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Issues Facing Manufacturers, Distributors and Retailers

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PRODUCT PERFORMANCE VS. DEFECT

Class action lawsuits are brought by consumers for defective products. These products may have inferior performance than expected based on how the products were advertised or marketed to work. The problems may arise from faulty design, poor quality, or other defects.

There was a nationwide LG refrigerator class settlement in 2012.[1] The refrigerator cooling defect led to food perishing. Even when the refrigerator doors would be closed, the light would remain turned on which led to overheating and food perishing.[2] When the case settled, the consumers were reimbursed according to their damages.

1. Consumer Fraud

Consumer fraud can occur when products are labelled in a misleading or deceptive manner. This deceptive or misleading labelling can cause harm to consumers. Consumers typically claim that they would not have bought the product if they knew the product's claims were false or inaccurate. To further understand consumer fraud and class action lawsuits, it is important to analyze the COVID-19 Consumer Protection Act and the recent cases.

A. COVID-19 Consumer Protection Act

In December 2020, Congress passed the COVID-19 Consumer Protection Act under the Federal Trade Commission Act. This act essentially makes it illegal "to engage in deceptive marketing related to the treatment, cure, prevention, mitigation, or diagnosis of COVID-19 among other things."[3]

The Act states the following:

For the duration of the COVID-19 public health emergency declared pursuant to section 319 of the Public Health Service Act (42 U.S.C. 247d), this Act makes it unlawful under Section 5 of the Federal Trade Commission Act for any person, partnership, or corporation to engage in a deceptive act or practice in or affecting commerce associated with the treatment, cure, prevention, mitigation, or diagnosis of COVID–19 or a government benefit related to COVID–19. The Act provides that such a violation shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under Sec. 18(a)(1)(B) of the FTC Act.[4]

This act was recently violated by a chiropractor in St. Louis when he deceptively marketed his products on social media, advertisements, marketing emails, and more. He claimed that his "products containing Vitamin D and Zinc were scientifically proven to prevent or treat COVID-19 and as being equally as effective as or more effective than currently available COVID-19 vaccines."[5]

B. Natural

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[1] *McLennan v. LG Elecs. USA, Inc.*, Civ. No. 2:10-cv-03604 (WJM) (D.N.J. Feb. 29, 2012).

[2] *Id.*

[3] Samantha Kingsbury, *FTC Engages in First Enforcement Action under COVID-19 Consumer Protection Act*, (July 3, 2021), https://www.natlawreview.com/article/ftc-engages-first-enforcement-action-under-covid-19-consumer-protection-act.

[4] Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

[5] *Id.*

In recent class action lawsuits companies have misled consumers by labelling their products as natural. A recent example is *Clark v. Westbrae Natural, Inc.*, where natural vanilla was claimed to be used.[6] The word "vanilla" was used on the label of the organic unsweetened vanilla soymilk, but the vanilla flavor was a result of various vanillin compounds. This can be misleading as consumers might believe the vanilla flavor was derived naturally from the vanilla bean plant. The Court held the label was not misleading and a reasonable consumer would not conclude the vanilla flavor to be exclusively derived from vanilla bean. The case was dismissed.

In *Cosgrove v. Westbrae*, consumers claimed that the word "vanilla" was misleading on the Blue Diamond's vanilla almond milk.[7] They claimed that there was less vanilla than suggested by the label. The *Cosgrove* court stated that "the term 'vanilla' by itself does not communicate to a reasonable consumer that the product was made exclusively with vanilla beans or vanilla bean extract. Instead, the court determined a reasonable consumer would understand 'vanilla' to refer to a flavor, not an ingredient."[8] The court also stated that a vanilla representation would only be misleading if the milk did not have the vanilla taste. Since consumers stated that the almond milk tasted like vanilla, the court concluded that the label was not misleading.[9]

C. Ingredients

Consumer fraud can occur when ingredients are mislabeled or misrepresented. Two recent examples are using partially hydrogenated oils in popcorn and presence of metals in dog food. It can also be how companies try to spell an ingredient in a unique way that may be misleading to consumers.

Partially Hydrogenated Oils in Pop Secret

In *McGee v. S-L Snacks Nat'l*, McGee alleged that injuries because Diamond Foods used partially hydrogenated oils in Pop Secret popcorn as an ingredient.[10] Plaintiff claimed three injuries due to the trans-fat amount she consumed in the popcorn "(1) 'caused her economic injury because she believed she was purchasing a safe product when she was not'; (2) 'caused her physical injury by harming her heart and blood vessels'; and (3) substantially increased her 'risk of heart disease, diabetes, cancer, and death.'"[11]

The Ninth Circuit ultimately dismissed this case. Regarding economic injury, the Court stated that Diamond Foods did not make any misleading representations that would encourage a consumer to believe that the popcorn is safe.[12] Court also held that a plaintiff "must do more than allege that she did not receive the benefit she thought she was obtaining."[13] Plaintiff also conceded that "Pop Secret's nutritional label disclosed the presence of artificial trans-fat, and the health risks of consuming artificial trans-fat were firmly established by the time of McGee's purchases."[14] Ultimately, the court held that McGee did not allege that there was a hidden

[6] *Clark v. Westbrae Natural, Inc.*, No. 20-CV-03221-JSC, 2020 WK 7043879 (N.D. Cal. Dec. 1, 2020).
[7] *Ryan Cosgrove et al. v. Blue Diamond Growers*, No. 19-Civ-8993 (S.D.N.Y. December 7, 2020).
[8] *Id*.
[9] *Id*.
[10] *McGee v. S-L Snacks Nat'l*, Case No. 17-55577 (9th Cir. December 4, 2020).
[11] Jeffrey Washafsky, Lawrence Weinstein, Marc Palmer, *Not a Kernel of Standing: Ninth Circuit Affirms Dismissal of Complaint Against Pop Secret*, (March 02, 2021), https://www.natlawreview.com/article/not-kernel-standing-ninth-circuit-affirms-dismissal-complaint-against-pop-secret.
[12] *Id*.
[13] McGee v. S-L Snacks Nat'l, Case No. 17-55577 (9th Cir. December 4, 2020).
[14] *Id*.

defect in the popcorn or that it was not worth the amount she paid for the snack.[15]

I. Biologically Appropriate: Presence of Metals in Pet Food

In a recent case against Champion Petfoods, the Court held that it was not reasonable for a consumer to believe that the pet food contained no metals.[16] Plaintiffs claimed to be misled by the advertisements stating "Biologically Appropriate"; "Fresh Regional Ingredients"; "Nourish as Nature Intended"; and "Delivering Nutrients Naturally" on the dog food.[17] However, the dog food contained or had potential risk of containing "heavy metals, BPA, pentobarbital, and non-fresh, non-regional ingredients."[18]

The Court held that a reasonable consumer would not believe that there were absolutely traces of heavy metals because of the advertisement stating, "Biologically Appropriate." Furthermore, the package did state that the dog food included meat and fish, in which heavy metals naturally occur. The number of heavy metals is not dangerous for the dogs. The Court stated that a reasonable consumer would believe that the advertisement means "the food does not ingredients that would make it unfit for a dog to consume."[19]

Plaintiffs also claimed the advertisement alleging "Fresh Regional Ingredients" was false. The Court rejected this claim because the package stated that every ingredient was not fresh. Some were raw, dried, and in form of oils.[20] The Court relied on two previous cases for support. "Citing *Sarr v. BEF* and *Harris v. Mondelez Global,* the court concluded that a representation highlighting a certain ingredient does not mislead consumers into believing the ingredient has not been mixed with others. In *Sarr*, the court found claims that mashed potatoes were made with 'real butter' did not imply that the only fat used was real butter."[21]

II. "Krab Mix" at P.F. Chang

P.F. Chang's used the term "krab mix" to describe the ingredients for certain sushi rolls.[22] The plaintiff claimed he bought these sushi rolls to have real crab meat, but instead received a "krab mix" which contains no crab meat. The restaurant reasoned that since it was written as "krab" instead of "crab", the reasonable consumer should know that it was not real crab.

