The New Wave of Food Labeling Litigation: Primary Defenses and Practical Considerations

By Andrew J. Scholz, Matthew R. Shindell, and Matthew D. Cabral

Counsel for food and beverage manufacturers know these are particularly trying times for the food industry. For years now it has faced the challenge of producing competitive products in a disproportionate global marketplace during a historic domestic economic downturn. As if this challenge was not enough, the American food manufacturer must now face a barrage of lawsuits from a growing number of creative and well-funded trial lawyers who see food and beverage manufacturers as their next big target.

If garnering more and more attention from America's trial lawyers is not bad enough, the industry must also deal with an aggressive regulatory regime, including the Food and Drug Administration, which has ramped up scrutiny of the industry under the latest administration.[1] Indeed, even municipal leadership, such as New York City's Mayor Bloomberg, has gotten into the act by imposing all sorts of requirements on the food and restaurant industry. Meanwhile, the frequency of litigation against the same manufacturers is increasing at a blistering pace.[2]

Remarkably, only a small portion of this litigation is focused on manufacturing defect claims allegedly resulting in consumer injuries or even death (*e.g.*, salmonella outbreaks). Instead, the bulk of the litigation is focused on alleged "false advertising" associated with food labeling. These plaintiffs are often represented by the same well-funded trial lawyers who took on Big Tobacco. The prevailing litigation tactic is to bring false-advertising claims as class actions in state courts under the umbrella of loosely interpreted state consumer protection statutes and common law theories of negligent misrepresentation, fraud, and breach of warranties.

What is their beef and why are they bringing these claims? Are they claiming, for example, that consumers are in some sort of significant health danger akin to lung claims associated with smoking tobacco, neurological impairments from eating lead paint, or mesothelioma from inhaling asbestos fibers? No. Instead, their claim is essentially that the health benefits touted on the food labels and packaging (*e.g.*, labeling statements and pictures indicating "all natural," "low sodium," "100% pure," "heart healthy," "cholesterol free"[3]) are misleading to consumers and, in some cases, induce the consumer to buy a slightly more expensive version of a product. The damage claims based on such liability theories are murky, at best. Consequently, and not surprisingly, if a claim does induce some sort class settlement, the trial lawyers are the primary beneficiaries.

The targeted products and manufacturers are often household names, such as Campbell's Soup, Cheerios, Hershey's, and Snapple. The manufacturers have defended these claims aggressively, both on procedural and substantive grounds, by immediately removing the cases to federal court and then moving to dismiss the claims on the pleadings. This article analyzes the judicial decisions interpreting the primary defenses taken by the manufacturers. We then suggest some proven, cost-effective strategies to defeat or minimize such claims going forward.

Preemption

One of the primary defenses to a false labeling claim is that the claim is preempted by federal laws and regulations, such as the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), the federal Food, Drug, and Cosmetic Act (FDCA), the Nutritional Labeling and Educational Act (NLEA), and various regulations promulgated by the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA). These laws provide nationwide standards for food labels, including image and wording requirements. As such, manufacturers correctly argue that any state-law claim challenging such labels should be preempted.[4]

Notably, federal preemption is an extremely complex area that cannot be fairly covered in this article. Indeed, given the complexity of the issue, courts in various jurisdictions have contradicted one another in applying preemption jurisprudence to food labeling cases. Consequently, we will only outline the general themes that are developing in the case law.

For example, courts generally find no federal preemption where the information on the label being challenged is not directly governed by federal statutes or regulations.[5] Similarly, courts typically find no preemption where plaintiffs, on the basis of state consumer protection statutes, allege that the manufactures' labels violate specific FDA regulations.[6] On the other hand, courts find preemption where there are specific federal regulations governing a food label and that label is compliant with regulations.[7] In sum, the strength of a preemption defense depends in part on the type of label being challenged, whether or not that label is directly governed by statute or regulations and, if so, whether that label is in compliance with those regulations.

