Stuck in the Food Court: Settlements in Food Labeling Class Actions Likely To Fuel More Lawsuits

As this year draws to a close, we look back on the food labeling class actions that have dominated the legal landscape in California and look ahead to the class actions that may loom large in the new year.

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False advertising class actions have plagued the food industry in California for years. These lawsuits are brought under California's trifecta of consumer protection laws—California's Consumer Legal Remedies Act (Cal. Civ. Code §§1750, et seq.), False Advertising Law (Cal. Bus. & Prof. Code §§17500, et seq.), and Unfair Competition Law (Cal. Bus. & Prof. Code §§17200, et seq.)—and allege that plaintiff and a class of similarly situated consumers were misled by the food labeling. As this year draws to a close, we look back on the food labeling class actions that have dominated the legal landscape in California and look ahead to the class actions that may loom large in the new year.

In the past three years, more than 30 class action lawsuits have been filed in California challenging food and drink labels for products containing citric acid or malic acid as misleading when labeled as containing "No Artificial Flavors" or "No Artificial Preservatives." Foods containing citric acid and malic acid naturally present an attractive target to the plaintiffs' bar. Citric acid and malic acid are found in fruit and may also be manufactured. They can be used for flavoring or as a preserving agent. Depending on the source and use of the acid, labeling such as "No Artificial Flavors" or "No Artificial Preservatives" may be entirely truthful, but still alleged to be false.

Since the source and intended use of the acid generally are not found in the four corners of the complaint, food companies find themselves looking towards summary judgment for an "early" exit from the case. But summary judgment is not an efficient resolution. It follows months of discovery and is time consuming and expensive. The plaintiffs' bar has leveraged the time and cost of pursuing summary judgment to negotiate numerous settlements.
Earlier this year, Coca-Cola agreed to pay $2.5 million to settle a class action lawsuit filed in the Northern District of California alleging that their soda labeled as "Made From Real Ginger" was misleading because it was flavored with citric acid. The company's motion to dismiss was denied and the company litigated the case for more than two years before reaching a settlement in *Fitzhenry-Russell v. The Coca-Cola Co.*, No. 5:16-cv-00603-EJD (N.D. Cal. Feb. 6, 2017).

Just last month, Ocean Spray agreed to pay $5.4 million to settle a similar class action challenging a “No Artificial Flavors” label on CranGrape and CranApple beverages containing malic acid. Before a settlement was reached in *Hilsley v. Ocean Spray Cranberries*, No. 3:17-cv-02335-GPC (S.D. Cal. Nov. 16, 2017), Ocean Spray litigated the case for two years in the Southern District of California, the court denied Ocean Spray’s motion for summary judgment and the court partially certified a class.

Settlements like these combined with California’s broad-based consumer protection laws incentivize the plaintiffs’ bar to target food labeling (even if truthful) as allegedly misleading under increasingly creative theories. For example, one suit that resolved earlier this year on a joint motion was premised on salt and vinegar potato chips containing malic acid even though no part of the label read that the product was made without artificial flavors or preservatives. In *Allred v. Kellogg Co.*, No. 3:17-cv-01354-AJB (S.D. Cal. July 5, 2017), plaintiff alleged that by failing to include such a label, the product was labeled “as if it [were] flavored only with natural ingredients.” The court found this allegation was legally sufficient to move beyond a motion to dismiss despite the fact that the plaintiff failed to allege that the malic acid in the product was artificially derived or used as a flavoring agent at all.

One food manufacturer squeezed out a win on summary judgment for a “No Artificial Flavors” case this year. *Clark v. The Hershey Co.*, No. 3:18-cv-6113-WHA (N.D. Cal. Oct. 4, 2018) targeted dark chocolate candy. The court found that plaintiffs’ own deposition testimony did not support their theory that plaintiffs relied on the label or that the label caused their injury.

The lesson learned in 2019 is that the plaintiffs’ bar shows tremendous adaptability to attack the presence of a single ingredient in many different ways. Lucrative settlements incentivize these types of suits. With no definitive regulatory guidance, products that are made with citric acid or malic acid—whether synthesized or not—will likely continue to be a target for class actions in the year to come. Food companies can meet this challenge with equal creativity by disclosing to consumers the source and use of citric acid and malic acid in their products and scuttling putative plaintiffs’ ability to credibly allege any misunderstanding of the terms “No Artificial Flavors” or “No Artificial Preservatives.”

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