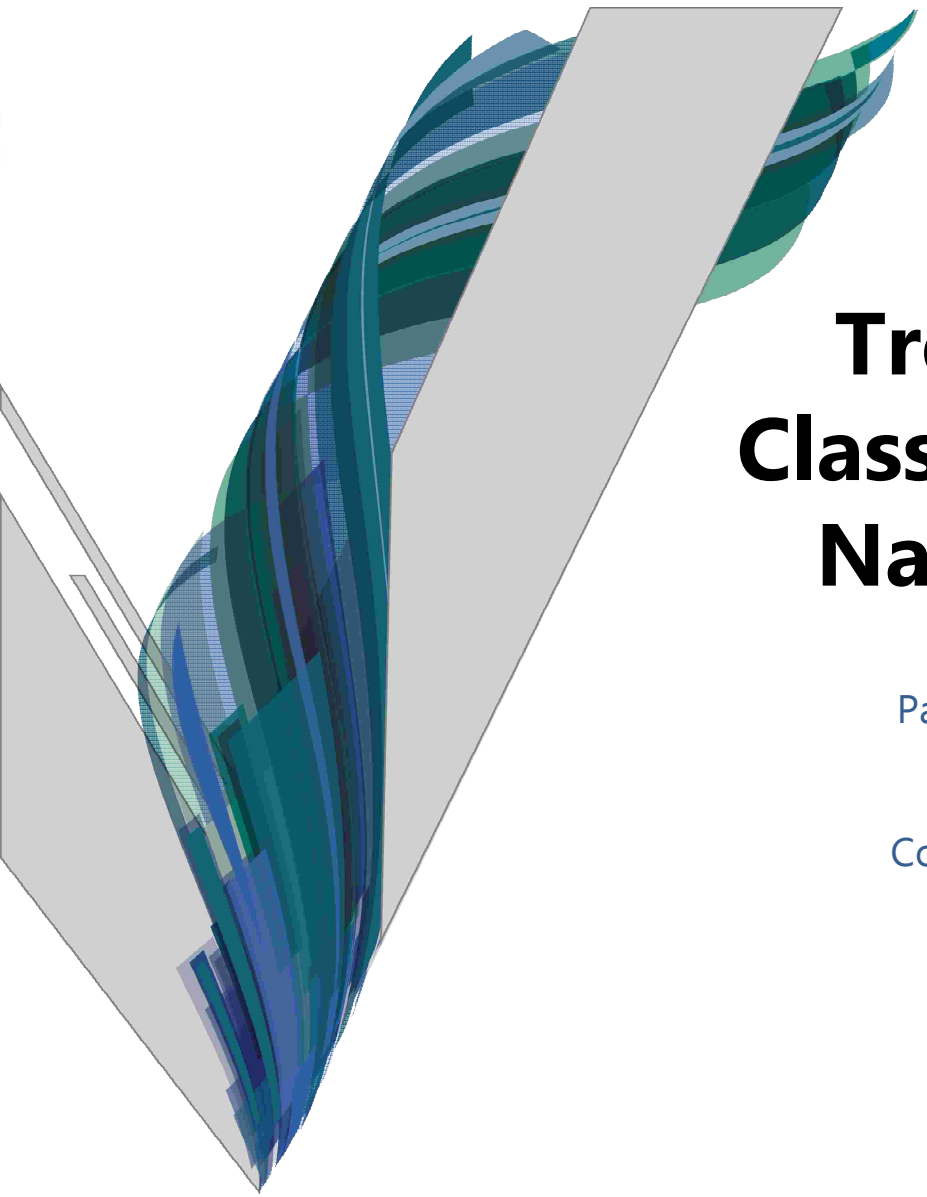

VENABLE

Trends and Hot Topics in Class Action Litigation for the Natural Products Industry

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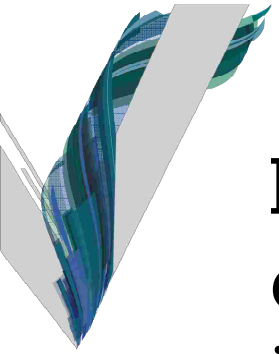
Overview

- Most common jurisdictions for false advertising class action filings
- Summary of Specific Claim Types
- Specific Claim Types
- Potential Defenses
- Risk Mitigation Strategies
- Takeaways



In 2016, more than 75% of false advertising class actions were filed in the following jurisdictions:

- California (36%)
- New York (22%)
- Florida (12%)
- Illinois (7%)

Summary of Specific Claim Types

- Standards of identity
- Ingredient claims
- Sugar claims
- Healthy or healthy inference claims
- "Natural" and "All Natural" claims
- "Organic" claims
- GMO and GMO-derivative claims
- Slack fill claims
- Real food claims
- Authentic claims
- Country of origin claims
- Front-of-package false advertising claims
- Automatic Renewal Law
- Cosmetic claims alleged to be drug claims

Standards of Identity

- A standard of identity sets out what ingredients a product must contain, which ingredients it may contain, and any requirements of manufacturing.
- Standards of identity are set out in the Food and Drug Regulations.
- In January 2018, the FDA said it would modernize certain standards of identity to address current barriers to the development of healthier products while making sure consumers have accurate information about the foods they eat.
- The FDA also stated that it intends to issue a request for information to identify which potential standards of identity should be modernized based on their public health value.

Recent Targets of Standards of Identity Litigation

- Cheese has been a focus of recent litigation. Plaintiffs have targeted "100% Cheese" labeling on products that contain ingredients other than cheese.
- For example, in one suit, plaintiffs claim Kraft 100% Grated Parmesan Cheese contains cellulose, which allegedly violates the FDA Standards of Identity for parmesan.
  - *See In Re: 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation [Kraft]*, No. 16-cv-05802 (N.D. Ill Aug. 24, 2017). The case was dismissed because "[p]laintiffs' claims [were] doomed by the readily accessible ingredient panels on the products that disclose the presence of non-cheese ingredients."
  - *See also Howe v. McDonald's Corp.*, 5:16-cv-00176 (C.D. Cal. Jan. 29, 2016). Plaintiff alleged that McDonald's 100% Mozzarella Cheese Sticks are not made with 100% mozzarella cheese, but also contain starch, which allegedly violates FDA Standards of Identity for mozzarella. Plaintiff voluntarily dismissed claims with prejudice.
- Recently, a similar case was filed alleging that "100% chicken breast fillet" labeling is misleading because defendants' products allegedly contain chicken rib meat, a purportedly inferior meat. *See Yip v. McDonald's Corp*, No. 17-cv-06464 (E.D.N.Y. Nov. 13, 2017).

Recent Targets of Standards of Identity Litigation

- Plant-based milk, a "dairy imitator," has also been a target.
- For example, plaintiffs allege that calling almond milk products "milk" is misleading because it is nutritionally inferior to dairy milk and should be labeled as "imitation milk" under 21 C.F.R. § 101.3(e).
- *See Kelley v. WWF Operating Co.*, No. 1:17-cv-117-LJO-BM (C.D. Cal. June 6, 2017)*; Cuevas v. Topco Associates, LLC*, No. 5:17-cv-0462 (C.D. Cal. July 18, 2017).
- Both courts granted motions to stay, finding the "imitation" milk issue raised a question of first impression best suited to FDA's expertise.
- However, with new technology enabling companies to produce proteins that precisely replicate their animal-based counterparts, the standards of identity debate will most likely not be limited to almond milk vs. dairy milk, or faba butter versus dairy butter.

