THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT
ALM Properties, Inc.
Page printed from: *The Recorder*

Back to Article

Welcome to Food Court

Pierce Gore is one of the consumer attorneys behind a wave of food labeling litigation that, so far, has found a receptive audience in the Northern District.

Vanessa Blum

2013-03-01 01:26:52 PM

SAN FRANCISCO — Across the Bay Area, corporate attorneys with degrees from top law schools are considering the nutritional content of corn chips.

And in their chambers, federal judges are in deep contemplation over pints of Ben & Jerry's and packs of sugar-free gum.

If that sounds like a joke, then welcome to the Food Court.

That's what some practitioners have taken to calling the Northern District of California, reflecting its emergence as preferred venue for a new wave of class action litigation over food labels alleged to misle

Though the merits of such cases have yet to be fully tested, judges here have rejected broad defenses to food labeling suits, spurring more litigation and setting the Northern District at the epicenter of a b

For defendants, early rulings mean that while food cases might seem technical and lawyer-driven, they won't be easy to get rid of — at least not in the early stages and before commencing expensive disc

"In the Northern District, the judges have shown they're going to allow cases," said Morrison & Foerster partner William Stern, an expert on California's consumer protection laws who represents Ben & Je

Since March 2012 a network of plaintiffs lawyers, including many veterans of Big Tobacco litigation, have filed 28 food label class actions in Bay Area federal courts.

Their suits challenge labeling on a grocery list that includes apple juice, yogurt, granola bars, frozen waffles, cocoa mix, baby food, cooking spray, potato chips and ice cream. Many suits zero in on ostens
plaintiffs both a consumer-friendly legal climate and a health-conscious jury pool.

The onslaught means most every judge in the district is confronting the issue: U.S. District Judge Edward Davila in San Jose has at least nine food labeling cases on his docket. One floor down, Judge Lu

The district's newest judge, Jon Tigar already has been assigned one action, while Judge Ronald Whyte issued two orders this past week in labeling cases against tea company Twining's Inc. and Kraft Fo

Several Big Law partners who used to find steady work representing clients in other industries have shifted into the defense of food labeling cases.

That's true for Arnold & Porter partner Angel Garganta, a past president of the San Francisco Bank Attorneys Association. Today, food label cases represent about 80 percent of his practice, he said.

"It's where the class action process has gone," Garganta explained. "I call it greener pastures. The asbestos litigation has pretty much dried up. Tobacco — the global settlement is done. Securities class a

LOW-HANGING FRUIT

Food labeling suits have been gaining momentum around the country for a few years, resulting in some substantial settlements, such as a $35 million deal in 2009 over the marketing of Dannon's Activia y

Other suits have faltered, including a Northern District case challenging the labeling on Nestle's Drumstick ice cream bars. Federal judges elsewhere in California dismissed suits over Kellogg's Froot Loop

Food makes an appealing target after the U.S. Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*, said Neil Popovic, a business litigation partner in the San Francisco office of Sheppard Mull
financial services and telecom companies.

"You don't have that when you buy a food product," Popovic said. "There's no contract on the back of your salad dressing bottle."

And after a 2008 ruling from the U.S. Court of Appeals for the Ninth Circuit in *Williams v. Gerber Products*, 552 F.3d 934, companies cannot rely on a complete ingredient list as cover in deceptive marketi

All-natural labeling has become a particularly active area of litigation, both because it is ubiquitous and because the term is not specifically defined by the U.S. Food and Drug Administration. Typical claim
Defendants often dispute the characterization of their ingredients.

Stephen Gardner, litigation director for the nutrition advocacy group Center for Science in the Public Interest, is adamant that high-fructose corn syrup is artificial and suggesting otherwise on labels is dec

"It started out as corn, but that doesn't make it natural," he said, adding, "Plastic started out as dinosaur bones but that doesn't make it natural."

Arnold & Porter partner Trenton Norris gave a webinar last year telling GCs that their companies should tread cautiously when labeling products as natural. Plaintiffs lawyers need only walk down the aisle

"That claim may indeed survive a motion to dismiss, which puts you into expensive litigation and discovery," Norris said.

TASTY TARGET

The latest push in food cases are so-called misbranding claims based on allegations that food labels are not simply misleading to consumers but explicitly violate federal standards.

That has been the primary legal weapon of the consortium led by Don Barrett, a Mississippi lawyer who made millions suing Big Tobacco, and Robert Clifford, a Chicago lawyer whose practice previously

Advised by a former director of the FDA's Office of Food Labeling, the group spent two years poring over FDA regulations. Also on board as a consultant is UCSF professor Robert Lustig, author of a new

Last year the group filed 24 suits in less than two months against companies like Procter & Gamble Co., Unilever and ConAgra Foods. More recent suits target smaller brands in the natural food market, li

Filing in the Northern District was strategic, said San Jose attorney Pierce Gore of Pratt & Associates, the group's lead lawyer in the Bay Area.

