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FOOD

PRODUCT LABELING

The tide of ''food court'' litigation in the Northern District of California appears to be turning in favor of the food industry, but it's too early to declare a victor, attorneys Anthony J. Anscombe and Mary Elizabeth Buckley say in this BNA Insight. One year after examining the ''tidal wave'' of food and beverage-related consumer class actions in the district (14 CLASS 800, 7/12/13), the authors find signs that the ''assault on the industry may be slowing,'' including a precipitous decline in new filings.

# Is the 'Food Court' Losing Steam? An Update on Food and Beverage Consumer Class Actions in the Northern District of California

By Anthony J. Anscombe and Mary Elizabeth Buckley

In 2013, we examined the state of the ''Food Court''[1] in the Northern District of California.[2] While highlighting the tidal wave of food and beverage-related consumer class action litigation in the Northern District, we suggested that the rise in such litigation was tied to factors largely outside of the courts' control, such as California's population, its liberal consumer protection statutes, and Ninth Circuit rulings that favor class certification. We also predicted that, despite these factors, food and beverage claims might well lose momentum, as many of the economic damage claims appeared difficult to prove, and because many consumers simply do not care about the alleged misconduct, which has usually centered on violations of very technical regulatory provisions.

One year later, we revisit the ''Food Court,'' noting new entrants to the fray and analyzing how existing claims have fared. California has maintained its #1 spot on the American Tort Reform Foundation's list of ''Judicial Hellholes'' for the second year in a row, due in large part to plaintiffs' continued assault on ''Big Food.''[3] However, there are signs that the assault on the industry may be slowing. Defendants have had some success defeating these claims early on in the litigation process. And, while a number of cases have managed to survive motions to dismiss and win class certification, many others have not. There have been relatively few settlements, and new filings are down precipitously. Whether the charge on the food and beverage industry retreats or gains ground will likely depend on whether plaintiffs and their counsel see a return on their substantial investment, and if so, in what areas. There are

[1] *See, e.g.*, Blum, Vanessa, *Welcome to the Food Court*, The Recorder (March 1, 2013).

[2] Anscombe, Anthony and Buckley, Mary, *Jury Still Out on the Food Court*, Bloomberg Law (June 28, 2013).

[3] *See* American Tort Reform Foundation, *Judicial Hellholes* 2013-2014 (Dec. 2013).

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also some important cases in the appellate pipeline that could affect the future of this litigation. For example, later this year the Ninth Circuit in *Kane v. Chobani*[4] and *Edwards v. Ford*.[5] In *Kane*, the Ninth Circuit will address whether the terms ''evaporated cane juice'' (''ECJ'') and ''All Natural'' are deceptive. In *Edwards*, the court will evaluate, among other things, the circumstances under which a presumption of reliance under the CLRA may satisfy a plaintiff's burden of demonstrating predominance on the issues of reliance and loss causation. Depending on how the Ninth Circuit rules, California might just become a more hospitable place for food and beverage manufacturers to do business.

## New Class Action Filings in the Food and Beverage Industry Down Significantly

When last we wrote, we noted that, from April 2012 to April 2013, approximately 85 false advertising class actions had been filed in the Northern District, 68 of which involved claims against food and beverage companies.[6] An updated examination of new filings listed by Courthouse News Service from April 2013 to April 2014 shows that 58 false advertising class actions were filed, and of these, only 14 involved claims against food and beverage companies. New filings of false advertising class actions were also down in California's other districts.[7]

In our report last year, we noted that claims in the Northern District typically focused on alleged violations of the California Sherman Food Drug and Cosmetic Law (''Sherman Law'') and the California Health & Safety Code (''CHSC''), which expressly adopted the requirements of the federal Food, Drug and Cosmetics Act and the Nutrition Labeling Act. Claims in the Northern District over the last 12 months, while reduced in numbers, continue to focus on the Sherman Act and the CHSC, and appear to have drilled down further on causes of action involving labeling claims of ''All Natural'' and labeling for ECJ.[8]

What accounts for the drop in filings? Perhaps the industry has become better sensitized to avoiding terms that might precipitate class litigation. It is quite likely, however, that the plaintiffs are simply waiting to see how their existing inventory of cases plays out.