Ingredient Claims

- One of the top categories of food and beverage advertising class actions in 2017.
- Name of product or packaging names ingredient(s) present only in small amounts in the product or the ingredient does not provide the benefit advertised.
- Cases also allege that the product's advertising or labeling misrepresented what it was made of. For example, "truffle oil" allegedly contained no truffles; "extra virgin" olive oil was not really extra virgin; and so forth.
- Plaintiffs typically bolster these claims with "independent testing" that shows an ingredient is either not present in a product, or not present in the claimed amount (e.g., listed as most predominant ingredient, but not actually most predominant ingredient).
- Frequently can be subject to preemption defense. Federal regulation specifies a very specific way to test for the presence of ingredients. 21 C.F.R. § 101.9(g)(2). If a complaint does not allege that the supposed "independent testing" was conducted according to those requirements, then the complaint may be dismissed. However, frequently dismissal is without prejudice, so plaintiffs may simply refile a corrected complaint (if possible). *See, e.g., In re: Whole Foods Market, Inc.*, 163 F. Supp. 3d 385, 392 (W.D. Tex. 2016) (gathering cases dismissing claims for failure to adequately plead required testing).

Recent Litigation Involving Ingredient Claims

- In *Segovia v. Vitamin Shoppe, Inc.*, 7:14-CV-7061 (S.D.N.Y.), plaintiff claims that defendants' product falsely claimed that the 100% casein is "enhanced with Aminogen, an enzyme that helps your body break down and absorb protein." Plaintiff alleged that defendant's dosage of 25 mg of aminogen is a fraction of the clinical dosage identified to achieve the advertised benefit.

- In *Gyorke-Takatri, et al., v. Nestle USA Inc., et al.*, CGC-15-546850 (Cal. Sup. Ct., San Francisco), plaintiffs claim Gerber Puffs cereal depicts fruits and vegetables on box but contains hardly any of those ingredients.

- In *Miller v. Yucatan Foods LP, Case No. BC645421*, Superior Court of the State of California, County of Los Angeles, the plaintiff alleged that Yucatan guacamole is labeled "95% avocado; 5% spices," when, in fact, it contains many other ingredients that are neither avocado nor spices, including onion powder, garlic powder, minced onion, evaporated cane juice, citric acid, ascorbic acid, and xanthan gum.

- In *Silva v. Unique Beverage Company LLC*, Case No. 3:17-cv-00391-HZ (D. Or.), the plaintiff alleged that a flavored carbonated water designated "coconut" flavor actually contained no coconut.

Recent Litigation Involving Ingredient Claims

- A trio of truffle oil cases, *Schiffman v. Urbani Truffles USA Inc.*, Case No. 2:17-at-00470 (E.D. Cal.), *Brumfield v. Trader Joe's Co.*, Case No. 1:17-cv-03239 (S.D.N.Y.), and *Quiroz v. Sabatino Truffles New York LLC*, Case No. 8:17-cv-00783 (C.D. Cal.), allege that truffle-infused olive oils are falsely held out as containing real truffles when actually they contain artificial truffle flavors.

- *Fitzhenry-Russell v. Dr. Pepper Snapple Group*, Case No. 5:17-cv-00564-NC, and *Fitzhenry-Russell v. The Coca Cola Company*, Case No. 5:17-cv-00603 (N.D. Cal.), are two cases filed by the same plaintiffs against makers of ginger ales, alleging the products contain no real ginger. Plaintiff alleged the deception arose not just from the designation of these beverages as ginger ales but also from explicit claims they are "made with real ginger" when the ginger flavor is allegedly provided by a chemical that mimics ginger flavor.

- In the latest of several cephalopod cases, *Lejbman v. Transnational Foods Inc.*, Case No. 3:17-cv-01317 (S.D. Cal.), purported tins of octopus are alleged to in fact contain squid, an allegedly cheaper and less tasty eight-armed delicacy.

Sugar Claims

- The amount of added sugar in food has been a recent focus for FDA.
- In May 2016, FDA revised the Nutrition Facts labeling for foods, requiring companies specifically disclose the amount of added sugars in products.
- FDA commented that "[s]cientific data shows that it is difficult to meet nutrient needs while staying within calorie limits if you consume more than 10 percent of your total daily calories from added sugar, and this is consistent with the 2015-2020 Dietary Guidelines for Americans."
- The World Health Organization and the American Heart Association have similarly focused on added sugars, recommending that individuals keep their added sugar intake to under 5%.
- On September 29, the FDA released a proposed rule to extend the compliance dates for disclosing added sugar from July 26, 2018, to Jan. 1, 2020, for manufacturers with $10 million or more in annual food sales. Manufacturers with less than $10 million in annual food sales would receive an extra year to comply—until Jan. 1, 2021.

Litigation Involving Sugar Claims

- Regulators are not the only ones focused on added sugars. Judging from the increase in cases challenging added sugar labeling, plaintiffs' attorneys and consumers are, too.

- Several recent cases attack "no added sugar" labeling on foods like juice and applesauce. Plaintiffs in these cases claim that the foods fail to meet regulations that dictate when a "no added sugar" claim can be used.

- These regulations include 21 C.F.R. 101.60(c)(2)(iv), which prohibits the use of phrases like "no added sugar" unless "the food that it resembles and for which it substitutes normally contains added sugars" and 21 C.F.R. 101.60(c)(2)(v), which requires a food bearing a "no added sugar" claim to contain a disclaimer that the food is not "low calorie."

Litigation Involving Sugar Claims

- Some of these cases have been dismissed. For example, the court in *Major v. Ocean Spray Cranberries, Inc.*, 2015 U.S. Dist. LEXIS 23542 (N.D. Cal. Feb. 26, 2015), granted summary judgment after plaintiff testified at her deposition that she knew that the cranberry juice she purchased was not low calorie. The Court reasoned that she could not have relied on the absence of that disclaimer, and dismissed the case. This decision was recently upheld by the Ninth Circuit. 2017 U.S. App. LEXIS 8140 (9th Cir. May 8, 2017).

- Others have survived the motion to dismiss stage.
  - *Wilson v. Odwalla, Inc.*, 2017 U.S. Dist. LEXIS 117090 (C.D. Cal. June 28, 2017) (plaintiffs argued that other, comparable juices did not typically contain added sugars, arguing for a narrowly defined substitute product, while defendants advocated for a broader definition; the district court declined to grant Odwalla's motion to dismiss, stating that it was not willing to adopt defendants' definition at this stage in the case);
  - *Hadley v. Kellogg Sales Company*, No. 5:16-cv-04955 (N.D. Cal. (August 10, 2017) (allegations that cereals contain an unhealthy amount of sugar are adequate to state a legal claim, even though the cereals were within the FDA's daily recommended value of 10 percent of calories).

- And some have not yet been decided. *McMorrow v. Mondelez*, No. 3:17-cv-02327 (S.D. Cal.) (involving amounts of sugar in Belvita breakfast biscuits).

Evaporated Cane Juice

- In addition to cases involving "no added sugar" claims, there has been an increase in cases challenging the use of "evaporated cane juice" as an ingredient on food labels.

- This is largely due to the final guidance issued by FDA in 2016 that stated that the term "evaporated cane juice" is misleading and that companies should make clear on their labels that evaporated cane juice is sugar.

- Several of the recent cases post-FDA guidance have denied motions to dismiss, or the cases have settled.

Healthy or Healthy Inference Claims

- Another food claim that continues to generate interest from the plaintiffs' bar is "healthy."
- Targets advertising that either expressly states a product is "healthy" or challenges advertising that *implies* a product is healthy.
- Subjective nature of the term "healthy," especially when the argument is that there is an implication of healthfulness in advertising, has given plaintiffs wiggle room to avoid regulation and potentially survive a motion to dismiss.
- This type of claim has dovetailed frequently with sugar-based claims, arguing that it is impermissible to convey a "healthy" impression about a product or make health/wellness claims for products that contain "excessive" amounts of added sugar, which is "toxic."

