

Food Litigation Newsletter



THIS NEWSLETTER AIMS to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

ABOUT

Perkins Coie's Food Litigation Group defends packaged food companies in cases throughout the country.

Please visit our website at perkinscoie.com/foodlitnews for more information.

RECENT SIGNIFICANT RULINGS

Subway Settles Footlong Complaints

In re: Subway Footlong Sandwich Mark'g & Sales Practices Litig., No. 3:13-md-2439 (E.D. Wis.): The Court granted preliminary approval to a nationwide settlement of cases alleging that Defendant misrepresents its sub sandwiches as being a "foot long" when they are actually shorter than 12 inches long. Under the settlement agreement, Defendant agreed to make certain practice changes, pay all costs and fees associated with creating a settlement website, and pay no more than \$525,000 in total for attorneys' fees, expenses, costs, and class representative awards. [Order](#).

Whole Foods Wholly Escapes ECJ Claims in Putative Class Action

Pratt v. Whole Foods Market California, Inc., No. 5:12-cv-5652-EJD (N.D. Cal.): In a putative class action claiming Defendants were unjustly enriched and violated California consumer protection statutes by (1) deceptively representing its 365 Everyday brand organic chicken broth, ketchup, and instant oatmeal products as containing "evaporated cane juice" (ECJ) instead of sugar, and (2) by false labeling its 365 Everyday brand colas as "natural" when they contain artificial ingredients, such as coloring and chemical preservatives, the Court granted in part Defendants' motion to dismiss Plaintiff's second amended complaint.

First, the Court rejected Plaintiff's argument that Defendants could be strictly liable under California's Unfair Competition Law. Liability does not attach under the UCL simply because a product label allegedly violates a law. Instead, a Plaintiff must plead actual reliance to have standing to assert a UCL claim. The Court also rejected Plaintiff's attempt to evade the reliance element by reformulating his allegations into a hybrid "duty to disclose/illegal product" theory, finding such a theory preempted by federal law because it would impose requirements not identical to those imposed by federal law.

Second, the Court rejected the remainder of Plaintiff's ECJ claims, finding Plaintiff had not plausibly alleged reasonable reliance. The Court noted Plaintiff's shifting and "somewhat irreconcilable" statements about his understanding of evaporated cane juice. For example, Plaintiff simultaneously and contradictorily alleged (1) he was unaware that ECJ was a sweetener, and (2) he was aware ECJ was a sweetener but thought it was

Food Litigation Newsletter

some type of healthy, unrefined sugar. The Court found it implausible that Plaintiff, “a self-styled health conscious consumer who wished to avoid ‘added sugars’” would have purchased any of the accused products because he was unaware that ECJ is a refined sugar, instead of some other type of sugar. According to the Court, “[a]dded unrefined sugar is added sugar, no matter how Plaintiff tries to spin it.” The Court also found it implausible that Plaintiff believed ECJ was healthy because it uses the word “juice,” noting the Plaintiff cannot purport to be looking for sugar in ingredient lists but at the same time feign ignorance of common phrases that refer to sugar. The Court similarly rejected Plaintiff’s claim that he did not know that ECJ was a sweetener because he failed to allege what he believed ECJ to be if not a sweetener. Having failed to plead reasonable reliance, the Court dismissed with prejudice all claims relating to ECJ.

Third, the Court dismissed two new claims added to Plaintiff’s second amended complaint—negligent misrepresentation and breach of the implied warranty of merchantability—because the Court’s prior dismissal order allowing Plaintiff to amend the claims asserted in his first amended complaint did not permit Plaintiff to add new claims and because Plaintiff did not comply with the procedural requirements of Rule 15 to add new claims.