## Have Plaintiffs Made Any Money Yet?

The first and most important determinant of the arc of this litigation is whether plaintiffs' counsel see any return on their investment. The short answer, so far, is that there have been a few settlements, but no show stoppers. Here are some of the notable ones:

In January 2014, a Central District of California court gave final approval for a $9 million settlement in *Pappas v. Naked*, a case in which plaintiff alleged that PepsiCo. Inc.'s Naked Juice Co. of Glendora unit misled consumers by claiming certain of its juice products were ''All Natural,'' despite allegedly containing unnaturally processed and synthetic ingredients and ingredients derived from genetically modified crops. The common fund settlement, as approved, includes reimbursement to eligible class members of between $5 and $75 (depending on claimants' evidence of proof of purchase) and attorneys' fees of approximately $2.525 million (only slightly less that than $2.6 million sought by counsel). The settlement calls for any unused funds to go to designated non-profit organizations under the *cy pres* doctrine. However, at the fairness hearing counsel stated that, given the large number of claim forms already received, there would likely be no residual funds. Several objectors filed appeals with the Ninth Circuit, but all appeals were voluntarily dismissed in April 2014.[9]

In February 2014, plaintiffs in the *Quaker Oats* litigation agreed to settle claims that defendant's products contained ''unhealthy'' ingredients, such as partially hydrogenated oils (''PHOs''), in exchange for injunctive relief only—Quaker Oats agreed to remove PHOs from its products and make certain labeling changes. Plaintiffs' counsel is seeking fees of $760,000. The fairness hearing took place June 26, 2014, and a final ruling on the fairness of the settlement and attorneys' fees is expected shortly.[10]

In May 2014, Kellogg Company agreed to settle claims that its Kashi line's use of ''All Natural'' on certain of its products was false and misleading (based on allegations that the products contained synthetically processed ingredients) for $5 million. Under the terms of the settlement, class members bearing receipts may seek reimbursement of $0.50 for every product purchased during the class period, up to a maximum of

[4] *Kane v. Chobani, Inc.*, Ct. App. Case No. 14-15670 (9th Cir. Apr. 9, 2014).

[5] *Edwards v. Ford Motor Co.*, Ct App. Case No. 13-55331 (9th Cir. Feb. 27, 2013).

[6] Anscombe and Buckley, *Jury Still Out on the Food Court*, Bloomberg Law (June 28, 2013).

[7] Over the same April 2013-April 2014 timeframe, by our count, California's three other districts had a combined 73 false advertising class actions, only 8 of which involved food and beverage companies. This too is down from 2012-2013, which had 85 false advertising class actions, with 12-15 involving the food and beverage industry.

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[8] *See, e.g., Surzyn, et al. v. Diamond Foods, Inc.*, Case No. 3:14-cv-136 (N.D. Cal.) (Complaint filed Jan. 2014, challenging defendant's claim that its tortilla chips are ''All Natural''); *Tchayelian, et al. v. Blue Diamond Growers*, Case No. 5:14-cv-91 (N.D. Cal.) (Complaint filed Jan. 2014 alleging that listing of EJC on almond milk labeling was false and misleading).

[9] *Pappas v. Naked Juice Co. of Glendora, Inc.*, Case No. 11-cv-08276, Dkt. #184, Order Granting Final Approval of Class Settlement (C.D. Cal. Jan. 2, 2014).

[10] *In re Quaker Oats Labeling Litigation*, Case No. 5:10-cv-00502 (N.D. Cal.); *See also Thurston, et al. v. Bear Naked, Inc.*, Case No. 3:11-cv-02890 (S.D. Cal.) (settling similar claims regarding granola bars for $375,000).

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$25.00. Those without proof of purchase may also seek reimbursement at $0.50 per product purchased, up to a maximum of $10.00. Under the terms of the proposed settlement, recovery for class members will ultimately be pro-rated upwards or downwards depending on the total amount of eligible claims. The settlement also provides that plaintiffs' counsel may seek up to $1.25 million in attorneys' fees from the $5 million settlement fund. The settlement was preliminarily approved on May 27, 2014, and the Fairness Hearing is scheduled for September 2, 2014.[11]

## How Have Cases Fared at Pleading Stage?

Last year we discussed how the class actions have fared at the pleading stage, noting several instances where defendants prevailed on trial courts to toss cases at their inception. Defendants have almost uniformly continued to seek dismissal of these cases at the pleading stage, either under 12(b)(6), under the primary jurisdiction doctrine, and/or under 12(b)(1). Many cases have survived these pleading challenges, but a substantial number have not.

