "100% Grated Parmesan Cheese." Ingredients listed on the back of the label include cellulose powder and potassium sorbate, along with parmesan cheese.

MDL claim that the front label deceives reasonable consumers. Pleading cites survey data showing 85 to 95 percent of consumers understood "100% Grated Parmesan Cheese" to mean the product contains only cheese, without additives.

The district court dismissed the case, holding—

- *Ambiguity*: "100%" claims on the front labels are ambiguous. A consumer who seeks clarity can find the correct information by reading the ingredient list on the back label.
- *Common sense*: Common sense would tell a reasonable consumer that the cheese products *must* contain added ingredients, because they are sold unrefrigerated, alongside dried pastas and canned sauces.

The Seventh Circuit overturned and held that "100%" claims should have survived:

- An accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers.
- "Common sense" is a fact finding beyond what is permissible on a Rule 12(b)(6) motion, especially given survey data and actual deception that were pleaded.

RECENT EXAMPLES—AMBIGUITY AND CLARIFICATION

KENNEDY V. MONDELEZ GLOBAL LLC, NO. 19-CV-302-ENV-SJB, 2020 U.S. DIST. LEXIS 124538 (E.D.N.Y. JULY 10, 2020).

PRODUCT: NABISCO GRAHAMS, HONEY MAID GRAHAMS.

Allegedly deceptive representations:

- "Nabisco Grahams"
- "Original"
- "made with 8g of whole grain per 31g serving"
- pictures of a tan, khaki-colored, darkened-color, or "noticeably dark-tan hue" cracker
- pictures of swaying, unrefined stalk of wheat.

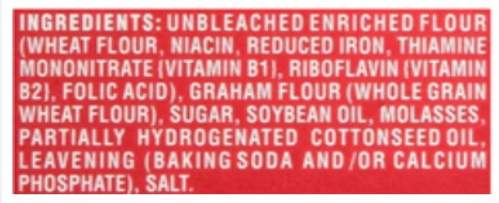
Side-panel clarifications:

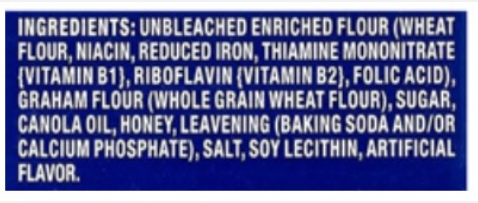
- "8g of Whole Grain Per 31g Serving"
- "No High Fructose Corn Syrup"
- "More than a century of great graham know-how"
- "A sensible snack with a satisfying hint of sweetness"
- ingredient list

KENNEDY V. MONDELEZ GLOBAL LLC, NO. 19-CV-302-ENV-SJB, 2020 U.S. DIST. LEXIS 124538 (E.D.N.Y. JULY 10, 2020).

Claim: Consumers deceived about amount of graham/whole wheat flour in the crackers, and whether sweetener was primarily honey.

Outcome: Dismissal with prejudice. Ingredient list on side panel confirms that products are not made with mostly graham/whole wheat flour, and that Honey Maids are not mostly sweetened with honey. No reasonable consumer would be deceived.





CAMPBELL V. WHOLE FOODS MARKET GROUP, INC., NO. 1:20-CV-01291-GHW, 2021 U.S. DIST. LEXIS 19624 (S.D.N.Y. FEB. 2, 2021).

PRODUCT: ORGANIC 365 HONEY GRAHAM CRACKERS.

Allegedly deceptive representations:

- "Honey Graham Crackers"
- "Organic"
- Pictures of golden brown crackers
- Pictures of a honey dipper resting in a bowl of honey.

Side-panel clarifications:

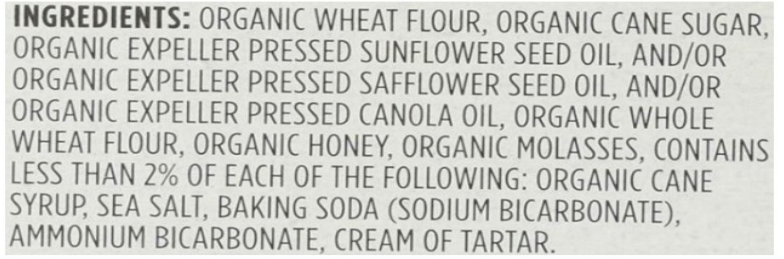
- Ingredient List
  - Organic wheat flower listed before whole wheat flower
  - Organic cane sugar listed before organic honey

CAMPBELL V. WHOLE FOODS MARKET GROUP, INC., NO. 1:20-CV-01291-GHW, 2021 U.S. DIST. LEXIS 19624 (S.D.N.Y. FEB. 2, 2021).

