5 Trends That Will Affect Food Litigation In 2024

By **Abby Meyer and Khirin Bunker** (January 2, 2024)

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False advertising class actions targeting food and beverage companies were filed with as much frequency in 2023 as in 2022.

Given the headwinds, there is no reason to expect a 2024 slowdown.

Here are five trends that food and beverage companies will want to be aware of as they develop their priorities and risk mitigation strategies for 2024.

1. McGinity will be a game changer.

On June 9, 2023, the U.S. Court of Appeals for the Ninth Circuit confirmed in its McGinity v. Procter & Gamble Co. decision that when statements on a label are ambiguous, consumers should read other parts of the packaging to make sense of them.[1]

McGinity dealt with a shampoo product with the phrase "Nature Fusion" on the front of the bottle. The consumer alleged that the phrase misled him to believe that the product was all natural or more natural than it in fact was.

The U.S. District Court for the Northern District of California rejected this claim at the motion to dismiss phase, finding that "Nature Fusion" does not reasonably mean the absence of synthetic ingredients, and this could be confirmed by referencing the statement of ingredients on the back of the bottle.

In affirming the district court's finding, the Ninth Circuit emphasized the context of the product's packaging — including the back of the product's packaging that disclosed its ingredients — and explained that when "a front label is ambiguous, the ambiguity can be resolved by reference to the back label."[2]

Critically, the McGinity decision also distinguished the Ninth Circuit's prior holding in Williams v. Gerber Products Co. in 2008, which has often been interpreted by district courts to require exclusion of information presented on the back of a products' packaging at the pleadings stage.[3]

Notably, the McGinity decision has already had a positive impact on the defense of false labeling consumer class actions.

For instance, after considering the opinion, the U.S. District Court for the Central District of California granted a motion for reconsideration and dismissed with prejudice Consumer Legal Remedies Act and express warranty claims in Scruggs v. Mars Inc. in August 2022.

In its prior motion to dismiss order, the court — citing Williams — had found that "the placement, color and font size of 'Artificially Flavored' compared to the word 'CINNAMON' [on an Altoids container] and the depiction of cinnamon sticks, could cause a reasonable consumer to find the meaning [of the front label] ambiguous."

In light of this prior finding, on reconsideration the court determined that, therefore, "a reasonable consumer would be expected to review and consider the back label in determining the actual ingredients of the Product."

The McGinity decision may give food company defendants in California federal court another argument for exiting litigation at the motion to dismiss phase.

2. PFAS litigation will not go away.

While consumer class action plaintiffs have had a number of losses at the motion to dismiss phase, particularly in New York federal court,[4] they are learning as they go, and we expect that they will start solving for past mistakes in new filings.

Indeed in the food and beverage space, new 2023 case filings related to per- and polyfluoroalkyl substances are about even with new case filings in 2022, 10 and 13, respectively by our count. PFAS are a common ingredient in protective coatings and firefighting foams that are believed to linger in the environment indefinitely.

Plaintiffs' interest in these cases continues to be predicated on consumer fear of PFAS chemicals, which may in part be fueled by articles published by Consumer Reports and other groups that have conducted product testing. The findings of these articles have featured prominently in the complaints filed by consumers.

For instance, in one recent complaint targeting pet food — Kueck v. Nestle Purina PetCare Co. in the Northern District of California in November 2023 — the plaintiffs cited testing conducted by the Environmental Working Group on packaging for various pet food products.

The complaint alleges that EWG's testing of the challenged product showed the presence of organic flourine indicative of PFAS as well as specific PFAS chemicals. As more studies are conducted on more product segments, we expect that the scope of products attacked in these actions will grow.

Complicating the future of these cases is a patchwork of state regulations governing the intentional use of PFAS in food packaging. The pet food case referenced above for instance alleges that "New York, Washington, Vermont, Connecticut, Colorado, Maryland, Minnesota, Rhode Island, and Hawaii have banned the intentional use of PFAS in food packaging."

It also alleges that "California not only banned the intentional use of PFAS in food packaging, but also banned food packaging that exceeds 100 ppm total organic fluorine."

Given the relative newness of these regulations, there are no tested safe harbors, yet, for defendants. The developing body of untested state laws will likely make this type of litigation appealing to plaintiffs' attorneys.

3. Citric acid and malic acid will continue to be challenged.

Cases challenging the presence and function of citric acid and malic acid have been long-time favorites of the plaintiffs bar.

For instance, consumers may allege that a "no preservatives" label statement is false or misleading due to the presence of one of these ingredients. Food manufacturers may have added the ingredient for the purpose of enhancing or stabilizing flavors and not to serve as

a preservative.

Nonetheless, plaintiffs counsel assert that these ingredients cannot help but act as a preservative. Another common theory is that synthetic citric or malic acid has been added to the product, rendering a "no artificial flavors" label claim false or misleading.

At the motion to dismiss phase, courts have often found that plaintiffs' allegations of the function or type of the citric or malic acid are sufficiently pleaded, such that at least some claims survive.[5]

By our count, there have been 56 of these cases filed so far in 2023, up from 27 in 2022. Given their durability, it is unlikely that plaintiffs counsel will back away from these cases in 2024.

