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Class and Derivative Actions
Food and Beverage Law Team

To: Our Clients and Friends

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California Court Decision Provides Guidance on Defending Against Food-Labeling Class Actions

A current trend in consumer class action litigation across the country focuses on food and beverage labeling. Plaintiffs will allege that products labeled as "all natural," being a good source of a certain nutrient, or having "no artificial ingredients" are deceptive and violate various unfair competition laws. The United States District Court for the Northern District of California has become a particularly active forum for these claims, earning the nickname, "the food court." That court often denies motions to dismiss and grants class certification, largely relying on California's consumer-friendly False Advertising Law, Unfair Competition Law, and Consumers Legal Remedies Act. A recent decision from one of the earliest "all natural" class actions, however, emphasizes that defendants can succeed against these claims even after losing the motion to dismiss and motion for class certification. This decision reminds us that, as with any class action, it is important to prepare the case as if you will take it to trial (and be prepared to try it) and to put the plaintiffs to the test of meeting the essential elements of their claims.

Reis v. AriZona Beverages USA LLC, No. 10-01139 RS (N.D. Cal. Mar. 28, 2013), began in March 2010 and is one of the earlier "all natural" food labeling cases. Those two plaintiffs alleged that the defendants falsely labeled AriZona Iced Tea as "all natural," "100 percent natural," and "natural" even though the products contain high fructose corn syrup and citric acid. The plaintiffs contended that those ingredients are not natural and that the marketing, advertising, and labeling was deceptive. The Northern District of California denied a motion to dismiss, denied a motion for summary judgment, and certified a class under Federal Rule of Civil Procedure 23(b)(2) to pursue claims under California law.

Things changed, however, after discovery had closed. The plaintiffs never disclosed any expert opinion as to whether high fructose corn syrup and citric acid are not "natural," and they did not provide any evidence as to how to measure restitution or disgorgement under California law. Thus, the defendants renewed their motion for summary judgment.

The court took a particularly harsh view of plaintiffs' failure to conduct basic discovery or provide evidence supporting essential elements of the claims. Central to the claims, of course, is the assertion that high fructose corn syrup and citric acid are not "natural." The defendants provided an expert report from a food scientist who described the processes of making those ingredients, and who opined that they are natural. The defendants also provided declarations from their suppliers reflecting that the high fructose corn syrup supplied to defendants satisfies FDA natural policy, and a certificate of the natural status of their citric acid.

The plaintiffs did not offer *any* evidence that high fructose corn syrup is artificial. Instead, they asked the court to take judicial notice of patents issuing for the process of producing that

product. They argued that high fructose corn syrup is not natural as a matter of law because a patented process is necessary to create it. The court quickly dismissed that argument as it lacked any legal support and was nothing more than an extension of plaintiffs' contention that a product is artificial if it cannot be grown in soil, plucked from a tree, or found in the ocean. As the court noted (Slip Op. at 7), "[i]n the face of a motion for summary judgment, rhetoric is no substitute for evidence."

The plaintiffs truly seemed to discard their "not natural" argument. Instead, they contended that the labels were misleading under California law because ordinary consumers would not know that "all natural" includes such ingredients derived through complex processes. The court rejected that argument as well because California law requires that the statements be *likely* to mislead the public, not merely that they *could* mislead the public. To succeed on this type of claim, the court wrote that the plaintiffs should have demonstrated by extrinsic evidence (such as consumer survey evidence) that the challenged statements tend to mislead the public. [Slip Op. at 9-10] Ambiguous deposition testimony from one of the defendant's executives about the decision to include the "all natural" labeling on the products did not meet the plaintiffs' burden.

Equally important, the plaintiffs failed to meet their burden of establishing some way to measure damages. Under California law, plaintiffs and the class would only be entitled to restitution or disgorgement. The proper measure of such damages is the difference between what plaintiffs paid for and what they received. Even under the plaintiffs' theory, the drinks they purchased had *some* value—presumably the same value as "correctly" labeled beverages that did not tout being "all natural." But the plaintiffs did not even address this essential element of their claims. "They offer not a scintilla of evidence from which the finder of fact could determine the amount of restitution or disgorgement to which plaintiffs might be entitled if this case were to proceed to trial." [Slip Op. at 11] That failure alone was sufficient to grant summary judgment.

Last, the court also decertified the Rule 23(b)(2) class that it had certified. The court concluded that the plaintiffs and their counsel were not adequate representatives for the absent class. The failure to even attempt the necessary discovery and to fail to address at all in their summary judgment opposition the proper measure of damages indicated they could not protect the class' interests.

Although *Ries* is a district court decision, it is significant for a few reasons. First, it is an important victory for class defendants facing such food labeling claims in the Northern District of California. That court has become a magnet for these types of claims. Second, the decision emphasizes that class action defendants cannot view class certification as the end of their case. Class action plaintiffs' reliance on the vague meaning of "all natural" can work against them on the merits of the claim. At some point, plaintiffs must prove that the ingredients they challenge truly are not "natural" or not a good source of a nutrient. While plaintiffs in this district often defeat motions to dismiss through rhetoric (*i.e.*, it is not natural if it can't be grown or raised), meeting the burden of proof at summary judgment is a different matter altogether. Defendants should be able to compel plaintiffs to provide, at a minimum, expert testimony to meet this burden. Of course, expert testimony must satisfy *Daubert* at the summary judgment stage, so that provides another avenue of attacking the plaintiffs' case. As with every case, prepare it from the outset as if you are going to trial.

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