One line of cases in particular—those alleging that defendants misleadingly described sugar as ''evaporated cane juice''—have foundered in the face of primary jurisdiction motions. Plaintiff's theory of recovery relies heavily upon draft guidance that the FDA issued in 2009, in which the FDA advised industry that it should not refer to sugars derived from cane as ''evaporated cane juice'' because it is not a ''juice'' as defined in 21 F.R. § 120.1(a). Instead, it advised that because there is a standard of identity for cane syrup, solid sugars derived therefrom should bear the common or usual name of ''dried cane syrup.''[12]

Prior to March 2014, primary jurisdiction challenges to these cases had been largely unsuccessful, with courts concluding that, although FDA was still developing its guidance on evaporated cane juice, existing FDA regulations, such as 21 C.F.R. 168.130, which requires labels to use the ''common or usual name of a food,'' were a sufficient basis for the plaintiffs' claims no matter what final guidance FDA might issue.[13] In March of 2014, however, FDA re-opened the comment period on its draft guidance, stating that it had ''not reached a final decision on the common or usual name for'' evaporated cane juice, and that it ''intend[s] to revise the draft guidance, if appropriate, and issue it in final form.''[14] Since this announcement, at least 12 courts in the Northern District of California have either stayed or dismissed cases based on the FDA's primary jurisdiction over the issue. Most of these courts have elected to stay the cases, suggesting that the stay would be lifted once the FDA's guidance becomes final.[15] If FDA accepts ''evaporated cane juice'' as a common or usual name, the parties will then likely debate the degree of deference such guidance would be owed. Under a *Chevron*[16] standard, courts would accord it a high degree of deference, while under a *Skidmore*[17] standard, it would deserve respect according to the strength of FDA's reasoning.

A number of 12(b)(6) motions have also successfully challenged the legal viability of plaintiffs' claims. One of the most notable among these is *Kane v. Chobani, Inc.*,[18] which will provide the U.S. Court of Appeals for the Ninth Circuit an opportunity to weigh in on whether the phrase ''evaporated cane juice'' and ''All Natural'' are deceptive. In *Chobani*, plaintiff's claims under the Sherman Law, CLRA, UCL and FAL alleged that defendant's yogurt labeling was deceptive because: (1) it listed evaporated cane juice as an ingredient, and does not identify the juice as sugar; and (2) it contained concentrated fruit, vegetable, and turmeric, added for coloring, which plaintiff alleged are ''highly processed'' and therefore ''unnatural.'' In February 2014, Judge Lucy Koh granted defendant's motion to dismiss plaintiffs' third amended complaint with prejudice. With regard to the ECJ claims, Judge Koh ruled that plaintiff must show reliance and damage in order to have statutory standing to pursue claims under the California consumer protection statutes. This plaintiff could not do. Plaintiff's pleadings had admitted that she understood that 'dried cane syrup'—the term specifically approved by FDA—was a sugar, and her assertion that she did not understand the same of ''evaporated cane juice'' was simply not plausible.

With regard to plaintiff's ''All Natural'' challenges, the court found that plaintiff's allegation that the concentrated fruit, vegetable and turmeric coloring additives were ''highly processed'' was conclusory, as was her conclusion that such processing rendered the additives ''unnatural.'' Judge Koh concluded that such allegations fell far short of FRCP 9(b)'s heightened pleading requirements, and that plaintiff also failed to sufficiently plead reliance. The court concluded that further attempts to amend the complaint would be futile, as plaintiff had already had a number of chances to amend, and therefore dismissed the claims with prejudice.

Beyond *Chobani*, several new cases have followed a line of authority that lack of deceptiveness, or lack of materiality, can appear on the face of the complaint.

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[11] *Bates v. Kashi Co*., Case No. 3:11-cv-01967 (S.D. Cal.).

[12] In its Draft Guidance, the FDA explains that the guidance, once finalized, ''will represent the FDA's current thinking on this topic.'' Further, the Draft Guidance clarifies that, even when finalized, it ''does not create or confer any rights for or on any person and does not operate to bind FDA or the public.''

[13] *See, e.g., Samet v. Procter & Gamble Co*., 2013 BL 160869 (N.D. Cal. June 18, 2013).

[14] F.R. Doc. 2014-04802 (Mar. 4, 2014).