4. Statutory damages under New York law will remain a threat.

Statutory damages under New York General Business Sections 349 and 350 have remained a consistent focus for plaintiffs counsel in false advertising class actions.

The GBL Sections 349 and 350 respectively provide for $50 and $500 in statutory damages per violation — a term that remains undefined in the context of class actions, with some district courts addressing violations on a per-person basis and others on a per-purchase basis.[6]

In 2022, in Montera v. Premier Nutrition Corp. in the Northern District of California, a jury found the defendant's Joint Juice beverages were deceptively labeled, and awarded around $1.49 million in actual damages to the class based on approximately 166,000 units sold.

Following the trial, the plaintiff requested that the court award the class over $91 million in statutory damages — including $8,312,450 in statutory damages under Section 349 and $83,124,500 in statutory damages under Section 350.[7]

Applying a per-purchase method for calculating the number of violations, the court ultimately reduced the requested damages award to $8,312,450, finding that the amount sought by the plaintiff was "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable ... and thus violative of the Due Process Clause."[8]

The court further determined that the award of $8,312,450 — or $50 per unit sold — was more appropriate "given the mixed evidence on reprehensibility."[9]

Both parties have since appealed, and the case is currently pending in the Ninth Circuit. It remains unclear whether and to what extent the Ninth Circuit will resolve the calculation of violations in false advertising cases and/or concur with the application of due process principles as a method to reduce the statutory damages award under GBL Sections 349 and 350.

Without settled precedent, plaintiffs counsel will likely continue to use the threat of exorbitant GBL statutory damages as leverage in false advertising class actions.

5. The FTC's revisions to the green guides will affect the direction of ESG litigation.

Environmental, social and corporate governance litigation claims in the food and beverage space have largely targeted topics that are squarely within the ambit of Federal Trade

Commission's Green Guides.

For instance, 2023 saw new case filings targeting the use of sustainable seafood, third-party certifications, claims regarding sustainable or regenerative agricultural practices, and claims about the product's carbon footprint.

While there have not been a plethora of these cases in 2023 — by our count, under a dozen targeting this industry — this may not be indicative of things to come.

In December 2022, the FTC indicated that it was going to update the Green Guides and specifically sought comments on the terms "recyclable" and "recyclable content".

The FTC's updated Green Guides, which are anticipated to issue in 2024, seem certain to affect the litigation landscape because many food manufacturers use "green" claims to differentiate their products in the marketplace.

There is also some chance that significant ESG litigation may proceed outside of the consumer class action context.

Following in the footsteps of the Earth Island Institute litigation filed in 2020 in California against 10 large food and beverage companies regarding the plastic waste from their products, on Nov. 15, 2023, the New York attorney general filed a plastics pollution nuisance suit against a large food company.

The New York attorney general has alleged that the accumulation of the company's plastic product waste in the Buffalo River is a public nuisance and seeks both abatement of the nuisance and an injunction to force the company to evaluate using non-single-use plastic alternatives.

Conclusion

In 2024, food and beverage companies are likely to continue to face threats of litigation relating to PFAS, citric and malic acid, and ESG claims.

However, recent developments in case law — including the Ninth Circuit's decision in McGinity — have created potential avenues for food and beverage companies to fight back against frivolous lawsuits.

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[1] McGinity v. P&G, 69 F.4th 1093 (9th Cir. 2023).

[2] Id. at 1098.

[3] At the time of this writing, LexisNexis reports that Williams has been cited in over 1,000 district court orders since 2008 in the Ninth Circuit alone.

[4] See, e.g., Dalewitz v. P&G, Case No. 7:22-cv-07323 (S.D.N.Y. Sept. 22, 2023); Onaka v. Shiseido Americas Corp., 2023 U.S. Dist. LEXIS 53220, at *13 (S.D.N.Y. Mar. 28, 2023).

[5] See, e.g., Scheibe v. Perfect Keto Group, LLC, Case No. 3:23-cv-00839 (S.D. Cal. Nov. 1, 2023) (Dkt. 12, granting motion to dismiss in part); Scheibe v. Fit Foods Distrib., Inc., Case No. 3:23-cv-00220 (S.D. Cal. Nov. 8, 2023) (Dkt. 11, granting motion to dismiss in part).

[6] Statutory damages under GBL sections 349 and 350 were intended by the legislature to be precluded in class actions through N.Y. C.P.L.R. § 901(b). However, as a result of the United States Supreme Court's decision in Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010), that state law restriction was found to be "procedural" and inconsistent with Federal Rule of Civil Procedure 23. This has created a peculiar result: class wide statutory damages are available in false advertising class actions brought under the GBL in federal court, but not in New York state court. See e.g., In re Scotts EZ Seed Litig., 2017 U.S. Dist. LEXIS 125621, at *16, (S.D.N.Y. Aug. 8, 2017) ("Even though the Court does not agree with the implications of Shady Grove—including that class actions for statutory damages under Sections 349 and 350 may be brought in federal court, but not state court—it is constrained by them").

[7] See ECF No. 280.

[8] Id.

[9] Id.