Legal Backgrounder

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Developments in Added-Sugar Food and Beverage Litigation: Cause for Hope, Cause for Concern

by Creighton Magid

The plaintiffs' bar continues to view foods and beverages containing added sugar as prime targets for litigation. The majority of the lawsuits brought to date have been labeling claims, in which plaintiffs assert that they were duped into buying products portrayed on the label as "healthy" but that, in reality, were laden with "unhealthy" amounts of added sugar. Some lawsuits have gone further, stealing a page from the tobacco litigation playbook and alleging a conspiracy to suppress evidence of the medical risks posed by excessive amounts of sugar and to elevate fat as the larger health risk. Recent judicial decisions have been a mixed bag for defendants, offering reasons for both optimism and concern. The recently proposed $20.25 million settlement of excessive-sugar claims targeting various Kellogg cereals and snack bars suggests that sugar litigation will continue to be attractive to the plaintiffs' bar.

One of the most notable sugar-labeling cases is *Krommenhock v. Post Foods, LLC*, a putative class action venued in the U.S. District Court for the Northern District of California. The *Krommenhock* plaintiffs allege that Post labels a variety of breakfast cereals with health-and-wellness statements that "suggest its cereals are healthy food choices"—statements such as "nutritious," "good for you," "rich in nutrients"—but that, in fact, the cereals contain (according to the complaint), large amounts of added sugar. This sugar, plaintiffs contend, contributes to overall excess sugar consumption and a resulting increase in the risk of chronic disease.

Judge William Orrick largely denied Post's motions to dismiss on two occasions. He held that, with the exception of claims expressly permitted by federal law, whether "overconsumption of cereals with excessive added sugar is unhealthy" or "whether [Post's] health and wellness statements are false or misleading" are "questions that cannot be resolved at motion to dismiss stage, but may be resolved under a more stringent and evidentiary-based review at summary judgment." *Krommenhock v. Post Foods, LLC*, 2018 U.S. Dist. LEXIS 42938, *11 (N.D. Cal. Mar. 15, 2018). Post has since taken Judge Orrick up on the suggestion and has moved for summary judgment. The court held a hearing in early October, but it has yet to issue an opinion.

Two recent Northern District of California decisions offer hope to defendants. In *Clark v. Perfect Bar, LLC*, 2018 U.S. Dist. LEXIS 219487 (N.D. Cal. Dec. 21, 2018), Judge William Alsup did not mince words in rejecting plaintiff's claims that Perfect Bar's labeling deceived him into thinking the protein bars were "healthy":

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> Defendant Perfect Bar, LLC, at all material times in question, remained in compliance with all sugar-disclosure regulations. It is true that the bars contained honey and thus sugar, but that was disclosed on the packaging as well as the amount of sugar. Plaintiffs' grievance is that the packaging led them to believe that the bars would be 'healthy' when, in supposed point of fact, the added sugar rendered them unhealthy or, in the alternative, less healthy from what they otherwise had believed. This is untenable. The actual ingredients were fully disclosed. Reasonable purchasers could decide for themselves how healthy or not the sugar content would be. No consumer, on notice of the actual ingredients described on the packing including honey and sugar, could reasonably overestimate the health benefits of the bar merely because the packaging elsewhere refers to it as a health bar and describes its recipe as having been handed down from a health-nut parent. The honey/sugar content was properly disclosed — that is the end of it — period.

Clark, 2018 U.S. Dist. LEXIS 219487, *1 - *2.

Judge Jeffrey White embraced Judge Alsup's reasoning in *Truxel v. General Mills Sales, Inc*., 2019 U.S. Dist. LEXIS 144871 (N.D. Cal. Aug. 13, 2019), a putative class action alleging that General Mills marketed various sweetened breakfast cereals and snacks with health-and-wellness claims despite the "compelling evidence" of sugar's role in heart disease, diabetes, and liver disease. Judge White concluded that the plaintiffs had failed to show that the health-and-wellness claims were likely to deceive a reasonable consumer:

> [T]he Court finds that Plaintiffs cannot plausibly claim to be misled about the sugar content of their cereal purchases because Defendant provided them with all truthful and required objective facts about its products, on both the side panel of ingredients and the front of the products' labeling. . . . [T]he actual ingredients were fully disclosed and it was up to the Plaintiffs, as reasonable consumers, to come to their own conclusions about whether or not the sugar content was healthy for them.

Truxel, 2019 U.S. Dist. LEXIS 144871, *11 - *12.

Although the majority of added-sugar cases focus on product label health-and-wellness claims, some plaintiffs have attempted to replicate the litigation tactics used against the tobacco industry by arguing that consumer product companies conspired to obscure sugar's health effects. One such case is *The Praxis Project v. The Coca-Cola Co*., Case No. 2017 CA 004801 B, venued in the Superior Court for the District of Columbia. There, two pastors and a non-profit organization brought suit against Coca-Cola and the American Beverage Association, alleging that the defendants "have engaged in a pattern of deception to mislead and confuse the public (and governmental entities that bear responsibility for the public health) about the scientific consensus that consumption of sugar-sweetened beverages is linked to obesity, type 2 diabetes, and cardiovascular disease" and have employed "ongoing campaigns of disinformation and misrepresentation . . . to maintain and increase the sales of sugar-sweetened beverages, and to thwart and delay efforts of government entities to regulate sugar-sweetened beverages through warning labels, taxes, and other measures designed to make consumers aware of the potential for harm."