[15] *See, e.g., Smedt v. The Hain Celestial Group, Inc.*, 2014 BL 151155 (N.D. Cal. May 30, 2014)(dismissing claims involving evaporated cane juice without prejudice); *Avila v. Redwood Hill Farm and Creamery, Inc.*, 2014 BL 138977 (N.D. Cal. May 19, 2014)(same); *Swearingen v. Late July Snacks, LLC*, 2014 BL 151715 (N.D. Cal. May 29, 2014)(staying action for 5 months, at which time the court will assess whether there has been ''any significant FDA action regarding the draft guidance''); *Figy v. Lifeway Foods, Inc*., 2014 BL 125065 (N.D. Cal. May 5, 2014)(same); *But see Samet v. Procter & Gamble Company*, 2013 BL 160869 (N.D. Cal. May 5, 2014)(denying renewed motion to dismiss based on primary jurisdiction doctrine, where court had previously held that plaintiffs' allegations were ''sufficient to proceed no matter what final guidance may be issued by the agency.'').

[16] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

[17] *United States v. Mead Corp.,* 533 U.S. 218 (2001).

[18] *Kane v. Chobani, Inc.*, D. Ct. Case No. 5:12-cv-02425, Dkt. # 168, Order Granting Motion to Dismiss (N.D. Cal. Feb. 20, 2014); Ct. App. Case No. 14-15670 (9th Cir.).

Perhaps most famously, back in 2010, the District Court in *Werbal v. PepsiCo Inc.* dismissed plaintiffs' claims that Cap'n Crunch's ''Crunch Berries'' cereal had misled consumers into believing that the cereal contained real fruit as ''[n]onsense.'' The court found that it was simply unreasonable for plaintiffs to suggest that the ''berries,'' which are described on the packaging as ''sweetened corn cereal'' and are depicted as ''brightly-colored balls'' would deceive reasonable consumers into believing that the ''berries'' were real fruit.[19] Over the last year, a number of other courts have followed suit, rejecting claims that, quite simply, do not pass the ''straight face'' test.[20]

Other cases involving ''All Natural'' labeling, on the other hand, have survived motions to dismiss. In early June 2014, for example, a District Court in the Central District of California rejected defendant Hain Celestial Seasonings' challenge to plaintiff's claims that its tea labeling was false and misleading. Plaintiff in that case has alleged that claims that the tea is ''100% natural'' are false because the teas ''can contain traces of pesticides.'' The court found that the ''100% natural'' claim could not be dismissed as ''mere puffery,'' and that if plaintiffs could establish that the teas contained the man-made pesticides as alleged, even in trace amounts, then the ''100% natural claim'' can be proven false. The court also rejected Hain's argument that the claims are barred by the primary jurisdiction doctrine, citing the FDA's refusal to consider similar labeling claims involving products containing genetically modified corn. ''Given the FDA's lack of interest in providing further guidance on the use of the word 'natural,' '' the Court wrote, ''staying or dismissing the case to permit the FDA to do so would likely be futile.''[21]

## How Have Cases Done on Class Certification?

There is no more important determinant of the future of the Food Court's docket than the success of these cases at the class certification stage. Here, the record thus far has generally favored defendants.

A number of cases in 2014 indicate that courts in the Northern District, and in California's other districts, have examined critically whether these types of claims are sufficiently cohesive to warrant class treatment. In January 2014, the court denied class certification in *Astiana v. Ben & Jerry's Homemade, Inc.*[22] In *Ben & Jerry's*, plaintiff sought to represent a class of California purchasers of ice cream products labeled ''All Natural,'' but which contained cocoa powder made with synthetic processing agents. In denying plaintiff's bid for class certification, the court preliminarily noted that plaintiff was not able to meet FRCP 23(a)'s ascertainability requirement, where Ben & Jerry's obtained its cocoa powder from 15 different suppliers, only one of which *sometimes* used synthetic processing agents. Under such circumstances, the court found that plaintiff could not demonstrate that she could reliably identify which purchasers bought ice cream containing the cocoa made with synthetic processing agents.

More importantly, however, the court went on to hold that plaintiff's claim did not meet FRCP 23(b)(3)'s predominance requirement, finding that plaintiff's proposed damages model could not reliably measure class-wide damages. The court explicitly rejected plaintiff's ''speculation'' that ''All Natural'' ice cream commands a $0.50 to $0.75 premium over other ice creams, where Ben & Jerry's provided unrebutted evidence that, as a wholesaler, it does not set retail prices, and that the retail market price varies based on a number of factors that have nothing to do with a product's ''All Natural'' status, such as the nature and location of the various retail outlets. Relying on last year's Supreme Court guidance in *Comcast Corp. v. Behrend*,[23] the court concluded that plaintiff's failure to offer a damages model capable of measurement across the entire class was fatal to her bid for class certification.