"The law is more favorable here in than in any other jurisdictions that we've looked at," said Gore, a former partner at San Francisco's Lieff Cabraser Heimann & Bernstein.

The cases use California's Unfair Competition Law and the state's Sherman Food, Drug and Cosmetic Law to challenge nutritional claims on food packaging. Several recent suits take issue with manufact

The misbranding claims filed by Gore's group don't allege that individuals were physically harmed by their consumption of products, merely that they were duped into buying an item they otherwise would n

In that sense, these are not the suits envisioned by activists after victories against Big Tobacco in the 1990s, and lawyers are not seeking to hold food companies directly accountable for the obesity epide

"They're really noninjury cases," said Angela Agrusa, a partner at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor in Los Angeles. Agrusa, who represented the maker of Pirate's Booty chees

"Consumers buy a product because they like how it tastes or they like a crazy character on the box," Agrusa said. "Only in the very rare case do they buy it because of a single statement on the packaging

MoFo's Stern, who represents clients in eight of the misbranding cases filed by Gore, calls the new wave of litigation hypertechnical. One case he is involved in takes issue with a label's failure to specify a

"There's no infraction too small to have avoided their attention," he said.

But Gore insists the breaches are neither minor, nor innocent.

"There is a public health underpinning for every one of these regulations," he said. "They don't exist purely to frustrate food companies."

As importantly, identifying violations of FDA regulations seems to provide plaintiffs with a way to overcome federal pre-emption, a central defense argument.

"We strongly believe the best way to plead a food label case is to dig into the label and find out if the companies are breaking the law," Gore said. "So far, the judges have agreed."

APPETITE FOR LITIGATION

At a December hearing, Hogan Lovells partner Robert Hawk, representing ConAgra, set out to persuade U.S. District Judge Charles Breyer in San Francisco to dismiss claims against Pam cooking spray,

Hawk told Breyer the plaintiffs' allegations encroached on areas subject to federal regulation and should be pre-empted.

"It makes a mockery of congressional intent to have this rival enforcement scheme," he said.

The argument has been on a losing streak in the Northern District, and Breyer was skeptical.

"Congress isn't sitting in a vacuum," he said. "They understand there's a plaintiffs bar out there."

Three days later, Breyer issued an order affirming that private parties can pursue labeling suits under state consumer protection laws if they do not seek to impose requirements beyond those set by feder

The ConAgra ruling sticks to a line of case law developing in the Northern District that has been tough to swallow for food companies. Several recent orders adopt an analysis of natural claims set out by L

Hamilton, who is health conscious and serves as chair of the Ninth Circuit's wellness committee, held that "all natural" claims are not pre-empted because the FDA has declined to regulate the area.

The decision was a factor in Gore's consortium of plaintiffs lawyers choosing to file cases in the Northern District.

Pre-emption, concedes Arnold & Porter's Garganta, is "not an argument that wins a lot" in the Northern District.

Judges have been split on whether claims related to products not purchased by a representative plaintiff must be dismissed for lack of standing or whether the issue should be addressed at class certificat

While several suits have survived motions to dismiss, none of the recent misbranding cases has yet achieved class certification — a hurdle that could pose challenges under tougher commonality standar

Striking settlement deals could also prove tricky, under recent Ninth Circuit rulings dealing with cy pres payments. Hamilton rejected a $7.5 million settlement last year in an ice cream case, after just 5,000 way to identify class members.

But since losing a motion to dismiss can push defendants to settle, some food company lawyers would like to see judges demand more from plaintiffs earlier in the litigation.

"Judges tilt in favor of saying, I'm not going to decide that, certainly not at the front end of the case," said Sidley Austin partner Thomas Hanrahan in Los Angeles, who represented Taco Bell in the 2011 in

Meanwhile, plaintiffs lawyers continue to troll the grocery aisles.

"Why shouldn't consumers be entitled to educate themselves and choose for themselves?" Gore said. "These companies are lying on their labels. They've been doing it for years. They're unhappy they go

Going for that natural look

A slew of cases against food companies al their way through the Northern District dc

Claim: Listing "propellant" rather than the components petroleum gas, propane and butane violates federal standards.

Claim: Listing "evaporated cane juice" as an ingredient instead of sugar is false and misleading.

Claim: Label saying chips contain "0 Grams Trans Fat" is not permissible due to high overall fat content.

Claim that p