The district court ultimately held that the consumer should have been more aware and dismissed the plaintiff's claims. This court relied on a previous case "finding no reasonable consumer would be misled into believing "Froot Loops" contained "Fruit." [23]

The Ninth Circuit, however, reversed this holding and held that P.F. Chang cannot simply rely on the fact that it was spelled as "krab" to not be responsible for this misleading of ingredients. This court relied on the *Williams v.*

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[15] *Id*.
[16] *Song & Wertkin, et al. v. Champion Petfoods USA*,No. 18-CV-3205 (PJS/KMM) (D. Minn. Dec. 22, 2020).
[17] Lawrence Weistein, Jeffrey Warshafsy, & Jessica Griffith, *Top Dog: Champion Petfoods Wins Dismissal of Dog Food Suit*, (March 09, 2021), https://www.proskaueronadvertising.com/2021/03/top-dog-champion-petfoods-wins-dismissal-of-dog-food-suit/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Kang v. P.F. Chang's China Bistro,* No. 20-55138 (9th Cir. Feb. 9, 2021).
[23] *McKinnis v. Kellogg*, 2007 U.S. Dist. LEXIS 96106 (C.D. Cal. 2007).

Gerber Prods. Co., when making this decision.[24]

"In *Williams*, the defendant sold products labeled "Fruit Juice Snacks" with images of fruits on the front label." [25] However, the ingredient list on the side of the box revealed there to be no actual juice from any of the fruits in the pictures. "The *Williams* Court found the defendant could not immunize itself against prominent, misleading front-label claims by disclosing the truth about the product's ingredients elsewhere. The majority held the same to be true in this case—just as the *Williams* court believed a consumer might not look beyond representations on the front of a box to discover an ingredients list displayed elsewhere on the packaging, the majority here concluded a P.F. Chang's customer might not look beyond the phrase "krab mix" to discover the term "crab" used elsewhere on the same menu."[26]

D. Healthy

A recent class action settlement with Kellogg's occurred where consumers alleged the company mislabeled products to the extent the food was a potential health risk.[27] Consumers purchased certain Kellogg's cereals because they were labeled as "heart healthy" or "lightly sweetened." The cereal advertisements also claim that the products would "help recharge your body," "help you rebuild," and "help you refuel," and that some of these cereals "offer the nutrients our bodies want to work and feel their best." [28]

This class action lawsuit alleged that the company violated laws by labeling "three of its cereals with certain nutritious statements even though plaintiffs alleged the products contained excessive amounts of sugar." [29] Although evidence does show that excessive sugar can be dangerous, Kellogg's "allegedly choses to market their high-sugar cereal and bars by using "aggressive health and wellness claims."[30] The plaintiffs reference a study "that reportedly show 'consuming excessive added sugar—any amount above approximately 5% of daily caloric intake—greatly increases the risk of heart disease, diabetes, liver disease, and a wide variety of other chronic morbidity.'"[31] This is concerning because children may consume the excessive sugar and possibly have an addiction response.

Along with the cereal, the cereal bars also have excessive sugar than the daily recommended amount. Yet, the products are advertised to the consumers as being healthy and nutritious. Despite the high sugar content, Kellogg advertised to consumers in a misleading manner by highlighting the products as "whole grain, high in fiber, and

[24] *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008)
[25] Lawrence Weinstein, Anisha Shenai=Khatkhate, & Alyson Tocicki, *Ninth Circuit Claws Back "Krab Mix" Class Action Dismissal*, (March 03, 2021), https://www.proskaueronadvertising.com/2021/03/ninth-circuit-claws-back-krab-mix-class-action-dismissal/.
[26] *Id*.
[27] *DiGregorio, et al. v. Kellogg Sales Company*, Case No. 3:19-cv-00632-GTS-ATB
[28] *Id*.
[29] Top Class Actions, *Kellogg 'Health' Cereals $13M Class Action Settlement*, (July 14, 2021), https://topclassactions.com/lawsuit-settlements/consumer-products/food/1023799-kellogg-healthy-cereals-13m-class-action settlement/#:~:text=The%20class%20action%20lawsuit%20alleged%20Kellogg%20violated%20certain,alleged%20the%20products%20contained%20excessive%20amounts%20of%20sugar.
[30] Brigette Honaker, Kellogg's Class Action Says Cereals Contain Too Much Sugar, (May 30, 2019), https://topclassactions.com/lawsuit-settlements/consumer-products/food/899586-kelloggs-class-action-says-cereals-contain-too-much-sugar/.
[31] *Id*.

containing real fruit."[32]

E. Humane

I. "Caring Dairy" Ice Cream

In *Ehlers v. Ben & Jerry's Homemade Inc*., the Court concluded that Ben & Jerry were not misleading consumers at whole.[33] This is "because neither Ben & Jerry's products nor its website represents that its ingredients are 'sourced exclusively' from Caring Dairy farms, Plaintiff's entire claim is grounded on a single phrase in a single heading on a multipage website which is neither false nor misleading when considered as a whole."[34]

The plaintiff claims the advertisements were misleading because it appeared the dairy products "come from 'happy cows' on 'Caring Dairy' farms".[35] She believed the ice cream was "sourced exclusively from 'happy cows' on Vermont dairies that participate in a special, humane 'Caring Dairy' program."[36] However, the reality was that the milk and cream originated from various dairies. This also included -mass production facilities which do use antibiotics and have confined the animals (not necessarily a "Caring Dairy").

Furthermore, the website explains that the Caring Dairy program is "a unique program that's helping farmers move toward more sustainable practices on the farm" and sets the "basic standards to be considered a Caring Dairy farm as well as the detailed eligibility requirements for higher levels of status."[37] The back of the ice cream cartons also state the following: '"We strive to make the best possible ice cream in the best possible way. We source non-GMO ingredients, Fairtrade cocoa & sugar, eggs from cage-free hens & milk & cream from happy cows. Learn more at benjerry.com."'[38] The Court dismissed this suit because the packing and the website did not claim that Ben & Jerry's received ingredients exclusively from Caring Dairy farms.

II. "American Humane Certified" Poultry

In *Leining v. Foster Poultry Farms, Inc.*, the Court granted summary judgment against the consumer and to the poultry farm.[39] The Poultry Farm paid American Humane Association a license fee to label some chickens as "American Humane Certified" making them more expensive than the chickens without that label.[40]

The plaintiff claimed that she only purchased this chicken because she was misled by the label. She thought it meant the chickens had been "afforded a comfortable existence and a quick and painless death."[41] Whereas, in reality, the chickens were treated the same as others and the premium cost was unjustified. Furthermore "the logo was misleading because 'the chicken was not treated in a manner that an objectively reasonable consumer

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[32] *Id*.
[33] *Ehlers v. Ben & Jerry's Homemade Inc.,*2020 U.S. Dist. LEXIS 80773 (D. Vt. May 7, 2020).
[34] *Id*.
[35] Robert Guite & Sascha Henry, *Food & Beverage False Advertising and Labeling Class Actions: What You Need to Know for 2021*, (January 12, 2021), https://www.coveringyourads.com/2021/01/articles/advertising/food-beverage-class-actions/#_edn3.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Leining v. Foster Poultry Farms, Inc.*, 2021 687941 (Cal. Ct. App. Feb. 23, 2021).
[40] Stephen McConnell, *Preemption On A Chicken Run*, (March 18, 2021), https://www.mondaq.com/unitedstates/professional-negligence/1048576/preemption-on-a-chicken-run#.
[41] *Id*.

would consider humane.'"[42]

For the poultry manufacturer's argument in the summary judgment, it claimed that the label by the Humane Association was approved by the federal government and pre-approved by the Food Safety and Inspection Service.[43] It is important to note that there is an express preemption clause in the Poultry and Poultry Products Inspection Act. It is also a common practice to preapprove labels in the industry.[44]

F. Presence or Absence of Recognized Allergens

Class action lawsuits can be brought when there is a presence or absence of recognized allergens in products. This could include milk, eggs, fish, crustacean shellfish, tree nuts, wheat, peanuts, sesame, and soybeans. In a current class action lawsuit against Whole Foods., plaintiffs claim that the store fails to disclose all the ingredients in its products.[45] This has resulted in about 32 recalls of the products and puts people with food allergies at risk as the products range from fish, soups, and bakery items. "Consumers with food allergies are careful to check product ingredient lists to confirm the items do not contain allergens – such as milk, shellfish, peanuts, soybeans, or tree nuts – that will harm them."[46] Without an accurate ingredient list, it is a great health risk for people with any allergies.