In March 2014, Judge Pregerson in the Central District reached a similar decision in *In re Pom Wonderful LLC Marketing and Sales Practices Litig.*[24] In *Pom Wonderful*, the Court had initially granted class certification (prior to the *Comcast* decision), stating only briefly that ''the fact that individualized damages calculations may be necessary cannot alone defeat class certification.''[25] However, after a lengthy discovery process, as well as the Supreme Court's holding in *Comcast*, defendant moved to de-certify the class, arguing, *inter alia*, that neither of plaintiff's proposed damages models could sustain class certification.

The court agreed. Judge Pregerson first rejected out-of-hand plaintiff's proposed ''Full Refund'' Model, noting that such a model makes no attempt whatsoever to ''account for benefits conferred upon plaintiffs, [and therefore] . . . cannot accurately measure class wide damages.''[26] The court then turned to plaintiff's ''Price Premium'' Model, which assumes that class members paid some ascertainable premium for the products, and that the premium can be attributable to defendant's allegedly misleading advertising. After a lengthier analysis, the court rejected this damages model as well. The court reasoned that, for this ''fraud on the market'' type of model to work, plaintiff must first establish an efficient market (*i.e.*, a market that ''prices a good on the basis of all available material information''), and that

[19] *Werbel ex rel. v. PepsiCo Inc.*, No C 09-04456 SBA (N.D. Cal. July 22, 2010).

[20] *See, e.g., Manchouck v. Mondelez International Inc.*, 2013 BL 273161 (N.D. Cal. Sept. 26, 2013)(''Plaintiffs' allegation that a reasonable consumer would think that 'made with real fruit' would not include fruit puree strains credulity. . . . It is ridiculous to say that consumers would expect snack food made with 'real fruit' to contain 'only actual strawberries or raspberries' rather than these fruits in a form amenable to being squeezed into a Newton''); *Ang v. Whitewave Foods Company*, 2013 BL 340946 (N.D. Cal. Dec. 13, 2013)(dismissing plaintiffs' claims that ''almond milk'' ''soymilk'' and ''coconut milk'' are misbranded because they do not contain ''milk'' from a lactating cow as defined by the FDA as ''simply not plausible.'')

[21] *In re Hain Celestial Seasonings Products Consumer Litigation,* Case No. 8:13-cv-01757, Dkt. #34, Order Denying Motion to Dismiss (C.D. Cal. June 10, 2014).

[22] *Astiana v. Ben & Jerry's Homemade, Inc*, 2014 BL 3609 (N.D. Ill. Jan. 6, 2014).

[23] *Comcast Corp., et al. v. Behrend, et al.,* 133 S. Ct. 1426 (2013).

[24] *In re Pom Wonderful LLC Marketing and Sales Practices Litig.*, 2014 BL 83192 (N.D. Cal. Mar. 25, 2014).

[25] *In re Pom Wonderful LLC Marketing and Sales Practices Litig.*, 2012 BL 260801 (N.D. Cal. Sept. 28, 2012).

[26] *In re Pom Wonderful LLC Marketing and Sales Practices Litig.* 2014 BL 83192.

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reliance on the fraud can only be presumed after the efficient market is established.

In this case, the court concluded that ''where, as here, consumers buy a product for myriad reasons, damages from the alleged misrepresentation will not possibly be uniform or amenable to class proof.''[27] Finally, Judge Pregerson concluded that the class as proposed by plaintiff was not ascertainable, where ''at the close of discovery and despite plaintiffs' best efforts, there is no way to reliably determine who purchased defendant's products or when they did so.''[28]