Primary Jurisdiction

Even where preemption is not dispositive, manufacturers have argued with some success that the court should stay the litigation where the relevant regulatory body (*e.g.*, the FDA) is currently considering the specific labeling issues being challenged by the plaintiffs.[8] For example, some courts have stayed class actions since the FDA was considering the word "natural" in the context of foods and beverages.[9] Consequently, this defense argument can significantly delay a claim.

Standing

For some time courts have held that there is no private cause of action under the FDCA or similar statutes. Generally, plaintiffs cannot file suit alleging a food company's products are misbranded or fail to comply with specific FDCA statutes or regulations.[10] However, as we have been discussing, plaintiffs, in ever-increasing numbers, have been finding other mechanisms to challenge food labels. The most common approach is to challenge on the basis of alleged consumer fraud. Most states have some form of consumer fraud, unfair trade practice, or unfair competition law, which typically prohibits deceptive or misleading trade practices in connection with the sale or advertisement of consumer goods. Such statutes are attractive to food labeling plaintiffs, at least in part, because they often have only minimal standing requirements.

In particular, two states, California and New Jersey, have seen an explosion of food labeling-related class actions. California's Unlawful Competition Law (UCL)[11] prohibits unlawful, unfair, and fraudulent practices.[12] The law also prohibits violations of California's false-advertising statute.[13] That statute has been broadly construed to "borrow" violations of other laws as unlawful practices, which are then treated as independently actionable.[14] New Jersey's Consumer Fraud Act (NJCFA) is similarly attractive to plaintiffs because the New Jersey Supreme Court has held that courts should construe the state's class action rules liberally with respect to consumer fraud class actions.[15]

The California Supreme Court has rendered a number of encouraging decisions for food labeling plaintiffs, which effectively relax the standing requirements under the UCL. The court in *In re Tobacco II Litigation*[16] held that only the class representative needed to establish standing, not all of the absent class members. Additionally, in *Kwikset Corp. v. Superior Ct. of Orange County,*[17] the court held that merely purchasing a product because of a defective label would be enough to establish "injury in fact" for purposes of standing.[18]

Federal courts have interpreted California law to grant standing in most circumstances. In a case alleging that defendant Sioux Honey Association Cooperative violated state law by marketing its "Sue Bee Clover Honey" as "honey" even though the product contains no pollen, the U.S. District Court for the Northern District of California dismissed Sioux Honey's argument that the plaintiff lacked standing, holding that "California law recognizes an injury when a product is mislabeled in violation of the law and consumers rely on that labeling in purchasing the product or paying more than they otherwise would have."[19]

The same court has also held that a plaintiff may even have standing in circumstances where he never actually used the product at issue. In the matter of *Anderson v. Jamba Juice Co.*, the court denied a motion to dismiss a proposed class action alleging that Jamba Juice's "all natural" do-it-yourself smoothie kits contain synthetic ingredients, holding that the plaintiff can bring claims based on products he never purchased. In that case, the plaintiff alleged that he actually purchased only two of the five kits at issue in the case. Nevertheless, the court determined that the class representative had standing to bring claims regarding smoothie kit flavors that he did not buy because the products were sufficiently similar and the labels contained the same alleged misrepresentation.

California's loose standing rules notwithstanding, standing remains an important defense to consider, particularly in other jurisdictions. For instance, in New Jersey, another state that has seen a dramatic spike in food labeling-related class actions, defendants enjoy more success obtaining dismissal of such claims on the basis of lack of standing. Take, for example, the case of *Hemy v. Perdue Farms, Inc.*,[20] in which the plaintiffs claimed that the defendant inhumanely raised and slaughtered its chickens, yet advertised that its raising of chickens was humane. Specifically, the plaintiffs brought a class action suit challenging the defendant's advertising practices relating to its Perdue and Harvestland chicken products. The defendant argued that the plaintiffs lacked standing to challenge the Perdue brand products as opposed to the Harvestland products because the plaintiffs never purchased the Perdue brand products. The District Court agreed and dismissed the plaintiffs' class complaints against the defendant with respect to its Perdue brand products.

