DAMAGES

CONSUMER

Food companies have several significant defenses to consumer fraud class actions over product labeling, say attorneys Joshua Briones and Crystal Lopez, and analyst Grace Rosales. The authors focus on damages, an area in which plaintiffs have ''struggled to persuade courts that their proposed damages models are a reliable method of calculating class wide damages.''

False Labeling Suits Get Hung Up On Faulty Damages Models

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Consumers want ''natural'', ''healthy'' and ''organic'' products and labels that identify them accurately. Unfortunately, enterprising attorneys are more frequently filing baseless, lawyer-driven strike suits alleging accurate labels are somehow false and misleading. The trend began with class actions challenging products labeled as ''natural,'' but other advertising claims are increasingly being challenged. Complaints have been filed with respect to the use of the phrase ''evaporated cane juice'' instead of sugar, labeling of trans fats, claims that products were ''imported from'' or ''made in'' certain locations, and whether products were ''handmade.'' Products as diverse as tea, guacamole and almond milk have been the subject of litigation. The Northern District of California, once dubbed the Food Court, is no longer alone. Cases are

filed in both federal and state courts across the country. Often, the filing of one lawsuit prompts copycat lawsuits in other jurisdictions.

It All Comes Down To Damages

Beyond proving the factual truth of the allegedly misleading labeling claims, food companies have several significant defenses to consumer fraud class actions. In this article, we focus on one: plaintiffs have struggled to persuade courts that their proposed damages models are a reliable method of calculating class wide damages.

An important question in the class certification process is the evaluation of the predominance of common issues with respect to consumer injury and damages. In order to certify a class, Federal Rule 23(b) requires the court to determine that "questions of law or fact common to class members predominate over any questions affecting only individual members." This requirement is necessary for a class approach to be superior to individualized trials in terms of both the fairness and the efficiency of the adjudicating process. The question of predominance can be informed by economic analysis — in particular, through an examination of the behavior of consumers and retailers, including pricing, consumer preferences and purchasing decisions. Generally, a consumer's damages in a false advertising case are equal to the amount of money needed to make the consumer "whole" — that is, to compensate the consumer for the harm caused by the false claim.

Some class action complaints request "full refunds," claiming that a mislabeled product is worthless. Courts generally reject full-refund damages models and hold that the proper measure of damages is the difference between the value of the product as represented and the price paid. As one court aptly noted, return of the full retail or wholesale price is not a proper measure of restitution because it fails to take into account the value class members received from the products. In the food and beverage context, for example, consumers receive calories, nutrition, vitamins and minerals. Plaintiffs often engage damages experts who purport to measure the difference between what was represented and the price paid, and attempt to recover that difference multiplied by the total sales of the company for a particular period and jurisdiction.

Measuring the actual value received by a consumer and the but-for value the consumer would have received absent the false labeling requires a fact-intensive economic inquiry. That inquiry should address questions related to individual consumers' behavior and preferences. Under some circumstances, one may be able to obtain estimates of the average preferences for a broad class of consumers through surveys or other common evidence. However, unless it could be shown that all class members had identical characteristics, those averages would not inform a determination of individual preferences outside of the subset of the class included in the surveys or specifically covered by the other available common evidence.

Thus, individual questions with respect to consumer behavior and preferences are critical to the determination of whether each member of the proposed class was injured by the false claims as well as the measurement of the values of those injuries. Determining how each class member was affected by the false claim would re-quire information specific to that consumer, potentially obtainable only through an interview or other individualized inquiry. The question of predominance also arises when determining the actual amount consumers paid for the product. Retail prices often vary across regions, store types (grocery, convenience, mass merchandise, etc.) and over time. Retail products also may be subject to discounting through coupons or rebates. Although sales data from checkout scanners or consumer surveys may shed light on the average amounts paid by broad groups of consumers, determining individual class members' expenditures is again likely to require individualized inquiries. Similarly, the availability, pricing and characteristics of products which may represent each consumer's available alternatives likely depend on, among other factors, the consumer's preferences, preferred shopping locations and the relevant time frame of actual purchases. Again, it is likely that these facts could only be developed through individualized inquiries.

Brazil and *Briseno*

Two seminal cases address these questions: *Brazil v. Dole Packaged Foods, LLC* and *Briseno v. ConAgra, Inc.* Both cases arise from nearly identical facts: the plaintiffs allege that the defendants' product labels are false or misleading in violation of various state laws because they claim to be "natural." The same panel of judges—Judges Fletcher, Christen, and Friedland—are involved. In considering these two cases, the Ninth Circuit has a chance to set a major precedent that could either reduce the flow of food-labeling suits into California-based federal courts or open the spigot even wider.

The similarities between the two cases are striking. The plaintiffs filed putative class actions alleging that the defendants violated various statutory and common-law causes of action by labeling some of their products as "All Natural" or "100% Natural." Brazil claimed that Dole's use of "All Natural" on several of its juices' labels is false or misleading because the company added ascorbic acid (vitamin C) and citric acid. Both additives occur naturally in the juice products. Similarly, Briseno claims that ConAgra's "100% Natural" label is false or misleading because the Wesson Oil in question contains genetically modified organisms (GMOs).

