

Food Labeling Class Actions: Navigating Ascertainability, Predominance, Preemption and Standing

THURSDAY, SEPTEMBER 5, 2019

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Today's faculty features:

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*Food Labeling Class Actions:
Navigating Ascertainability,
Predominance, Preemption and Standing*

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QUIZ

WHY ARE SO MANY NEW CASES
BREWING IN THE UNITED STATES?

[MULTIPLE CHOICE TEST]

**A. BECAUSE TOBACCO COMPANIES
SHELLED OUT BIG BUCKS TO THE
PLAINTIFFS' LAWYERS.**



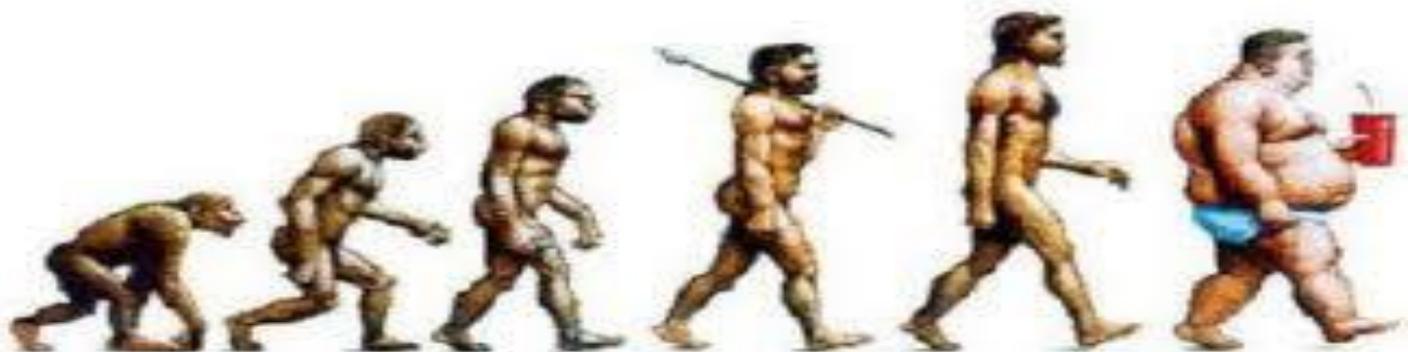
B. BECAUSE AL GORE INVENTED THE INTERNET.



C. BECAUSE OF THE EVER INCREASING USE OF CONSUMER CLASS ACTIONS IN THE COURTS.



D. BECAUSE OF THE GROWING FOCUS ON OBESITY AND HEALTH



E. BECAUSE PEPSI DOES NOT TALK TO COKE.



ANSWER

all
of the
above.

AND MANY MORE FACTORS HAVE CONTRIBUTED TO THE GROWING NUMBER OF CASES.

LITIGATION IS A “FOR- PROFIT” BUSINESS – THE PLAYBOOK

- Demonize the industry
- Support certain public interest groups
- Use the media to maximum advantage
- Blame a multi-factorial health problem on a single “ADDICTIVE” or “HARMFUL” ingredient.



ADDING FUEL TO THE FIRE – SOCIAL MEDIA

- **PLAINTIFFS' LAWYERS SCOUR WEB ADVERTISING**
- **PLAINTIFFS' LAWYERS TROLL FOR CLAIMANTS**
- **BLOG COMMENTS GET REHASHED IN PLEADINGS**
- **VIRAL STORIES ABOUT LAWSUITS**



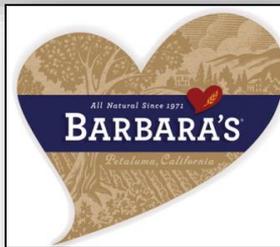


“Nature’s valley is linked with the concept of natural on the brand’s website”

“General Mills also links the Nature Valley Brand with the concept of natural on its Flickr photostream”

“Nature Valley’s Facebook page also features photographs of nature . . .”

Janney v. General Mills (Class Action Complaint), (N.D. Cal.)



Silber v. Barbara's Bakery, Inc. (Class Action Complaint), (E.D.N.Y.)



Take Action

THE UNHAPPY TRUTH ABOUT SODA

It wasn't so bad when soft drinks were the occasional treat.
But now sugary drinks are the number one source of calories in the American diet.

With one third of America overweight and another third obese, it's a wonder
anyone is still swallowing what the soda companies are selling.



THE INDUSTRY'S DISADVANTAGES

- Regulated, but not completely
- Highly competitive – competing claims on “natural,” ingredients, health, etc.
- Constantly evolving product lines
- Rapidly changing consumer tastes
- Diet is a subject of strong public interest⁺



Emerging Trends



Emerging Trend No. 1

The Reasonable Consumer

- The validity of claims often turns on what the fabled “reasonable consumer” thinks and does.
 - To plead a variety of popular statutory claims, (*e.g.*, FAL, CLRA, UCL, NY GBL), plaintiff must plead facts showing that members of the public are likely to be deceived.
- Class certification also often rises or falls based on what the “reasonable consumer” thinks or does.
 - A plaintiff’s ability to invoke the CLRA’s presumption of reliance turns on whether the statement at issue would be “material” to a reasonable consumer.
- But what does it mean to be “reasonable?”

You say Potato . . .