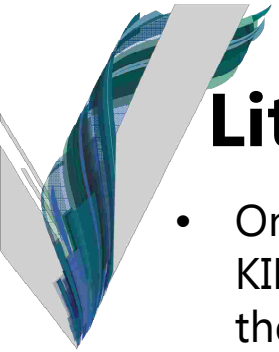
FDA Guidance on Healthy Claims

- Unlike "natural," "healthy" is an FDA defined term. When used as an implied nutrient content claim, healthy is defined as a food low in fat, cholesterol, and sodium, and containing at least 10 percent of one or more qualifying nutrients.

- Prior to 2016, the FDA issued a slew of Warning Letters attacking manufacturers for labeling their foods as healthy, usually because they were not low in fat. These Warning Letters spurred significant consumer class action litigation.

- FDA Sept. 2016 Guidance Document on "healthy" claims:
  - Enforcement discretion toward products with disqualifying amounts of total fat, if the majority of total fat is unsaturated
  - Enforcement discretion toward products with at least 10% of the DV of non-qualifying nutrients vitamin D or potassium

- In late 2016, the FDA opened a comment period on regulation of the term "healthy" (comment period extended until April 2017). The FDA is now reviewing the comments and is expected to promulgate new regulations to redefine the "healthy" nutrient content claim at the conclusion of that review.

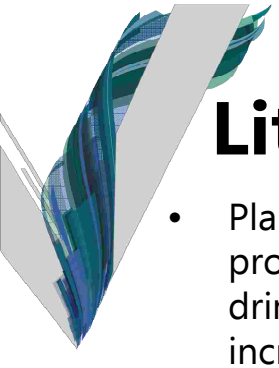


Litigation Involving Healthy Claims

- One of the most publicized "healthy" cases triggered by FDA Warning Letters involved KIND snack bars. Because the snack bars contain nuts, they were not low in fat, and therefore failed to qualify as "healthy" under the FDA definition. KIND made changes to their labeling in response to the Warning Letter, but also challenged FDA on its outdated definition of "healthy." Not all fats are created equal, KIND argued, and some fats, such as those found in nuts and avocados, are beneficial and support good health. KIND filed a Citizen Petition in support of its position and urged FDA to reconsider the current definition of "healthy."

- FDA ultimately allowed KIND to use the term "healthy" on its labels and agreed that the definition of "healthy" needed retooling. It also solicited public comments on the issue, and, in Sept. 2016, issued non-binding guidance setting out situations where the agency will exercise enforcement discretion with respect to the term "healthy."

- Although FDA ultimately sided with KIND, the company still had to endure significant litigation that garnered significant publicity.

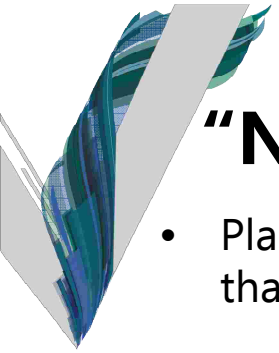


Litigation Involving Healthy Claims

- Plaintiffs have also recently sued diet soft drink producers, alleging the term "diet" implies that products promote weight loss and healthy living. The term is allegedly misleading because it implies that diet drinks are healthy when they contain artificial sweeteners that purportedly cause weight gain and increase health risks. *See Becerra v. The Coca-Cola Company*, No. 17-cv-5916 (N.D. Cal. Oct. 16 2017).

- Another wave of recent litigation involving the term "healthy" focuses on the use of added sugar in products advertised or marketed as healthy and nutritious. The FDA has regulated the disclosure of added sugars, but its requirements do not go into effect until 2020 or 2021. In the interim, plaintiffs challenge labeling on products that contain what they define as "excessive" amounts of added sugar on products that make a variety of health claims. For example, in 2016, three putative class actions were filed (with mixed results) in the federal court in the Northern District of California against Post, Kellogg, and General Mills. Plaintiffs argued that the cereals and cereal bars produced by these companies contain "excess" added sugars, which are toxic and increase serious health risks, such as risk of strokes and heart attacks. Therefore, they claimed, the defendants' products are not healthy or nutritious as advertised.

- Other healthy-inference-type claims focused on the presence of trans fat, which plaintiffs allege is dangerous in any amount. These claims have been decreasing in the more recent past. *See Backus et al. v. ConAgra Foods, Inc.*, 2016 WL 3844331 (N.D. Cal. July 15, 2016) (denying motion to dismiss claim that advertising re: "healthy lifestyles" was misleading on products that contained trans fat).



"Natural" and "All Natural" Claims

- Plaintiffs typically allege that a product cannot be "natural" if it contains certain ingredients that are highly processed, sourced from "synthetic" substances, or fermented using GMOs.
- Plaintiffs often cite other regulations to identify a substance as "synthetic," including USDA's National Organic Program list of "synthetics allowed."
- Examples of these "synthetic" ingredients range from B vitamins to xanthan gum.
- USDA regulates labeling of meat and poultry products. USDA's informal position on "natural" is "not containing any artificial flavor or flavoring, coloring ingredient, or chemical preservatives" or a synthetic ingredient and not more than minimally processed.
- FDA has jurisdiction over labeling of foods not regulated by the USDA.
- FTC has jurisdiction over labeling and marketing of food and consumer products. FTC does not have an official position on "natural," though the director has recently stated that "natural" means "no artificial ingredients or chemicals."

"All Natural" Claims – Delay in Regulatory Action

- The FDA has historically declined to define the term, deferring instead to a long-standing non-binding policy.
- FDA considers "natural" on a food label to be truthful and non-misleading when "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food."
- In 2015, the agency sought public comment on whether and how it should define "natural."
- In May 2016, the comment period for FDA's evaluation of the term "natural" on food labeling ended.
  - FDA has not yet issued a determination or rule on the issue
  - FDA has clearly identified that it is only evaluating the term "natural" with respect to food products

Implications of Lack of Formal Regulatory Definition

- Natural claims continue to be an issue for defendants because there is no formal regulatory definition, which frequently allows plaintiffs to survive a motion to dismiss and proceed toward discovery.
- Consumer plaintiffs have continued to file a steady stream of purported class actions, alleging the term is misleading when used on products that contain genetically modified organisms (GMOs) or other "artificial" and "synthetic" ingredients and substances.
- Most courts have stayed "natural" cases in the past year on primary jurisdiction grounds (to allow the FDA to weigh in first).
- Other courts have declined to issue a stay in the absence of a timeline for action from the FDA.
- Some courts are dismissing "natural" claims as implausible instead of issuing stays.

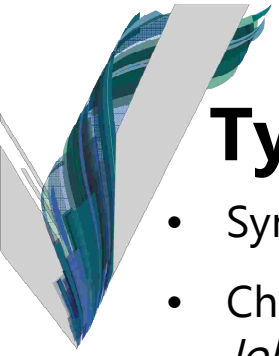
Pending FDA Guidance DOES NOT Stay "Natural" Claims for Non-Food Products

- At least one district court in California has denied a request to stay the litigation because of an FDA letter stating that it "decline[s] to make a determination regarding the term 'natural' in cosmetic labeling at this time."

- Over the past 15 years, claims that a product is "natural" or "all natural" have become more common for use in promoting personal care products, in part because the FDA, which regulates cosmetics, has never published a regulatory definition for "natural" in the context of FDA-regulated products – leaving a "gray area" as to what types of products can be promoted as "natural."