Claim: The reference to "Honey" and "Graham" led reasonable consumers to wrongly believe that the honey was the primary sweetener (as opposed to sugar or another sweetener) and that whole-grain was the primary flour (as opposed to regular white or refined flour).

Outcome: A reasonable consumer could be misled by the packaging. Plaintiff's consumer protection claims under Sections 349 and 350 of the New York General Business Obligation Law were adequately pleaded.

Plaintiff's negligent misrepresentation, fraud, breach of express warranty, implied warranty of merchantability, Magnuson-Moss Warranty Act, unjust enrichment claims failed. Plaintiff also did not have standing for injunctive relief.



WINSTON V. HERSHEY CO., NO. 19-CV-3735, 2020 U.S. DIST. LEXIS 247128 (E.D.N.Y. OCT. 26, 2020).

Plaintiff attempts (and fails) to create ambiguity with reference to external representations.

- Product: "Reese's White."
- Word "white" is listed on package front, in a product with no white chocolate—which is also evinced by back-label ingredient list.
- Plaintiff alleges that, because Reese's peanut butter cups are known for their milk chocolate and dark chocolate varieties, consumers reasonably assume that a variant identified as only as "white" is in fact white chocolate.
- Plaintiff further alleges that defendant instructs third-party vendors to group "Reese's White" together with its milk and dark chocolate counterparts in stores, and alongside chocolate products in general.

Result: Dismissal.

- Implausible beyond genuine dispute that a reasonable consumer acting reasonably under the circumstances would be misled into believing that the product contains white chocolate.
- Court acknowledges that accurate **ingredient list** or disclaimer will not defeat a deceptive business practice claim—where the packaging prominently features a misleading word or phrase. But court **distinguishes** this circumstance, where there is no misleading word or phrase on the packaging, and ingredient list confirms what the absence of the word "chocolate" on the packaging suggests—that "Reese's White" is not white chocolate.

OTHER RECENT EXAMPLES

Quynh Phan v. Sargento Foods, Inc., No. 20-cv-09251-EMC, 2021 U.S. Dist. LEXIS 103629 (N.D. Cal. June 2, 2021).

- Cheese label states "No Antibiotics," with asterisk to statement, "our cheese is made from milk that does not contain antibiotics."
- Claim premised on literal falsity—i.e., that sometimes, the cheese itself contains antibiotics—is dismissed, but with leave to amend with pleading regarding frequency of occurrence.
- Claim premised on misleading representation—i.e., that the statements suggest the cows are not given antibiotics—survives, as plaintiff pleaded survey evidence demonstrating how consumers interpret "no antibiotics."

Parham v. Aldi Inc., No. 1:19-cv-08975, 2021 U.S. Dist. LEXIS 28892 (S.D.N.Y. Feb. 15, 2021).

- Almond milk labeled with terms "organic," "unsweetened," "almond," and "vanilla" on front of packaging.
- Ingredients list on the back of packaging does not mention vanilla; only flavoring ingredient is "natural flavor."
- Plaintiff alleges that reasonable consumers would expect the product to be flavored solely with vanilla.
- Claim dismissed. A reasonable consumer would understand "vanilla" on carton front to describe how the Product tastes, not what it contains.
- Distinguishes cases in which front of packaging states "made with . . . ."

OTHER RECENT EXAMPLES

Sarr v. BEF Foods, Inc., No. 18-cv-6409, 2020 U.S. Dist. LEXIS 25594 (E.D.N.Y. Feb. 13, 2020).

- Front of Bob Evans mashed potato packaging states, "Made with Real Potatoes, Milk & Butter."
- Ingredients list on back of packaging shows oil and other flavoring.
- Claim dismissed. As the ingredient list confirmed, products ***were*** made with "real potatoes, milk & butter"—along with the other listed ingredients. Rejected allegation that typical mashed potatoes contain either butter or vegetable oil, but not both.