The Tootsie Roll Case

- *Daniel v. Tootsie Roll Indus.*, 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018).
 - Plaintiffs brought claims of deceptive and unfair trade practices (N.Y. Gen. Bus. Law § 349 (“GBL § 349”)) and false advertising (“GBL §§ 350, 350-a”)
 - To allege an unfair trade practices claim under GBL § 349, a plaintiff must allege and prove three elements: (1) the challenged act or practice was consumer-oriented; (2) it was misleading in a material way; and (3) the plaintiff suffered injury as a result of the deceptive act. False advertising claims under GBL §§ 350 and 350-a must satisfy the same elements.
 - Court concluded that the slack-fill enclosed in the Junior Mints would *not mislead a reasonable consumer*, as the Product boxes provide more than adequate information for a consumer to determine the amount of Product in the container.

Be Reasonable: Read the Label

- Bottom line: a reasonable consumer would read the package to figure out how much product is actually inside the container.
 - First, the weight of the candy is displayed prominently on the box.
 - Second, consumers can easily calculate the number of candies inside by viewing the serving size information on the outside of the box.
 - Third, consumers are not operating on a blank slate: “[b]ecause of the widespread nature of this practice, no reasonable consumer expects the weight or overall size of the packaging to reflect directly the quantity of product contained therein.” (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 967 (9th Cir. 2016)).

The Iced Coffee Case

- *Forouzes v. Starbucks Corp.*, 714 Fed. Appx. 776 (9th Cir. Mar. 12, 2018) (affirming dismissal of proposed class action against Starbucks)
 - Plaintiff alleged that Starbucks’s method of preparing its iced beverages deceives its customers by misrepresenting the amount of liquid a customer receives when he or she orders an iced drink.
 - Plaintiff brought claims of breach of express warranty, breach of implied warranty, negligent misrepresentation, unjust enrichment, fraud, and violations of California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.



Be Reasonable: An Iced Drink . . . Has Ice In It

- Because a reasonable consumer would not think that a 12-ounce ‘iced’ drink ... contains 12 ounces of coffee or tea and no ice.
- Because plaintiff did not show that consumers justifiably relied on Starbucks’s representation and “justifiable reliance” is a required element of fraud.
- The claim for breach of express warranty failed because the plaintiff did not allege that Starbucks ever promised that its iced drinks contained a specific amount of liquid “as distinct from a total amount of liquid and ice.”

Emerging Trend No. 2: Venue Shift?



More suits filed in New York

- *Louis v. Nature's Path Foods USA Inc.* (E.D. N.Y. May 1, 2019)
- *Niles v. Beverage Marketing USA Inc.* (E.D. N.Y. April 2, 2019)
- *Troncoso v. TGI Friday's* (S.D. N.Y. March 27, 2019)
- *Cunningham v. Pret A Manger Ltd* (S.D. N.Y. March 15, 2019)
- *Morrison v. Snack Innovations, Inc.* (S.D. N.Y. Feb. 2019)

Emerging Trend No. 3 Non-Profits Seeking Injunctive Relief

- Not class actions but brought “on behalf of the general public”
- The District of Columbia Consumers Protection Procedures Act. D.C. Code § 28-3905(k)(1).
- Creates statutory standing (under certain circumstances) for non-profit groups

Non-Profits seeking injunctive relief – An Example

- ***Children's Health Defense v. Beech-Nut Nutrition Company***, Docket No. 2019-CA-004475 (D.C. Super. Ct. Jul 08, 2019)
 - Claims over the term “100% natural” when baby food allegedly contains residues of synthetic materials
 - Complaint alleges that many parents are increasingly making baby food at home, where they feel more confident that the ingredients are simple, wholesome and real, and therefore results in parents seeking out natural foods
 - According to the complaint, a recent Consumer Reports survey of 1,000⁴ adult U.S. residents found, for example, that 59% of consumers now check to see if their food is natural when shopping

Unique Features

- Injunctive relief only—to frustrate removal
 - Aggregation principles (injunctive relief & attorneys’ fees)
- No deceived consumer requirement
 - No plaintiff consumer deposition?
- Focused exclusively on the “reasonable consumer”
 - Battles of the experts
- Reliance on studies—not relying on the organization’s views
- Battles over standing
 - Diversion of resources (injury-in-fact standing)
 - Public interest organization standing
- Ideologically driven litigation

Emerging Trend No. 4: DOJ Intervention in Class Settlements



Emerging Trend No. 5 Glyphosate – Round(up) II



Glyphosate – The First Wave

- ***In re General Mills Glyphosate Litigation***, 2017 WL 2983877, at *5-7 (D. Minn. Jul. 12, 2017) (dismissing class action with prejudice because “[i]t is implausible that a reasonable consumer would believe that a product labeled as having one ingredient—oats—that is ‘100% Natural’ could not contain a trace amount of glyphosate that is far below the amount permitted for organic products”).
- ***Gibson v. The Quaker Oats Company***, 2017 WL 3508724, at *3-4 (N.D. Ill. Aug. 8, 2017) (dismissing class action complaint alleging that “the use of the slogans ‘Natural,’ ‘100% Natural,’ ‘100% Natural Whole Grain,’ ‘Heart Healthy’ or ‘part of a heart healthy diet’ are deceptive because Quaker Oats contain trace amounts of glyphosate, a herbicide used in the harvesting process,” finding that such claims were preempted by federal law).

Glyphosate – The First Wave (cont'd)

- ***Axon v. Citrus World, Inc.***, 354 F. Supp. 3d 170, 174, 184-85 (E.D.N.Y. Dec. 10, 2018) (following *General Mills* and concluding that “a reasonable consumer would not be misled by defendant’s product labels,” which indicated that the product was “natural,” into believing that the product would not contain even a trace amount of glyphosate).
- ***Parks v. Ainsworth Pet Nutrition, LLC***, Case. No. 1:18-cv-06936 (S.D.N.Y. April 18, 2019) (dismissing plaintiff’s claims and noting that “a reasonable consumer would not be so absolutist as to require that ‘natural’ means there is no glyphosate, even an accidental and innocuous amount, in the Products”).