Failure to State a Claim

A routine motion filed in federal cases is a 12(b)(6) motion that the complaint fails to sufficiently state a claim, particularly given the new *Iqbal/Twombly* pleading standards. In fact, one of the early food label decisions addressing a 12(b)(6) motion was *Pelman v. McDonald's Corp*.[21] There, two families sued McDonald's under the guise of New York's consumer protection statute and alleged that McDonald's advertising campaigns, such as "McDonald's can be part of any balanced diet and lifestyle," constituted deceptive advertising.[22] The District

Court dismissed the complaint, but the Second Circuit reversed, thereby permitting the plaintiffs to supplement their pleadings.[23] Ultimately, however, the plaintiffs agreed to voluntarily dismiss the claim after they lost a class certification motion and after McDonald's changed its advertising campaign.

Following *Pelman*, Courts have granted 12(b)(6) motions involving food labeling claims. For example, in *Rooney v. Cumberland Packing Corp.*,[24] the plaintiffs alleged that "Sugar in the Raw" was misleading consumers under California's consumer protection laws because, they claimed, consumers believe that the product is not refined sugar. The District Court dismissed the claim, finding, among other things, that the defendant's packing did not state anywhere that the sugar was "unprocessed" or "unrefined." Although the procedural context for the decision came on a 12(b)(6) motion, the court was persuaded by the defendant's submission of color reproductions of the defendant's advertisements and materials, which the court took judicial notice of. The court also cited to the fact that the defendant's trademark has been in use without contest for over four decades.

Similarly, in *Verzani v. Costco Wholesale Corp*.[25] the plaintiff alleged the defendant engaged in deceptive practices by failing to disclose on its label of Shrimp Tray with Cocktail Sauce the actual weight of the shrimp. The plaintiff's motion to amend the complaint was ultimately denied because the court agreed with the defendants that a reasonable consumer would not believe that the net weight disclosed on the label refers only to the shrimp.

Unfortunately, not all motions are successful and the threat of filing a 12(b)(6) motion has done little to slow down the filing of food labeling claims. However, it is essential that all defendants in this form of litigation examine a plaintiff's complaint closely to ensure it complies with the pleading requirements outlined in *Iqbal/Twombly*.

Damages

This is also a key defense to any claim because it is difficult for plaintiffs to show that they actually suffered any measurable or cognizable harm from the alleged "deceptive" label. Notwithstanding the hurdles, plaintiffs have creatively espoused various damages theories because, clearly, if they can survive a dispositive motion on any one theory, damages can quickly add up given that the claims are typically brought as class actions.

The recent decision in *In re Cheerios Marketing and Sales Practice Litigation*[26] illustrates the point. In that case, the proposed class plaintiffs alleged that General Mills' "Cheerios" labels were deceptive in that the labels suggested that eating Cheerios helps lower cholesterol. The District Court of New Jersey refused to dismiss the claim at the pleading stage and directed limited discovery as to whether the plaintiffs suffered any cognizable harm. Plaintiffs' damages theories were "return of purchase price refunds," "benefit of the bargain" damages, and "disgorgement of profits." After taking depositions of various proposed class plaintiffs, General Mills moved for summary judgment.

The District Court found that the plaintiffs could not recover under any of the damages theories they advanced. Specifically as to the return of the purchase price theory, the court found that plaintiffs could not show that the product was "essentially worthless." As for the benefit of the bargain theory, the court found that plaintiffs could not show that plaintiffs were induced by the labeling when purchasing the product and, moreover, they could not show an actual difference in value between the product promised and the one they received. Finally, the plaintiffs could not recover a disgorgement of profits because they could not show that General Mills was unjustly enriched.

Similarly, in *Hemy v. Perdue Farms, Inc.*,[27] the New Jersey District Court dismissed the plaintiff's complaint with leave to re-plead as to damages. The court held that the plaintiff must specifically allege a loss that is "quantifiable or otherwise measurable." Like the *In re Cheerios Marketing and Sales Practice Litigation*, plaintiffs were required to establish more than conclusory allegations that they would not have purchased the products had they known that the chickens were, in their view, inhumanely treated. Instead, the plaintiffs were required to allege proven lost value, such as by showing that there were comparable chicken products without the alleged false label and that those products were less money.