- However, the rise in the number of cosmetics being promoted as "natural" has given rise to greater scrutiny from regulators, resulting, as we now see, in an increase in FTC enforcement based on a lack of adequate substantiation for making such claims. Thus, the cosmetics industry may be subject to FTC enforcement for promoting products as "natural" unless they possess substantiation that adequately supports such claims.

- In 2016, the FTC announced that it reached settlement agreements with four companies that market skin care products, shampoos, and sunscreens online over charges that they falsely claimed that their products are "ALL NATURAL" or "100% NATURAL," despite the fact that they contain synthetic ingredients.



Typical Targets Include

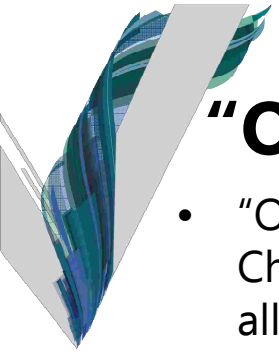
- Synthetic/artificial ingredients (such as artificial sugars or fillers).
- Chemical ingredients in personal care products (such as shampoos). *See Langan v. Johnson & Johnson Consumer Companies, Inc.*, No. 3:13-CV-1470 (JAM), 2017 WL 985640, at *1 (D. Conn. Mar. 13, 2017) (certifying class of consumers challenging natural labeling on shampoo, lotion, and sunscreen products containing chemical ingredients) (stayed pending appeal of certification order).
- Manufacturing processes (such as chemical-based processes used to create the products).
- Plaintiffs are also adopting newer tactics to challenge "natural" on product labels. For example, there is a recent wave of cases involving use of pesticides (glyphosate) on oat/food products. Some plaintiffs have engaged third-party laboratories to test products for trace residues of pesticides and other "unexpected" ingredients.
- Some of these cases have been dismissed, finding that the FDA's informal guidance on the term "natural" was not intended to cover food production methods, or finding that a reasonable consumer would not view the "natural" labeling and form the belief that the products contained no trace elements of glyphosate.

Litigation Involving Natural

- There was a resurgence in "all natural" litigation in 2017.
- 2017 litigation attacked incidental synthetic additives used in natural flavors that do not, according to the plaintiff, belong in beverages labeled as "all natural," to "natural" cheese using milk from cows treated with rbST, and "natural" yogurts made with milk from cows likely given feed from GM crops.
- Some "natural" suits have been stayed on primary jurisdiction grounds, while other courts have lifted stays or refused to grant them because of how long the FDA has been considering comments.
- We expect to see more cases in 2018 filed citing "testing" and pronouncements about harmful, "unexpected" substances.
- News reports, stories, and opinions issued by international bodies about the potentially harmful nature of certain substances can also inform and trigger class action filings.

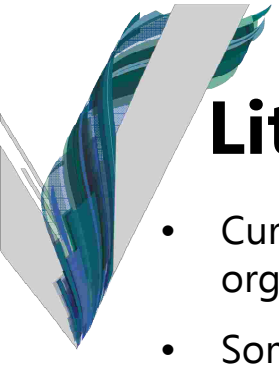
Settlements of "All Natural" Claims

- Flaxmilk: $260,000 settlement fund + $5,000 to named plaintiff
- Ghirardelli: $5.25 million settlement fund + $5,000 to each named plaintiff
- Merisant stevia products: $1.65 million settlement fund + $4,000 to named plaintiff
- Seventh Generation: $4.5 million settlement fund
- People against Dirty and Method Products (Method and Ecover cleaning products): $2.8 million settlement fund



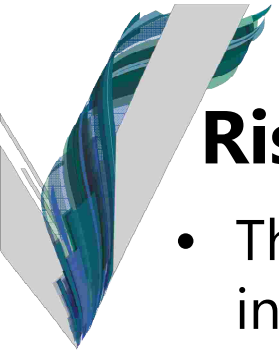
"Organic" Claims

- "Organic" is a strictly regulated term, with a national list of permissible content. Challenges to this term usually focus on the presence or use of ingredients or practices allegedly not permitted by that list.
- USDA regulations preclude the use of genetically modified organisms in the production of "organic" products (7 C.F.R. § 205.2).
- Products are certified as organic by a USDA certifying agent.
- Cases involving organic claims—at least with respect to agricultural products—have historically been relatively rare because the USDA organic seal on agricultural products is certified organic by detailed federal laws and regulations.
- However, while federal law regulates agricultural products, state law regulates cosmetics and other personal care products.
- So, if products are labeled organic and do not meet these state-by-state standards, then the company can get into trouble. For example, courts have recently approved a $7.5 million settlement involving cosmetics, and a $6.5 million settlement for a hair care product.



Litigation Involving "Organic" Claims

- Currently, a split in the law has developed regarding whether the FDA's certification of a product as organic can be challenged based on state consumer protection laws.
- Some courts have held that certification cannot be challenged because federal law preempts state law.
  - *Marentette v. Abbott Labs.,* Case No. 15-cv-2837 (E.D.N.Y. Aug. 23, 2016) (baby formula certified as organic but allegedly containing impermissible ingredients under USDA regulations; granting motion to dismiss as preempted because organic claim had been certified by an accredited certifying agency under federal regulation).
- Others have permitted the challenges to go forward.
  - *Segedie v. The Hain Celestial Group, Inc.*, Case No. 14-cv-5029 (S.D.N.Y. May 7, 2015) (food and personal care products certified as "organic" alleged as misleadingly labeled in violation of state consumer protection laws; denied motion to dismiss on preemption grounds, despite federal regulation that certified the products as "organic");
  - *Gedalia v. Whole Foods*, 53 F. Supp. 3d 943 (S.D. Tex. 2014) (challenges to certifying agent's determination permitted under state consumer protection law).
- The most recent decisions favor defendants.
  - *See Birdsong v. Nurture, Inc.*, No. 16-CV-4435-RRM-PK (E.D.N.Y. Sept. 28, 2017) (holding that plaintiff cannot use state consumer protection laws to challenge "organic" certifications made by USDA-accredited certifying agents);
  - *Organic Consumers Assoc. v. Hain Celestial Group, Inc.*, No. 16-cv-00925 (D.D.C. Jan. 3, 2018) (dismissed organic claim on similar grounds).



Rise of GMO Claims

- The presence of genetically modified organisms or synthetic ingredients in foods is another area that plaintiffs are increasingly attacking because, as with natural claims, there is no federal definition of GMO ingredients yet.

- Plaintiffs have begun targeting sourcing of ingredients, attempting to extend liability further up the supply chain.

- Most common claims have focused on the way the animals are fed and raised to create products such as meat or dairy.

Regulations Involving GMO

- FDA issued guidance in Nov. 2015 on how food makers can label genetically engineered food products, but still does not require it.
  - "Genetic engineering" refers to the use of modern biotechnology on food or its ingredients.
  - FDA also recommends against the use of "non-GMO" and "GMO free," because the reference to "organism" is not precise.
- USDA regulations preclude the use of genetically modified organisms in the production of "organic" products (7 C.F.R. § 205.2).

GMO-Related Litigation

- Chipotle line of cases – argue that use of GMO feed for meat products labeled "non-GMO" is false and misleading.

- Cases typically survive pleading stage.

- *See Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-CV-02200-HSG, 2016 WL 6563348, at *2 (N.D. Cal. Nov. 4, 2016) (case ongoing after surviving motion to dismiss); *Reilly v. Chipotle Mexican Grill, Inc.*, No. 15-cv-23425 (S.D. Fla. Apr. 20, 2016) (summary judgment affirmed on appeal).