So what's new?

The New York Times

\$2 Billion Verdict Against Monsanto Is Third to Find Roundup Caused Cancer

EPA Glyphosate letter- April 2019

- Proposed Interim Registration Review Decision (PID) on glyphosate
 - The EPA noted that some commenters pointed to the use of glyphosate as a pre-harvest desiccant for wheat as a source of glyphosate residues in cereal products.
 - The EPA responded that “wheat desiccant use was considered in the agency’s dietary risk assessment; EPA assumed maximum legal residues in wheat and other cereal grains. Taking exposures from those residues into consideration in its most recent human health risk assessment, EPA’s estimation of risk from aggregate exposure to glyphosate, *even including residues from pre-harvest desiccant use on wheat, is below the agency’s level of concern.*” (Id.)



Emerging Trend No. 6

The Evolution of Natural Claims: Natural Ingredients

- *Allred v. Kellogg Co.*, 2018 WL 1158885 (S.D. Cal. Feb. 23, 2018) complaint alleged that the design of the Product’s label implies that Pringles are flavored only with only natural ingredients, but defendant adds two artificial ingredients, sodium diacetate and malic acid to produce the vinegar flavor in the Product.
- Further, the complaint alleged deficient labeling of the ingredients, in violation of California and federal law, because the packaging “misleadingly identifies the malic acid flavoring agent only as a generic ‘malic acid’ instead of using the specific, non-generic name of the ingredient.”



Emerging Trend No. 7

CBD claims

- Maybe not emerging yet but it will be
 - Extreme claims made on a variety of products (treats a variety of illnesses, cures cancer, etc.)
 - Potential for regulatory action
- Mandatory for every food law presentation to talk about CBD

The FDA Weighs In—At Least On Marketing Statements

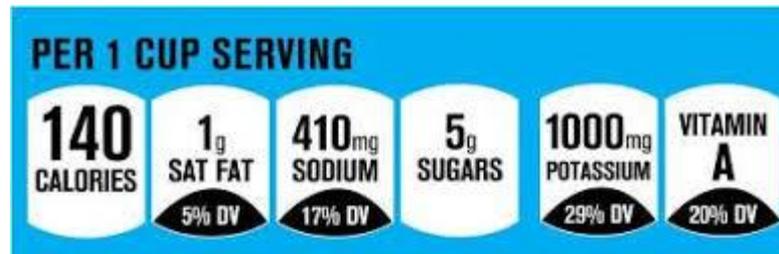
- Curaleaf, Inc. warning letter from Center for Drug Evaluation and Research
- Advised Curaleaf that the FDA reviewed Curaleaf's website and Curaleaf is advertising selling unapproved new drugs sold in violation of sections 505(a) and 301(d) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), 21 U.S.C. 335(a) and 331(d).
- Also warned that the products are misbranded under section 502(f)(1) of the FD&C Act, 21 U.S.C. 352(f)(1).
- Also determined that the Bido CBD for pets are unapproved new animal drugs that are unsafe under section 512(a) of the FD&C Act, 21 U.S.C. 360b(a).

Emerging Trend No. 8 Nutrient Content Claims

- *Hawkins v. The Kroger Co.*, Case No.16-55532, 906 F. 3d 763 (9th Cir. 2019)
 - Regulations regarding rounding apply only to figures listed in the Nutrition Facts Panel and *not* claims made on the rest of the product.

Nutrition Facts	
8 servings per container	
Serving size	2/3 cup (55g)
Amount per serving	
Calories	230
% Daily Value*	
Total Fat 8g	10%
Saturated Fat 1g	5%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 160mg	7%
Total Carbohydrate 37g	13%
Dietary Fiber 4g	14%
Total Sugars 12g	
Includes 10g Added Sugars	20%
Protein 3g	
Vitamin D 2mcg	10%
Calcium 260mg	20%
Iron 8mg	45%
Potassium 235mg	6%

* The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.



Emerging Trend No. 9

Supply Chain Claims

- *Hodson v. Mars, Inc.*, 891 F.3d 857 (2018)
 - Consumer class action against Mars, alleging a failure to disclose that suppliers used forced and child labor, which violates Unfair Competition Law, Consumers Legal Remedies Act, and False Advertising Act.
 - The District Court dismissed and the Ninth Circuit affirmed.

Emerging Trend No. 9 Supply Chain Statements

- Defendant did not have to disclose that the raw ingredient used to make its candy bars *might* have been a product of child slave labor
- “In the absence of any affirmative misrepresentations by the manufacturer, we hold that the manufacturers do not have a duty to disclose the labor practices in question, even though they are reprehensible, because they are not physical defects that affect the central function of the chocolate products.” -U.S. Circuit Judge A. William Tashima

Emerging Trend No. 10: Issue Class

Martin v. Behr Dayton Thermal Prods. LLC, No. 17-3663 (6th Cir. 2018)

- Held that even though a toxic tort class action based on “the risk of vapor intrusion” from two plumes of groundwater contamination could not be certified as a (b)(2) class, it could be certified as an issue class under (c)(4)
- Seven issues of law and fact were certified, including each defendant’s role in creating the contamination, whether it was foreseeable, whether defendants engaged in abnormally dangerous activities, whether the contamination underlies the class area, causation, and whether defendants failed to investigate and remediate the contamination
- Deepens circuit split on issue classes



