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PERSPECTIVE

Common sense bar to consumer class actions

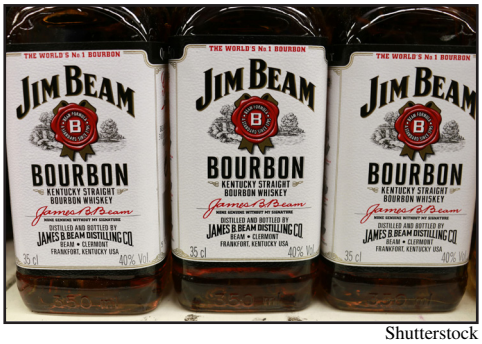
By Amy Lally and Lauren De Lilly

Contrary to Voltaire's witticism that "Common sense is not so common," it is indeed becoming somewhat common, at least in the world of consumer class actions.

On March 18, Jim Beam filed a motion to dismiss a false advertising class action challenging the "handcrafted" designation on its bourbon labels because automated processes and machinery are involved in the distillation process. *Welk v. Jim Beam*, 15-0328. So far this year, California courts have disposed of three consumer class actions on common sense grounds and Jim Beam's motion seemingly looks to capitalize on this emerging legal trend.

On Feb. 26, the U.S. District Court for the Northern District of California granted summary judgment to Ocean Spray in *Major v. Ocean Spray*, 12-03067. The plaintiff sued for false advertising because Ocean Spray's juices were labeled "No Sugar Added," which the plaintiff interpreted to mean "[t]hat there is literally nothing containing sugar that's added to this other than the natural sugar from the fruit." Indeed, this interpretation was an accurate description of the juices. The plaintiff's theory of liability did not account for the difference between "fruit juice from concentrate," such as Ocean Spray juices that contained the same ratio of water to sugar that exists naturally, and "fruit juice concentrate," which contains a higher level of sugar than would exist naturally. Ocean Spray's evidence established that its juices were "fruit juice from concentrate" with naturally occurring sugar levels, and thus the "No Sugar Added" label was not false.

On March 4, the same court dismissed the complaint in *Riva v. Pepsico*, 14-2020, because the plaintiff, who challenged the presence of 4-methylimidazole (4-MeI), a known carcinogen, in Pepsico's soda never claimed that the amount of 4-MeI in the soda could cause harm to humans or cause the type of cancer for which the plaintiff sought medical monitoring. The plaintiff neglected to allege the level of exposure to 4-MeI that would increase the risk of cancer, and thus could not make the necessary ultimate showing that the need for future monitoring was a reasonably certain consequence of the alleged toxic exposure from Pepsico's soda.



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On March 19, the U.S. District Court for the Southern District of California dismissed *Branca v. Nordstrom*, 14-02062, where the plaintiff alleged that the "Compare At" prices on Nordstrom Last Call stores' price tags were misleading because he interpreted "Compare At" to mean that the item was previously sold at that price in a full line Nordstrom store. The court granted Nordstrom's motion to dismiss because the plaintiff never alleged that he believed the "Compare At" price represented a former price at which Nordstrom stores previously sold the items or that he purchased the products based on that assumption. The plaintiff also never alleged that Nordstrom statements led him to believe that the "Compare At" prices were former Nordstrom prices. The plaintiff could not demonstrate that he or reasonable consumers would be deceived; rather, the court found that reasonable consumers would likely interpret the "Compare At" language on the price tag, standing alone, as a comparable price to merchandise of "like grade and quality" as sold by others in the area at the listed price.

The parallel thread in these cases is that the plaintiffs' theories of liability made leaps in reasoning that defied common sense and ultimately proved fatal to their complaints. The *Ocean Spray* and *Nordstrom* plaintiffs alleged unreasonable interpretations of advertisements that were factually true. The *Pepsico* plaintiff failed to connect the dots between the actual levels of 4-MeI in the soda and any harm it could cause to consumers. These decisions show a potential trend in consumer class actions — that common sense can and does pose a bar to complaints in California that not every case can clear.

These cases also highlight the hurdles that the plaintiff in the lawsuit against Jim Beam will need to overcome to defeat Jim Beam's motion to dismiss, which makes two common sense arguments: that the plaintiff unreasonably ignores that the word "handcrafted" appears to modify the phrase "family recipe," and that plaintiff unreasonably interprets "handcrafted" to mean "that Jim Beam employees break up the grain with their hands, stir the mixture by hand, distill and ferment the alcohol without the use of machinery, make the glass bottles by hand, and handwrite each label on each bottle."

Given the recent rulings in *Ocean Spray, Pepsico* and *Nordstrom*, the *Jim Beam* plaintiff faces an uphill climb. The plaintiff's interpretation of "handcrafted" can be analogized to the *Nordstrom* plaintiff's unreasonable interpretation of "Compare At" price tags or to the *Ocean Spray* plaintiff's unreasonable allegation that the "No Sugar Added" label was false. Viewed in context next to "family recipe," the word "handcrafted" may not be a false statement, and a reasonable consumer is unlikely to interpret "handcrafted" to apply to every step of the bourbon production process.

Plaintiffs in California may need to take more steps, and less leaps, in drafting consumer class action complaints to avoid the pitfalls that felled the plaintiffs in *Ocean Spray*, *Pepsico* and *Nordstrom*, and that may lead to a dismissal of *Jim Bean*.

Amy Lally *is a partner and* **Lauren De Lilly** *is an associate in Sidley Austin LLP's Los Angeles office. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP and its partners.*


AMY LALLY
Sidley Austin


LAUREN De LILLY
Sidley Austin