The only surviving claim alleges that various of Defendants’ sodas were falsely represented as “natural” when they contain artificial colors, flavors, or preservatives. [Order.](#)

Court Dismisses “Natural” Capri Sun Suit Because Attorney Doesn’t Know If Challenged Ingredient is Natural or Synthetic

Osborne v. Kraft Foods Group, Inc., No. 3:15-cv-02653 (N.D. Cal.): In a putative class action claiming Defendant’s Capri Sun drinks are mislabeled as “all natural” when they allegedly contain synthetic citric acid, the Court dismissed Plaintiff’s complaint with leave to amend. Noting that citric acid can be natural, the Court chastised Plaintiff’s counsel for not knowing which kind of citric acid, natural or synthetic, is used in Defendant’s product before filing suit. [Order.](#)

NEW FILINGS

Mullins v. Wal-Mart Stores, Inc., No. 15-cv-08946 (N.D. Ill.): Plaintiff claims Defendants’ Great Value Pork & Beans in Tomato Sauce product is misrepresented as containing pork when in fact it does not. Plaintiff alleges claims for breach of express warranty, unjust enrichment, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, and breach of the implied covenant of good faith and fair dealing on behalf of a putative national class and putative Illinois subclass. [Complaint.](#)

Tye v. Wal-Mart Stores, Inc., No. 15-cv-01615 (C.D. Cal.): On behalf of a putative national class, as well as putative subclasses of California, New Jersey, and Pennsylvania consumers, Plaintiff alleges that Defendants’ Great Value Pork & Beans in Tomato Sauce product is falsely labeled as containing pork when it does not. Plaintiff

Food Litigation Newsletter

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alleges unjust enrichment, warranty, implied covenant, and consumer protection claims under the laws of California, New Jersey, and Pennsylvania. [Complaint.](#)

Gioia v. GNC Holdings, Inc., No. 15-cv-02273-WQHNL (S.D. Cal.): Plaintiff claims Defendant intentionally packages its whey protein productions in large, opaque containers that contain approximately 40% empty space. On behalf of a putative national class and California and New York subclasses, Plaintiff alleges violations of California and New York consumer protection statutes, as well as negligent misrepresentation. [Complaint.](#)

Demmler v. ACH Food Cos., Inc., No. 15-cv-13556-LTS (D. Mass.): Putative class action of Massachusetts consumers alleging violation of the Massachusetts consumer protection statute and unjust enrichment, claiming Defendant's Weber BBQ Sauce products are misrepresented as being "All Natural" when they actually contain caramel color. [Complaint.](#)

Hawkins v. The Kroger Co., No. 15-cv-02320-JM-BLM (S.D. Cal.): On behalf of putative national class, Plaintiff claims Defendant's bread crumb products are misbranded as containing "0g Trans Fat" when in fact they contain partially hydrogenated oil ("PHO"), which Plaintiff claims is unfair and unlawful. The Complaint asserts warranty and California consumer protection statutory claims. [Complaint.](#)

Hawkins v. AdvancePierre Foods, Inc., No. 15-cv-02309-JAH-BLM (S.D. Cal.): Plaintiff claims Defendant's Fast Bites microwaveable sandwiches contain PHOs, which Plaintiff claims are unsafe and therefore unfair and unlawful. On behalf of a putative national class, Plaintiff alleges claims for violation of the California Unfair Competition Law, nuisance, and breach of the implied warranty of merchantability. [Complaint.](#)

Samet v. Health-Ade LLC, No. 15CV286907 (Santa Clara Super.): On behalf of a putative California class, Plaintiff claims Defendant misrepresents the amount of sugar in its kombucha products. Plaintiff asserts California consumer protection, warranty, negligent misrepresentation, unjust enrichment/quasi-contract claims. [Complaint.](#)

Samet v. Millennium Prods, Inc., No. 15CV286908 (Santa Clara Super.): On behalf of a putative California class, Plaintiff claims Defendant misrepresents the amount of sugar in its kombucha products. Plaintiff asserts California consumer protection, warranty, negligent misrepresentation, unjust enrichment/quasi-contract claims. [Complaint.](#)