Melendez v. One Brands, No. 18-CV-06650 (CBA) (SJB), 2020 U.S. Dist. LEXIS 49094 (E.D.N.Y. Mar. 16, 2020).

- Front of nutrition bar packaging contains the brand name "ONE," apparently referring to one gram of sugar, along with phrases "1g sugar" and "20g protein."
- Nutrition facts on back of packaging list 1 gram of sugar ***and*** 5 grams of sugar alcohol.
- Claim dismissed. Any potential ambiguity created by the front label regarding the bars' carbohydrate and caloric contents is readily clarified by the back panel, which lists the amount of carbohydrates and calories in each bar.

A NOTE ON PLEADING SURVEY EVIDENCE

Becerra v. Dr. Pepper/Seven Up, Inc., 945 F.3d 1225 (9th Cir. 2019).

Claim: The name "Diet Dr. Pepper" was false or misleading because it suggested that the beverage would help consumers lose weight or maintain a healthy weight, when in fact aspartame can be a cause of weight gain.

After several amendments, the pleading was citing, among other sources deemed less relevant, (1) **survey** evidence purportedly showing that 62-63% of consumers expected diet soft drinks to help maintain/not affect their weight, and (2) a **study** regarding aspartame's effect on weight loss. The district court dismissed the claim with prejudice.

The Ninth Circuit affirmed, on the basis that it was not plausible for reasonable consumers to believe that the word "diet" in Diet Dr Pepper's brand name promises that the product will assist in weight loss or healthy weight management. After assessing other reasons why the claim was implausible, the Ninth Circuit held that **survey evidence could not resuscitate the claim**:

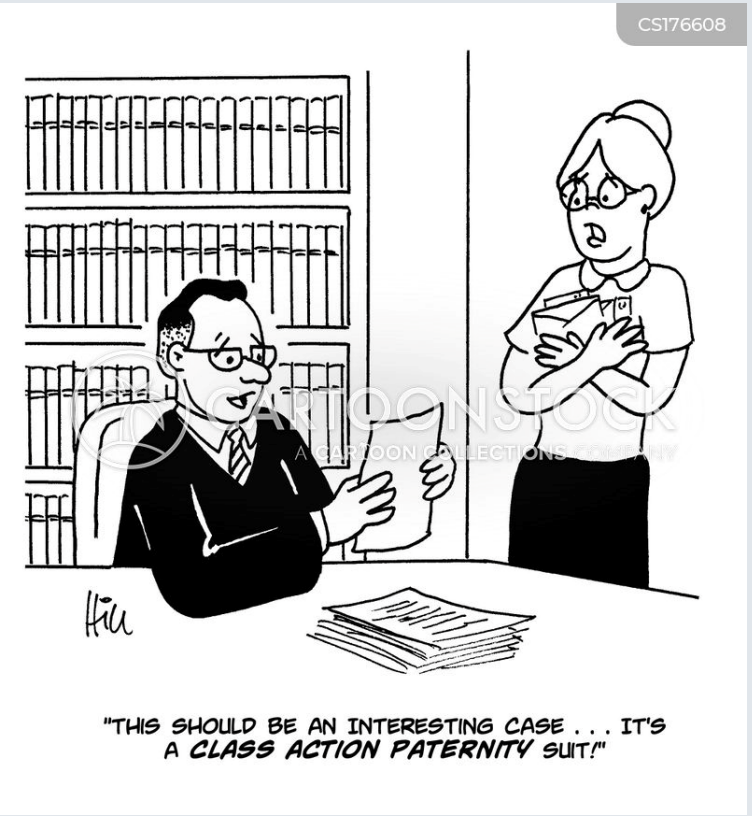
> "Although we must accept the allegations surrounding the survey as true at this stage of the litigation, a reasonable consumer would still understand "diet" in this context to be a relative claim about the calorie or sugar content of the product. The survey does not address this understanding or the equally reasonable understanding that consuming low-calorie products will impact one's weight only to the extent that weight loss relies on consuming fewer calories overall. At bottom, the survey does not shift the prevailing reasonable understanding of what reasonable consumers understand the word "diet" to mean or make plausible the allegation that reasonable consumers are misled by the term "diet."