Emerging Trend No. 11: Lab tests

- *Robinson v. The J.M. Smucker Co.* (N.D. Cal. May 8, 2019)
- Denying in part and granting in part motion to dismiss
- “Plaintiff has plausibly alleged that Crisco EVOO is not 100% extra virgin olive oil, **even if she has not disclosed the methodology or source of the lab results upon which she relies.**”



New Targets in 2019 and beyond

- Focus on “environmentally-friendly” claims



New Targets in 2019 and beyond

- More focus on ingredients such as “Made with Real”



New Targets in 2019 and beyond

- Origin



“War on Coconut Products”



“Not enough” and “Not actually” claims

- *DeVane v. L’Oreal USA Inc.* (S.D.N.Y. May 14, 2019) (keratin hair products)
- *Louis v. Nature’s Path Foods USA Inc.* (E.D. N.Y. May 1, 2019) (acai toaster pastries)
- *Niles v. Beverage Marketing USA Inc.* (E.D. N.Y. April 2, 2019) (ginseng green tea)
- *Troncoso v. TGI Friday’s* (S.D.N.Y. March 27, 2019) (potato skins)
- *Morrison v. Snack Innovations, Inc.* (S.D. N.Y. Feb. 2019) (white chocolate snacks)

Slack Fill: Back from the Dead?

- *Escobar v. Just Born, Inc.* (C.D. Cal. March 25, 2019) (granting class certification for Mike and Ike and Hot Tamales candy; despite survey finding more than 80 percent of CA respondents found they received the exact amount of candy they expected the last time they bought the products)
- *Stemm v. Tootsie Roll Industries, Inc.* (N.D. Ill. March 19, 2019) (dismissing suit targeting Junior Mints)
- *Faison v. Russell Stover Chocolates LLC* (E.D.N.Y. Feb. 2019) (new complaint)

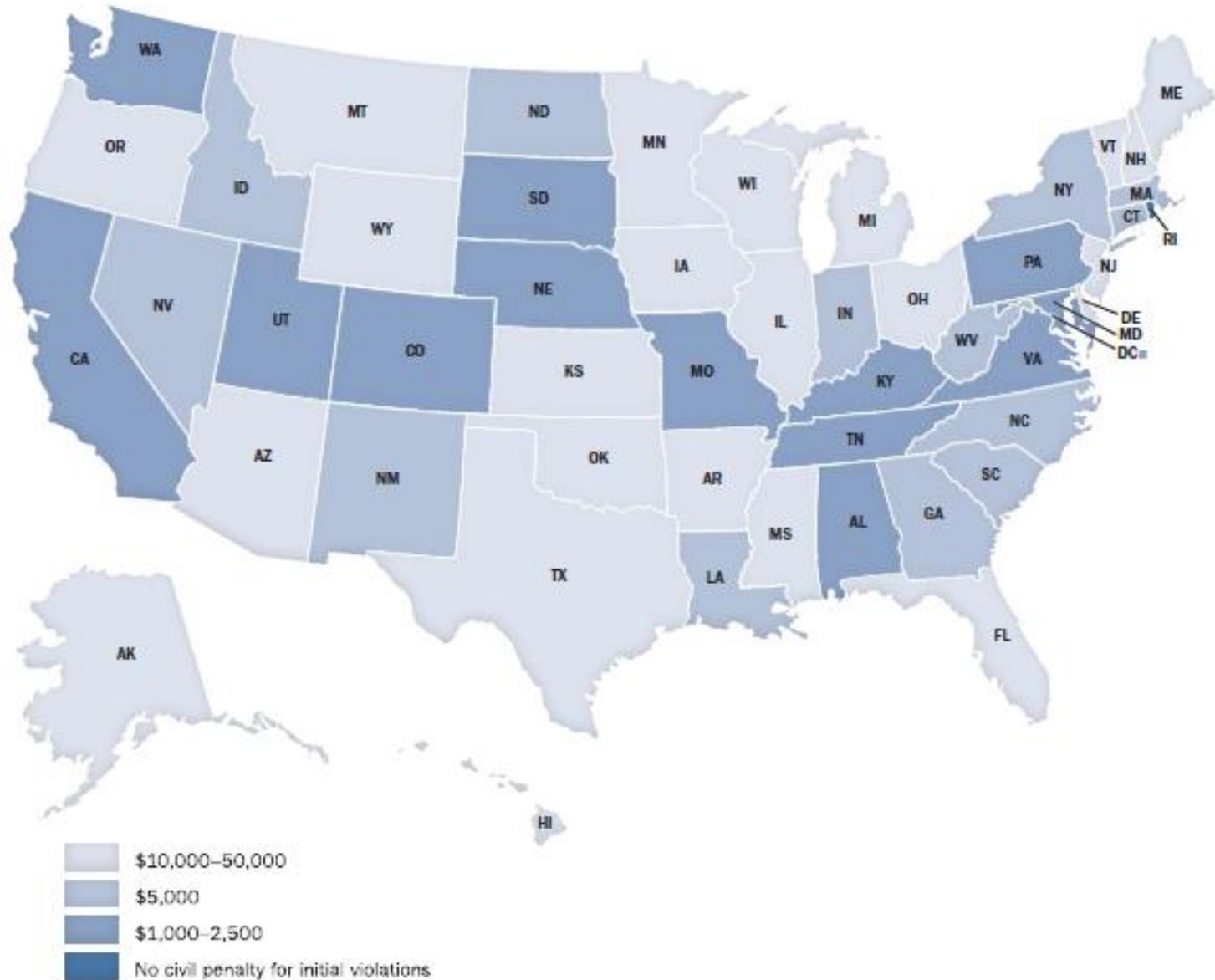
DAMAGES



Statutory Damages

- Many statutes only provide for statutory damages if violation is “knowing.”
- Many statutes state that the statutory damages can be “up to” a certain amount if there is a violation.
- In many states, an award of statutory damages is discretionary.
- Some statutes only award statutory damages once for a course of conduct.