G. 100% Grated Parmesan Cheese

In *Bell v. Albertson Companies Inc.*, the consumer claimed that he believed the phrase "100% Grated Parmesan cheese" on the cheese canister implied that it would be only cheese added with nothing else. In reality, however, there were ingredients added to act as a preservative. [47]

The Court ultimately ruled in favor of the consumer stating that "an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers."[48] Court states that the Albertson Companies cannot rely on label, common sense, preemption, or the fact this cheese was placed in non-refrigerated section to claim there was not a misleading label. Court concluded the "100% grated cheese" was misleading to the consumers.

H. Blue Diamond Smokehouse Almonds

In a recent class action lawsuit against Blue Diamond Growers, consumers allege that the company was misleading consumers that the almonds were actually smoked.[49] The packaging of the almonds may be deceptive as the "color scheme evocative of the fire used in actual smoking."[50] The company marketed Smokehouse Almonds as if they were smoked, but instead that was only the flavor known as "Natural Hickory Smoke Flavor"

[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] Katherine Webster, *Consumers Concerned About Food Allergies File Class Action Lawsuit Against Whole Foods*, (December 24, 2020), https://topclassactions.com/lawsuit-settlements/consumer-products/food/consumers-concerned-about-food-allergies-file-class-action-lawsuit-against-whole-foods/.
[46] *Id*.
[47] *Bell v. Publix Super Markets, Inc*., 982 F.3d 468 (7th Cir. 2020).
[48] *Id*. at 476.
[49] *Colpitts et al v. Blue Diamond Growers*, Case No. 20-cv-2487, S.D.N.Y.
[50] *Id*.

was added.[51]

Phrases such as "Smokehouse" and "Smart Eating!" may urge consumers to believe that the flavor was from the almonds being smoked. "When terms like 'smoke' are used when describing a product without using qualifying works like flavor or flavored, consumers will get the impression that the food is being prepared by actual smoking."[52] Despite the trademark next to the word smokehouse, consumers might not know that "things described is false or that is necessarily fanciful."[53] Consumers allege they would not pay the premium price for the almonds had they known that it was a flavor being added rather than from actual smoking of almonds.

I. Net Weight and Servings

There is a class action lawsuit against Kilwins Quality Confections for allegedly mislabeling the portions of their chocolates and candy.[54] It is claimed that the portion and calories on the products are mislabeled. The consumer alleges "while the caramel toppings were labeled as containing 40 tablespoons of the product, they contained only 32 tablespoons."[55] Furthermore, "the volumes of the 'Caramel Topping' and 'Sea-Salt Topping' are both over-stated by at least twenty-five percent."[56] The calories are also misrepresented as "there are 140 in each and every two tablespoon serving, not the 110 calories represented."[57]

It is important to note that the claims at issue do involve gross misrepresentation of the net weight and calories, but this does not necessarily mean this will be a new class action lawsuits area of scrutiny. "Net weight lawsuits centered on violations of state laws sometimes raise complex preemption issues where different results would follow under a less complicated sampling plan under FDA's Compliance Policy Guide which calls for selecting a sample of 48 units and considers the sample to be in compliance if the mean of the sample is within 1% of the declared contents."[58]

J. Calories

AriZona's drinks that may claim to be zero-calorie are facing a class action lawsuit.[59] The half-lemonade, half-iced tea drinks allegedly contain more calories and are deceiving to consumers. Although the drink is marketed and labeled as zero-calories or no calories, it is important to note that may not be true. According to the U.S. Food and Drug Administration, companies are allowed to label their products in such a manner if they have less than five calories.[60] The class action lawsuit alleges there are about fifteen calories in the 23 ounce can.

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[51] Steven Cohen, *Blue Diamond Class Action Says Smokehouse Almonds Are Artificially Flavored*, (March 24, 2020), https://topclassactions.com/lawsuit-settlements/consumer-products/food/blue-diamond-class-action-says-smokehouse-almonds-are-artifically-flavored/.
[52] *Id*.
[53] *Id*.
[54] *John Rand vs. Kilwins Quality Confections Inc.*, Case No. 1:21-cv-01513.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] Food and Drug Law at Keller and Heckman, *Lawsuit Filed Over Net Weight and Caloric Content*, (March 22, 2021), https://www.natlawreview.com/article/lawsuit-filed-over-net-weight-and-caloric-content.
[59] *Schrode et al., v. AriZona Beverages*, Case No. 1:21-cv-03159
[60] Jessy Edwards, *AriZona 'Zero Calorie' Arnold Palmers Aren't Zero-Calorie, Class Action Lawsuit Alleges*, (June 14, 2021), https://topclassactions.com/lawsuit-settlements/consumer-products/food/1022364-arizona-zero-calorie-arnold-palmers-are-not-zero-calorie-class-action-lawsuit/.

K. Kashi's Ripe Strawberry Bar

Consumers allege that the Kashi's Ripe Strawberry Soft Baked Breakfast Bars are misleading as the strawberry ingredient is not present. [61] The company, Kashi, advertises itself as an organic and health snack retailer. The plaintiff claims that she bought the "healthy strawberry bar" because she believed that it did have nutritive value, along with strawberries as the main ingredient. However, it appears that the bars are "mostly made from pears and apples."[62] Consumers may have been misled because they may specifically be wanting to get the strawberry bars as some research indicates that "strawberries protect your heart, increate HDL (good) cholesterol, lower your blood pressure, and guard against cancer."[63] However, since strawberry is not the main ingredient in the bars, consumers may not be able to receive these potential health benefits. Plaintiff also states that "the company also overstated the amount of honey in the bars, as the ingredient show there is more sugar than honey."[64]

L. Infants and Children's Tylenol Versions

In *Eidmann v. Walgreen Co.*, a class action lawsuit was brought because the Infant Tylenol and the Children Tylenol was allegedly misleading in their marketing. [65]Although the composition was the same for both products and the labels did indicate so, the images were different. One used the infant whereas the other had an older child. The price for the Infant Tylenol was also significantly more than for the Children's Tylenol, even though there was no difference in the amount of liquid given either.[66]

The Court ultimately dismissed the claims and concluded that "no reasonable consumer would understand the Infants' Product to be specially formulated for infants."[67] To support this conclusion, the *Lokey v. CVS Pharmacy, Inc*. case was considered.

The plaintiff is the Lokey case claimed that "CVS's store-brand infant acetaminophen deceives reasonable consumers into believing that the product is specially formulated for children under two, as compared to its children's product."[68] To make their decision, the court considered both products' packaging. They stated that "the front labels clearly disclose that the medicines are compositionally the same. Because of these clear disclosures, depictions of differing dosing mechanisms and images of children of differing ages could not plausibly suggest different formulations. The *Lokey* court therefore found that the labels were not likely to mislead a reasonable consumer."[69]

M. Handmade/Crafted Tito's Vodka

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[61] *Sheila Johnston vs. Kashi Sales, L.L.C.*, Case No. 3:21-cv-00441

[62] Anna Bradley-Smith, *Strawberries Are The Missing Ingredient in Kashi's Strawberry Breakfast Bars, Class Action Claims*, (May 3, 2021), https://topclassactions.com/lawsuit-settlements/consumer-products/food/1018128-kashi-ripe-strawberry-breakfast-bars-not-enough-strawberry-class-action-lawsuit/.