GMO-Related Litigation

- Dairy line of cases – argue that use of GMO feed, hormones, and/or "unhappy" conditions for cows used to create dairy products are "unnatural" based on use of GMOs.

- *See Podpeskar v. Dannon Company, Inc.*, No. 7:16-cv-08478-VB (S.D.N.Y.) (dismissing natural claim as there was "no legal support for the idea that a cow that eats GMO feed or is subjected to hormones or various animal husbandry practices produces 'unnatural' products").

- *See Stanton v. Sargento Foods Inc.*, No. 3:17-cv-02881 EDL (N.D. Cal.) (challenging natural labeling on cheese products based on use of genetically modified feed, recombinant bovine somatotropin, and industrial farm conditions).

GMO-Related Litigation

- Small handful of earlier cases that made it to class certification stage challenging the use of GMOs in cooking oil products as misleading.

- Court rulings generally focused on procedural aspects of class actions, rather than substantive merits of the allegations.
  - *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919 (C.D. Cal. Feb. 23, 2015) (certifying 11 state class in case challenging "natural" labeling on Wesson oil products based on alleged use of GMOs);
  - *Ault v. J.M. Smucker Co. et al.*, No. 13-cv-03409 (S.D.N.Y. Aug. 6, 2015) (denying class certification in case alleging GMO-based Crisco products mislabeled as natural because plaintiff could not establish ascertainability of class).

Slack Fill Claims

- Class action lawyers are increasingly bringing claims alleging that a product's packaging or empty space misleads consumers to believe there is more product inside than the package actually contains.

- Food products are a primary target. Manufacturers of candy, potato chips, tuna, pasta, ground black pepper, and other products face such lawsuits.

- Other products that have been targeted include cosmetics, drugs, deodorant, lip balm, and laundry detergent.

Regulations Relating to Slack Fill

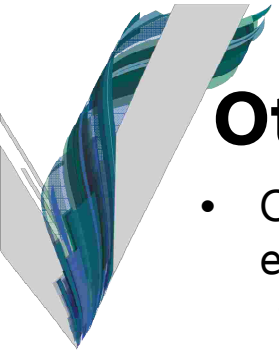
- Federal regulations are very specific on what constitutes permissible slack fill vs. impermissible or non-functional slack fill—generally negates these types of claims for empty space resulting from natural settling, padding left to protect product, or air necessarily introduced by manufacturing processes (21 C.F.R. § 100.100(a)).

- California law has two separate provisions regulating non-functional slack fill. Section 12606.2 of the California Business & Professions Code governs non-functional slack fill regarding food packaging, and Section 12606 governs other commodities.

- Slack fill is functional if it falls under one of many enumerated exceptions:
  - Protection of the contents of the package
  - Requirements of the machine used to enclose the contents
  - Settling during shipping and handling
  - Need for packaging to perform a specific function
  - Food packaged in a reusable container with empty space as part of the presentation
  - Inability to increase the fill level because the size is necessary to accommodate labeling requirements

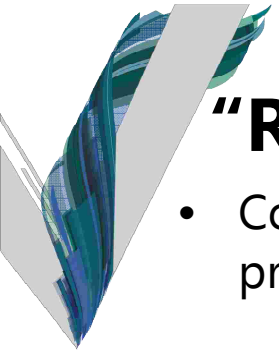
Slack Fill Litigation

- None of these legitimate and legally protected explanations have deterred some in the plaintiffs' bar from bringing slack fill-related suits.
- Some courts dismiss slack fill claims when the product packaging accurately displays content on front of packaging (e.g., net weight or total number of products included) because consumers cannot be deceived by admittedly accurate disclosures of content.
  - *See, e.g., Bush v. Mondelez Int'l, Inc.*, Case No. 16-2460, 2016 WL 5886886 (N.D. Cal. Oct. 7, 2016) (Reasonable consumer could not be misled by empty space in cookie pouches because labeling revealed net weight and number of cookies);
  - *Fermin v. Pfizer, Inc.*, 2016 U.S. Dist. LEXIS 144851 (E.D.N.Y. Oct. 18, 2016) (Reasonable consumer could not be misled regarding the number of pills in the bottle based on its size when the label clearly identifies the total number of pills contained in each package);
  - *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016) (No reasonable consumer would be misled that 25% of the lip balm was not accessible because of the plastic stop device; no reasonable consumer expects the weight and size of packaging to reflect directly the quantity of product contained therein).
- Some courts have also dismissed actions where the plaintiff failed to establish that he paid a premium for the product. *See, e.g., Izquierdo v. Mondelez Int'l*, Case No. 16-cv-4697 (S.D.N.Y. Oct. 26, 2016).



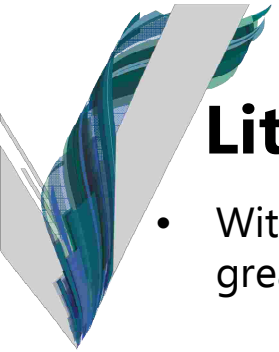
Other Recent Slack Fill Litigations

- Other courts have allowed slack fill claims to move forward when plaintiffs allege that empty space in products is non-functional slack fill.
  - *See, e.g., Bratton v. Hershey Co.*, No. 2:16-cv-4322-C-NKL (W.D. Mo. May 16, 2017) (denying motion to dismiss because plaintiff plausibly alleged that 29% and 41% percent empty space in opaque product boxes serves no purpose at all);
  - *Hawkins v. Nestlé USA Inc.*, case number 4:17-cv-00205 (E.D. Mo. Feb. 7, 2018) (denying motion to dismiss over Raisinets boxes with empty space, finding that it "cannot conclude as a matter of law and at this stage of the litigation that the packaging is not misleading").
- Some slack fill lawsuits have settled for significant sums or confidentially. In September 2016, a federal court in California gave final approval to a $12 million settlement between plaintiffs' lawyers and Starkist to resolve allegations that five-ounce cans of tuna were underfilled. In 2017, GNC confidentially settled a class action lawsuit alleging that its Whey Protein products were deceptively packaged because they contain slack fill.
- A number of recent suits have been brought in Missouri, which has become a particularly hot spot for food class action because of its reputation for fast trials, favorable rulings, and big awards under the state statutes.



"Real" Food Claims

- Companies have recently been making an increasing number of "real" claims on products to appeal to consumer aversion to "fake-sounding" ingredients.
- No federal regulation of "real," as with "natural," so the term is theoretically prime for litigation.
- However, courts typically dismiss these claims as long as the ingredients touted on the front of the package are actually found in the product itself.
- For example, "made with real fruit" claims on cookie products were found not to be deceptive, given that each of those fruits actually was in the product. One court said it "strained credulity" to argue the fact it was a pureed strawberry instead of a whole strawberry was somehow deceptive to consumers, since there was no argument it was not *actually* strawberry puree. *See Manchouck v. Mondelez Int'l, Inc.*, 2013 WL 13887 (N.D. Cal.), *aff'd* 603 Fed. Appx. 632 (9th Cir. 2015).



Litigation Involving "Real" Claims

- Without clear, accurate, and readily accessible ingredient panels, "real" claims could present greater risk.

- For example, a "Made with Real Ginger" claim survived motion to dismiss because the product's ingredient panel states that the soft drink contains a "natural flavor," with no other information about ginger. The court held that plaintiff plausibly pleaded deception because a reasonable consumer "would not know the true nature of the ginger flavoring merely by reading the ingredient label." *Fitzhenry-Russell v. Coca-Cola Co.*, No. 5:17-CV-00603-EJD, 2017 WL 4680073, at *1–2 (N.D. Cal. Oct. 18, 2017).