Accordingly, the defendant that cannot get out of a claim at the outset should aggressively pursue a damages defense by first demanding detailed fact and expert discovery on damages and then by moving for summary judgment.

What's Working and What's Not

For the foreseeable future, trial lawyers have chosen their next target and, so long as the food industry puts out products with labels describing the health-related contents of their products, there will be continued lawsuits filed against them. The food industry is, as a result, in this fight together. While, on one hand, aggressive litigation tactics are undoubtedly expensive, the aggressiveness is paying off by slowly but surely establishing binding legal precedent throughout the country that will help traditional and newly targeted defendants in the future. In such future cases, such as the cases targeting new labels or non-traditional defendants, it is critical for defendants to immediately identify the best defenses to the claim and to aggressively pursue them through early motion practice and, if necessary, through targeted discovery.

Endnotes

1. *See* Sarah Roller and Raqiyyah Pippins, "Marketing Nutrition & Health-Related Benefits of Food & Beverage Products: Enforcement, Litigation & Liability Issues," 65 Food Drug L.J. 447 (2010).
2. *See, e.g.*, Stephanie Strom, "Lawyers from Suits Against Big Tobacco Target Food Makers," New York Times (Aug. 18, 2012) (available at www.nytimes.com/2012/08/19/business/lawyers-of-big-tobacco-lawsuits-take-aim-at-food-industry.html); and "Food Labeling Lawsuits Fill Up Court Dockets," Rockland County Times Web site (Oct. 18, 2012) (available at http://www.rocklandtimes.com/2012/10/18/food-labeling-lawsuits-fill-up-court-dockets/).
3. *Cox v. General Mills, Inc.*, 3:12 CV 06377 (N.D.Ca.) (steamers not "all natural"); *Kosta v. Del Monte Corp*., 12 CV 1722 (N.D.Ca.) ("natural" label misleading since preservatives added); *Sovocool v. Coca Cola,* 12 CV 2064 (N.D. Ca) (orange juice purportedly not "pure, natural orange juice" as labeled); *Trammal v. Barbara's Bakery, Inc.,* No. 12 CV 2664 (N.D. Ca.) ("all natural" misleading); *Lanavaz v. Twinings North America, Inc.,* No. 12 CV 2646 (N.D. Ca.) (antioxidant claims in tea misleading); *Wilson v. Frito-Lay North America, Inc.,* 12 CV 1586 (N.D. Ca) 12 CV 1586 (trans fat labeling misleading); *Anderson v. Starbucks,* No BC485458 (Cal. Super. Ct., L.A. Co.) (Starbucks beverage dyed with insect extract); *Hawkins v. General Mills,* 12 CV 3306 (C.D.Ca.) ("Greek" yogurt falsely labeled).
4. *See* 21 U.S.C. § 343-1(a)(1)–(5) (express preemption clauses).
5. *Holk v. Snapple,* 575 F.3d 329 (3d Cir. 2009) ("all natural" claim)*; Khasin v. The Hershey Company,* 5:12-cv-01862, 2012 U.S. Dist. LEXIS 161300 (N.D. Cal. Nov. 9, 2012) (N.D.Ca.); *Chacanaca,*752 F. Supp. 2d 1111, 1118 (N.D.Ca. 2010) (no preemption "[u]ntil the agency brings 'front of the box' symbols and photographs into its regulatory ambit"); *Wright v. General Mills Inc.,* 2009 WL 3247148, at *3 (S.D. Cal. Sept. 30, 2009) (no preemption since "FDA has deferred taking regulatory action"); *Fellner v. Tri Union,* 539 F.3d 237, 255 (unregulated food warning claim not preempted).
