

Food Litigation Newsletter



THIS NEWSLETTER AIMS to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

ABOUT

Perkins Coie's Food Litigation Group defends packaged food companies in cases throughout the country.

Please visit our website at perkinscoie.com/foodlitnews for more information.

RECENT SIGNIFICANT DEVELOPMENTS AND RULINGS

After Another Round of Motions, the Court Dismisses Some Claims and Stays Others

Thomas v. Costco Wholesale Corp., No. 5:12cv2908 (N.D. Cal.): Plaintiff alleged that eight of Costco's Kirkland Signature food products are improperly labeled in violation of state and federal law. After the court dismissed some of plaintiff's claims in March, plaintiff filed an amended complaint adding two new claims: violations of the implied warranty of merchantability and negligent misrepresentation. The court dismissed both new claims and stayed other claims involving Evaporated Cane Juice ("ECJ") under the primary jurisdiction doctrine. Plaintiff's claim for violation of the implied warranty of merchantability was dismissed because plaintiff failed to allege that Costco's food products lacked a basic degree of fitness or would be unsafe for consumption. The court noted that mislabeling of a product is not the sort of "fundamental defect" that the implied warranty of merchantability is intended to protect against. The court dismissed plaintiff's negligent misrepresentation claim, finding that plaintiff failed to allege any affirmative misrepresentations made by Costco, and instead only alleged omissions, which is insufficient. The court granted Costco's request to stay plaintiff's claims involving ECJ until the FDA issues its final guidance. *Order*.

Damages Class Decertified

Brazil v. Dole Food Company, Inc. et al., No. 5:12-cv-01831(N.D. Cal.): The court decertified a damages class but declined to certify an injunction class in this action where plaintiff alleges that Dole's fruit products are misbranded as "all natural." In decertifying the damages class, the court ruled that the damages report prepared by plaintiff's expert failed to ascertain the price premium attributable to the "all natural" label by controlling for other variables that could also impact pricing of the products (such as advertising expenditures). Plaintiff's expert also failed to verify whether competing products made "all natural" claims, did not account for the possibility that packaging may make more than one claim (e.g. "all natural" and "sugar free"), and did not account for variations in how different products were packaged. *Order*.

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NEW FILINGS

Seidman v. Snack Factory LLC, No. 14cv62547 (S.D. Fla.): Plaintiffs allege that defendant falsely labels its Pretzel Crisps “all natural” when they contain synthetic or artificial ingredients such as maltodextrin, soybean oil, dextrose and caramel color. [Complaint.](#)

Browne v. The Coca-Cola Co., No. 14-cv-02687 (S.D. Cal.): Plaintiffs allege that defendant falsely promoted and sold its Minute Maid Pomegranate Blueberry 100% Fruit Juice Blend as a product that provides brain support benefits. [Complaint.](#)

Cruz v. Anheuser-Busch, LLC, No. BC563150 (L.A. Sup. Ct.): Plaintiffs allege that defendant falsely advertised beverages as being low in calories and carbohydrates. [Complaint.](#)

Michelle Richard v. Whole Foods Market California Inc., No. BC563304 (L.A. Sup.): Plaintiffs allege that defendant improperly advertised and sold certain Blue Diamond products with the Non-GMO Project label when these products have not been verified by the Non-GMO Project. [Complaint.](#)