- In another case, plaintiff alleged the word "blueberry" in the name of some of defendant's donuts is misleading because the products purportedly contain fake blueberries or blueberry pieces that mimic the shape and color of real blueberries. The court held that plaintiff stated a claim for deception because he alleged that "he wanted a product with blueberries in it and he was allegedly deceived into believing that the [products] had real blueberries in it." In particular, the court noted that plaintiff's confusion was reasonable because no ingredient list was available at the point of purchase. *See Grabowski v. Dunkin' Brands, Inc.*, Case No. 17-cv-05069 (N.D. Ill. Dec. 7, 2017).

"Authentic" Claims

- In the past, courts have dismissed "authentic" claims as non-actionable puffery; that is, the term "authentic" is vague and impossible to measure.

- Courts recognize that "an advertising claim is mere puffery—as opposed to a verifiable representation of fact—when it is so vague, highly subjective or meaninglessly general as to preclude consumer reliance."
  - *See Henderson v. Gruma Corp.*, No. CV 10-04173 AHM AJWX, 2011 WL 1362188, at *11 (C.D. Cal. Apr. 11, 2011) (dismissing claims based on "The Authentic Tradition" labeling on guacamole products because the term was "not a specific and measurable claim").
  - *See also Hammer v. Vital Pharm., Inc.*, No. CIV.A. 11-4124, 2012 WL 1018842, at *7 (D.N.J. Mar. 26, 2012) (holding that "buzz word[] 'authentic' [was] not sufficient to bring the statements out of the realm of puffery because these statements are not making a specific claim as to the [dietary supplement] product").

- However, words such as "honest" present greater risk.
  - *See Salazar v. Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1317 (E.D. Cal. 2014) (denying motion to dismiss "honest" claim because the term "may imply the defendant provides only truthful information regarding its products, and truthfulness can be measured").

Country of Origin Claims

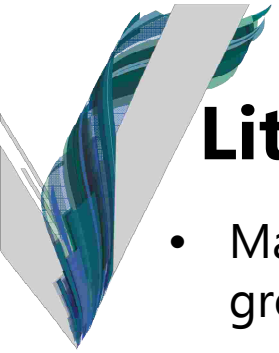
- Class actions focused on claims about the origin of a food, beverage, or other consumer product have also been on the rise. Claims that products tout their origin (typically exotic/abroad) as a selling point, when actually the product was produced somewhere less interesting that would not appeal to consumers.
- For example, there has been an uptick in the number of cases challenging "Made in the U.S.A." claims.
- Although FTC maintains exclusive enforcement authority over these claims under the FTC Act, private plaintiffs have used state consumer protection laws or the California "Made in the U.S.A." statute (California Business and Professions Code 17533.7) to bring class actions against food companies and other consumer product manufacturers.

Recent Revisions to California "Made in the U.S.A." Statute

- Effective January 1, 2016, the California statute now allows "Made in the U.S.A." claims for products that contain foreign components or ingredients as long as the foreign content is 5 percent or less of the products' wholesale value (or up to 10 percent of the value if the manufacturer can prove the materials or ingredients are not available in the United States).

- This significantly relaxes the standard for "Made in the U.S.A." claims under California law, which had previously required that essentially 100 percent of the product ingredients or components originate in the United States.

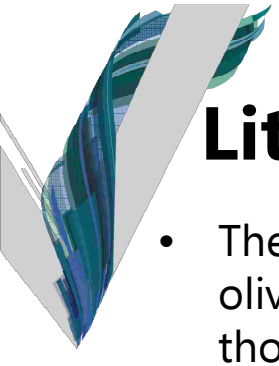
- More companies may choose to challenge lawsuits attacking their use of "Made in the U.S.A." claims in light of the recent revisions to the California "Made in the U.S.A." statute.



Litigation Involving Country of Origin Claims

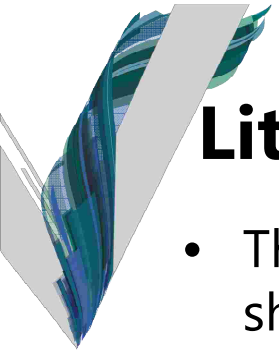
- Many cases have settled, although some manufacturers have held their ground.

- For example, a putative class action was filed against Rockstar, Inc., a maker of energy drinks that are advertised as being "Made in the U.S.A." Plaintiffs argued that several ingredients in their drinks, including taurine, guarana seed extract, and milk thistle extract, were foreign sourced. The Court granted Rockstar's motion to dismiss, finding that plaintiffs failed to plead with specificity where the foreign-sourced ingredients were made and what percentage of the product comprised foreign-sourced ingredients. *Alaei v. Rockstar, Inc.*, 224 F. Supp. 3d 992 (S.D. Cal. 2016).



Litigation Involving Country of Origin Claims

- There have also been recent cases in the past few months filed against manufacturers of olive oil, beer, and other spirits, claiming that products were purchased because consumers thought the products were from Italy/Japan, respectively, when they were actually from other sources.
- In these cases, plaintiffs allege that the place where, for example, the alcohol is brewed is of value to them, and that the labels at issue misrepresent the geographic origin of the products to justify a price premium.
- Several of these cases have been dismissed early, usually on grounds that a reasonable consumer would not be misled about the product origin.
  - *See, e.g., Bowring v. Sapporo U.S.A., Inc.*, 2017 U.S. Dist. LEXIS 32333 (E.D.N.Y. Feb. 10, 2017);
  - *Dumas v. Diageo PLC*, 2016 U.S. Dist. LEXIS 46691 (S.D. Cal. Apr. 6, 2016).
- Others have not, largely because disclaimers on the label disclosing where the beer was brewed was not conspicuous enough or was confusing.
  - *See Broomfield v. Craft Brew Alliance*, 2017 U.S. Dist. LEXIS 142572 (N.D. Cal. Sept. 1, 2017);
  - *Shalikar v. Asahi Beer USA Inc.*, No. 2:17-cv-02713 (C.D. Cal. Sept. 11, 2017) (denying dismissal even though company disclosed on packaging that it was packaged in Canada).



Litigation Involving Country of Origin Claims

- These types of claims may face hurdles during class certification, to show that consumers actually relied on the specific representation at issue, and to establish damages models that track that theory of liability.

- However, a class was certified in an olive oil case alleging "Made in Italy" was deceptive when product was actually produced in various other locations. *Koller v. Med Foods Inc.*, No. 14-cv-02400 (N.D. Cal. Aug. 24, 2017).

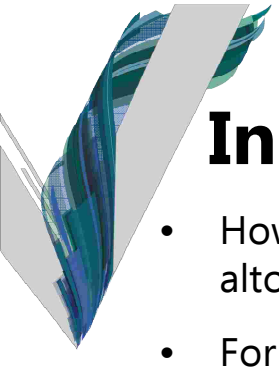
Front-of-Package False Advertising Claims

- Class actions alleging that the front of the product or label description is not consistent with the ingredient list or serving size are becoming more increasingly common.

- For example, Bayer has been sued for multivitamin bottle labels that stated on the front that the bottles contained 70 days' worth of multivitamins, but specified serving size on the back of the bottle was actually "two gummies," so the bottle contained only 35 days' worth of gummies.