CLASS CERTIFICATION

- Rule 23
- Bifurcation

RULE 23(a)

- Under Rule 23(a) there are four key prerequisites:
  1. **Numerosity** — so numerous that joinder of all members is impracticable (some courts have required at least 40 members)
  2. **Commonality** — common questions of law or fact
  3. **Typicality** — class representative claims must be typical
  4. **Adequacy of the representation** — fairly and adequately protect interests of class
  5. * **<u>Ascertainability</u>**



RULE 23(b)

- Rule 23(b) permits maintenance as a class action if the action satisfies Rule 23(a)'s prerequisites and meets one of three alternative criteria for maintainability.
  - First, Rule 23(b)(1)(A) permits certification to prevent inconsistent rulings regarding defendants' required conduct. Standards for certifying a class under Rule 23(b)(1)(B) relate primarily to limited fund settlements.
  - Second, Rule 23(b)(2) permits a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."
  - **Third, Rule 23(b)(3) permits a class action if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Section 21.141 elaborates on the requirements for certifying a litigation class.**

-(Manual for Complex Litigation, Sec. 21.131 (2021))

PREDOMINANCE

- Reitman v. Champion Pet Food USA, Inc., 2019 WL 7169792 (C.D. Cal. 2019)

A. Predominance

When certification is sought for a litigation class, the predominance inquiry under Rule 23(b)(3) asks whether "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication[.]" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). "The predominance criterion is far more demanding" than the commonality requirement of Rule 23(a). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997). Yet "[w]hen 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as ... some affirmative defenses peculiar to some individual class members.' " *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). "In determining whether common questions predominate, the Court identifies the substantive issues related to plaintiff's claims (both the causes of action and affirmative defenses), and then considers the proof necessary to establish each element of the claim or defense; and considers how these issues would be tried." *Petersen v. Costco Wholesale Co.*, 312 F.R.D. 565, 579 (C.D. Cal. 2016).

The party seeking class certification has the burden of establishing predominance. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011) (citation omitted). Further, plaintiffs must show that " 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (citing *Comcast v. Corp. v. Behrend*, 569 U.S. 34 (2013)).

CLASS CERTIFICATION

IN RE: KIND LLC "HEALTHY AND ALL NATURAL" LITIGATION, CASE NO. 15MD2645

- In re: KIND LLC "HEALTHY AND ALL NATURAL" LITIGATION, 337 F.R.D. 581 (S.D.N.Y. 2021)

- *Comp. Reitman v. Champion Petfoods USA, Inc., et al.*, No. 19-56467, 2020 WL 7238439 (9th Cir. Dec. 9, 2020).

BIFURCATION

- **Traditional explanation:** Bifurcated discovery into class and merits stages based on the notion that narrow class discovery will preserve party resources until and unless a class is certified.
- Class Discovery followed by Merits Discovery, or….
- Merits Discovery followed by Class Discovery, or ….
- One Discovery Period

BIFURCATION

- The Federal Rules of Civil Procedure do not provide for bifurcated discovery.
- Fed. R. Civ. P. 26(c)(1): A court may, “for good cause,” limit the scope of discovery or control its sequence to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”
- The 2003 Advisory Committee Notes to Rule 23 recognize that bifurcation “is appropriate to conduct controlled discovery . . . limited to those aspects relevant to making the certification decision on an informed basis.”

BIFURCATION

- Bifurcation also directly serves Civil Rule 23's requirement that courts must, "[a]t an early practicable time after a person sues or is sued as a class representative determine by order whether to certify the action as a class action."
- Wal-Mart v. Dukes, 131 S. Ct. 2541, 2551 (2011).
  - The Wal-Mart court stated that district courts had to undertake "rigorous analysis" to ensure that "the prerequisites of Rule 23(a) have been satisfied," adding this further observation: "Frequently, that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."
- Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).
  - Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

BIFURCATION

- FOR:
  - Expediency
  - Economy
  - Severability
- AGAINST:
  - Delay
  - Duplication
  - Overlapping issues

BIFURCATION

"Allowing some merits discovery during the precertification period is generally more appropriate for cases that are large and likely to continue even if not certified. On the other hand, in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden. If merits discovery is stayed during the precertification period, the judge should provide for lifting the stay after deciding the certification motion."