Strength of States' Civil Penalties



Source: ©National Consumer Law Center, 2018.

Statutory Damages

- Aggregating statutory penalties in class actions “create[] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.” *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003).
- “Combining the litigation incentives of statutory damages and the class action in one suit, . . . creates the potential for absurd liability [and] . . . over-deterrence.” Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 111 (2009)

Golan v. Veritas Entm't, LLC,
2017 WL 3923162 (E.D. Mo. Sept. 7, 2017)

- Reduced statutory damages of \$500 per call under TCPA because award would have been “obviously unreasonable and wholly disproportionate to the offense” making it unconstitutional.
- Full award would have been \$1.6 billion.
- Court reduced it to \$32 million, which was approximately \$10 per call.

Conjoint Analysis

- Supply-side challenges
 - *In re GM LLC Ignition Switch Litigation* (Aug. 6, 2019)
 - Conjoint analysis “measures only the effect that a disclosed defect would have on *willingness to pay*.”
 - “Willingness-to-pay does not necessarily reflect the actual price that a consumer ends up paying for a product.”
 - The expert’s conjoint analysis “thus measures consumers’ private valuations (on average) of certain hypothetical GM vehicles sold with fully disclosed defects; it does not measure the *market value* of those vehicles.”

Class

- *Kurtz v. Kimberly-Clark Corp.* (2d Cir. May 14, 2019)
- Remanded back to trial court on issue of classwide harm
- Issue is whether plaintiffs can show harm through common evidence (specifically Colin Weir’s hedonic regression analysis)
- Trial court originally certified multiple NY classes of purchasers of “flushable wipes”

Class

- *Mohamed v. Kellogg Co.* (S.D. Cal. March 23, 2019)
- Denying class certification in case alleging veggie burger was mislabeled as “made with natural ingredients”
- “Plaintiff provides no indication how she intends to prove the price premium to which [pltf’s expert] percentage would be applied to arrive at the amount of damages. Plaintiff has not proposed to conduct a hedonic regression or any other type of analysis to calculate the price premium, which would account for the supply and market factors that influence price.”

Ascertainability

- Objective criteria
- Administrative feasibility

A photograph of a person's hand, palm up, holding the word "ascertainable" in a large, bold, red sans-serif font. The background is a plain, light-colored wall.

ascertainable

Ascertainability

- *Wasser v. All Market, Inc.*, No. 16-21238-Civ-Scola, 2018 WL 5629906 (S.D. Fla. Sept. 26, 2018) (held that damages class was not ascertainable; held that self-identification was not appropriate)
 - “Numerous courts have recognized the issues inherent in requiring class members to accurately recall specific information about purchases of low-cost consumer goods”
- *Brantley v. Handi-House Mfg. Co.*, 2018 WL 3613998 (S.D. Ga. 2018) (similar)
- *Fenwick v. Ranbaxy Pharmaceuticals, Inc.*, 2018 WL 5994473 (D. N.J. 2018) (similar)
- *Spacone v. Sanford LP*, 2018 WL 4139057 (C.D. Cal. 2018) (similar)

**“Heightened”
requirement:**

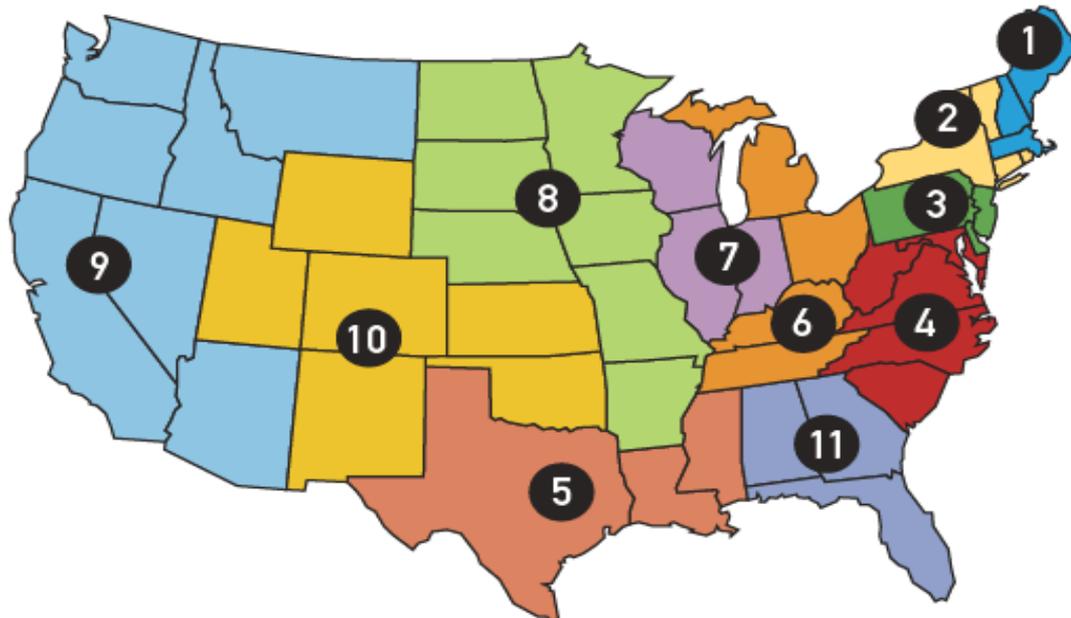
Third Circuit
Fourth Circuit
Eleventh Circuit