Litigation Involving Front-of-Package False Advertising Claims

- When faced with consumer litigation, food, beverage, and dietary supplement companies routinely point to the ingredient list in defense of front-of-package false advertising claims.
- The defense is essentially this: A false advertising claim based on the content of the product cannot exist where the ingredient list accurately discloses all ingredients.
- This defense is not always successful, particularly in a motion to dismiss context where the court finds that the packaging may be misleading or deceptive.
- As the Ninth Circuit noted, reasonable consumers should not be "expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."
  - *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939 (9th Cir. 2008).
  - *See also Walters v. Vitamin Shoppe Industries*, No. 15-35592 (9th Cir. 2017) (finding plaintiff "did not have a duty to validate claims on the front of a product's label by cross-checking them against information contained in small print on the back").
  - Likewise, a Missouri appellate court in 2016 rejected an ingredient list defense raised in a putative food labeling class action brought under the state's consumer fraud statute.
- In these jurisdictions, the ingredient list won't shield a manufacturer from liability for actual deception.



Ingredient List Defense Can Be Successful

- However, some recent defense successes caution against abandoning the ingredient list defense altogether.
- For example, the Northern District of California dismissed a false advertising claim based on front-of-package language because the allegations of deception were implausible on their face after looking at the package as a whole, including the ingredient list.
  - See *Goldman v. Bayer AG*, No. 17-CV-0647-PJH, 2017 WL 3168525, at *6 (N.D. Cal. July 26, 2017).
  - *See also Brady v. Bayer AG, et al.*, California Superior Court, Orange County, Case No. 30-2016-00839608-CU-MC-CXC (July 12, 2016) ("A reasonable consumer of any medicine or medicine-like substance such as vitamins would not stop with the brand name. He or she would read the label for the dosage [which clearly stated that the serving size is 2 gummies].").
- As another court put it: "an ingredient list alone cannot remedy an otherwise misleading or deceptive package but it still plays a part in assessing whether the package as a whole is misleading." *Silva v. Unique Beverage Co.*, LLC, No. 3:17-CV-00391-HZ, 2017 WL 4896097, at *4 (D. Or. Oct. 30, 2017).
- The ingredient list defense was more successful in these and similar cases because the companies encouraged the court to use common sense when applying the "reasonable person" standard (i.e., alternative meanings of challenged statement, put statement in context of entire package, and/or invoke products' inherent characteristics that all reasonable consumers should know).

Automatic Renewal Law (ARL)

- Over 20 states have laws regulating auto-renewal contracts, but with the recent passage of California's Senate Bill 313, California—one of the strictest states—will soon implement even more stringent regulations.
- The new regulatory requirements of the updated ARL come into effect on July 1, 2018, and add additional requirements relating to free trial offers, temporary promotional pricing, and online subscriptions.
- When compared with federal law, California's original ARL was already broader and more detailed than the requirements of the Restore Online Shoppers' Confidence Act (ROSCA), which is enforced by the Federal Trade Commission (FTC).
- The stricter California rules come at a time where there has been a significant increase in the amount of class action litigation on behalf of consumers under the original statute, including a multi-million-dollar judgment against EHarmony just a couple of months ago.
- Under the ARL, a company that enters into an auto-renewal contract with a California consumer can be held liable for violations; therefore, businesses offering goods or services on an auto-renewal basis in California should comply with the updated ARL rules. In particular, companies with free trial or promotional pricing models should revise their pre- and post-purchasing disclosures to comply with the new requirements.

VENABLE

The Original ARL

- The original ARL, which is codified within section 17600 of the California Business and Professional Code, came into effect in 2010.
- The law required businesses that sell goods, products, or services on a recurring basis to:
  1. disclose their terms clearly and conspicuously;
  2. obtain affirmative consent prior to charging the consumer; and
  3. provide an acknowledgment capable of being retained by the consumer that includes terms, a cancellation policy, and information on how to cancel.
- In addition, if the business offers a free trial, the business must disclose the cancellation procedure to the consumer before the paid portion of the subscription begins, it being sufficient to make the disclosure at the time of the free trial offer rather than immediately before the paid portion begins.
- The statute also indicates what constitutes "clear and conspicuous" disclosures. Specifically, disclosures must be written "in a manner that clearly calls attention to the language," either by using a different type, font, or color than surrounding text or a larger font; or by setting the disclosure off with symbols or other marks. Audio disclosures must be sufficiently loud and in a cadence that is easy to understand.
- Recent judicial guidance on what constitutes "affirmative consent" under the ARL: In both *eHarmony* and *Beachbody*, California courts found affirmative consent under the ARL must be obtained through an "express act" by the consumer to consent to the terms of the automatic renewal contract. This "express act" should be obtained through a mechanism such as a checkbox or signature, but it should not be part of a larger transaction such as a checkout button. *Companies looking to ensure compliance with the ARL should therefore include a separate checkbox to consent to the terms of the automatic renewal contract.*

VENABLE

The Recently Amended ARL

- Senate Bill 313 amended section 17602 of the California Business and Professional Code, adding new requirements to the original ARL.
- The new requirements increase consumer protections regarding automatic-renewal contracts that contain free trial and promotional pricing, and subscription agreements entered into online.
- The amended statute requires new pre-purchase disclosures for offers that include a free trial or promotional discount. Specifically, an offer that includes a free trial must also contain a clear and conspicuous explanation of any change to the price or purchase agreement after the free gift or trial concludes.
- Affirmative consent must be obtained prior to charging the consumer a non-discounted or promotional price. However, a second standalone notice right before the end of the free trial offer/promotion is not required.
- Businesses allowing consumers to enter into auto-renewal agreements online are now required to provide an exclusively online method of cancellation. Businesses may no longer allow consumers to enter into auto-renewal agreements online, but then only permit those same consumers to cancel the agreement by phone. At a minimum, the exclusive online cancelation method requires businesses to provide a formatted termination email that a consumer can send without adding information.

Federal ROSCA

- ROSCA regulates auto-renewal contracts at the federal level. Section 8403 imposes specific requirements on negative option features. The FTC's Telemarketing Sales Rules defines a negative option feature as an offer or agreement where the customer's silence or failure to cancel is interpreted by the seller as acceptance.
- Although ROSCA does not specifically mention automatic renewals, in 2007 the FTC held a workshop on negative option marketing. The report summarizing the workshop provided four examples of negative option marketing: 1) pre-notification negative option plans; 2) continuity plans; 3) automatic renewals; and 4) free-to-pay or nominal fee-to-pay conversion offers.
- ROSCA's negative option provision requires business to: 1) clearly and conspicuously disclose the material terms of the transaction prior to obtaining billing information; 2) obtain the consumer's express consent before charging the consumer; and 3) provide simple mechanisms for a consumer to stop recurring charges.
- The workshop panelists provided guidance on what constitutes "clear and conspicuous." They recommended that marketers: 1) place negative option disclosures in locations on their websites that are likely to be seen; 2) highlight the importance and relevance of the information by labeling disclosures or links to disclosures; and 3) format disclosures in fonts and colors, and against backgrounds to make the text easy to see and read onscreen. The panelists discouraged disclosures worded in "legal jargon" or labeled with headings such as "More Info."

Judicial Guidance on ROSCA

- Since ROSCA came into effect, there has been some judicial guidance on what constitutes clear and conspicuous disclosure. In *FTC v. One Technologies, LP.*, the FTC alleged the terms of a negative option offer, including a recurring monthly charge, were not adequately disclosed even though they were presented on several pages of the website: at the top of the home page; on an inside page, via a link to "Offer Details" which the consumer agreed to by clicking to continue the enrollment process; and on the signup page in an "Offer Details" box adjacent to the credit card fields. The court issued a stipulated order stating that disclosures made through any interactive electronic medium must be unavoidable and above the order button. The disclosures were considered not conspicuous enough to be unavoidable. The company settled for $22 million.

