

# **Regulatory Compliance Alone Is Not Enough: Understanding and Mitigating Consumer Fraud Claims**

## **DRI PRODUCTS SEMINAR FOOD LAW CLE**

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### **Brief Biographies:**

Ken Odza leads the food liability practice at Stoel Rives LLP and is a partner in the trial group. Ken's practice is focused on helping food manufacturers and retailers respond to regulatory compliance, supply chain contracting, and litigation challenges. Ken is the founder of the nation's first legal blog written from the perspective of the food industry, [www.foodliabilitylaw.com](http://www.foodliabilitylaw.com), and a frequent lecturer at food industry and academic conferences.

Scott Rickman is Associate General Counsel and Director of Litigation at Del Monte Foods. Rickman has managed Del Monte's litigation since 1999. He developed the e-discovery program, policies and procedures at Del Monte. He is currently managing e-discovery in multiple class actions related to a national pet food recall earlier this year. He is a frequent speaker on issues relating to food law, litigation and e-discovery.

Lara White joined Adams and Reese in 2000 and is a member of the Products Liability, Pharmaceutical and Medical Device, and Class Actions and Complex Litigation teams. She focuses her practice on the handling and management of complex litigation matters, including discovery, document management, witness development, briefing and presentation of dispositive motions, and settlement evaluation and negotiation. Prior to joining Adams and Reese, Lara practiced insurance coverage litigation for more than five years at another large defense firm in New Orleans.

### **I. What Are These Claims and Why Are Plaintiffs Bringing Them?**

The claims discussed in this presentation involve small-dollar, state law "fraud" claims aggregated over millions of products sold. The common fact pattern is this: plaintiffs challenge the labeling or marketing of a food product alleging that consumers would not have purchased the product or paid the price they did had they known the "truth" behind representations made. Often, the plaintiffs' strategy is to achieve class certification and then leverage the threat of a judgment into a settlement that involves a handsome payment of attorneys' fees.

## II. State Consumer Protection Laws Vary

It's critical to understand that there are great variances in state law in bringing consumer fraud class claims. The variations inform not only what proof plaintiffs need to show to prosecute their claims, but also whether a court will permit a class to be certified under [Federal Rule of Civil Procedure 23\(b\)](#). Approximately 40 states permit consumer fraud and/or unfair trade practices claims. Among those 40 states, the law varies significantly. For example, some states require individualized showing of causation for plaintiffs (and putative class members) and other states do not. Some states require individualized showing of reliance for plaintiffs (and putative class members) and other states do not.

## III. What Kinds of Claims Are Being Asserted and What Defenses Have Been Successful?

The bottom line is that the plaintiffs' bar is looking for cases where they believe that they can show consumers are being misled. Two areas that have seen a series of suits in recent years are natural- and health-related claims:

### A. Natural Claims

1. In [Holk v. Snapple Beverage Corp.](#), 575 F.3d 329 (3d Cir. 2009), the Third Circuit reversed the district court and reinstated state law putative class claims for consumer fraud and breach of warranty for use of the term "all natural" despite the inclusion of high fructose corn syrup (HFCS) (though the court noted that the manufacturer no longer uses HFCS in its products).

The case is significant because the Third Circuit concluded that "the FDA's policy statement regarding the term 'natural' is not entitled to preemptive effect." *Id.* at 340. The court was persuaded because "the FDA declined to adopt a formal definition of the term 'natural,'" choosing instead to simply enforce its longstanding "informal policy":

"[T]he agency *has considered* 'natural' to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there. For example, the addition of beet juice to lemonade to make it pink would preclude the product being called 'natural.'"

*Id.* at 340-41 (emphasis added) (quoting Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991)). [As expected](#), the court followed its previous ruling in [Fellner v. Tri-Union Seafoods, L.L.C.](#), 539 F.3d 237 (3d Cir. 2008), ruling that neither the FDA's "informal policy" nor its enforcement letters were entitled to *any preemptive weight*.

Note that the Third Circuit did not rule (though it expressed its skepticism) on the "express preemption" argument based on [21 U.S.C. § 343-1\(a\)\(3\)](#). The court ducked the issue by concluding that Snapple waived the argument by not "advancing it" in the district court.