[63] *Id*.

[64] *Id*.

[65] *Eidmann v. Walgreen Co*., No. 20-cv-04805-EJD (N.D. Cal. Feb. 26, 2021).

[66] *Id*.

[67] Lawrence Weinstein, Anisha Shenai-Khatkhate, & Alyson Tocicki, *A Dose of Relief: Federal Judge Dismisses Walgreens Infant Acetaminophen Class Action*, (March 23, 2021), https://www.natlawreview.com/article/dose-relief-federal-judge-dismisses-walgreens-infant-acetaminophen-class-action.

[68] *Id*.

[69] *Id*.

Numerous class action lawsuits were filed against Fifth Generation who produce Tito's Handmade Vodka.[70] The claim is that the company markets their product as if it is crafted or handmade, when it is actually mass produced by machines instead. This is concerning because usually handmade products come with better quality. Consumers indicate that the label is misleading as it states, "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery," whereas in reality, about "500 cases an hour" are produced.[71] Consumers allege that they would not have paid the premium price for this product had they known it was mass produced.

N. Origin (made in…)

Class action lawsuits regarding the origin of a product occur often. In *Maeda v. Kennedy Endeavors, Inc*., the court held that "a reasonable consumer would not be misled into believing that the Hawaiian Snacks originate from Hawai'i due to the mere inclusion of the word "Hawaiian" plus Hawai'i-related imagery on the snacks' packaging."[72] In another case, consumers brought a class action lawsuit because the Hawaiian Host Candies were not made in Hawaii.[73] Consumers paid premium price because they believed from the packaging that the chocolates were made in Hawaii, and not California. "The product packing includes hibiscus flowers, palm trees, Hawaiian landmarks, and other 'references to Hawaiian culture."[74]

O. Cure Capabilities

Many consumers have also been misled through advertisements by Capillus82 Laser Therapy. The company suggested that hair regrowth as possible by wearing a laser cap for about six minutes each day.[75] However, people continued to lose hair and did not meet their expectations from the advertisements. The manufacturer had used claims "clinically proven to regrow hair" and "physician recommended" when this was actually misleading consumers.[76] When the company refused to stop using those claims, it was reported to the Federal Trade Commission.

P. Product Reviews (Lanham Act) (competitor challenged)

The National Advertising division "evaluates the truth and accuracy of advertising in order to ensure that no false claims arebeing made by companies about their products or services, and by doing so, to increase the public's trust in advertising."[77] The Lanham Act, also known as the trademark statute, protects businesses to make sure there is not unfair competition by misleading consumers through labels or advertisements.[78]

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[70] *Gary Hofmann v. Fifth Generation Inc.,* Case No. 3:14-cv-02569, in the U.S. District Court for the Southern District of California.
[71] Christina Davis, *Class Cert. Sought in Tito's 'Handmade' Vodka Class Action Lawsuit*, (January 21, 2016), https://topclassactions.com/lawsuit-settlements/lawsuit-news/317837-cert-sought-titos-handmade-vodka-class-action-lawsuit/.
[72] *Maeda v. Kennedy Endeavors, Inc.*, 407 F. Supp. 3d 953, 972-974 (D. Haw. 2019).
[73] *Alison Toy, et al. v. Hawaiian Host Candies of L.A. Inc.*, Case No. 8:20-cv-02191.
[74] Katherine Webster, *Hawaiian Host Candies Aren't Made in Hawaii, Class Action Lawsuit Claims*, (November 17, 2020), https://topclassactions.com/lawsuit-settlements/consumer-products/food/class-action-lawsuit-claims-candies-arent-made-in-hawaii/.
[75] KJ McElrath, Capillus82 Laser Therapy Hair Regrowth Cap Reviews, (June 04, 2019).
[76] *Id*.
[77] Sage Datko, *How Does the National Advertising Division Monitor False Labels on Multivitamins?*, (May 07, 2020), https://topclassactions.com/lawsuit-settlements/consumer-products/supplements/how-does-the-national-advertising-division-monitor-false-labels-on-multivitamins/.
[78] BonaLaw PC, *Do I Have a Lanham Act Claim Against My Competitor for False Advertising?*

The Lanham Act Elements are the following:

> To prevail on a false-advertising claim under the Lanham Act, a plaintiff must satisfy the following elements: (1) a false or misleading statement of fact; that is (2) used in a commercial advertisement or promotion; that (3) deceives or is likely to deceive in a material way; (4) in interstate commerce; and (5) has caused or is likely to cause competitive or commercial injury to the plaintiff.[79]

A recent case against Too Faced Cosmetics was brought because consumers alleged that the mascara did not boost volume as it was advertised to do so.[80] The claims were that the lash volume is enhanced by 1,944% and there also a supposed supporting clinical study. In reality, the mascara was not as successful, and the National Advertising Division stated that the percent claims were misleading.[81] Furthermore, consumers believe that the volume was similar to the competitor mascara companies, even though Too Faced claimed more volume.

2. Conduct of Recall

In a recent suit against IKEA, a class action lawsuit occurred because the product was recalled. Most class actions occur because of the product itself, but this is the first case where the class action lawsuit is regarding the recalling itself.[82] IKEA recalled dressers after the death of some children and offered two options to the customers. They offered to provide full refunds or a one-time free installation of anchoring the Ikea dressers to the wall. Consumers claim that they did not receive notice of the dresser recall until the class action lawsuit occurred.[83] This is concerning as it shows that there was not a consistent method in informing consumers of the dangers. Consumers also claim they allegedly did not receive a refund although that was one of the remedies promised by IKEA.[84]

3. ADA – Americans with Disabilities Act

A. A. Title III of the ADA

"Title III requires that any place of 'public accommodation,' as defined in 42 U.S.C. § 12181, provide 'appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities' (28 C.F.R. § 36.303(c (1)). An individual with a qualifying disability can sue a business that doesn't meet Title III's requirements and obtain injunctive relief and attorney's fees."[85]

The courts are split as to when a website or a mobile app is considered a "public accommodation" under the Americans with Disabilities Act (ADA). "The Third, Sixth, Ninth, and Eleventh Circuits have held that the ADA's mandate applies to digital services that have a "nexus" to a physical place of public accommodation. Courts within

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[79] *Id*.

[80] *Floth and Eshelby v. Too Faced Cosmetics LLC,* Case No. 8:18-cv-00707.

[81] Brigette Honaker, *Too Faced Class Action Challenges Better Than Sex Mascara Volume Claims,* (April 30, 2018), https://topclassactions.com/lawsuit-settlements/lawsuit-news/844220-too-faced-class-action-challenges-better-than-sex-mascara-volume-claims/.

[82] *Dukich v. Ikea US Retail LLC, 2021 BL 142824, E.D. Pa., No. 20-2182, 4/19/21.*

[83] Paul Benson, *"One-off" case or new class action trend: Ikea gets sued over how it did its recall.* (April 20, 2021), https://insights.michaelbest.com/post/102gw3s/one-off-case-or-new-class-action-trend-ikea-gets-sued-over-how-it-did-its-reca.

[84] *Id*.

