Not Real Froot?

Deconstructing Food Labeling Consumer Class Actions

By Nilda M. Isidro,
Anne A. Gruner,
and Carla R. Pasquale

A broad overview of the types of claims brought in these cases, as well as various issues to consider when responding, including removal, standing, preemption, primary jurisdiction, insufficiency of various claims, and settlement.

Product liability lawsuits have traditionally arisen in the personal injury context, where the plaintiff generally alleges that use of the product (or, in the case of foods and beverages, ingestion of the product) caused his or her claimed injury. There is, however, a new type of product liability case on the rise that does not focus solely on personal injury. Instead, plaintiffs' focus is on alleged misrepresentations made in food labeling and advertising. These lawsuits, often brought under state consumer protection laws prohibiting deceptive conduct, seem to be increasingly attractive to plaintiffs' counsel because these cases eliminate the requirement to prove medical causation, thus greatly simplifying the case from plaintiffs' perspective. Additionally, some state laws arguably do not even require that plaintiffs prove reliance on the allegedly misbranded label, making class action certification significantly less cumbersome.

As plaintiffs increasingly begin to bring these consumer class action lawsuits—which can include nationwide plaintiffs and sometimes result in sizable settlements—food and beverage companies need to become aware of the types of claims brought, potential defenses, and steps that can be taken to avoid these lawsuits. This article provides the authors' views of these claims, including a broad overview of the types of claims brought in these consumer class action cases, as well as various issues to consider in responding to such lawsuits, including removal, standing, preemption, primary jurisdiction, insufficiency of various claims, and settlement.

Overview of Regulatory Framework Governing Food Labeling

Several prominent federal regulations govern food and beverage labeling and advertising. Foremost in this arena is the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) which prohibits the sale or distribution of misbranded foods. Under the

■ Nilda M. Isidro, Anne A. Gruner, and Carla R. Pasquale are associates at Goodwin Procter LLP in New York City. Ms. Isidro is a member of the firm's Food Industry Group, which provides strategic counseling to food, beverage, and supplement businesses on a range of issues, including launches, regulatory compliance, litigation avoidance, and risk management. The authors are members of the firm's Products Liability & Mass Torts Practice and specialize in food, supplements, medical devices, and pharmaceuticals. This article states opinions of its authors, and does not necessarily represent opinions of Goodwin Procter LLP or its clients.

FDCA, the Food and Drug Administration (FDA) has responsibility to protect public health and has promulgated regulations regarding foods and beverages pursuant to this authority. *See, e.g.*, 21 C.F.R. pts. 100–199. The FDCA does not provide a private right of action; rather, the FDA must bring an action to enforce regulations. *See* 21 U.S.C. §337(a).

With regard to product labels, §343(a)(1) of the FDCA states that a food is misbranded if "its labeling is false or misleading in any particular." The term "misbranded" under the FDCA at least arguably operates as the functional equivalent of "deceptive" under state laws, but because there is no private right of action under the FDCA, litigants' claims may be dismissed if they would require courts to make decisions related to FDA regulations promulgated under the FDCA.

The Nutrition Labeling and Education Act (NLEA) is codified as part of the FDCA and specifically addresses certain food and beverage labeling requirements, including requirements to identify artificial flavors on product labels (21 U.S.C. §343(k)) and to identify "imitation" products or ingredients. 21 U.S.C. §343(c).

The Organic Foods Production Act of 1990 (OFPA) establishes national standards for the sale and labeling of organically produced agricultural products, and creates a certification program through which agricultural producers and products may become certified as organic. The United States Department of Agriculture (USDA) has promulgated regulations, known as the National Organic Program (NOP), 7 C.F.R. pt. 205, defining which agricultural products qualify as organic. Courts have recognized that Congress expressly preempted independent state certification laws by enacting OFPA (*see* 7 U.S.C. §6507), but certain courts have held that Congress did not expressly preempt state tort claims, consumer protection statutes, and common law claims so long as the requirements at issue do not conflict with OFPA. *See, e.g., Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2012 WL 6569393, at *2–6 (N.D. Cal. Dec. 17, 2012) (citing *Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2012 WL 3138013 (N.D. Cal. Aug. 1, 2012), *petition to appeal denied*, No. 12-80186 (9th Cir. Dec. 17, 2012), *motion to dismiss and motion to strike denied*, No. C 11-03082 LB (N.D. Cal. Dec. 22, 2012)).

In addition to the various federal regulations, state laws can also be implicated in consumer class actions relating to food labeling. California—where a majority of these consumer class actions are being filed—has a number of consumer protection laws that class plaintiffs frequently invoke, including the False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA). Plaintiffs have similarly invoked analogous consumer protection statutes in other states, such as the New Jersey Consumer Fraud Act.