2. In [Chacanaca v. The Quaker Oats Company](#), No. C 10-0502, 2010 U.S. Dist. LEXIS 111981 (N.D. Cal. Oct. 14, 2010), the plaintiffs asserted state law claims concerning the marketing of granola bars. [Federal District Court Judge Richard Seeborg](#) of the [Northern District of California](#) dismissed the plaintiffs' state law claims targeting the "0 grams trans fat," "good source," "made with whole grain oats," and "no high fructose corn syrup" declarations on preemption grounds. Yet, "[i]nsofar as Quaker Oats seeks a favorable judgment at this juncture on all state claims that focus on the term 'wholesome,' on images of children, nuts, or oats, or the 'smart choices made easy' language or decal," the court denied the motion to dismiss. *Id.* at \*42.

The plaintiffs' challenges to Quaker Oats' use of the term "wholesome" and images of the children seem targeted exactly at the claims that were preempted: the trans-fat issue. The court conceded that the FDA has recently indicated its intent to explore rule-making in the area of Front of Package ("FOP") labeling claims and that the FDA already "has extensively regulated food labeling in the context of a labyrinthine regulatory scheme." *Id.* at \*33. "Nonetheless," according to the court, "plaintiffs advance a relatively straightforward claim: they assert that defendant has violated FDA regulations and marketed a product that could mislead a reasonable consumer. As courts faced with state-law challenges in the food labeling arena have reasoned, this is a question 'courts are well-equipped to handle.'" *Id.*

3. In [Williams v. Gerber](#), 552 F.3d 934 (9th Cir. 2009), the Ninth Circuit, reversing the district court, reinstated a putative class action that alleged labeling on "fruit juice snacks" (1) constituted misrepresentation and breach of warranty under California common law and (2) violated California's statutes on [unfair competition](#) (Cal. Bus. & Prof. Code § 17,200, *et seq.*) and [consumer law](#) (Cal. Civ. Code § 1750, *et seq.*). The district court had granted a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), finding that statements on the label "were not likely to deceive a reasonable consumer, particularly given that the ingredient list was printed on the side of the box." 552 F.3d at 937.

Here's the label in question:

**Gerber.**  
**Graduates**  
For Toddlers  
Fruit Juice Snacks

**FOR YOUR INFORMATION**  
Gerber Graduates Fruit Juice Snacks should only be fed to children who are accustomed to chewing solid foods. As with all food, Gerber recommends this product be served to a small child who is seated. Small children should always be supervised while eating.

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Gerber® Graduates® Fruit Juice Snacks have been specially designed for growing toddlers learning to self feed. Softer and easier to chew than most other fruit snacks.

Just the right size for little hands.

Rich in vitamin C

6 delicious fruit flavors.

Made with real fruit juice and other all natural ingredients.

This is just one of a variety of nutritious Gerber Graduates foods and juices that have been specially designed to help toddlers grow up strong and healthy. Try Gerber Graduates Microwavable Dinners, 100% Juices with Calcium, Juicy Smoothy™ and foods for little fingers like our baked snacks, fruit, vegetable and dinner dices and meat sticks.

**Gerber.**  
**Graduates**  
For Toddlers  
Fruit Juice Snacks

Rich In Vitamin C

JUST RIGHT FOR PICKING UP!

6 PACKETS

NET WT 1.6 OZ (45g)

GERBER PRODUCTS COMPANY

**Just For Toddlers**

**Nutrition Facts**  
Serving Size 1 Packet (28g)  
Servings Per Container 6

Amount Per Serving	
<b>Calories</b>	100 Calories From Fat 0
<b>Total Fat</b>	0g
<b>Saturated Fat</b>	0g
<b>Cholesterol</b>	0mg
<b>Sodium</b>	15mg
<b>Potassium</b>	10mg
<b>Total Carbohydrate</b>	24g
<b>Fiber</b>	0g
<b>Sugars</b>	17g
<b>Protein</b>	<1g
% Daily Value * Protein 0%	
Vitamin A 0% • Vitamin C 20%	
Calcium 0% • Iron 0%	

**INGREDIENTS:** CORN SYRUP, SUGAR, WHITE GRAPE JUICE FROM CONCENTRATE. CONTAINS 2% OR LESS OF THE FOLLOWING: CARRAGEENAN, ASCORBIC ACID (VITAMIN C), CORN STARCH, NATURAL FLAVORS, CITRIC ACID, HYDROGENATED COCONUT OIL, CARNAUBA WAX, RED CABBAGE EXTRACT COLOR, PAPRIKA COLOR, BEESWAX, ANIATTO COLOR AND ELDERBERRY JUICE CONCENTRATE COLOR.