[85] Concord Law School, *Is a Website or Mobile App a "Public Accommodation" Under the ADA?*, (February 18, 2020), https://www.concordlawschool.edu/blog/news/website-app-public-accommodation-ada/.

the First, Second, and Seventh Circuits have held that a website can be a place of public accommodation without any connection to a physical location."[86] The Supreme Court denied the petition for writ of certiorari on a case which would have required them to answer how accessible digital services must be.[87]

Gil v. Winn-Dixie Stores, 242 F. Supp. 3d 1315 (S.D. Fla. 2017) was the first case regarding website accessibility that went to court. The 11th Circuit held that even if the websites are operated by businesses, it does not mean that they are places of public accommodation under Title III of the ADA. Gil was unable to access the website because of his blindness, but it was not a violation because Gil could have shopped for the items in the physical store instead of the website.[88]

Currently, the trend is more towards requiring more accessibility to be complaint with the ADA. For example, in *Haynes v. Dunkin' Donuts LLC et al.*,[89] the court held that it is important for the website to be accessible to prevent discrimination. "The prohibition on discrimination is not limited to tangible barriers that disabled persons face but can extend to intangible barriers as well." *Id*. The plaintiff was blind and claimed he was unable to access the goods offered on the website. This included not being able to purchase gift cards or find the nearest physical store locations. The Eleventh Circuit held that "the website is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation." Vision-impaired people were being denied access to the goods and services online.

To support this decision, the court relied on the decision of *Rendon v. Valleycrest Productions, Ltd.*[90] This case held that "the ADA's protections could extend to intangible barriers, such as a telephone selection process that improperly prevented disabled contestants from competing on the television show *Who Wants To Be A Millionaire*."[91]

B. How Companies can Avoid Class Action Claims

There is a multitude of ways in which companies can avoid or at least limit their exposure to class action claims. One of the easiest methods is by engaging with all necessary departments within the company. These departments may include design, purchasing, sales and marketing, labeling, and packaging, and regulatory compliance. Other means companies can use to avoid class action claims include upstream protecting from vendors, accessibility review, as well as obtaining support for these claims which may be through 3rd party verification or testing.

I. Forum, Venue, and Removal: Class Action Fairness Act

On February 18, 2005, the U.S. Class Action Fairness Act ("CAFA") was signed into law, expanding federal subject-matter jurisdiction over a substantial amount of class-action suits and actions taken in the U.S.[92] Under CAFA, federal jurisdiction exists over most class actions in which diverse citizenship of any one member of a class

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[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Haynes v. Dunkin' Donuts LLC et al.*, No. 18-10373 (11th Cir. July 31, 2018)
[90] *Rendon v. Valleycrest Productions, Limited,* No. 01-11197 (11th Cir. 2002).

[91] Anthony McClure, *Websites May Be Places of Public Accommodation Subject to the ADA*, (March 18, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2019/websites-may-be-places-public-accommodation-subject-the-ada/.
[92] 28 U.S.C. § 1332(d), §1453, §1711-1715.

(named or not) is present, provided that the *aggregate* amount in controversy exceeds $5 million.[93] While this provision provided plaintiffs access to file cases in federal court that previously could only be filed in state court, it also gives defendants new rights to remove certain cases to federal court that previously could not have been removed.[94] CAFA, like many statutes, has its exceptions—the local controversy and discretionary exceptions—being two frequently invoked to permit remand. These exceptions "permit remand where a certain percentage of the putative class are citizens of the same state."[95]

Plaintiffs attempting to avoid federal court by relying on general economic studies and population statistics as a method of proving that their case should be in state court will fall short in the Eleventh Circuit. In *Smith v. Marcus & Millichap, Inc.*, the court held that "studies, surveys, and census data—which do not directly involve the plaintiffs"—are not "sufficient to establish that a certain percentage of the plaintiff class are citizens of a particular state for the purposes of CAFA's local controversy and discretionary exceptions."[96]

II. Preemption

Preemption is another critical component litigants need to consider when faced with either challenging or defending class action claims surrounding labels of federally regulated products. Often federal law will contain preemption clauses that contradict or impose different requirements from those found in state law but nonetheless may preempt a plaintiff bringing a claim under state law. Preemption may exist in an array of food related regulatory frameworks, including but not limited to the Food, Drug, and Cosmetic Act ("FDCA"), Federal Meat Inspection Act ("FMIA"), and the Poultry Products Inspection Act ("PPIA").

Impact Applications, Inc., v. Concussion Mgt, LLC, sheds light on how preemption plays a role in actions to enforce the FDCA.[97] 21 U.S.C. § 337(a) contains an implied preemption by declaring that all actions to enforce the FDCA "shall be by and in the name of the United States." *Buckman Co. v. Plaintiffs' Legal Committee* sets forth the Supreme Court's interpretation of the provision as prohibiting private plaintiffs from attempting to enforce the FDCA.[98]

The passage of the FDCA was intended to create not only a national but uniform standard for labeling. This in turn, expressly preempts any state law labeling requirement that does not mirror those set forth in the FDCA. Section 403(r)(6) of the Act authorizes such structure/function claims to be made provided that they, (1) are substantiated so that the statement is truthful and not misleading; (2) do not claim to diagnose, mitigate, treat, cure, or prevent a disease; and (3) include a mandatory disclaimer informing the consumer that the product has not been evaluated by the FDA and is not intended to treat or otherwise address disease.

In a substantial win for the dietary supplement industry, the Ninth Circuit Court of Appeals dismissed the case, upholding the lower court's grant of summary judgment to Target.[99] In doing so, the court ruled that state law false advertising challenges made to structure/function claims, while may ordinarily be permissible, are

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[93] 28 U.S.C. § 1332(d).

[94] *See also* Pub. Citizen Litig. Grp., *A Section-by-Section Analysis of the Class Action Fairness Act of 2005* (Feb. 2005), *available at* Microsoft Word - The Class Action Fairness Act of 2005 Final Version for Di– (citizen.org) (providing a detailed summary of CAFA).

[95] Smith v. Marcus & Millichap, Inc., 991 F.3d 1145, 1148 (11th Cir. 2021) (*citing* 28 U.S.C. § 1332(d)(3), (4)).

[96] *Id*.

[97] ***Impact Applications, Inc., v. Concussion Mgt, LLC,*** WL 978823 (D. Md. 2021

[98] Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001).

[99] Greenberg v. Target Corp., 402 F. Supp. 3d 836 (N.D. Cal. 2019), aff'd, No. 19-16699, 2021 WL 116537 (9th Cir. Jan. 13, 2021).

preempted by the FDCA[100]. This decision affords a new level of comfort for the industry against class action plaintiffs seeking to assert deceptive claims of labeling to the "reasonable consumer" by establishing that if a structure/function claim complies with the FDCA, it is less likely to be challenged in the Ninth Circuit.

It is imperative to note that not all foods or labels will be regulated under the same framework as that of the FDCA. The regulatory framework governing advertising claims or general labeling of meat and poultry products for consumption fall under the FMIA and PPIA—invoking preemption in a different context. The FMIA and PPIA are expressed more directly than those under the FDCA. Specifically, both the FMIA and PPIA contain preemption provisions that prohibit states from imposing restrictions that contradict that in place at the federal level. *National Meat Ass'n v. Harris* established that the FMIA expressly preempted application against that of the California Penal Code provision prohibiting the sale or "non-ambulatory" meat related products.[101] Thus, if defendants cannot defeat claims based on preemption, standing and other procedural grounds need to be considered.