In *Brazil*, the plaintiff appealed three district court holdings. First, the court dismissed Brazil's California common law fraud claims and several of his state statutory claims because they did not adequately meet the pleading requirements of Federal Rule of Civil Procedure 9. Further, several of his "causes of action" were in fact duplicative remedies that were unnecessary given his surviving state statutory claims. Second, after initially certifying Brazil's claim as a class action, the court decertified the damages class because Brazil's proposed damages model could not establish damages on a class-wide basis through common proof and therefore individual damage issues predominated in violation of Rule 23. Third, the district court granted Dole's motion for summary judgment because Brazil could not demonstrate that a reasonable person would be deceived by Dole's All Natural juice labels. Since the labels were not misleading, they could not be "unlawful" under the state statutes.

In contrast, the *Briseno* appeal is much more straightforward. The district court certified 11 consoli-

dated putative class actions. The cases involved plaintiffs from 11 states each alleging state-specific statutory violations based on the same Wesson Oil label. After the district court issued its certification order, ConAgra successfully sought immediate review of that decision.

Wrestling With the Damages Issue

As to class certification, the parties in both *Brazil* and *Briseno* contest nearly every element of Rule 23's class-certification mechanism: typicality, predominance, superiority, and ascertainability. The parties in both cases hotly contest whose damages model can accurately calculate class-wide injury. Because the plaintiffs in each case use similar methods to attempt to calculate class-wide damages, and the district courts arrived at opposite conclusions about the models' accuracy, the Ninth Circuit should address the issue head on and clarify the requirements for a damages-calculation model under Rule 23.

Fortunately for defendants, the Ninth Circuit opinion in *Brazil v. Dole Packaged Foods* confirms that an early motion for decertification is one way to eviscerate these meritless cases.

The Ninth Circuit sided with plaintiff and ruled that a jury could conclude that the "All Natural Fruit" description is misleading to a reasonable consumer. However, the Court also gave defendants a partial win when it ruled that the lower court did not err in decertifying the class. First, the Court found that the damages for class-action plaintiffs seeking to recover money (as distinguished from injunctive relief) are limited to the price premium: the difference between the price consumers paid and the value of the fruit they bought. The Court explained that a full refund would only be appropriate if the product purchased was worthless. The Court concluded that since Brazil hadn't proven that the Dole products lacked value, recovery would be limited to the premium paid under the misunderstanding that the products were indeed all-natural.

Second, the court explained that to satisfy the predominance requirement for certification of a damages class under Rule 23(b)(3), plaintiffs must "explain how this premium could be calculated with proof common to the class." The Court ultimately held that the district court had not abused its discretion in granting the motion to decertify "[b]ecause Brazil did not explain how this premium could be calculated with proof common to the class." The Ninth Circuit thus held that Brazil's individual actions could continue but his class action could not. The Court remanded the case to allow plaintiff to pursue injunctive relief, as well as his individual claim for restitution.

Unlike the experts in *Brazil*, *Briseno's* expert combined a regression analysis with a conjoint study that isolates the price premium specifically tied to consumer's impression of the label's statements. This approach has never been used in a consumer fraud suit. The District Court Judge Morrow certified the class in February 2015.

While some legal experts believe that *Briseno* can become precedent, others believe that the regression-only analysis is not thorough enough to withstand the mandate of a damage model capable of identifying a particular harm that can be measured across an entire class under the 2013 Supreme Court decision in *Comcast v Behrend*.

Another important outcome from *Briseno* could also be whether or not the element of class member ascertainability is satisfied by clearly defining who might qualify for a particular class. Currently, Ninth Circuit courts are split on this issue.

Take Aways

The combination of the ever-increasing number of food, beverage and other "mislabeling" class actions and the unique class damages challenges they pose, together with the increased scrutiny of proposed class damages models, means that courts and litigators are being forced to grapple with these and other advanced economic and statistical modeling methodologies. The food industry has become a popular target for plaintiffs' attorneys. In addition, with current trends focused on maintaining good health, plaintiffs' lawyers view food labeling class actions in the same health-related vein as the big tobacco cases, leading to increased media and press attention being given to food-law litigation contributing to its popularity. Given these factors and the fact that new and more health-related claims are being made on labels each and every day, litigation is likely to hold strong in this area for years to come.

Even though the Ninth Circuit's decision in *Brazil* is unpublished, the ruling on class certification reaffirms that class-action plaintiffs seeking to recover money must explain how the price premium attributable to the alleged misleading product label would be calculated with proof common to the class. This means that even if defendants lose an attack on the merits, they can still regain a litigation advantage by opposing class certification or filing an early motion to decertify showing that the plaintiffs' damage model cannot be calculated with proof common to the class. Defendants would do well to attack plaintiff's damages model from the outset in the context of early resolution /negotiations.