**“Hybrid”
requirement:**

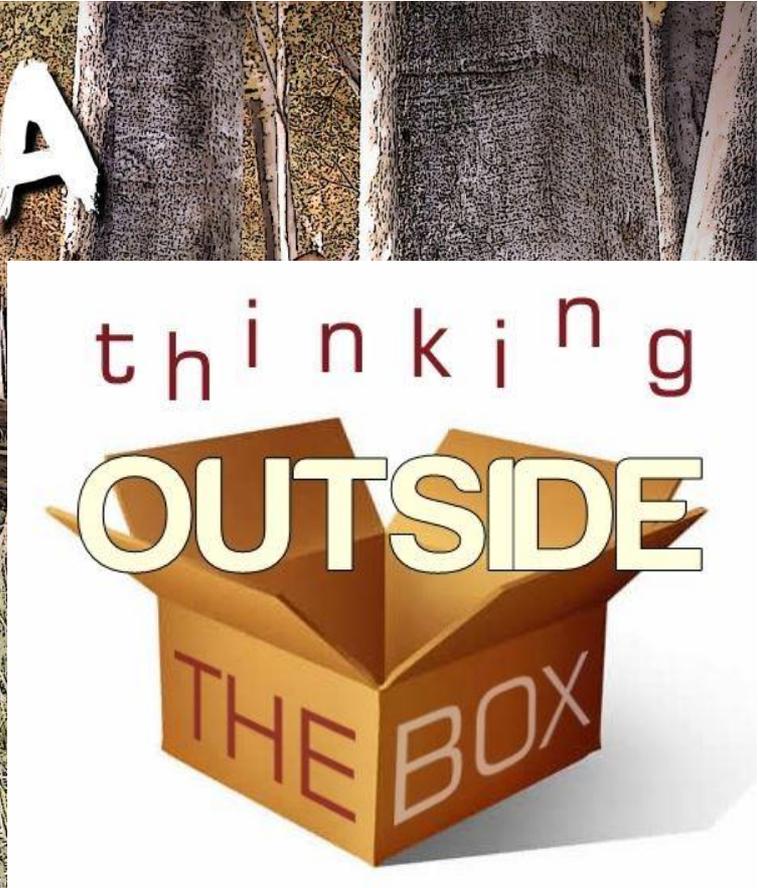
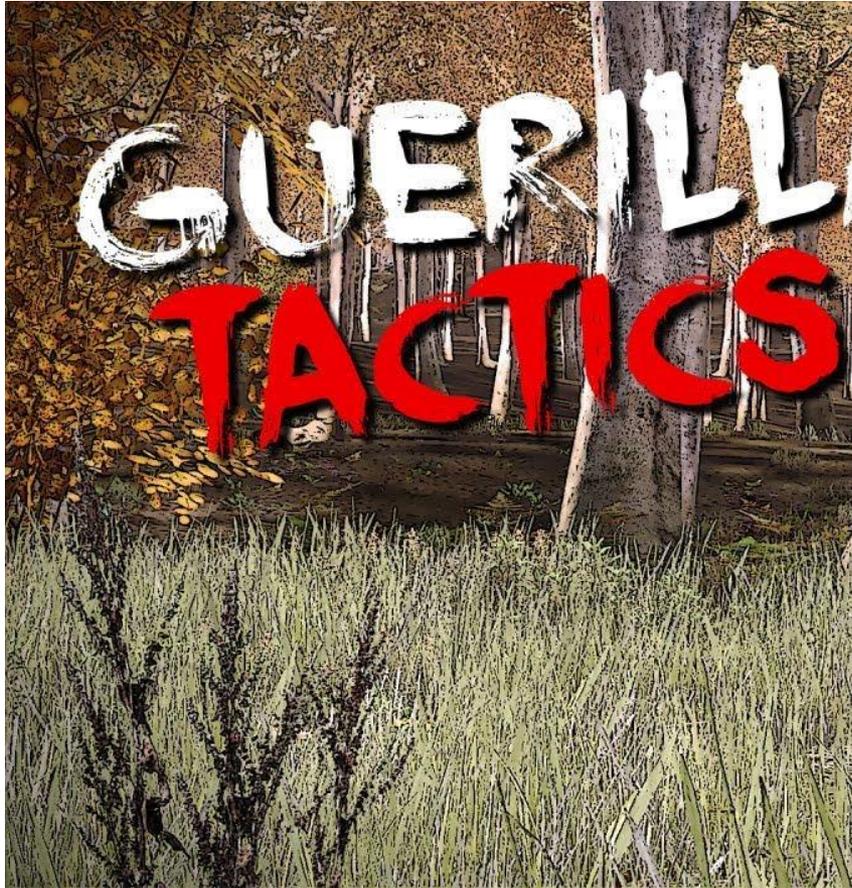
First Circuit*

**Less rigorous or no
formal requirement:**

Sixth Circuit
Seventh Circuit
Eighth Circuit
Ninth Circuit
Second Circuit



Guerilla Tactics to Attack Class Actions



Recruitment of Plaintiffs – How did the Plaintiff become a Plaintiff?