III. Standing, Article III, and Injury

Thole v. U.S. Bank N.A., provides the Supreme Court's most recent restatement of the rules governing standing which set forth:

> To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief.[102]

In order to have Article III standing to sue in federal court, a plaintiff must demonstrate that, among other things, that the plaintiff suffered concrete injury in fact.[103] In a tightly split 5-4 decision, the United States Supreme Court ruled that *only class members* who were *concretely harmed* due to TransUnion's FCRA violation had Article III standing to seek damages.[104] This Supreme Court decision is one of the most significant class-action decisions in recent years. Beyond ruling that every class member has to have Article III standing to recover damages, it also expanded the scope of the Court's earlier decision in *Spokeo, Inc. v. Robins*.[105] *Ramirez* provides a new basis for potentially powerful class certification defenses, affording defendants leverage in cases where the statutory claims based on conduct that has limited or little actual impact on putative class members.[106]

However, in *McGee v. S-L Snacks Nat'l,* the Ninth Circuit Court of Appeals affirmed dismissal of the case, on the basis that the consumers did not adequately allege an injury-in-fact, and thus lacking standing to sue.[107] Here, McGee contended that Diamond Foods, Inc. ("Diamond")—who manufactures Pop Secret brand popcorn—

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[100] *Id*.
[101] National Meat Ass'n v. Harris, 565 U.S. 452 (2012).
[102] Thole v. U.S. Bank N.A, 140 S. Ct. 1615, 1618, 207 L. Ed. 2d. 85 (2020).
[103] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992).
[104] Ramirez v. TransUnion LLC, 951 F.3d 1008, 1037 (9th Cir.), cert. granted in part, 141 S. Ct. 972, 208 L. Ed. 2d 504 (2020), and rev'd and remanded, 141 S. Ct. 2190 (2021).
[105] *Class Action Litigation Update: Five Key Developments from 2nd Quarter 2021:* Covington & Burling LLP: Covington Alert (July 15, 2021) *available at* Class Action Litigation Update: Five Key Developments from 2nd Quarter 2021 | Covington & Burling LLP.
[106] *Id*.
[107] McGee v. S-L Snacks Nat'l, 982 F.3d 700 (9th Cir. 2020).

engaged in unfair practices, created a nuisance, and breached the warranty of merchantability by including PHOs as an ingredient in Pop Secret.[108] Since McGee failed to allege that Diamond had made any representations regarding the safety of consuming Pop Smart, her unilateral assumption that the popcorn contained only safe any health ingredients fell short.[109] In turn, her unilateral assumption did not become part of the basis for her bargain with Diamond, specifically in light of the product's labeling disclosing the presence of PHOs.[110] In addition, McGee failed to allege that Diamond made false representations, actionable non-disclosures, and/or hidden defects in Pop Secret, falling short on the merits of an injury-in-fact claim.[111] As a result, the court held that "a key element of our overpayment cases—a defendant's misrepresentations about a product—is absent here."[112]

Relevant to defending class actions, *McGee*'s class action failed to plausibly establish that she suffered a physical injury and did not adequately allege an injury-in-fact based on the theory that consumption of the product substantially increased her risk of disease.[113] In holding such, the court rationalized that McGee could not allege that Pop Secret contained a hidden defect or was worth *objectively* less than she paid for it, where (1) the product's labeling disclosed the presence of artificial trans fat and (2) the health risks associated with trans fat were already firmly established when she subsequently purchased the products.[114]

Lastly, McGee's argument that consuming half a pound of PHOs over several years—along with the fact that no allegations that McGee had undergone medical testing or examination to confirm that she *presently* suffered from any medical condition because of consuming Pop Smart—aided the court in finding that her argument fails because the physical injury was too speculative and was not sufficiently supported by the studies cited in her complaint.[115]

While this case sheds light on the limitations surrounding class actions against manufacturers of consumer products, Washington DC case law supports other avenues for overcoming standing issues that companies should consider in avoiding class action suits. The District Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3905(k)(1), has be used by class action members to establish standing under the CPPA's "tester standing."[116] Prior to *The Praxis Project v. The Coca-Cola Co.* case, many believed the CPPA's provision granting a cause of action to "test or evaluate qualities" only applied to individuals or organizations that were actually misled.[117] However, in *Praxis Project*, "the trial court held that the CPPA's 'tester standing' provisions allowed customers who purchase products for the purchase of determining whether those products are what they claim to be to file suits against allegedly untruthful merchants."[118] In holding that testers may bring these claims even in the event they were not actually misled opens the door for allowing non-profit and public interest organizations to bring suits on behalf of consumers generally, even in the instance where the organization itself is not a

[108] *Id*. at 702-03.
[109] *Id*. at 706.
[110] *Id*.
[111] *Id*. at 707.
[112] *Id*.
[113] *Id*. at 703, 709-10.
[114] *Id*. at 707-08.
[115] *Id*.
[116] D.C. Code § 28-3905(k)(1).
[117] *Class Action Litigation Update: Challenges Posed By Mislabeling Claims Brought By "Testers"*, Covington & Burling LLP: Covington Alert (January 21,2021) *available at* Class Action Litigation Update: Challenges Posed By Mislabeling Claims Brought By "Testers" | Covington & Burling LLP.
[118] *Id*. (citing ***The Praxis Project v. The Coca-Cola Co.***, 2019 WL 11583140, at *8 (D.C. Super. Ct. Oct. 1, 2019)).

member of the consuming (and allegedly deceived) public.[119]

As a result of the *Praxis* decision, dozens of lawsuits in the following 14 months, have been filed by both individuals and organizations seeking to capitalize on the decision's novel and expansive interpretation of the CPPA's "tester" cause of action.[120]

IV. Exposure to Label: No Presumption

In the realm of class action suits, it is imperative to address concerns relating to the impact that publicity and reputational harm can play against a business facing class action suits. Class actions frequently result in an implicit presumption that a class action means a company has done something wrong. As a result, state attorney generals and federal agencies like the FDA, FTC, etc., tend to piggyback off consumer claims and vice versa, resulting in more regulatory and litigation risk for businesses.[121] Defendants seeking to defend putative class actions should carefully consider the ruling by *Basic Inc. v. Levinson*, which plaintiffs expected to invoke the presumption of class-wide reliance was first articulated.[122] The *Basic* presumption, when successfully asserted and invoked, permits class action plaintiffs to "avoid issues regarding differing degrees of individual reliance, which may preclude class certification under Federal Rule of Civil Procedure 23."[123]

However, there are a number of cases in which the courts have held there is no presumption where plaintiffs seek class certification under Rule 23(b)(3). In *Hadley v. Kellogg Sales Co.,* Kellogg asserts that plaintiff's motion for class certification fails to establish Rule 23(b)(3) predominance.[124] Under Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members."[125] Here, the court found that plaintiffs failed to satisfy Rule 23(b)(3) predominance as to "(1) plaintiff's proposed Nutri-Grain Soft-Baked Breakfast Bar Subclass; and (2) Plaintiff's deceptive omission theory or liability."[126]

In *Pfizer Inc. v. Superior Court,* the Court of Appeals held that: (1) class members who were not exposed to the alleged misrepresentations would not be entitled to restitution; (2) certified class of all persons who purchased the mouthwash in California during six-month period was overbroad; and (3) consumer was inadequate class representative for the certified class.[127] Here, the court found that the class certified by the trial court, i.e., all purchasers of the mouthwash in California during a six-month period, was grossly overbroad and the record reflected that 19 of the 34 mouthwash labels never included any label that made any statement comparing the mouthwash to floss (key to alleging deceptive conduct by Pfizer).[128]

Similarly, in the case of *In re Clorox Consumer Litigation,* the court held that issues common to all class members did not predominate over questions applicable only to individual members, as required to the applicable state's

[119] *Id*.
[120] *Id*.
[121] Andrew Demko, et al., *Assessing and Responding to Class Action Risk,* (Feb. 13, 2020), *available at* 2020-02-13 Katten-Assessing & Responding to Class Action Risk-PPTX.pdf (acc.com).
[122] ***Basic Inc. v. Levinson***, 485 U.S. 224 (1988).
[123] Demko, *supra* note 24.
[124] ***Hadley v. Kellogg Sales Co.***, 324 F. Supp. 3d 1084, 1094 (N.D. Cal. 2018).
[125] *Id*. (citing Fed. R. Civ. P. 23(b)(3)).
[126] *Id*. at 1118.
[127] Pfizer Inc. v. Superior Ct., 182 Cal. App. 4th 622 (Cal. App. Div. 2010).
[128] *Id*. at 631-32.