6. *Ackerman v. Coca-Cola Co.,* No. CV-09-0395, 2010 WL 2925955 (E.D. N.Y. July 21, 2010); *Mason v. Coca-Cola Co.,* 2010 WL 2674445, at *3 (D.N.J. June 30, 2010) (allegedly false statement of ingredients related to Diet Coke Plus); *Chavez v. Blue Sky Natural Beverage Co.,* 268 F.R.D. 365, 371-72 (N.D. Cal. 2010) (allegedly false statement of origin); *Vermont Pure Holdings, Ltd. v. Nestle Waters,* 2006 WL 839486, at *5-6 (D. Mass. March 28, 2006) (alleged violation of spring water source regulation); *Smajlaj v. Campell Soup,* 782 F. Supp.2d 84 (2011).
7. *Turek v. General Mills., Inc.,* 2011 U.S. App. LEXIS 20959 (7th Cir. 2011) (fiber statements); *Pom Wonderful LLC v. Coca Cola,* 679 F.3d 1170 (9th Cir. 2012) (juice label); *Carrea v. Dryer's Grand Ice Cream,* No. 11-15263 (April 5, 2012); *Lateef v. Pharmavite,* 12-cv-05611 (N.D.Il. Oct. 24, 2012) (dismissing class action complaint related to food supplement label since directly governed by FDA regulations); *Peviani v. Hostess Brands,*2010 WL 4553510, at *6 (C.D. Cal. Nov. 3, 2010) (trans fat label claims directly preempted); *Henderson v. Gruma Corp.,* CV 10-04173, 2011 WL 1362188, at *13 (C.D. Cal. Apr. 11, 2011) (trans-fat/cholesterol statements).
8. *See, e.g., Astiana v. Hain Celestial Group, Inc.,* 2012 WL 5873585 (N.D.Ca.); *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.,* 307 F.3d 775, 780 (9th Cir. 2002).
9. *See Coyle v. Hornell Brewing Co.,* Civ. No. 08-02797, 2010 U.S. Dist. LEXIS 59467 (D.N.J. June 15, 2010); *Holk v. Snapple Beverage Co.,* Civil Action No. 07-3018, 2010 U.S. Dist. LEXIS 81596 (D.N.J. Aug. 10, 2010); *Ries v. Hornell Brewing Co.,* Case No. 10-1139-JF, 2010 U.S. Dist. LEXIS 86384 (N.D. Cal. July 23, 2010).
10. *See Murphy v. Cuomo*, 913 F. Supp. 671, 679 (N.D.N.Y 1996).
11. Cal. Bus. & Prof. Code § 17200.
12. *See In Re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009).
13. Cal. Bus. & Prof. Code § 17500.
14. *See Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992).
15. *See Strawn v. Canuso*, 140 N.J. 43, 68 (1995).
16. 46 Cal. 4th 298 (2009).
17. 51 Cal. 4th 310 (2011).
18. In *Kwikset*, the plaintiff had purchased door locks, which were not in any way defective, but were labeled "Made in the USA" even though some components were made elsewhere.
19. *See Brod v. Sioux Honey Ass'n Coop.*, 2012 U.S. Dist. LEXIS 129391 (N.D. Cal. Sept. 11, 2012). Notably, the court did dismiss the case on other grounds, finding that California's consumer protection laws, which essentially prohibit a product from being labeled as honey if it contains no pollen, were preempted by federal law mandating that foods not otherwise defined by federal law should be labeled with their common or usual names. Because there is no specific regulation pertaining to honey, the court determined that federal law required Sioux Honey's product to be labeled as "honey" in clear conflict with the state statute.
20. 2011 U.S. Dist. LEXIS 137923 (D.N.J. Nov. 30, 2011).
21. 237 F.Supp. 512 (S.D.N.Y. 2003).
22. *Id.* at 527-28.
23. 396 F.3d 508 (2d Cir. 2005).
24. 12 CV 0033 (S.D.Ca. April 16, 2012).
25. 2010 U.S. Dist. LEXIS 107699 (S.D.N.Y. 2010).
26. MDL Docket No. 2094, 2012 U.S Dist. LEXIS 128325 (Sept. 10, 2012).
27. 3:11-cv-00888 (D.N.J.).

Andrew J. Scholz (ascholz@goldbergsegalla.com), Matthew R. Shindell (mshindell@goldbergsegalla.com), and Matthew D. Cabral (mcabral@goldbergsegalla.com) are attorneys in the Product Liability Practice Group at Goldberg Segalla LLP, where they counsel and represent clients with respect to the labeling, packaging, marketing, and advertising of a wide range of products.

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