Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Cure For Calif.'s Food Suit Binge

Law360, New York (October 18, 2012, 5:09 PM ET) -- As the New York Times recently reported, a group of former tobacco lawyers looking for a shakedown has gone on a food binge. Over the past four months, class counsel has filed 24 (and counting) nearly identical food "misbranding" class actions in federal court in the Northern district of California.

So many "misbranding" cases have been filed there in the past few years that one commentator recently noted that the court has become, for false-labeling litigants, what the Eastern district of Texas has been to patent trolls. The U.S. Court of Appeals for the Ninth Circuit's recent decision in Pom Wonderful, however, may cause class counsel a touch of indigestion.

Class Counsel's Cuisine

Class counsel has come to the "Golden State," looking for a free lunch. Their "assembly-line" complaints follow a common recipe: posit a wrong by reading, in isolation, a few words on a food label, contrast those words with a cramped reading of a U.S. Food and Drug Administration regulation, then find a plaintiff and sue.

For the remedy, insist that everyone in the United States who bought the product since 2008 get a full refund, toss in punitive damages and finish with an injunction requiring changes to product labeling more to class counsel's liking. The resulting broth, reflecting the makeup of the cooks who created it, is a recipe only a plaintiffs' lawyer could love.

FDA Preemption

At first glance, the food industry seems an unlikely target for a litigation makeover. Food manufacturers should be able to rely on express preemption.

First, Congress has established through the Federal Food, Drug and Cosmetic Act (FDCA) a comprehensive federal scheme of food regulation to ensure that food is safe and labeled in a manner that does not mislead consumers (21 U.S.C. §§ 341-350f).

In fact, Congress expressly preempted any state law that requires food manufacturers to include nutritional information on their packaging that is "not identical" to federal requirements (21 U.S.C. § 343-1(a)). The phrase "not identical" means information that is different from, or in addition to, federal requirements (21 C.F.R. § 100.1(c)(4)(i)(ii)).

Second, FDCA Section 337(a) expressly forbids private plaintiffs to sue in order to enforce the FDCA. That task was left exclusively to the U.S. Department of Justice, the FDA or the states.

California Makes up Its Own Recipe

The California courts haven't seen it that way. In In re Farm Raised Salmon Cases, for example, the California Supreme Court held that as long as California's labeling requirements were identical to those specified by the federal law, plaintiffs could get around the no-private-right-of-action bar by relabeling their claim under California's unfair competition law. See 42 Cal. 4th 1077 (Cal. 2008).

The Ninth Circuit has been similarly accommodating, holding in Williams v. Gerber Products Co. that whether a label is deceptive should not ordinarily be decided on a motion to dismiss, leaving cases to linger in court and driving up settlement values with the threat of bone-crunching e-discovery. See 552 F.3d 934 (9th Cir. 2009).

The Ninth Circuit's Decision in Pom Wonderful

After years of enablement, the Ninth Circuit may have finally said, "Enough!" In Pom Wonderful LLC v. Coca-Cola Co., the Ninth Circuit found preemption of false labeling claims against a backdrop in which the FDA had not acted; it was sufficient that the FDA "can act." See 679 F.3d 1170 (9th Cir. 2012).

In Pom Wonderful, the plaintiff alleged that its competitor violated the Lanham Act by misleadingly using the word "Pomegranate" and a picture of a pomegranate on its label, even though the product consisted more than 99 percent of apple and grape juices.

Pom Wonderful brought claims under the false-advertising provision of the federal Lanham Act as well as state law claims under California's unfair competition law and false advertising law. The district court granted summary judgment to Coca-Cola.

On appeal, the Ninth Circuit affirmed. It ruled that the FDCA "comprehensively regulates food and beverage labeling," which means that the plaintiffs cannot sue under the Lanham Act to enforce the FDCA or its regulations; to interpret ambiguous FDA regulations; or even to decide whether conduct violates the FDCA.

Express preemption is back on the menu. Significantly, the Ninth Circuit made no finding about whether the Coca-Cola label was deceptive. No matter. What mattered was that no court could make that determination:

If the FDA believes that this context misleads consumers, it can act. But the FDA has apparently not taken a view on whether Coca-Cola's labeling misleads consumers—even though it has acted extensively and carefully in this field. (The FDA has not established a general mechanism to review juice beverage labels before they reach consumers, but the agency may act if it believes that a label in the market is deceptive.) As best we can tell, Coca-Cola's label abides by the requirements the FDA has established. We therefore accept that Coca-Cola's label presumptively complies with the relevant FDA regulations and thus accords with the judgments the FDA has so far made. Out of respect for the statutory and regulatory scheme before us, we decline to allow the FDA's judgments to be disturbed.

It may be several months before we learn just how strong the Ninth Circuit's new resolve is, but one district court has already followed in Pom Wonderful's footsteps and dismissed similar claims on the basis of preemption. See All One God Faith Inc. v. Hain Celestial Grp., No. 09-3517 SI, 2012 U.S. Dist. LEXIS 111553, *33 (N.D. Cal. Aug. 8, 2012).

Ban on Private Right of Action?

Does Pom Wonderful shut the door on private litigants seeking to bring indirect claims to enforce alleged violations of FDA regulations? Several of the food companies targeted by the tobacco lawyers say yes. Stay tuned to find out what the judges in the Northern district think.

Conclusion

The food industry is under attack. Pom Wonderful, like its product namesake, comes packed with nutrients. Food manufacturers beset by food labeling class actions ought to take it out of the pantry. With luck, the food trolls could find that it gives them heartburn.

--By Claudia Maria Vetesi, Morrison & Foerster LLP

Claudia Maria Vetesi is an associate in Morrison & Foerster's San Francisco office.