Verify Plaintiffs' account with third-party subpoenas



Absent class members



Cast a wide net in finding customers who were not deceived or misled

- Correspondence with company / consumer feedback
- Internet search
- Possible focus group or survey

Iqbal/Twoombley

- Concretize Plaintiffs' claims to greatest extent possible as early as possible



Motion to Strike Class Claims

- Focus on standing to get them to narrow the class which may lead to predominance issues



Sequencing and Scheduling

- Quick class certification deadline
- MSJ before class certification
- Motion for judgment on the pleadings



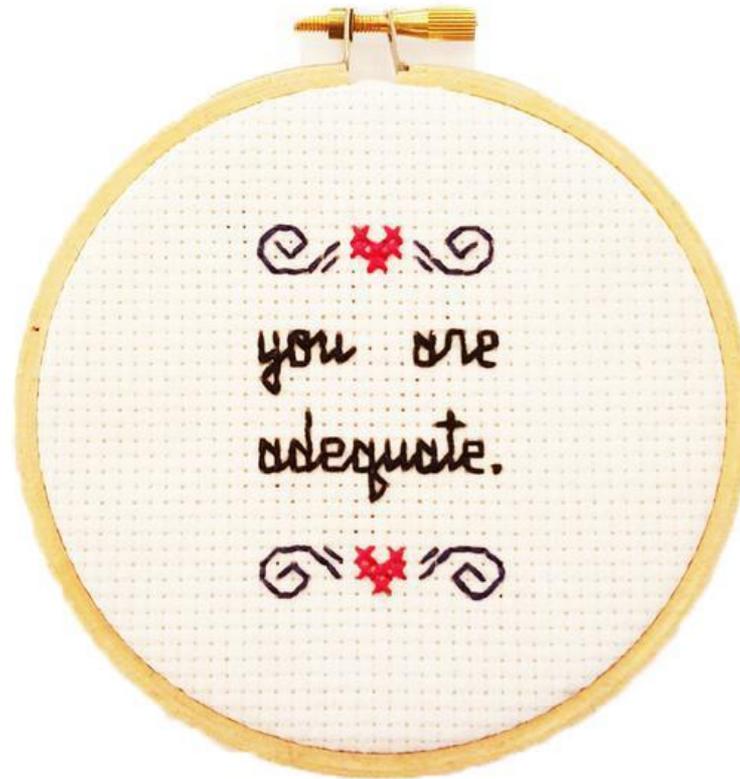
Attack

- Consider aggressively attacking claims that do not seem to be based in fact or that seem to rely on faulty data
- Motion for Sanctions
- Counterclaims
- Opposing dismissals of individual plaintiffs
- Moving for costs



"He's been trained in guard duty, attack, and litigation."

Adequacy of Plaintiffs and their counsel



ANTICIPATED REACTIONS

THE FIVE STAGES OF CORPORATE GRIEF

Denial

We complied with the FDA's rules and regulations, so ...we are not liable.
The statements in our labels/ads are true, so ...we are not liable.

Anger

The lawsuit is frivolous; it will not cost me anything.
This is pure Blackmail; we must defend our product no matter what.

Bargaining

We can make this case go away quickly.

Depression

If we settle, we will attract more plaintiffs and more lawsuits.

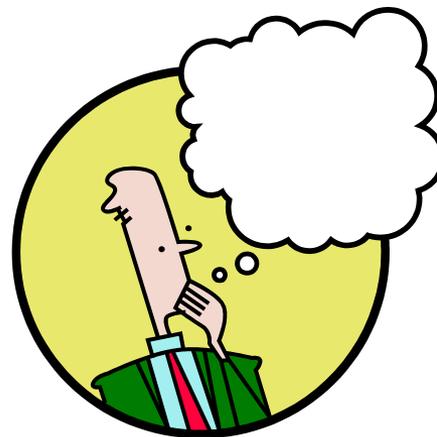
Acceptance

If we settle, will we buy peace with respect to the product forever?



WHAT IS GOING INTO YOUR STRATEGIC DECISION?

- Cost
- Exposure
- Odds of success on motions
- Discouraging other claims
- Avoiding publicity



Taco Bell Fights Back

Thank you for suing us.

Here's the truth about our seasoned beef.

The claims made against Taco Bell and our seasoned beef are absolutely false.

Our beef is 100% USDA inspected, just like the quality beef you buy in a supermarket and prepare in your home. It is then slow-cooked and simmered in our unique recipe of seasonings, spices, water, and other ingredients to provide Taco Bell's signature taste and texture.




Newsprint

YouTube

facebook

Taco Bell Like

Wall Info NEWS FREE Taco SDIF Video

So close... You can almost taste it.

Now go ahead, click the "like" button!

BORDER SAUCE™ FIRE

"Like" me!

THINK OUTSIDE THE BUN

OFFICIAL TACO BELL PAGE

Information

People You May Know

John Szeluga Add as friend

Wendy Prezin 2 mutual friends Add as friend

Facebook

Case Study: Taco Bell Continued

- ✦ Prior to the Lawsuit:
 - Almost 80,000 followers
 - Over 5 ½ million Facebook Fans
 - Nearly 3 million views of YouTube Videos

- ✦ One month after filing:
 - “Taco Bell” search on Google
 - Only ONE result in the top ten related to action

**Would it
kill you to
say you're
sorry?**

The law firm that brought this class action over our product quality and advertising integrity has voluntarily withdrawn their class action suit against Taco Bell.

- No changes to our products or ingredients.
- No changes to our advertising.
- No money exchanged.
- No settlement agreement.

Because we're **AGGRESSIVE** about 100% FDA-suggested portion sizes.

Some of our most famous products are 1/2 size. You can see our full menu here: tacobell.com. We're sorry that our legal team's actions have caused you any inconvenience. We're sorry that our legal team's actions have caused you any inconvenience. We're sorry that our legal team's actions have caused you any inconvenience.