Claims Targeted by Class Action Plaintiffs

"All Natural"

Among the consumer class action claims that plaintiffs bring alleging deceptive labeling, some of the most common involve claims that a food is deceptively labeled as "all natural," "nutritious," or "healthful." American consumers have been increasingly purchasing products that claim to have "all natural" ingredients. Although the FDA has not specifically defined what foods qualify as "natural," a 1993 regulation states that use of the term "natural" on a food label is not misleading when "nothing artificial or synthetic... has been included in, or has been added to, a food that would not normally be expected to be in the food." 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993). Warning letters have also shed some light on what the FDA considers "natural." For example, in November 2011, the FDA issued a warning letter to Alexia Foods, concerning an "all natural" claim on their Roasted Red Potatoes & Baby Portabella Mushrooms product, which contained the synthetic chemical preservative disodium dihydrogen pyrophosphate. Warning Letter to Alex Dzieduszycki, Alexia Foods (Nov. 16, 2011). The synthetic chemical preservative was an additive that the FDA said "would not normally be expected to be in the food."

Lawsuits challenging "all natural" claims have frequently involved products containing ingredients such as high fructose corn syrup, alkalized cocoa, factory-made ascorbic acid, and genetically modified organisms (GMOs). For example, plaintiffs sued Snapple Beverage Company alleging its products labeled "all natural" contained high fructose corn syrup. First Amended Class Action Complaint & Jury Demand, *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2007 WL 4837756 (S.D.N.Y. Nov. 20, 2007); *see also* Class Action Complaint, *Ries v. Hornell Brewing Co., Inc.*, No. CV10-01139 PVT ADR, 2010 WL 2100662 (N.D. Cal. Mar. 17, 2010) (class action lawsuit alleging Arizona Iced Tea is not "natural" because it contains high fructose corn syrup and artificial citric acid). Nature Valley has also been the target of a class action suit based on granola bars allegedly containing high fructose corn syrup, high maltose corn syrup, and maltodextrin, as well as GMOs. Complaint, *Chin v. Gen. Mills, Inc.*, No. 0:12-cv-02150-MJD-TNL (D. Minn. Aug. 31, 2012); Class Action Complaint, *Rojas v. Gen. Mills, Inc.*, No. 4:12-cv-05099 SBA (N.D. Cal. Oct. 1, 2012). Similarly, consumers have brought claims against Frito Lay for its "all natural" claims on products (including Tostitos, Sun Chips, and bean dip) allegedly containing genetically modified corn or soy, as well as hexane-extracted soybean oil. Class Action Complaint, *Deaton v. Frito-Lay N. Am., Inc.*, No. 1:12-civ-01029-SOH (W.D. Ark. Apr. 2, 2012); Class Action Complaint, *Altman v. Frito-Lay N. Am., Inc.*, No. 0:12-cv-61803-WJZ (S.D. Fla. Sept. 13, 2012). Other products targeted for purportedly containing GMOs have included Green Giant products. Class Action Complaint, *Cox v. Gen. Mills, Inc.*, No. 3:12-cv-06377-WHA (N.D. Cal. Dec. 17, 2012). Products as varied as cookies, smoothie kits, canned tomatoes, cocoa, and cooking spray have been the targets of consumer class actions challenging their labeling as "natural" based on a variety of allegedly non-natural ingredients. *See* Class Action & Representative Action Complaint, *Jones v. ConAgra Foods, Inc.*, No. 3:12-cv-01633 (N.D. Cal. Apr. 2, 2012) (challenging "natural" labeling on PAM cooking spray, Hunt's canned tomato products, and Swiss Miss cocoa products); Complaint, *Anderson v. Jamba Juice Co.*, No. 12-CV-01213 YGR, 2012 WL 1576913 (N.D. Cal. Mar. 12, 2012) (challenging labeling of smoothie kit as "natural" based on ascorbic acid, steviol glycosides, xanthan gum, and citric acid content); Complaint, *Larsen v. Trader Joe's Co.*, No. 3:11-cv-05188-SI

(N.D. Cal. Oct. 24, 2011) (challenging "natural" label on a variety of products, including cookies and apple juice, containing ascorbic acid, xanthan gum, and/or other ingredients).

"Healthful" Claims

Plaintiffs also frequently challenge products claiming to be "healthful" when they contain trans fat, high sugar content, high sodium content, or artificial colors. In a prime example of such a case, *Lam v. General Mills, Inc.*, plaintiffs challenged the healthful claims made by General Mills on its Fruit Roll-Up snacks and other similar products. Class Action Complaint, No. 3:11-cv-05056-SC (N.D. Cal. Oct. 14, 2011). The complaint alleged that, while these snacks were presented as healthful by the company, they contained "trans fat, added sugars, and artificial food dyes; lacked significant amounts of real, natural fruit; and had no dietary fiber." *Id.* ¶3. Another example of this type of claim is a class action lawsuit in which plaintiffs claimed that defendant Ferrero's Nutella was falsely advertised under the New Jersey Consumer Fraud Act as a "nutritious," "wholesome" food, while allegedly having high saturated fat and sugar content. Class Action Complaint, *Glover v. Ferrero USA, Inc.*, No. 3:11-cv-01086-FLW-DEA (D.N.J. Feb. 27, 2011).