Another interesting case, *Sethavanish v. ZonePerfect Nutrition Co.*,[29] also recently resulted in a denial of plaintiff's bid for class certification. The *ZonePerfect* court focused more extensively on the ascertainability requirement that was discussed briefly by the *Ben & Jerry's and Pom Wonderful* courts. The *ZonePerfect* court began by recognizing a split within the district on the ascertainability issue. Some courts, it noted, have followed the lead of the Third Circuit in *Carrera v. Bayer*,[30] and have denied certification in cases where a plaintiff's affidavit would be required to ascertain class membership, reasoning that such a process would ''invite fraudulent or inaccurate claims and undermine the finality of the judgment.''[31] Other courts, by contrast, such as the court in *Ries v. Arizona Beverage USA, LLC* have concluded that there is ''no requirement that the identity of class members be known at the time of certification.''[32] The *ZonePerfect* court adopted the reasoning of *Carrera* and its progeny, requiring plaintiff to submit an administratively feasible method for determining class membership as a prerequisite to certification. The court denied plaintiff's class certification bid without prejudice, inviting plaintiff to re-seek certification if and when she can devise an acceptable method for determining class membership. In May of 2014, plaintiff voluntarily dismissed her claims against ZonePerfect with prejudice.[33]

## Merits Rulings

While we have not reviewed the docket in every class action filed over the last several years, we are presently unaware of any cases that have gone to trial. Several cases have, however, come up for summary judgment. Here, there have been a couple of notable decisions over the last year.

In January 2014, Judge Koh rendered largely toothless plaintiff's claims in *Ogden v. Bumble Bee*.[34] Plaintiff claimed that Bumble Bee's Omega-3 nutrient content and other claims violated various FDA regulations adopted into California law through the Sherman Act. Based on plaintiff's testimony that she would not have purchased the products but-for the mislabeling, the court found she had standing to pursue certain of her theories under the UCL, CLRA and FAL. However, the court also concluded that plaintiff produced no competent evidence entitling her to restitution or disgorgement, and that California does not recognize claims for unjust enrichment. The court also held that plaintiff could not pursue claims under the Song-Beverly Act, which does not apply to food products, and could not pursue claims under Magnuson-Moss Warranty Act because the product prices did not meet Magnuson Moss's jurisdictional threshold.

In May 2014, Judge Davila granted summary judgment on most of plaintiff's claims in *Kashin v. Hershey*.[35] Plaintiff admitted that he did not rely on most of the alleged improper label content, and thus lacked statutory standing to pursue his claims under the UCL.

## What Do 2014 Appellate Proceedings Portend for the Food Court?

There are several appellate proceedings underway that have the potential to affect the success of the current inventory of food court class actions.

At the outset of this discussion, we offer our view that the most anticipated decision of the year, *Pom Wonderful v. Coca Cola*,[36] probably will not have much impact on California's consumer class actions. In *Pom Wonderful*, Coca Cola had obtained summary judgment on Pom Wonderful's Lanham Act claim, which alleged that Coca Cola had hoodwinked consumers into believing that its juice was predominantly pomegranate, when in fact it consisted primarily of grape and apple juice. The product's label complied with FDA regulations, which specifically permitted Coca Cola to refer to its product using the name and image of a fruit that comprised only 3% of its total content.

The trial court and the Ninth Circuit concluded that the Lanham Act and the Food, Drug and Cosmetic Act would come into conflict if the Lanham Act were used to impose liability for conduct that FDA specifically permitted. They ruled that the FDCA should prevail because of Congress's intent to create national uniform labeling requirements under FDA's oversight.[37]

The Supreme Court unanimously disagreed, holding that the FDCA and the Lanham Act are not in conflict because they address different ills.[38] In a narrowly written opinion, the Court permitted Pom Wonderful's Lanham Act claim to go forward, while simultaneously recognizing that FDA's authority over product labeling preempts state laws to the contrary. The Court's decision thus provides little ammunition to consumer fraud plaintiffs, who had hoped that the decision might offer

[27] *Id.*
[28] *Id.*
[29] *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12- 2907-SC (N.D. Cal., Feb. 13, 2014).
[30] *Carrera v. Bayer Corp*., 727 F.3d 300 (3rd Cir. 2013).
[31] *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12- 2907-SC (N.D. Cal., Feb. 13, 2014).
[32] *Id., citing Ries v. Arizona Beverage, USA, LLC*, 287 FRD 523 (N.D. Cal. 2012).
[33] *See Sethavanish v. ZonePerfect Nutrition Co.*, Case No. 3:12-cv-02907, Dkt. # 104, Stipulation and Order of Dismissal (N.D. Cal. May 2, 2014); *But see, e.g., Werdebaugh v. Blue Diamond Growers*, 2014 BL 146743 (N.D. Cal. May 23, 2014) (rejecting rationale of *Carrera* and holding that affidavits from class members that they had purchased the products at issue during the class period would be sufficient).
[34] *Ogden v. Bumble Bee Foods, LLC*, 2014 BL 301 (N.D. Cal. Jan. 2, 2014).
[35] *Khasin v. The Hershey Company*, 2014 BL 125052 (N.D. Cal. May 5, 2014).
[36] *Pom Wonderful, LLC v. The Coca Cola Company*, 134 S. Ct. 2228 (U.S. June 12, 2014).
[37] *Pom Wonderful, LLC v. The Coca Cola Company,* 727 F. Supp.2d 849, 861-869 (C.D. Cal. 2010), and 679 F.3d 1170, 1175-1178 (9th Cir. 2012).
[38] *Pom Wonderful, LLC v. The Coca Cola Company*, 134 S. Ct. 2228.