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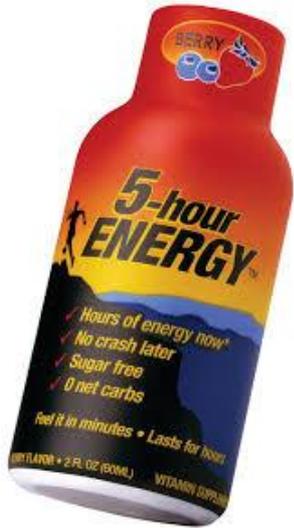
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Counter-Attack: Malicious Prosecution



- ✦ Deceptive Labeling Action
- ✦ “Hours of energy now – No crash later”
- ✦ DISCOVERY REVEALED THAT:
 - ✦ Plaintiff never saw or read the Complaint, which referred to her as a “he.”
 - ✦ Plaintiff never met counsel, except the day before the deposition.
 - ✦ Plaintiff bought the product for the case!

Risk Management Strategies

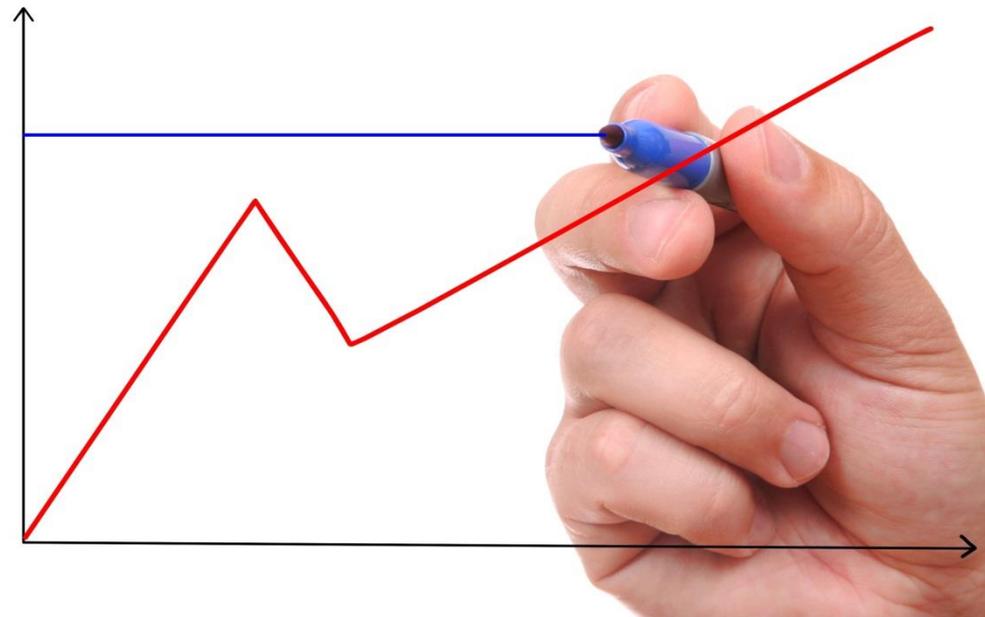
Table Stakes: Compliance with Labeling Regulations

- Seven basic label elements
- Nutrient content claims (express and implied)
- Health claims (substantiation, approval, know your risk)
- Flavors and flavor cues
- Know other labeling requirements specific to your industry
 - Dairy (SOIs and flavor labeling)
 - Juice labeling
 - Dietary supplements
 - Food for kids



Know Your Industry and the Trends

- Keep ahead of the risk curve
- Benchmark (but don't rely upon) your competitor's labels
- Understand consumer perception and how it is changing
- Watch CSPI, CU and others – often the vanguard
- Look beyond U.S. borders



Overall Net Takeaway Test

- Label is more than the sum of its individual parts
- Combination of claims
 - Each claim by itself may be fine, but do two or more claims, taken together, imply a third message?
- Combination of claim + graphics
 - E.g., Heart picture + benign copy = implied health claim?
- Vignettes by themselves (especially fruits)
 - E.g., Gerber Suit:
 - “Fruit Juice Snacks” with photos of fruits
 - But snacks didn’t contain juice from those fruits
 - 9th Circuit reversed dismissal, allowed class action to go forward



Coordinate Early!

- Two ways of building claims:
 1. Develop product, then let marketing figure out the claims; or
 2. Understand target market and expected claims, and (re)formulate to that market and claims
- Second approach gets Marketing, Quality and Legal involved in early development, helping build product and the label
- Helps build substantiation necessary for claims



Most Important: Uniform Process and Procedures

- Situations to avoid:
 1. The Last Minute Approval:
 - “I need to get this to the printer in 3 hours to make our deadline, can you please take a look”?
 2. Nobody Asked Me:
 - “Of course you can’t make that claim. If you had asked me, I would have told you our product does not qualify for a “gluten free” claim because ingredient X contains gluten.”
 3. Never Approved That:
 - “That wasn’t the label I approved!”



Show Your Work

- Develop and document a claims evaluation framework
- Establish substantiation for different types of claims
- Maintain substantiation files
 - Certain claims require different or more stringent substantiation
 - E.g., health claims
- Address both express and implied claims
- Substantiation required in advance (FTC)



Know When Not To Make the Claim

- Understand Marketing's desire to make claims does not necessarily stem from studies showing increased sales
- Ask:
 - Why are we making this claim?
 - What do we expect to gain and on what basis do we believe that?
- Do the risk-benefit analysis
 - What is chance we will be sued?
 - What is worst case scenario if we are sued (assume millions)?
 - How will the brand suffer if faced with suit (even if we win)?
 - Weigh that against expected benefit of claim