Defendants can challenge standing early with a motion to dismiss, or later at the summary judgment stage or in opposition to a plaintiff's motion to certify a class.

Other Labeling Claims

In addition to claims falling under the "natural" or "healthful" category, class action suits have been brought alleging other types of alleged misrepresentations found on food and beverage labels. For example, in *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008), the plaintiffs argued that the packaging of Gerber's Fruit Juice Snacks displayed a variety of fruits, but that in reality the only fruit in the snack was white grape juice, and the two most prominent ingredients were corn syrup and sugar. The plaintiffs in the class action *Fishbein v. All Market Inc.* claimed that All Market, Inc.'s VitaCoco coconut water does not contain the amount of electrolytes (sodium, magnesium, and potassium) stated on the label, and that it does not hydrate more effectively than less expensive sports drinks despite being labeled "super hydrating." Complaint, No. 1:11-cv-05580-JPO (S.D.N.Y. Aug. 10, 2011). In *Khasin v. Hershey Co.*, No. 5:12-CV-01862 EJD, 2012 WL 5471153 (N.D. Cal. Nov. 9, 2012), the plaintiffs challenged claims regarding nutrient content and antioxidant content in Hershey chocolate products. Plaintiffs have also alleged that an orange juice product is not "100 percent orange juice" if it is processed, pasteurized, and has compounds added to it to mask taste. *Veal v. Citrus World Inc.*, No. 2:12-CV-801-IPJ, 2013 WL 120761 (N.D. Ala. Jan. 8, 2013). And, in a recent lawsuit, plaintiffs alleged that Yoplait Greek yogurt is neither "Greek" nor "yogurt" because it is made using milk protein concentrate, rather than by straining. Summons & Complaint, *Taradejna v. Gen. Mills Inc.*, No. 0:12-cv-00993-SRN-LIB (D. Minn. Dec. 10, 2012).

Issues to Consider in Defending Food Labeling Class Actions

Removal to Federal Court Under the Class Action Fairness Act

If a class action lawsuit is initially filed in state court, it may be possible for the defendant to remove the action to federal court under the Class Action Fairness Act (CAFA). Under 28 U.S.C. §1332(d)(2):

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Certain limitations on original jurisdiction, based primarily on the proportion of proposed class members who are citizens of the state in which the action was initially filed, are set out in 28 U.S.C. §1332(d)(3) and (4). To determine whether the $5,000,000 threshold is met, the claims of all individual class members are aggregated. 28 U.S.C. §1332(d)(6).

Plaintiffs may attempt to defeat removal by stipulating that the award sought is capped at an amount below the $5,000,000 amount-in-controversy threshold for CAFA jurisdiction, as was done in a recent putative class action originally filed against Frito-Lay North America, Inc. in Arkansas state court. *Deaton v. Frito-Lay N. Am.*, Inc., No. 12-01029 (W.D. Ark.). The defendant removed the action to federal court pursuant to CAFA, but the plaintiff then sought to remand by adding a stipulation to the complaint promising not to seek any damages or award beyond the jurisdictional threshold. The stipulation was written in the first person (*e.g.*, "I do not seek and will not accept..."). The court nevertheless held that the stipulation was sufficient to bind the whole class, including absent class members, thus defeating jurisdiction under CAFA. *Deaton*, 2012 WL 3986804 (W.D. Ark. Sept. 11, 2012).

A recent decision by the Supreme Court of the United States, however, has limited plaintiffs' ability to use such tactics. In *Standard Fire Insurance Co. v. Knowles*, the Court held that a class action plaintiff cannot defeat federal jurisdiction by entering a stipulation limiting damages prior to certification of the class. No. 11-1450, ___ S. Ct. ___, 2013 WL 1104735 (U.S. Mar. 19, 2013). The Court's holding was based on the fact that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. *Id.* at *3.

Challenging the Plaintiff's Standing

One potential strategy for food companies defending class action suits against their product labeling is to challenge the

named plaintiff's standing to bring the lawsuit. Because standing must be established before a class can be certified, and before a court arrives at the merits of a lawsuit, defendants can challenge standing early with a motion to dismiss, or later at the summary judgment stage or in opposition to a plaintiff's motion to certify a class. If none of the named plaintiffs has standing, the district court lacks subject matter jurisdiction.