a basis on which to thwart defendants' invocation of FDA's primary jurisdiction in cases addressing label claims.

Although *Pom Wonderful* probably will not have much impact on proceedings in the ''Food Court,'' a far more significant decision emanating from the Third Circuit, *Carrera v. Bayer*, may very well have a profound impact on food and beverage class actions. As noted above, *Carrera* denied certification in an over the counter medication case, because the identity of class members could not be ascertained through an administratively feasible process. Several district courts within California have adopted *Carrera*'s reasoning, while several have rejected it.

It is thus likely that the Ninth Circuit will soon be called on to resolve this issue, unless, of course, the Supreme Court does so first. If the Supreme Court or Ninth Circuit were to adopt the Third Circuit's approach to ascertainability, that ruling would likely effect a cataclysmic end to the Food Court. In most cases involving low price, mass marketed consumer products, plaintiffs will have no ability to identify class members. Indeed, many class members will have no way to reliably identify themselves—they do not retain package containers once they have consumed the product, and, years later, may often not have the foggiest idea whether they bought a product bearing the allegedly deceptive or unlawful content.

Finally, as mentioned at the outset, there are two potentially important cases pending before the Ninth Circuit: *Kane v. Chobani* and *Edwards v. Ford*. In *Kane*, as discussed previously, the court will consider the sufficiency of plaintiff's allegations relating to Chobani's use of the terms ECJ and All Natural. Given how commonly these terms form the basis of consumer fraud class actions, it is possible that the court's ruling could have far reaching consequences. It is also possible, however, that the court will resolve the case on narrow ground relating to the plausibility of plaintiff's allegation that term ECJ misled her when she admitted that she knew that ''dried cane syrup'' was an added sweetener. As for the term ''All Natural,'' the court could simply issue a narrow ruling that plaintiff was given enough opportunities to amend her complaint, and after her fourth chance to allege a factual basis for showing that the color additives were not ''all natural,'' the trial court was well within its authority to call time. The court may also consider an antecedent question, which is whether plaintiffs proceeding under the ''unlawful'' prong of the UCL must prove reliance and damage under California B&PC § 17,204, where the gravamen of the misconduct is deception.

Finally, in *Edwards v. Ford*, the court may be called on to evaluate the role that presumptions of reliance play in allowing CLRA plaintiffs to establish that a defendant's conduct caused classwide deception and economic loss. In *Edwards*, the district court denied class certification of plaintiff's CLRA claim against Ford, in part because Ford introduced evidence showing that the materiality of the undisclosed information would vary from person to person.[39] The Court's holding was, in our view, unexceptional, as presumptions of reliance are ordinarily rebuttable.[40] A ruling by the Ninth Circuit in favor of plaintiffs on this issue, while unlikely, would mark a major change from existing law, and would greatly assist plaintiffs in overcoming the CLRA's reliance hump in food and beverage class actions.

## Conclusion

The tide of the ''Food Court'' litigation appears to be turning in favor of the food industry, but it is too early to declare a victor. There have been a few settlements to date, and a number of cases have survived pleading, class certification and summary judgment challenges, while several cases pending before the Ninth Circuit could reinvigorate the litigation if the court undoes key district court victories won by defendants.

California continues to present plaintiffs with the important strategic advantages that we remarked about in 2013—it will continue to have over 38 million residents and liberal consumer protection laws. If this litigation ultimately goes away, it will not be a one-year process. Stay tuned.

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[39] *Edwards v. Ford Motor Company*, 2012 BL 152404 (S.D. Cal. June 12, 2012).

[40] *See* Anscombe and Buckley, *Presumptions of Reliance: What They Really Mean and How to Defeat Them*, Bloomberg BNA Product Safety & Liability Reporter (Jan. 2014).

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