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FREMONT, MI 49413, U.S.A.

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In particular, the appellate court did not approve that the product, made of white grape juice, featured photographs of a variety of fruit on the label. The court also found misleading the statement that the product was made with “fruit juice and other all natural ingredients.” The product contained in addition to all-natural ingredients some ingredients the Ninth Circuit believed may not be “all natural.” The court believed that the statement, though not untruthful, should have disclosed more information.

The Ninth Circuit concluded that “we do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations.” *Id.* at 939.

## B. Health Claims

1. Dannon agreed to a \$45 million class action settlement agreement in 2010. Consumers sued Dannon alleging that the health claims regarding the yogurt were false and misled the public into paying a premium for the yogurt. The settlement agreement requires the company to remove the phrases “clinically proven” and “scientifically proven” from labels and advertisements for Activia and other related products, and replace those phrases with something like “clinical studies show.” Dannon must also place qualifying statements on the products’ labels and company’s website that explain that the yogurt and other products are not intended to treat medical conditions, and that consumers eating the products will not see an immediate improvement to digestive health.

Later in 2010, Dannon entered into a \$21 million settlement with the attorneys general from 39 states. [The Los Angeles Times](#) (Dec. 15, 2010) reports that this is the largest-ever multistate attorney general consumer protection settlement with a food producer. The attorneys general alleged that Dannon made deceptive and unlawful claims in advertising that were not substantiated by competent and reliable scientific evidence at the time the claims were made. According to the allegations, the majority of scientific studies showed improvement in intestinal transit time when an individual consumed three servings of the probiotic products per day for two weeks, and did not support Dannon’s advertised claims that one serving per day for two weeks improved digestive health. In addition, the attorneys general alleged that Dannon could not substantiate claims regarding improved immunity against the flu and common cold. Dannon also [agreed with the FTC](#) (Press Release, FTC, Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink (Dec. 15, 2010)) to drop claims that the probiotic foods help prevent irregularity and offer protection against the flu and common cold.

2. [Judge James Ware](#) dismissed on a [Rule 12\(b\)\(6\)](#) motion putative class claims against [Unilever](#) alleging violations of the [California Consumers Legal Remedies Act](#) (Cal. Civ. Code § 1750, *et seq.*), [Unfair Competition Law](#) (Cal. Bus. & Prof. Code § 17,200, *et seq.*), and [False Advertising Law](#) (Cal. Bus. & Prof. Code § 17,500). Judge Ware’s decision can be found [here](#) (*Rosen v. Unilever United States, Inc.*, No. C 09-02563, 2010 U.S. Dist. LEXIS 43797 (N.D. Cal. May 3, 2010)). Plaintiff alleged that Unilever misrepresented the ingredients of its butter-substitute product through its advertising and product labeling.

The heart of plaintiff’s complaint was Unilever’s marketing of the product as “Made with a Blend of Nutritious Oils.” The plaintiff alleged that “[t]his message . . . is misleading and deceptive because Defendant’s Product contains a highly unhealthy, non-nutritious oil known as partially hydrogenated oil.” 2010 U.S. Dist. LEXIS 43797, at \*7.

Unilever’s preemption argument was rejected. The court followed what’s becoming a familiar line of reasoning that while federal law governs the labeling of the product, state advertising and marketing claims are not preempted:

Although the “oils” referred to in the advertisement on the label are the same oils that are subject to the [Nutrition Labeling and Education Act (NLEA)] labeling requirement, the Court finds that there is no inherent conflict in allowing relief under

state law with respect to what is said in the advertisement on a label about characteristics of those oils that are not regulated by the NLEA.

