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9th Circ. Juicy Juice Ruling Could Curb Food Labeling Suits

By **Erin Coe**

Law360, San Diego (February 21, 2013, 8:57 PM ET) -- The growing number of consumer suits accusing food and beverage companies of making unsubstantiated health benefit claims on their products' labels could be slashed if the Ninth Circuit backs the dismissal of a proposed class action against Nestle USA Inc. and finds the plaintiffs must present scientific evidence showing the claims are false, attorneys said.

Buyers of Nestle's Juicy Juice told the Ninth Circuit at a Feb. 12 oral arguments hearing that a California district court wrongly tossed their proposed nationwide class action claiming Nestle made unsubstantiated claims that one of its Juicy Juice products would provide brain-enhancing benefits, and that another would boost immunity and increase digestive health.

The case was tossed in May 2011, with a federal judge finding the plaintiffs' theory of liability, based on a lack of substantiation for Nestle's claims, didn't support a cause of action under California's unfair competition and false advertising laws. If the Ninth Circuit upholds that ruling, plaintiffs will need to show independent proof that labeling claims are false, according to Angela Agrusa, a partner at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP.

"Plaintiffs would have to have direct evidentiary support that a label is false," she said. "They couldn't just articulate some theory that they believe science wasn't behind the claim; they would have to demonstrate how it is false."

Such a ruling would require plaintiffs lawyers to hire independent scientists to back up a case alleging that a company lied about a product's generalized health benefits, a step that would likely curb consumer actions over labels that are clogging up the courts, she said.

"Some lawyers would have to think twice about whether this is a business undertaking they want to get into," she said. "These cases would involve more diligence, work and investigation before plaintiffs could make allegations that label claims are false."

If the Ninth Circuit agrees with the lower court, it would give clarity to food and beverage companies that they can't be sued by consumers alleging label claims lack substantiation without evidence that the claims are false, according to David Biderman, a Perkins Coie LLP partner.

"While the government could still sue the manufacturer for lack of prior substantiation, a private consumer under the California Unfair Competition Law or the False Advertising Law could not," he said.

The current case is playing out in California, whose expansive state laws have made it a breeding ground for consumer actions against food and beverage firms, according to lawyers. But the California cases have spurred copycat suits across the country, and a ruling in the Juicy Juice case could affect suits beyond the Golden State, according to attorneys.

"California tends to be at the forefront of consumer protection cases, and other courts will take notice of a decision here," Biderman said.

However, although a ruling for Nestle would help eliminate cases alleging a company's health benefit claims are unsubstantiated, it would not stop the bulk of consumer class actions from being filed, according to Biderman.

"The ruling would affect one variety of cases, but most of the cases we see tend to claim a falsity or that some claim was misleading or deceptive, and those cases would not be affected," he said.

In dismissing the case against Nestle, the California federal court also briefly indicated that the plaintiffs' claims regarding the presence of DHA in the brain development beverage would be subject to dismissal under the primary jurisdiction doctrine, and a Ninth Circuit decision upholding that portion of the ruling as well would be an added boost for food and beverage companies, according to lawyers.

Nestle has argued that the U.S. Food and Drug Administration is better suited to regulate food and beverage labeling based on scientific policy than private litigants, and a ruling agreeing with its primary jurisdiction defense would put the Ninth Circuit in line with the Second Circuit and other courts attempting to stem the tide of food, beverage and cosmetic labeling cases, according to Scott Voelz, an O'Melveny & Myers LLP partner.

"It would at least give defendants a consistent argument in California that many of these claims are inappropriate for private litigation and that essentially the best way to go about this is through regulation, not litigation," he said. "Because so many suits are filed in California, it could have good impacts for the industry nationwide. If it's less attractive to file in the state, it may cause fewer suits to be filed overall."

The case is a consolidation of two putative class actions — one filed by Mauricio Chavez in December 2009 and the other by Vincent Bonsignore in January 2010. They alleged the Brain Development juice was advertised to increase brain development with "minute quantities" of docosahexaenoic acid, while the immunity beverage's marketing promised to aid immunity and digestive health with small amounts of zinc and prebiotic fiber and a "typical amount" of vitamin C.

According to the complaint, the products were advertised as "premium juice product[s] providing substantial added benefits" and were sold to consumers for a "substantially higher price" than other Juicy Juice beverages.

U.S. District Judge George H. Wu in May 2011 dismissed the case with prejudice, saying that although the plaintiffs purported to identify specific "false and misleading representations" by Nestle, they failed to adequately explain why the identified statements were false or misleading.

The plaintiffs are represented by Joseph P. Guglielmo and Christopher M. Burke of Scott & Scott LLP.

Nestle is represented by Charles A. Rothfeld of Mayer Brown LLP.

The case is Chavez v. Nestle USA Inc., case No. 11-56066, in the U.S. Court of Appeals for

the Ninth Circuit.

--Additional reporting by Matthew Heller and Allison Grande. Editing by John Quinn and Chris Yates.