–Manual for Complex Litigation (4th) § 21.14 (2021).

CONTACT US

LEAH KELMAN
LKELMAN@HERRICK.COM
973-274-2004

THANK YOU

www.herrick.com

SETTLEMENTS

CLASS ACTION SETTLEMENT: THE REALITY

The reality is that **class actions are rarely tried**. According to the 2021 *Carlton Fields Class Action Survey*,* 58.5% of class actions settled in 2020, a decline from 2019 (73.1%) and 2018 (60.3%) but still significant.

Consumer fraud cases, which include food and beverage marketing cases, account for 21% of total class actions

According to the 2019 *Survey*, **fewer than 2%** of cases filed as class actions went to trial.

Unlike private settlements, **Rule 23 settlements** require court approval and are frequent targets of objectors—both for profit, *see Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020), and on principle.

- * available at https://classactionsurvey.com

CRAFTING A CLASS SETTLEMENT THAT STICKS

Key factors to consider:

Rule 23 factors and not seeking unreasonable class definition.
- Remember that rights are released.

Attorneys' fees.
- Circuit authority on lodestar versus percentage of the fund.
- Whether a multiplier must be calculated/considered.
- To the extent relevant, the 12 factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Increasing claims rates.
- Demonstrate substantial benefit to the class members.
- Avoid any appearance of not putting class members first.

Cy pres.
- Distribution of leftover class funds to a charitable organization, meant to approximate as nearly as possible interests of the class members.
- Past abuse of *cy pres*, through distributions to organizations not working directly in class members' interest (classic example: class counsel's law school).
- Even after those abuses were curbed, *cy pres* distributions remain lightning rods: arguments for deducting from percentage-based fee awards, or for insufficient class benefit.
- Without *cy pres*, can get caught in reversion trap.

BRISEÑO V. HENDERSON, NO. 19-56297, 2021 U.S. APP. LEXIS 16261 (9TH CIR. JUNE 1, 2021)

CASE STUDY FROM MOST RECENT APPELLATE DECISION IN FOOD-AND-BEVERAGE CONTEXT

This case, originally filed in 2011, alleged that ConAgra Foods **falsely labeled Wesson vegetable oil as "100% all natural,"** even though the product **contained genetically modified ingredients**.

Settlement was approved by the district court. Class members, who had to submit claims to receive 15-cent refunds, were slated to recover **less than $1 million**. Class counsel were awarded **nearly $7 million** in fees and costs.

The Ninth Circuit reversed, holding that approving the settlement was abuse of discretion. The opinion identifies two primary forms of error:

- The district court **failed to scrutinize the fee request** according to *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935 (9th Cir. 2011), which identifies three warning signs for determining self-dealing by plaintiffs' attorneys:
  - Whether counsel counsel "receive a disproportionate distribution of the settlement";
  - The existence of any "clear sailing arrangement" in which a defendant agrees not to challenge the agreed-upon fees for class counsel; and
  - The existence of a "kicker" or "reverter" clause in which the defendant, not the class members, receives the remaining funds if the court reduces the agreed-upon attorneys' fees.
- The district court, in determining **fairness of the settlement**, should not have given any credit to class counsel for obtaining an injunction to block ConAgra from using the "all-natural" label in future Wesson oil packaging; that **injunction was "virtually worthless"** because ConAgra sold the Wesson brand before entering the class action settlement.

A settlement years in the making thus collapsed. It can be argued that at least, given the terms of the settlement, consumers were not punished for counsel's strategy.

P. RENÉE WICKLUND

Renée Wicklund is senior Of Counsel at the Richman Law & Policy. Previously, Ms. Wicklund spent a decade with one of the nation's largest and top-ranked law firms, practicing class action defense and mass toxic tort litigation.

Ms. Wicklund is a 1998 graduate of The Yale Law School, where she was a Coker Fellow and managing editor of The Yale Law Journal, and a 1994 graduate of Syracuse University, where she was Syracuse University Scholar. She also holds master's degrees from The University of Chicago and Sarah Lawrence College.