*Id.* at \*9-10. Judge Ware dismissed the claims against Unilever on the basis of the plausibility pleading standards articulated by the [Supreme Court](#) in the [Ashcroft v. Iqbal](#), 129 S. Ct. 1937 (2009), and [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544 (2007), cases. He ruled that the plaintiff's claims concerning the oils were "conclusory" and explained that the "implausibility of Plaintiff's allegations can more readily be seen if the allegation[s] are expressed as a categorical syllogism":

For the representation "blend of nutritious oils" to be true, all constituent oils must be nutritious. One of the constituent oils in the product [partially hydrogenated oil] is not nutritious. Therefore, the product representation is false.

2010 U.S. Dist. LEXIS 43797, at \*13. The court went on to explain why the plaintiff's claims, even if accepted as true, were implausible. The court found faulty the logic underlying the plaintiff's complaint about the use of partially hydrogenated oil in the "blend of nutritious oils." The court found that the plaintiff's argument suffered from (1) "petitio principii (begging the question)," (2) the "fallacy of composition" and (3) the "fallacy of division." *Id.* at \*15-17. In short, the Unilever case demonstrates that without a solid scientific and factual basis, consumer fraud claims are frequently vulnerable to attack on an early motion to dismiss (though maybe not for preemption).

3. In a case that presented facts similar to *Rosen*, the court in [Yumul v. Smart Balance, Inc.](#), **XXX** (C.D. Cal. July 30, 2010), did not apply the plausibility pleading standard as stringently as the court in the *Rosen* decision, lending some question as to precisely how far *Iqbal* and *Twombly* will reach.

In *Yumul*, the plaintiffs alleged [Smart Balance](#) violated the California [Unfair Competition Law](#) (Cal. Bus. & Prof. Code § 17,200, *et seq.*), [False Advertising Law](#) (Cal. Bus. & Prof. Code § 17,500), and [Consumers Legal Remedies Act](#) (Cal. Civ. Code § 1750, *et seq.*). These exact same violations were alleged in the *Rosen* case. In *Yumul*, the plaintiffs alleged that Smart Balance misled consumers with its marketing of Nucoa margarine as "cholesterol free" and "healthy," despite the presence of artificial trans fat in the product.

In addressing Smart Balance's motion for dismissal, the court noted the plaintiffs' reliance on the delayed discovery exception in support of its assertion that tolling of the statute of limitations was appropriate. Stating the applicable law, the court offered:

A plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer.

*McKelvey v. Boeing N. Am., Inc.*, 74 Cal. App. 4th 151, 160 (1999).

In its order, the court directed the plaintiffs to specify, in an amended complaint within 14 days of the July 30 order, the manner of discovery (how and when the plaintiffs actually discovered the fraud or mistake). The court denied Smart Balance's motion to dismiss on all other grounds. While this is no guarantee of success for the plaintiffs by any means, the decision of the court not to dismiss the allegations in *Yumul* on the basis of the plausibility pleading standard under *Iqbal* and *Twombly* stands as an example of the type of inconsistency we may see as courts attempt to apply the standard.

#### **IV. A Couple of Possible Strategies to Defeat Class Claims**

If the applicable law requires an individualized showing of causation or reliance, then class certification may be defeated under Rule 23(b), because common issues of law or fact may not predominate over individual issues. See [Picus v. Walmart](#), 256 F.R.D. 651 (D. Nev. 2009)

But if the jurisdiction does not require an individualized showing of causation or reliance, here's an alternative strategy in federal court to dismiss claims at an early stage:

- In states where plaintiffs need not show individualized reliance/causation, they may still have to demonstrate that an objectively reasonable consumer would have been damaged by the marketing/advertising campaign.
- The Supreme Court in *Iqbal/Twombly* said that a court must disregard conclusory allegations and scrutinize the complaint's factual allegations to determine whether it nudges the alleged wrong-doing "across the line from conceivable to plausible." The complaint must have meat on its bones. In the case of a consumer fraud class complaint, the plaintiffs' counsel, to survive a motion to dismiss, should need to include references to evidence or other substantiation for the claim such as consumer surveys or perhaps a government finding.
- Without a strong factual basis as to how an "objectively reasonable consumer" might behave, consumer fraud/unfair trade practices putative class claims concerning the marketing of a food product may be in jeopardy.