To establish standing under Article III of the United States Constitution, plaintiffs are required to demonstrate that they have suffered some actual or threatened injury. Some courts, such as the Northern District of Alabama in *Veal v. Citrus World, Inc.*, No. 2:12-CV-801-IPJ, 2013 WL 120761 (N.D. Ala. Jan. 8, 2013), also consider the "prudential" standing requirements of 1) whether the plaintiff's claims fall within the zone of interests that the relevant statute protects or regulates; 2) whether the complaint "raises abstract questions amounting to generalized grievances which are more appropriately resolved by legislative branches"; and 3) whether the plaintiff asserts his or her own rights rather than those of third parties. *See also Miller v. Ghirardelli*, No. C 12-04936, 2012 WL 6096593, at *5 (N.D. Cal. Dec. 7, 2012) (citing same prudential considerations).

In consumer class actions brought in federal court, individual state consumer protection statutes might impose standing requirements in addition to Article III requirements. For example, under California consumer protection statutes (UCL, FAL, and CLRA), a plaintiff only has standing to sue if he or she has suffered an injury-in-fact and has lost money or property because of the defendant's conduct.

Lack of Injury

An attack on a plaintiff's standing can provide grounds for dismissal where that plaintiff cannot establish an injury in the context of food labeling claims. For instance, in *Veal v. Citrus World, Inc.*, a breach of contract and breach of express warranty case, the Northern District of Alabama found that the named plaintiff did not have standing because he failed to allege an actual injury. He did not explain how purchasing packaged, rather than fresh-squeezed, orange juice caused him any injury. Nor did he properly allege future injury. The court also reviewed prudential standing considerations and determined that because the plaintiff did not allege the amount of the purported higher value charged for the alleged deceptively labeled orange juice, and did not allege what the orange juice would have been worth had it been the product the plaintiff believed it to be, the allegations were just "generalized grievances" that would be "more appropriately resolved by the legislative branches." The court also rejected the plaintiff's "benefit of the bargain" argument—that the plaintiff suffered injury because, had he known the truth about the orange juice, he would not have paid the higher price.

Nevertheless, certain courts have found that a showing of even a nominal economic injury can amount to an injury-in-fact. In *Ries v. Hornell Brewing Co., Inc.*, No. 10-01139 RS, 2012 WL 597247 (N.D. Cal. Nov. 27, 2012), the court ruled it was sufficient for standing purposes that the named plaintiffs had testified they suffered economic injury when they purchased the product for a dollar or two based on the representations on the product's label. Furthermore, the court found that plaintiffs need not show that the defendant's alleged misrepresentation was the *only*, or even the decisive, factor influencing plaintiffs to purchase the product. Similarly, in *Khasin v. Hershey Co.*, the Northern District of California found that the plaintiff satisfied Article III and UCL standing requirements and established injury-in-fact by alleging that he would not have purchased the product (and could have purchased a cheaper alternative) had it been properly labeled and had he known the ingredients. No. 5:12-CV-01862 EJD, 2012 WL 5471153.

Lack of Future Injury

When plaintiffs seek injunctive relief, defendants can point to a lack of future injury to defeat standing. In determining whether a named plaintiff has standing to seek injunctive relief, courts focus on whether the plaintiff has alleged future injury as a result of the defendant's conduct. The *Veal v. Citrus World, Inc.* court found that the plaintiff did not have standing to seek injunctive relief because he did not explain how the defendant's conduct would cause him injury in the future. Similarly, when ruling on a motion to certify a class in *Robinson v. Hornell Brewing Co.*, No. 11-2183 (JBS-JS), 2012 WL 6213777 (D.N.J. Dec. 13, 2012), the District of New Jersey found no Article III standing because the named plaintiff had testified and stated in written discovery that he would not purchase the product in the future. *Cf. Ries*, 2012 WL 597247 (holding that standing for injunctive relief was satisfied because there was no evidence in the record negating the plaintiffs' stated intent to purchase the beverages in the future).

In determining whether a named plaintiff has standing to seek injunctive relief, courts focus on whether the plaintiff has alleged future injury as a result of the defendant's conduct.

Lack of Standing to Represent Other Class Members

Another way for food industry defendants to challenge standing is to argue that a named plaintiff lacks standing to bring claims on behalf of class members who purchased a different flavor or variety of a product than was purchased by the named plaintiff. In *Miller v. Ghirardelli*, 2012 WL 6096593, the Northern District of California noted that there is no controlling authority on the issue of whether a plaintiff has standing to allege claims for products he or she did not purchase, noting that some courts have held that a plaintiff lacks standing to bring claims for products he or she did not purchase, but other courts have ruled that the standing question should be reserved and decided on a motion for class certification. This type of standing argument is strongest in cases in which the named plaintiff purchased a

product that is a totally different type of product than those purchased by some other plaintiffs in the class (even if all products were manufactured by the same company). In *Miller*, the court found that the Ghirardelli products (which included baking chips, drink powders, and wafers) were *not* "substantially similar" enough to confer standing on the named plaintiff.

Standing arguments are currently pending in consumer class actions before several district courts, so food industry companies should continue to monitor the emerging case law on this issue.

