The Rise of the "Private Surgeon General"

William L. Stern and Janelle J. Sahouria, Morrison & Foerster LLP

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An Article discussing some of the major challenges that "private Surgeon General" suits pose to product manufacturers, and offering practical guidance on how to effectively defend these suits.

Unless you sell tobacco or alcohol products, the Surgeon General probably does not matter all that much to your business. However, for manufacturers and retailers of consumer and household products other than tobacco or alcohol, there is a different Surgeon General to worry about. Not the real Surgeon General who wears a three-star admiral's uniform and is appointed by the President, but posses of private Surgeons General. There are dozens of them (and counting), all self-appointed. Initially, their preferred hangout was California, the headwaters of many litigation insurgencies. But recently, they have expanded their franchise eastward.

Private Surgeons General seek to force manufacturers and retailers of food, consumer and household products to post Surgeon General-like warnings, change package labels and advertising and refund hundreds of millions of dollars to unharmed and otherwise perfectly happy consumers who purchased perfectly healthful and untainted products. Why? Because a substance shown in the ingredient list is claimed to be dangerous or a statement in the product advertising or label is claimed to be misleading.

In the past two years courts have been increasingly reluctant to dismiss private Surgeon General actions at the pleading stage. This fact, coupled with a relatively low barrier for class certification, has allowed private Surgeon General claims to prosper and multiply. This article discusses some of the major challenges that private Surgeon General suits pose to product manufacturers, and offers practical guidance on how to effectively defend these suits.

WHAT IS A PRIVATE SURGEON GENERAL LAWSUIT?

What is a private Surgeon General lawsuit? The simple answer is, you'll know it when you see it. Still, for the uninitiated we offer these clues:

- **Omission.** It is a class action in which the manufacturer or retailer of a consumer product (usually food, cosmetics or some other household product) is alleged to have touted the benefits of its product while omitting allegedly material information. Plaintiffs in these cases contend that the omitted information was material and that consumers would not have bought the products had they been warned, even though the substance may have been disclosed in the ingredient list.
- **Published reports.** Private Surgeons General often file suit weeks or days after the publication of a news report, FDA warning letter, academic study or magazine article identifying risks from a certain nutrient, substance, manufacturing process or ingredient. For example, on July 14, 2010, researchers at UC Davis issued a report funded by California olive growers suggesting that imported "extra virgin" olive oil often fails international and USDA standards. Two weeks later, a class action was filed against 24 manufacturers, importers and retailers of all the brands named in the study (see *Martin v. Carapelli USA, No. BC442300 (Cal. Super. Ct. filed July 30, 2010)*).

- **Dubious science.** Private Surgeon General suits are often, but not always, based on disputed studies or even "junk" science. Complaints sometimes ramble on for pages, reprinting models of molecules or quoting the findings of this study or that article, but ignoring those that reach different conclusions. They fault the manufacturer or retailer for failing to conspicuously state in the advertisement or on the product label that at certain dosages, or for people with certain preconditions, there could be harmful side effects. Since no one was told this (so the argument goes) everyone should get their money back.
- **"At risk" ingredients.** If a product includes one of the substances that is "high risk" or has become the substance du jour (think high-fructose corn syrup (HFCS), partially hydrogenated vegetable oil or bisphenol A (BPA)) the chances of drawing a private Surgeon General suit are high.
- **Cookie-cutter complaints.** The complaints in these cases are often cut-and-paste jobs. But they invariably allege claims under state unfair and deceptive acts and practices (UDAP) and false advertising statutes, fraud and negligent misrepresentation, breach of express and implied warranty and unjust enrichment.
- **Injunctive relief.** These would not be private Surgeon General cases unless they sought injunctive relief compelling the manufacturer to change the advertising, post a warning label or stop using an offending term such as "green," "healthy" or "natural" (see, for example, *Yumul v. Smart Balance, Inc., No. 10-cv-0927, 2010 WL 3359663 (C.D. Cal. May 24, 2010); Koh v. S.C. Johnson & Son, Inc., No. 09-cv-0927, 2010 WL 94265 (N.D. Cal. Jan. 6, 2010); Wright v. Gen. Mills, Inc., No. 08-cv-1532, 2009 WL 3247148 (S.D. Cal. Sept. 30, 2009)*). These cases typically seek restitution of the retail price (or the alleged overcharge) for all class members, actual and punitive damages and an award of attorneys' fees and costs.

