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PERSPECTIVE

## Think there's fruit in your Froot Loops?

By Martin Quinn

Does Frosted Mini-Wheats cereal improve a child's attentiveness in school? Do Fruit Roll-Ups and Fruit by the Foot have to contain real fruit? Would a reasonable consumer expect Cap'n Crunch with Crunchberries cereal to contain real berries? These questions and many similar food labeling issues raised in class actions are increasingly on the desks of federal judges and mediators.

Food labeling cases present myriad different claims and defenses that must be addressed in mediation. While the legal complexity of these cases enhances the risk to both sides, they also tend to make defendants intransigent because they have so many legal traps available to obtain a dismissal. Fortunately, mediation typically occurs after an initial round of legal motions, which may have shrunken the number of open legal issues.

Class plaintiffs typically allege that a food product's ingredients do not square with its advertised contents (fruit, anti-oxidants, nutrients, fiber, trans-fat, etc.), it does not convey the advertised health benefits (naturally regulates digestive system, helps block cholesterol, etc.), its benefits are not "clinically proven" as represented, or that its claimed qualities do not exist (fresh, natural, free of additives, etc.).

Defendants will attack federal claims on the ground that there is no private right of action to enforce the federal Food, Drug, and Cosmetic Act, so cases brought in California typically allege claims under the state Consumer Legal Remedies Act, Unfair Competition Law or Cartwright Act. Preemption is frequently an issue as defendants will assert that the Food and Drug Administration or the Federal Trade Commission has exclusive authority to regulate advertising and food ingredient labeling. Often defendants will assert that no reasonable consumer could believe that fancifully named foods such as "crunchberries" or "froot loops" actually contain real berries or fruit.

Certifying a class in food labeling cases presents special challenges. Plaintiffs will allege a class consisting of all persons who purchased the product at issue during a certain time period, or within a certain geographic area. But

how is the class to be ascertained: Who bought which of the myriad products that may be at issue (each with slightly different labeling)? Who saw which label or advertisement? Since consumers do not keep years of grocery receipts, the class can usually be ascertained only in a post-judgment or settlement claim process — a reality that may make some judges averse to certification. Another problem is manageability: there are usually tens or hundreds of thousands of potential class members, which increases the cost and difficulty of giving appropriate notices. Finally, defendants will argue that individual issues of injury and damage predominate over common impacts. One class member fed Frosted Mini-Wheats to her daughter to improve her attentiveness; another class member merely worried about whether her niece was eating this cereal product.

Finally, damages and nonmonetary relief are fraught with evidentiary and legal issues. Settlements in these cases almost invariably involve some corrective nonmonetary relief. The defendant will often fairly readily agree to — or may have already implemented — a change to its advertising or labeling prospectively. With much greater reluctance, a defendant may agree to a period of corrective advertising to dispel consumers' alleged confusion. A fund of money is commonly set aside to compensate consumers based on the purchase prices of the products that they certify that they bought. The issue of a cy pres fund often arises, either as part of the original settlement relief, or as a way to dispose of the remainder of the common fund after all claims have been processed. The 9th U.S. Circuit Court of Appeals has recently instructed counsel and district courts that there must be a "driving nexus" between the class members and the beneficiaries of a cy pres fund.

Food labeling cases are well-suited to mediation. The defendant can resolve the case quickly and confidentially, thus avoiding bad publicity from a drawn-out legal battle over the fairness of its marketing. Plaintiffs, who are often public interest groups, can obtain the prompt enforceable changes to misleading labels that they are really after. Both parties benefit from mediation's flexibility in devising noncash remedies a court will not order. Although damages are

usually a secondary objective, a good mediator will speedily bring about agreement on cash compensation to the class. Determining the amount of attorney fees to class counsel is easier with an experienced mediator present who can make recommendations, or even determine the amount to be paid in a high-low or similar process. In short, mediation presents the best forum for obtaining the win-win resolution that is possible in these cases.

An imaginative tool to generate settlements is the use of the self-policing processes of the National Advertising Division (NAD) of the Advertising Self-Regulatory Council. In some cases defendants will seek an NAD determination as to the truthfulness of labeling or advertising in an effort to head off litigation, or to provide a basis for settlement of a pending action. Proposals have been made for dismissal of a pending action so that it can be prosecuted at the NAD. Although the NAD is hardly a substitute for a legal action in the eyes of most class counsel, it provides at least another option for the mediator.

Because nonmonetary terms will almost surely be critical, counsel must know in advance what class counsel will demand and what defense counsel can offer. Discussions in advance of the session between counsel and the mediator to nail down the outlines and some details of nonmonetary terms are very helpful.

A common impediment is the defendant's concern not to agree to relief in terms of altered labeling or corrective advertising that goes too far beyond what its competitors are doing. If major competitors are touting "fruit" in products, the defendant will be reluctant to give them a competitive advantage by eliminating all references to "fruit." Delicate and nuanced discussions are needed to find the remedy that goes far enough but not too far.

Negotiations over attorneys' fees must wait reaching a tentative resolution of the remedy to the class in order to avoid putting class counsel in the conflict position of simultaneously negotiating for cash for his clients and for herself. Of course,



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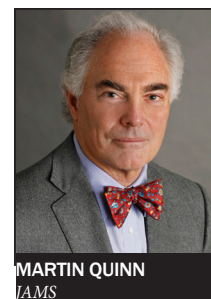
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defendants resist this because they want to know the entirety of what they will pay before they agree to a class remedy. So the mediator needs to tread delicately, and offer the defendants at least hints and winks at what the attorney fee demand is likely to be. Once the class remedy has been agreed, subject to an agreement also on fees, the mediator will ask class counsel to present a demand for fees and costs. It is essential that class counsel have available the amount of their lode-star (hourly rate times number of hours) in credible detail, since that will be the starting point for negotiations. It is also essential for defense counsel to prepare their client for the level of demand that is likely to be made, so that the defendant does not faint from sticker shock.

If negotiations reach a sticking point, the mediator may employ a mediator's proposal or other impasse-breaking tools to break through the parties' resistance. If the proposal will involve a number of complex terms (labeling changes, common fund, notice provisions, attorneys' fees, etc.), it is good practice for the mediator to type up a formal proposal for the parties' consideration.

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