The plaintiff was challenging different language in the labels of the various products, and the court held that the commonalities in the alleged misrepresentations on the labels were not sufficient to confer standing on the plaintiff for the products he did not purchase. Moreover, because the products and labels were *so* dissimilar, the court declined to wait until the class certification stage to decide this issue, instead opting to dismiss the plaintiff's claims as to the products he did not purchase. Courts have held similarly in situations where the named plaintiff did not personally purchase the product at issue. *See Colucci v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2012 WL 6737800 (N.D. Cal. Dec. 28, 2012) (finding one of two named plaintiffs lacked standing because, even though the other named plaintiff (his wife) purchased the nutrition bars for him, he himself did not purchase any of the bars).

A number of courts, however, have ruled that the named plaintiff has standing if there is enough similarity between the purchased products and non-purchased products, and between the purchased and non-purchased products' labeling. When analyzing the similarities, courts consider whether the products are of the same kind and include mostly the same ingredients, as well as whether the product labels contain the same alleged misrepresentations. For example, in *Anderson v. Jamba Juice Co.*, No. 12-CV-01213 YGR, 2012 WL 3642835 (N.D. Cal. Aug. 25, 2012), the court found sufficient similarity to establish standing because all of the smoothie kits bore the same allegedly deceptive "All Natural" language despite containing ingredients the plaintiffs claimed were non-natural. *See also Colucci*, 2012 WL 6737800 (finding sufficient similarity where the products were all nutrition bars of the same size and shape, bearing the same "All-Natural Nutrition Bars" label, and differed only in flavor).

Standing arguments are currently pending in consumer class actions before several district courts, so food industry companies should continue to monitor the emerging case law on this issue.

Federal Preemption of Food Labeling Claims

Defendants have recently had some success asserting federal preemption as a defense to lawsuits challenging substantiation of food and beverage labeling claims. This has been particularly effective when the preemption arguments focus on state law claims that require the defendants to omit or add language to their federally approved or mandated product labeling.

NLEA prohibits individual states from imposing "any requirement respecting any claim of the type described by Section 343(r)(1) made in the label or labeling of food that is not identical to the requirement of Section 343(r)." In *Turek v. General Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011), the plaintiffs' claims were dismissed as preempted by NLEA. The plaintiffs claimed that the defendants' labeling for their "chewy bars" should have disclosed an allegedly non-natural fiber ingredient, inulin. Judge Posner, writing for the court, held that these claims were preempted because of NLEA's statutory requirement that the labeling state "the amount of... dietary fiber... contained in each serving size or other unit of measure." *Turek*, 662 F.3d at 427. Therefore, the ingredient disclaimer the plaintiffs sought was not identical to the NLEA labeling requirements, which require only identification of amount of dietary fiber. Similarly, in *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097 (N.D. Cal. 2012), certain of the plaintiffs' claims were dismissed as preempted because they conflicted with NLEA.

The *Veal v. Citrus World, Inc.* court, after holding that the plaintiff lacked standing, also addressed preemption, noting that the defendant's orange juice labeling was compliant with FDA regulations. 2013 WL 120761. Because the FDCA and its implementing regulations govern the language included on food and beverage labeling and the way that language is displayed, 21 U.S.C. 343(f), the court noted that the plaintiff would not be able to escape preemption of his state law claims. *Veal*, 2013 WL 120761, at *9–10.

However, some courts have held that certain state law consumer protection claims are not preempted because they *parallel* or *mirror* the labeling requirements under federal statutes and regulations. In *Jones v. ConAgra*, No. C 12-01633 CRB, 2012 WL 6569292 (N.D. Cal. Dec. 17, 2012), the court rejected ConAgra's argument that NLEA expressly preempted the plaintiffs' state law claims, holding that the plaintiffs' claims were based on state laws that parallel the requirements of NLEA. The court also declined to find conflict preemption by NLEA of the plaintiffs' claims because the relevant provisions in the California consumer protection statutes at issue were substantially the same as the provisions of NLEA. Although the court recognized there is no private right of action to enforce provisions of the FDCA pursuant to §337(a), the court also found that the California statutes do not impose labeling requirements different from federal law requirements and, thus, the FDCA did not preempt the plaintiffs' state law claims. Similarly, the court in *Khasin* found no FDCA or NLEA preemption where the plaintiffs' state law claims did not impose additional labeling requirements and, thus, were parallel to federal law. 2012 WL 5471153.

The *Jones* court held that the plaintiffs' organic food labeling claims were not expressly preempted by OFPA because the claims did not concern the organic certification of the defendants' food products, and because the Eighth Circuit had held

in *In re Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation*, 621 F.3d 781, 792 (8th Cir. 2011), that OFPA does not expressly preempt consumer protection statute claims, state law tort claims, or common law claims. Because the court found that the plaintiffs' state law claims did not conflict with OFPA's requirements, the court ruled there was no express preemption. The court did not find conflict preemption either, holding that the California statutes did not impose organic labeling requirements additional to those in OFPA.