- Hyperlinks to disclosures within online terms of service or disclosures "below the fold" (requiring the user to scroll down) are also unlikely to satisfy the unavoidability standard. In *FTC vs. JDI Dating, Limited*, the FTC alleged that JDI failed to meet the clear and conspicuous standard when the required disclosures could only be accessed by clicking a hyperlink to a terms and conditions page. In the stipulated injunction against JDI the court again reiterated that the disclosures had to be unavoidable.

- Similar to the court decisions in California, a recent ROSCA decision appears to require a separate checkbox to obtain affirmative consumer consent. In *FTC v. AdoreMe*, the court held that for written offers affirmative consumer consent should be obtained through a checkbox, signature, or similar methods which consent to only the negative option feature and no other portion of the offer. *Companies should, therefore, include a separate checkbox to comply with both ROSCA and California's ARL.*

California's ARL Compared to ROSCA

- Although ROSCA came into effect after California's original ARL statute, ROSCA is not as stringent as the ARL.
- ROSCA contains many of the same essential requirements as the ARL, but ROSCA lacks the original ARL's acknowledgment requirements and the required disclosures for free trials.
- While there has not been a similar level of judicial guidance on whether disclosures made "below the fold" or in hyperlinks are acceptable in California, given the policy objectives of the ARL'S clear and conspicuous disclosures requirement, it is likely that these kinds of disclosures would also be insufficient under the ARL.
- Also, ROSCA does not contain provisions included in the newly amended sections of the ARL regarding additional free trial, promotional discount disclosure, and online cancellation. Moreover, California sets a higher standard for a disclosure to be considered "clear and conspicuous," requiring text with type that contrasts with surrounding text.
- Hence, companies that already comply with ROSCA most likely need to take additional measures to comply with California's ARL.

VENABLE

Surge of ARL Litigation

- ARL's update comes at a time when class action litigation under the statute is growing. Many prominent technology firms have faced litigation, including Spotify, Google, Apple, Yahoo, Hulu, and Blizzard.
- Although courts have held that the statute applies only to California consumers, any California consumer who enters into an auto-renewal or subscription agreement may bring an action under the ARL. Therefore, companies that offer their goods or services on an automatic renewal basis in California should comply with the ARL.
- One of the most common allegations in ARL-based complaints is that a business failed to provide automatic renewal or continuous service terms in a clear and conspicuous manner. Other frequent allegations include the failure to provide the terms in visual proximity to the request for consent, failure to provide acknowledgment of the terms, and failure to provide an easy mechanism for the consumer to cancel the subscription. Exposure under the ARL can be quite substantial, with settlements in the tens of millions of dollars.

Arbitration Clause Might Not Avoid ARL Litigation

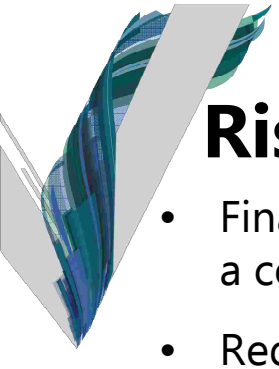
- While decisions in cases against Spotify and Hulu have shown that arbitration clauses may be successful in dismissing ARL class actions to arbitration, under a recent California Supreme Court decision arbitration clauses may no longer help.
- Generally, arbitration clauses are enforceable for online contracts, but the legal climate in California on the enforceability of consumer arbitration agreements is complex. The state has a history of finding California "public policy" to preclude the enforcement of arbitration agreements under the Federal Arbitration Act (FAA), which seems to run counter to the Supreme Court's stance in *ATT Mobility v. Conception* and *American Express Co v. Italian Colors*.
- And the California Supreme Court's recent decision in *McGill v. Citibank* complicates matters further. In *McGill*, the court held that arbitration provisions that waive a plaintiff's right to public injunctive relief under consumer protection statutes are unenforceable as a matter of public policy.
- This latter decision is particularly important to ARL cases, since the ARL does not create a private cause of action, and thus most complaints are brought under California's unfair competition law and other consumer protection statutes.
- Post-*McGill*, ARL plaintiffs are likely to include public injunctive relief claims to avoid arbitration. Companies should therefore utilize an arbitration clause, but know they may be severely limited in preventing ARL litigation post-*McGill*.

Potential Defenses

- Courts allow many of these cases to move past the motion to dismiss stage, but there are several defensive strategies companies can consider.
- Certainly some of these lawsuits are open to challenge on the merits—if no reasonable consumer would share the plaintiff's view, then the case should not move forward.
- Similarly, if the packaging discloses enough information such that consumers cannot reasonably be misled, then the complaint should be dismissed.
- In some circumstances, courts have found that plaintiffs' claims are preempted by federal regulations, which require the label to appear as is, or that a state consumer protection law otherwise provides safe harbor.
- A few other courts have agreed with food manufacturers that FDA should decide the specific question at issue in the case, and stayed or dismissed the matter on primary jurisdiction grounds.

Potential Defenses

- Other arguments can be raised at the class certification stage. Courts are split on whether the "ascertainability" of a class is a valid criterion to consider when certifying a class, but arguments based on whether it is feasible to accurately determine who qualifies as a class member may be useful, depending on the jurisdiction.
- Defendant manufacturers can also pick apart the methods and models used to calculate the damages incurred by various class members. If damages cannot be accurately calculated, plaintiffs may be left with only the opportunity to receive injunctive relief, or no relief, if class members lack a common injury.
- Or defendants can ask whether the named plaintiff is the right person to bring the lawsuit and challenge the adequacy of the class representative.
- Furthermore, private plaintiffs may not bring claims on the basis of a lack of substantiation (i.e., that defendants' advertising claims lack adequate scientific substantiation); instead, private plaintiffs bear the burden of proving the challenged advertising claims are false or misleading by pointing to scientific evidence that disproves the defendants' advertising claims.



Risk Mitigation Strategies

- Finally, there are a few risk mitigation strategies that companies can adopt now—before a complaint is filed.
- Regular communication between research and development, regulatory, marketing, and legal teams can be crucial to understanding the potential risks associated with particular claims up front.
- Certain claims and labeling statements often appear attractive from a marketing and competitive standpoint. That said, communications with R&D, regulatory, and legal can help ensure such claims are appropriately tailored and adequately substantiated, while carefully weighing any potential value against existing litigation risks.
- Even long-standing claims are open to challenge by consumer plaintiffs, so these discussions should be ongoing and in conjunction with regular review and reassessment of existing labels.
- Members of the legal team can inform these discussions with regular monitoring of case filings, warning letters, guidance documents, and other regulatory activity to stay on top of developments.

Takeaway Points

- Plaintiffs continue to pursue food, beverage, supplement, and cosmetic targets:
  - Often a cluster of cases making similar claims against similar products will be brought by the same plaintiff/law firm
  - If your competitor is sued, odds are you will be too
  - Plaintiffs' attorneys tend to follow consumer complaint trends, so stay abreast of what consumers are concerned with

Takeaway Points

- Defendants should defend strategically:
  - Know and comply with applicable regulations—they may provide effective "safe harbors" and give rise to preemption defense
  - Become familiar with cases involving similar products
    - Figure out what worked/didn't work for others
    - Identify key differences in your case and exploit them
  - While parties understandably tend to focus on the substantive merits of allegations, do not forget to carefully scrutinize damages early in the case
    - Failure by the plaintiff to sufficiently compile a damages model can lead to effective dismissal of the case

Takeaway Points

- Work with outside counsel to:
  - Review and approve advertising claims and even product packaging ***before*** they are made available to consumers
    - Use language that would make sense to a reasonable consumer
  - Consider incorporating mandatory arbitration clauses with class action waivers in all consumer contracts (but recognize the limits)
  - Pay attention to consumer complaints and correspondence
    - Addressing and fixing customer complaint issues early may preempt a potential class action