sub-classes.[129] In holding the foregoing, the court concluded that plaintiffs here faced issues of ascertainability and predominance, relying on the fact that "the variations in Clorox's Fresh Step packaging during the proposed class period, and the fact that most class members likely never saw the allegedly misleading statements at all, create individualized questions that render a class action unmanageable."[130] This rationale resulted in the court denying plaintiff's motion for class certification with respect to all five proposed sub-classes.[131]

At issue in *Zakaria v. Gerber Products Co.,* the court was faced with determining whether plaintiffs successfully demonstrated that defendant's advertising was sufficiently pervasive to warrant a presumption that all class members saw it in order to grant class certification.[132] The court here noted, "such reliance may be inferred as to absent class members if it is found that a 'material misrepresentation' has been made."[133] As a result, the court found that certification was appropriate but the approved class was narrower than the one proposed by plaintiff, limiting the class to those consumers that were misled by a specific seal used by the defendants.[134]

Lastly, the court in *Mazza v. American Honda Motor Co.,* held that common issues of fact did not predominate in nationwide class.[135] In arguing predominance issues, the defendants "contend that common issues of fact do not predominate because the court impermissibly relies on presumptions that all class members were exposed to the allegedly misleading advertising, that they relied on misleading information in making their purchasing decision, and that they were damaged as a result."[136] Here, the court held that the California class members have Article III standing but specifically that the district court abused its discretion in finding that common issues of fact predominate "because the small scale of the advertising campaign does not support a presumption of reliance."[137]

V. Reasonable Consumer Standards

The FDCA provides that "[a] food shall be deemed to be misbranded…[i]f…its labeling is false or misleading in any particular."[138] As a result of the FDCA lacking a standard for misleading branding, courts generally assess allegations of unfair competition and violations of consumer protection statutes under what is known as the "reasonable consumer standard" and found that it is inconsistent with FDCA regulations.[139]

The role of ingredients lists comes into play where the focus is on packages with allegedly deceptive front labels but with additional relevant information on the list of ingredients shown on the side of the package.[140] Here, the court found that "reasonable consumers should not be expected to look beyond misleading representations on

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[129] ***In re Clorox Consumer Litigation,*** 301 F.R.D. 436, 440 (N.D. Cal. 2014).
[130] *Id*. at 449.
[131] *Id*.
[132] Zakaria v. Gerber Prod. Co., No. LACV1500200JAKEX, 2016 WL 6662723, at *11 (C.D. Cal. Mar. 23, 2016).
[133] *Id*. (*quoting* Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022 (9th Cir. 2011).
[134] *Id*. at 18.
[135] Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012).
[136] *Id*. at 589.
[137] *Id*. at 594.
[138] 21 U.S.C. § 343(a)
[139] Lima et al. v. Post Consumer Brands, LLC, No. 1:18-CV-12100-ADB, 2019 WL 4889599, at *1 (D. Mass. Oct. 2, 2019), appeal dismissed, No. 19-2004, 2020 WL 6375112 (1st Cir. Oct. 16, 2020).
[140] Mantikas v. Kellogg Co., 910 F.3d 633,635 (2nd Cir. 2018).

the front of the box to discover the truth from the ingredient list in small print on the side of the box."[141] However, this standard is seemingly in tension with other Second Circuit courts, specifically *Jessani v. Monini N. Am., Inc.,* where the court found "it simply not plausible that a significant portion of the…public acting reasonably would conclude" that this product was made with actual truffles—"particularly…given that the product's ingredient list contains no reference to the word 'truffle'…"[142]

VI. Defeating Class Cert

Class certification is critically important, if not the decisive, issue in class action suits. Understanding the standards and how to defeat them is the best method for limiting a company's liability in potential lawsuits. The approach by different courts, as well as standards they choose to apply with issues of ascertainability, predominance, and expert testimony at the class stage are all imperative to consider when facing class action suits.

1. Ascertainability

Ascertainability, while not explicit in Rule 23, means that members of a certified class must be sufficiently definite. In other words, the class members are easily ascertained or determined using objective criteria. At the class certification stage, ascertainability serves three essential purposes: (1) for purposes of opting out of a class, it allows potential class members to identify themselves; (2) it operates as a means of ensuring defendant's rights are protected by the class action mechanism; and (3) it serves to ensure the parties to a class action suit can identify the class members in a manner consistent with the efficiencies of a class action.[143]

Companies seeking to use the ascertainability requirement against class action plaintiffs are likely to succeed when faced with three problematic types of classes: (1) difficult-to-identify class; (2) the overbroad class; and (3) the fail-safe class.[144] Difficult-to-identify classes remain the most actively litigated ascertainability issues and arguments tend to arise in the instance where determining membership would be administratively burdensome.[145]

Using the ascertainability requirement against class action plaintiffs is a strategic and useful consideration for companies facing consumer class action suits. "In addition to the to the explicit requirements of Rule 23, an implied prerequisite to class certification is that the class must be sufficiently definite; [and] the party seeking certification must demonstrate that an identifiable and ascertainable class exists."[146] The Seventh Circuit has also taken this position.[147] However, ascertainability and the standard for it remains a frequently contested issue. Distinguishing itself from the 1st, 3rd, and 4th Circuits, and aligning with the 2nd, 6th, 7th, 8th, and 9th Circuits,

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[141] *Id.*at 637 (*quoting* Williams v. Gerber Prods. Co., 552 F.3d. 934, 939 (9th Cir. 2008).

[142] Jessani v. Monini N. Am., Inc., 744 F. App'x 18, 19 (2d Cir. 2018).

[143] Michael A. Iannucci, et al., *Ascertainability Requirement for Class Certification*, Strafford (Mar. 6, 2018) *available at* Slide 1 (straffordpub.com).

[144] Michael A. Iannucci, et al., *Ascertainability Requirement for Class Certification*, Strafford (Mar. 6, 2018) *available at* Slide 10 (straffordpub.com).

[145] *Id*. at 11.

[146] Perrine v. Sega of America, Inc. No. 13-CV-01962-JD, 2015 WL 2227846, at *2 (N.D. Cal. May 12, 2015) (internal quotation marks and citation omitted).

[147] Physicians Healthsource, Inc. v. Alma Lasers, Inc. No. 12 C 4978, 2015 WL 1538497 (N.D. Ill. 2015) ("While not an explicit requirement under Rule 23, the Seventh Circuit has held that a class action definition 'must be definite enough that the class can be ascertained." (Internal quotation marks and citation omitted)).

the 11th Circuit rejected a heightened standard that would require proof of an administratively feasible method to identify absent class members.[148] In holding that administrative feasibility is not a prerequisite for class certification under Rule 23, the court explained "administrative feasibility is not an inherent aspect of ascertainability" because "membership can be capable of determination without being capable of *convenient* determination."[149] The court noted that, while administrative feasibility is not a prerequisite, it is relevant to the extent that Rule 23(b)(3)'s balancing test is used to determine class manageability when deciding if a class action is superior against other methods for resolving claims.[150]

VII. Predominance

Predominance plays a role beyond that already addressed in *Part D* in that defendants are afforded the right to defend class certification when there lacks evidence to determine the extent class members are injured. The 9th Circuit held that the district court abused its discretion by granting class certification when it neglected to determine the percentage of class members that were injured as a result of the allegedly anticompetitive conduct.[151]

VIII. Daubert and Class Certification

Understanding the standards set forth and the reality of circuit splits around issues pertaining to class certification is critical in being able to defeat potential class action suits. The rule in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, set forth that a judge must ensure that evidence admitted at trial is both relevant and reliable. However, critics argue that applying *Daubert* at the class certification stage misdirects a judge ruling on a class certification motion when it was intended to serve as a gatekeeping function for the jury.[152]