Federal preemption of food consumer class action claims is being actively litigated in courts throughout the country. In California, for example, the case law has been shifting over the past year or so. For instance, the Ninth Circuit recently vacated its decision in *Degelmann v. Advanced Medical Optics Inc.*, 659 F.3d 835 (9th Cir. 2011), which was frequently cited to argue conflict preemption of plaintiffs' state law claims when state law presents an obstacle to the completion of Congress's objectives. 699 F.3d 1103 (9th Cir. 2012). Other recent California cases have made reference to primary jurisdiction in addition to (or instead of) federal preemption. (*See* discussion, *infra*.)

As the body of preemption case law concerning food labeling continues to grow, it remains to be seen what state law claims can survive a federal preemption defense.

Primary Jurisdiction

Defendants are increasingly alleging the defense of primary jurisdiction in tandem with their preemption arguments. This defense often arises in the context of claims that a defendant's use of the terms "all natural," "pure natural," or another similar variant on a product label is false and misleading. Under the doctrine of primary jurisdiction, defendants urge the court not to intervene when doing so would undermine the FDA's comprehensive regulatory scheme with respect to labeling pursuant to the FDCA. Case law provides that the primary jurisdiction doctrine enables courts, in their discretion, to determine that "initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). The court held that the doctrine applies where four elements are met: where there is "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Id.* at 781–82. If primary jurisdiction is employed, the court can either stay proceedings or dismiss the case without prejudice. *Id.* at 781.

This defense is particularly well suited to situations where the FDA has promulgated specific guidelines based on agency expertise relating to the claims at issue. For example, in *Astiana v. Hain Celestial Group, Inc.*, No. C 11-6342 PJH, 2012 WL 5873585 (N.D. Cal. Nov. 19, 2012), the court declined to determine whether the defendants' use of the term "natural" on cosmetic labels was false or misleading. *Id.* at *3. It reasoned that doing so would "risk undercutting the FDA's expert judgments and authority." *Id.* (citing *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1177 (9th Cir. 2012)). This was especially so because the FDA's regulations for cosmetic labeling are "remarkably specific" and "[t]he level of detail provided in these regulations shows that the area of cosmetics labeling is indeed comprehensively regulated by the FDA." *Id.* at *2.

Similarly, in *Pom Wonderful*, the court cited the specificity of FDA regulations with regard to the naming and labeling of foods and beverages in finding the plaintiff's claims barred. *See* 679 F.3d at 1176–77. There, the plaintiff, Pom Wonderful, alleged that the Coca-Cola Company misled customers by labeling its Minute Maid juice as "Pomegranate Blueberry," even though those fruits allegedly only comprised a minute proportion of the product. *See id.* at 1172–73.

The need for uniformity was a paramount consideration in *Taradejna v. General Mills, Inc.*, No. 12-993 (SRN/LIB), 2012 WL 6113146 (D. Minn. Dec. 10, 2012), where the plaintiff challenged the labeling of Yoplait Greek yogurt, alleging that "'Yoplait Greek yogurt is neither yogurt, nor Greek, as those terms are used in the industry and as defined by regulation.'" *Taradejna*, 2012 WL 6113146, at *1 (quoting Pl.'s Summons & Complaint ¶3). In addition to citing the specific FDA regulations defining standards of identity for yogurt (21 C.F.R. §131.200), the court emphasized that the FDA's "decision on the permitted ingredients in yogurt will ensure national uniformity in labeling, utilizing the Agency's special expertise in this regard." *Taradejna*, 2012 WL 6113146, at *6.

As the body of preemption case law concerning food labeling continues to grow, it remains to be seen what state law claims can survive a federal preemption defense.

This was an added incentive for invoking the primary jurisdiction doctrine, as several other yogurt lawsuits involving similar issues were pending across the country. *See* Class Action Complaint, *Conroy v. Dannon Co., Inc.*, No. 12-CV-6901 (S.D.N.Y. Sept. 11, 2012); First Amended Class Action Complaint, *Smith v. Cabot Creamery Coop. Inc.*, No. 3:12-CV-4591 (N.D. Cal. Oct. 9, 2012).

Courts have neglected to apply the primary jurisdiction doctrine where defendants fail to demonstrate a need for uniformity or FDA expertise. In *Jones*, 2012 WL 6569393, class action plaintiffs alleged that various products were deceptively labeled as 100 percent natural when they purportedly included chemical preservatives and other allegedly artificial ingredients. *Lockwood v. ConAgra Foods, Inc.*, 597 F. Supp. 2d 1028 (N.D. Cal. 2009), also involved claims that the label of "all natural" on pasta sauce was misleading because the sauce included high fructose corn syrup. In both cases, the court reasoned that the FDA has been asked to define "natural" formally in the food labeling context and it "has declined to do so because it is not a priority and the FDA has limited resources." *Jones*, 2012 WL 6569393, at *6