In an order issued October 1, 2019, Superior Court Judge Elizabeth Wingo—who had previously dismissed the claims against the American Beverage Association—first addressed standing. She held that

the non-profit organization had failed to establish that its claimed financial expenditures were "beyond those normally expended to carry out their advocacy mission." (Oct. 1, 2019, Order at 17 (quoting *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011).) Judge Wingo then found that one of the two pastors lacked standing because he had failed to allege that he had purchased one of the products at issue or that he had done so in reliance on Coca-Cola's advertising. The other pastor, however, did allege a product purchase made in reliance on Coca-Cola's alleged disinformation campaign. Because one plaintiff had standing, the standing of the others became immaterial. *See Watt v. Energy Action Educ. Found*., 454 U.S. 151, 160 (1981).

Judge Wingo, however, then held that the statute of limitations precluded plaintiffs from basing their claim on any statements made prior to July 2014. This was significant: the ruling prevents plaintiffs from presenting a tobacco-style narrative alleging a decades-long campaign to obscure the health effects of sugar.

In arguing that the discovery rule should prevent the running of the statute of limitations, plaintiffs found themselves hoist on their own petard. As Judge Wingo noted, the plaintiffs had asserted that the alleged disinformation campaign "ramped up" in 2012 as a result of "growing public perception that sugar-sweetened beverages are linked to obesity, type 2 diabetes, and cardiovascular disease." The plaintiffs had also filled their Complaint "with citations to studies and newspaper articles that make clear that the health risks of sugar sweetened beverages was a topic that any educated individual, but in particular individuals who [like plaintiffs], as part of their profession, counsel people about health risks, were on inquiry notice well before 2014." (Oct. 1, 2019, Order at 27-29.) Though Judge Wingo upheld the plaintiffs' standing to sue, her statute-of-limitations ruling significantly circumscribed their claims.

Praxis Project sets forth a clear line of attack for defendants in such "sugar conspiracy" cases. At the same time, defendants should view Judge Wingo's opinion with caution, as it provides an equally clear roadmap for sugar-conspiracy plaintiffs. For example, a relatively unsophisticated plaintiff with medical conditions arguably related to excessive sugar intake could potentially dodge the statute of limitations by asserting that a corporate disinformation campaign convinced him to discount the publicly-available information on sugar's health effects.

The proposed settlement of *Hadley v. Kellogg Sales Co.*, No. 5:16-cv-04955, filed on October 21, 2019 with Northern District of California Judge Lucy H. Koh, is another indication that a defense-bar declaration of victory in the sugar litigation wars is premature. In *Hadley*, the plaintiffs alleged that the sugar content of various Kellogg cereals and snack bars rendered health-and-wellness labeling claims misleading under California law. Judge Koh had previously certified the suit as a class action and the U.S. Court of Appeals for the Ninth Circuit had denied Kellogg's motion for interlocutory appeal.

The proposed settlement requires Kellogg to create a $20.25 million fund from which class members may seek payment and from which attorneys' fees will be paid. Kellogg would also agree to remove or revise health-and-wellness claims on the packaging of the allegedly offending products.

The proposed settlement is significant for several reasons. First, the process of changing product labeling and associated marketing campaigns requires an enormous amount of time and financial resources. *See* Martin J. Hahn and Samantha L. Dietle, *State and Federal Food-Labeling Reforms Impose Unappreciated Complexities and Compliance Challenges*, WLF Legal Backgrounder, May 18, 2018, https://www.wlf.org/2018/05/18/publishing/state-and-federal-food-labeling-reforms-impose-

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unappreciated-complexities-and-compliance-challenges/. Second, the settlement lends credence to the legal theory that a product's added sugars render health-and-wellness claims printed on the product label misleading under consumer-protection laws. At a minimum, the settlement demonstrates both the high cost of fighting such claims and the difficulty defendants face in contesting sugar-related class actions. At a time when judicial decisions appeared to be tightening the screws on sugar litigation, the proposed Kellogg settlement portends continued litigation in this arena and also sets a benchmark for other plaintiffs' settlement demands.

The law concerning health-and-wellness claims on labels of products containing added sugar continues to evolve. Will courts follow Judges Alsup and White and find such claims untenable in light of disclosures on the Nutrition Facts label? Will courts exhibit a greater willingness to determine the reasonableness of claims on motions to dismiss? Will the plaintiffs' bar attempt to expand on *Praxis Project* and assert industry-wide conspiracy claims? This rapidly-developing area of law merits close attention. At the same time, as the proposed Kellogg settlement indicates, sugar litigation is not going away anytime soon.

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