The split between circuits on the proper application of *Daubert* at the class certification stage has resulted in the ultimate standard for applying expert testimony to be dependent on the forum in which the action is brought.[153] The 3rd, 5th, 7th[154], and 11th[155] Circuits apply *Daubert* at the class certification stage, whereas the 8th[156] and 9th[157] Circuits do not. Ultimately, the outcome of class certification is impacted by the effect of whether it will

[148] Cherry v. Dometic Corp., 986 F.3d 1296 (11th Cir. 2021).
[149] *Id*. at 1303.
[150] *Id*. at 1304.
[151] ***Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC,*** 993 F.3d 774, 2021 WL 1257845 (9th Cir. 2021).
[152] MEREDITH M. PRICE, *The Proper Application of Daubert to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L.REV. 1349 (2013).
[153] *Id*. at 1353.
[154] Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) ("We hold that when an expert's report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. . . . [T]he district court must perform a full Daubert analysis before certifying the class if the situation warrants.").
[155] Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011) ("The American Honda court found that, if the situation warrants, the district court must perform a full Daubert analysis before certifying the class .. We agree."). The Eleventh Circuit joined the Seventh Circuit by predicating its decision on the gatekeeping function a district court judge serves. *Id*. ("A district court is the gatekeeper. It must determine the reliability of the expert's experience and training as well as the methodology used.").
[156] In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 629 (8th Cir. 2011).
[157] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 602 n.22 (9th Cir. 2010) (en banc) ("We are not convinced by the dissent's argument that Daubert has exactly the same application at the class certification stage as it does to expert testimony relevant at trial. However, even assuming it did, the district court here was not in error. Thus, we need not resolve this issue here." (citation omitted)).

require an early and full analysis of expert testimony.[158]

4. Arbitration Agreements

Arbitration agreements are a hotly contested issue in the realm of class action suits where the court might ultimately find them invalid. One of the most effective lines of defense against consumer class actions remains with arbitration clauses with class action waivers.[159] The Ninth Circuit, for example, has denied enforcing consumer arbitration provisions in the absence of public injunctive relief available to plaintiffs, becoming what is known as the so-called *McGill* rule.[160]

In an attempt to sidestep arbitration provisions with class action waivers, class action plaintiffs will argue that such provisions are not enforceable because they prohibit the ability to seek public injunctive relief and thus in violation of the *McGill* rule. However, that may now change after the Ninth Circuit's ruling in *DiCarlo v. MoneyLion*.[161] In *DiCarlo*, the Ninth Circuit rejected the consumer's challenge to an arbitration provision, holding that arbitration provisions that prohibit consumers from "acting as a private attorney general"—where a plaintiff seeks relief on behalf of the general public—do not run afoul of the *McGill* rule if public injunctive relief remains available through arbitration. [162]

Thus, in defending class actions, companies should remain alert as far as relying on arbitration provisions that do not afford public injunctive relief to plaintiffs, specifically within the Ninth Circuit or courts mirroring its position.

5. Use of Inadmissible Evidence

Another important consideration that companies defending themselves in class actions should take is the court's treatment of inadmissible evidence in class certification. While the Supreme Court has not yet addressed whether evidence offered at the class certification stage must be admissible, there remain circuit splits on this issue. The Fifth and Sixth Circuits are the latest to address usage of inadmissible evidence, however deepening the existing split by taking opposite approaches.[163] The Fifth Circuit joined three circuits in *Prantil v. Arkema, Inc.*, in holding that the *Daubert* standard—which governs admissibility of expert opinions at trial—applies with "full force" at class certification.[164] In providing a rationale, the court reasoned that applying *Daubert* at class certification is a "natural extension" of the Supreme Court's direction in *Dukes* to conduct a "rigorous analysis" in conjunction with Rule 23.[165]

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[158] ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 12 (2d ed. 1977) ("In terms of the dynamics and economics of class actions . . . lawyers believe that whether the [class] will be certified . . . is the single most important issue in the case. All the lawyers' weapons and all of the litigants' resources tend to be mobilized to deal with that question. Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification. Conversely, plaintiffs' lawyers believe that their ability to obtain a large settlement turns on securing certification.").

[159] Fred Puglisi et al., *More on McGill: Ninth Circuit Affirms Order Enforcing Arbitration of Public Injunctive Relief Claims*, Sheppard Mullen Richter & Hampton LLP (Feb. 23, 2021) *available at* More on McGill: Ninth Circuit Affirms Order Enforcing Arbitration of Public Injunctive Relief Claims | Sheppard Mullin Richter & Hampton LLP - JDSupra.

[160] McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017).

[161] ***DiCarlo v. MoneyLion, Inc.,*** 988 F.3d 1148 (9th Cir. 2021).

[162] *Id*. at 1153.

[163] *Class Action Litigation Update: Key Developments from First Quarter 2021,* Covington Alert (Apr. 8, 2021) *available at* Class Action Litigation Update: Key Developments From First Quarter 2021 | Covington & Burling LLP.

[164] Prantil v. Arkema, Inc. 986 F.3d 570 (5th Cir.2021).

[165] *Id*. at 575.

However, this line of reasoning was rejected by the Sixth Circuit who ultimately sided with two other circuits in holding evidence offered need not be admissible when offered in support of class certification.[166] While this holding was limited to non-expert evidence, which was the central issue, the court relied on decisions that pertained to expert evidence.[167] Thus, it is important to consider in future cases because the court may apply this reasoning equally to expert evidence.

6. Parallel Litigation

As technology and the internet continue to interconnect with the everyday consumer, problems continue to arise particularly when consumers voice their concerns about a product that is allegedly defective or deceptively advertised. This inevitably has resulted in consumers using their platform to expose or negatively impact businesses even on the most trivial of complaints. As such, companies who sell products in multiple states are exposed to the possibility of numerous suits, being particularly troublesome when a group of plaintiffs file a nationwide class action in federal district court and subsequently bring an analogous class action in state court.

Putative class members pursing parallel litigation are required to follow a district court's instructions for opting out of a settlement or find themselves bound to it. The Seventh Circuit reaffirmed this well settled rule, holding that two class member's attempts to pursue parallel litigation in state court did not overcome their failure to follow the district court's opt-out instructions.[168] This set forth that putative class members must "do what they are told or bear the consequences of inaction."[169]

In *Adkins v. Nestle Purina PetCare Co.*, the 7th Circuit Court of Appeals held that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court presiding over a nationwide class action from enjoining prosecution of a parallel state court class action to the extent it effects the settlement of the nationwide class action.[170] While the *Adkins* holding suggests that class action defendants are at a loss in trying to freeze parallel state court actions, the Court of Appeals proposed an alternative method of halting litigation when appropriate in that state's court. The *Adkins* court noted that the Anti-Injunction Act "commits to the state court the question whether it would be prudent, beneficial, or helpful to let the federal case go first."[171] Thus, if a company is facing a parallel class action in a state that affords the district court discretion to stay a state court proceeding pending the outcome of federal class-action litigation, companies may have more leverage to limit their exposure (at least for the time being).[172]

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[166] Lyngaas v. Curaden Ag, 2021 WL 1115879 (6th Cir. 2021).
[167] *Id*.
[168] In ***Matter of Navistar MaxxForce Engines Mktg., Sales Practices, & Prod. Liab. Litig.***, 2021 WL 925805 at 1054 (7th Cir. 2021).
[169] *Id*. at 1053.
[170] *Adkins v. Nestle Purina PetCare Co.,* 779 F.3d 481, 486 (7th Cir. 2015).
[171] *Id*. at 485.
[172] Timothy L. Karns, DTCI: Defending Parallel Class Actions, The Indiana Lawyer (May 5, 2015) *available at* DTCI: Defending parallel class actions - The Indiana Lawyer.