(citing *Lockwood*, 597 F. Supp. 2d at 1034–35). Further, the *Jones* and *Lockwood* courts held that the FDA's technical expertise was not required in this context because courts routinely decide whether conduct is misleading. *See id.* at *7 (citing *Lockwood*, 597 F. Supp. 2d at 1035). In *Jones*, the court distinguished *Taradejna*'s application of the primary jurisdiction doctrine on the basis that the FDA had proposed a rule specifically concerning the standard of identity for yogurt. *See id.* at *6 n.4. The court also distinguished *Astiana*, citing an absence of FDA guidance on the word "natural" in the cosmetics context, in contrast to an FDA policy statement on the subject in the food context. *Id.*

The court found that the Froot Loops cereal box would not mislead a reasonable consumer into thinking that the product contained actual fruit.

Courts will likely handle future cases in a fact-specific manner, with consideration of the regulations at issue, the need for uniformity, and FDA expertise being deciding factors in whether to apply the primary jurisdiction doctrine.

Breach of Express Warranty Claims Based on Magnuson-Moss Warranty Act

Plaintiffs in numerous class actions involving food labeling claims have attempted to establish a cause of action for breach of express warranty under the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C. §§2301, *et seq.* These claims have largely been unsuccessful for a variety of reasons, and are typically dismissed with prejudice.

The MMWA is expressly "inapplicable to any written warranty the making or content of which is otherwise governed by Federal law." 15 U.S.C. §2311(d). Because the FDCA and its implementing regulations govern the labeling of foods and beverages, MMWA is inapplicable to food and beverage labeling claims. *Hairston v. S. Beach Beverage Co.*, No. CV 12-1429-JFW (DTBx), 2012 WL 1893818, at *5–6 (C.D. Cal. May 18, 2012).

In addition, plaintiffs typically are unable to allege sufficient facts to establish that food labeling meets the narrow definition of "written warranty" established within MMWA. Under MMWA, a "written warranty" is:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.

15 U.S.C. §2301(6). With respect to food labeling, plaintiffs typically are unable to allege that the label promises a defect-free product or guarantees a level of performance over a specific time period; claims such as "all natural" are considered product descriptions, rather than promises that the product is defect-free or will perform a certain way. *See Jones*, 2012 WL 6569393; *Anderson*, 2012 WL 3642835 (dismissing MMWA claims without prejudice); *Hairston*, 2012 WL 1893818. This disqualifies food labels as "written warranties" under 15 U.S.C. §2301(6)(A). In addition, food labels typically do not promise refund, repair, or replacement if the product fails to meet specifications. *Hairston*, 2012 WL 1893818, at *6. This disqualifies food labels as "written warranties" under 15 U.S.C. §2301(6)(B). Courts have also held that alleged artificial or synthetic ingredients do not constitute a "defect" for purposes of MMWA, even though the product is labeled as "all natural." *See Colucci v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2012 WL 6737800, at *6 (N.D. Cal. Dec. 28, 2012).

The Common Sense Approach: Plausibility of Claims

Defendants have also had some success invoking common sense and plausibility to challenge the sufficiency of plaintiffs' claims relating to food and beverage labeling. For example, to establish a deceptive labeling claim under California statutes, plaintiffs must allege that a defendant's product label is "likely to deceive a reasonable consumer." *McKinnis v. Kellogg USA*, No. CV 07-2611 ABC (RCx), 2007 WL 4766060, at *3 (C.D. Cal. Sept. 19, 2007). Assessing this standard, several courts have found that plaintiffs' consumer class action lawsuits alleging claims based on food labels simply are not plausible. In *Veal v. Citrus World, Inc.*, while finding that the named plaintiff lacked standing to pursue his claims, the court also criticized the plaintiff for allegedly believing that the packaged orange juice was actually "fresh squeezed" orange juice. The court noted that it is common sense that a container on a grocery store shelf bearing an expiration date several weeks later would not hold a "fresh" product. Similarly, in *McKinnis v. Kellogg USA*, the court found that the Froot Loops cereal box would not mislead a reasonable consumer into thinking that the product contained actual fruit. The court opined that no reasonable consumer would think that the name "Froot Loops," which does not even properly spell the word "fruit," was describing the product as actually containing fruit. The court further found that a reasonable consumer would not think that the actual cereal pieces depicted pieces of fruit; nor would a reasonable consumer believe that the pictures of fruit surrounding the words "natural fruit flavors" on the cereal box indicated that the cereal contained actual fruit.

Settlements

In the face of this new type of litigation involving potentially large class action lawsuits, food industry companies will need to consult with experienced counsel to consider potential defenses versus settlement options. Settlement, however, may arguably not always be the end of the matter.

Notice of appeal papers have been filed in the Third Circuit on behalf of several class members after a settlement order was en-

Food Labeling, continued on page 72

Food Labeling, from page 30
tered in July 2012 in the class action *Glover v. Ferrero USA, Inc. See, e.g.*, No. 12-3456 (3d Cir.). The plaintiffs in the underlying case alleged that Ferrero's Nutella product was falsely advertised *under* the New Jersey Consumer Fraud Act as a nutritious, wholesome food, despite having a claimed high saturated fat and sugar content.

Notice of appeal papers have also been filed in the Second Circuit on behalf of a class member after a settlement order was entered in August 2012 in the class action *Fishbein v. All Market Inc.*, No. 12-3892 (2d Cir.). In the underlying action, the plaintiffs alleged that All Market, Inc.'s VitaCoco coconut water did not contain the amount of electrolytes (sodium, magnesium, potassium) stated on the label, and that it allegedly did not hydrate more effectively than less expensive sports drinks despite being labeled "super hydrating."

While the threat of class certification can incentivize some defendants to participate in settlement negotiations, emerging trends in the success of various defenses discussed above may equip defendants with various options to oppose claims. Differences in states' laws may be used to defeat nationwide class certification. Additionally, certain claims may be amenable to early dismissal. As the body of case law grows, precedent involving these tactics may strengthen defensive opportunities, and we may then see the rate of settlement begin to decline. FD

Electronic Info, from page 47

Third, the proposed rule provides a variety of considerations that a court should weigh in calibrating its response to a loss of information. Specifically, the rule provides five factors that courts should use to determine whether a party failed to preserve discoverable information that reasonably should have been preserved or whether the failure was willful or in bad faith. These factors give practitioners some guidance about how courts will perceive their actions and give courts direction about appropriate circumstances for sanctions. Finally, the proposed rule gives courts rule-based authority to impose sanctions, eliminating the need for courts to resort to their inherent authority as so many have in the past.

As electronic discovery continues to increase, specific standards relating to preserving discoverable information, particularly electronically stored information, will continue to be critically important to both plaintiffs and defendants. The proposed rule will go a long way to provide some certainty to courts and to litigants, and it should incentivize parties to make reasonable decisions about preservation issues and to avoid the urge to preserve excessively, which increases the cost of discovery. The proposed rule should also conserve the resources of both the courts and the litigating parties by reducing the motivation to spend time arguing about preservation and spoliation issues. Ultimately the proposal by the Advisory Committee Rules of Civil Procedure is still just that—a proposal. It may change, and if and when Congress agrees to adopt a version, the courts will interpret it. For now, the proposed rule represents a step toward clarity and consistency for litigants and should further assist courts in managing the complicated issues that arise from the ever-expanding digital age. FD

Appellate, from page 62
Justices Scalia, and Roberts. *See* Jennifer Haberkorn, *Obama Makes a Play for Scalia*, Politico (Feb. 28, 2012), http://www.politico.com/news/stories/0212/73412.html (last accessed Mar. 13, 2013). The administration quoted frequently from Judge Jeffrey Sutton's opinion upholding the individual mandate as a valid exercise of the Commerce Clause. *See id.* Judge Sutton is a former law clerk to Justice Scalia and one who Justice Scalia has said that he holds in regard. *See id.* As to Justice Roberts, the administration focused on his decision in *United States v. Comstock*, 130 S. Ct. 1949 (2010). While the Commerce Clause arguments ultimately did not succeed, they reflect one particular approach to trying to appeal to Justice Roberts. As history will now show, however, it was an issue that drew substantial less attention, the tax issue, which ultimately swayed Justice Roberts.

Even when cases may not involve issues about which the judges may have predispositions, learning the traits of a bench can have benefits. For example, understanding if a judge tends to react from the gut, relies on personal experience, or emphasizes policy, can help you understand the nature of the judge's questions and how to respond best to his or her concerns. As Justice Scalia has stated, "you should scope out the judges involved in your case before you write your brief or before you stand up." This is because understanding the themes and the factors that drive a judge can help you understand the nature of his or her questions and how to frame an issue to coincide better with the judge's philosophy or approach.

Conclusion

Importantly, none of the strategies discussed in this article alone can win your case because as much as we have become better at understanding certain tendencies, humans are inherently unpredictable. How many people predicted after the oral argument on the Affordable Care Act that the Supreme Court would uphold it, let alone on the basis of Congress' taxing power? Indeed, while research suggests that strategic framing can produce unconscious errors in judgment, the goal is not to manipulate a court into making a decision as some politicians attempt to do. Nor, in my opinion, is that really probable at the appellate level. As Tversky and Kahneman have stated, formulating a question is only part of the equation. The other part is an individual's conscience acquired through years of personal experiences, education, training, and moral development. Those factors, in a sense, become the anchor by which your proposed frame is judged. It is speaking to those factors in a way that is consistent with a judge's general outlook that can give you a better chance of winning.

For more effective advocacy, therefore, practitioners should use these strategies in combination. When someone uses them correctly and credibly, they can increase the chances of achieving success in an appeal. FD