HOW TO KNOW WHETHER YOUR COMPANY IS AT RISK

Inoculating against a private Surgeon General is not easy. Almost any substance if consumed in large enough quantities can be harmful to at least someone. Too much salt has been associated with high blood pressure; too much sugar with tooth decay, diabetes and heart disease; and red wine (despite its proven healthful effects) with an increased risk of breast cancer. Even drinking too much water can be fatal.

There are, however, some ingredients that stand out. These are the "red flag" substances to which manufacturers and their counsel or compliance officers should pay closer attention. How does one know what they are? To start with, private Surgeons General are copycats. They are followers, not leaders. So, to think the way private Surgeons General think, you need to read what they read.

GO TO THE SOURCE

First, for food manufacturers especially, the starting point is the Center for Science in the Public Interest (CSPI). If a substance is listed on the CSPI's *website* (including its "10 Worst Foods and Best Foods" *list*) there is a good chance a future private Surgeon General has seen it. The CSPI's list includes:

- Artificial sweeteners such as acesulfame potassium, aspartame (NutraSweet), cyclamate and saccharin.
- Food dyes such as Blue 1, Blue 2, Citrus Red 2, Green 3, Orange B, Red 3, Red 40, Yellow 5 and Yellow 6.
- Preservatives such as benzoic acid, sodium benzoate, butylated hydroxyanisole (BHA), sodium bisulfite, sodium nitrate and sulfites.
- Additives or flavor enhancers such as brominated vegetable oil (BVO), butylated hydroxytoluene (BHT), caffeine, hydrolyzed vegetable protein (HVP), hydrogenated vegetable oil, trans fatty acids (TFAs), monosodium glutamate (MSG), olestra (Olean), potassium bromate and propyl gallate.

To identify potential private Surgeon General suits before they materialize, food manufacturers should consider subscribing to the CSPI's publication *Nutrition Action*, consumer-driven blogs, gripe sites and review sites such as Yelp!, or even *Consumer Reports*.

For manufacturers of personal care products, the analogue to the CSPI is the Environmental Working Group (EWG). The EWG provides lists of toxic chemicals and warns consumers of their use in everyday products, such as formaldehyde in baby shampoo and triclosan in hand soaps.

BROWSE THE WEB

Second, a company might create a "Google Alert" search that marries the brand name of its product with the words "class action." And for those who are not Web 2.0-challenged, they might want to do this on Facebook and Twitter, too. These will generate lists of potential private Surgeons General looking to find lawyers, and lawyers looking for potential clients.

KEEP ABREAST OF RECENT LITIGATION

Third, a company might consider the list of substances and nutrients that have already been the subject of private Surgeon General litigation such as aspartame, HFCS, partially hydrogenated vegetable oil, TFAs, probiotic bacteria, BPA and methylene chloride. If a company's brand contains any of these ingredients, especially the substance du jour (last year it was HFCS, this year TFAs and BPAs), the risk of drawing a suit increases.

ELIMINATE THE THREAT BEFORE IT MATERIALIZES

Once you have this information, what do you do with it? The best vaccination against a class action is to put the plaintiffs' attorneys' fees at risk. In federal court, a defendant that changes the allegedly offending conduct before the lawsuit is filed potentially deprives plaintiffs' counsel of his right to fees (see *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 610 (2001)* (rejecting "catalyst" theory of attorneys'

fee recovery); but see *Graham v. DaimlerChrysler Corp., 34 Cal. 4th 533, 565-77 (Cal. 2004)* (declining to follow *Buckhannon* and recognizing "catalyst" theory)).

Companies that are at risk of becoming the targets of private Surgeon General suits may therefore want to schedule regular reviews of product labels, advertisements and marketing materials. This can usually be done as part of a regular product update cycle. A fresh update is never a bad idea, especially if a lawsuit can be avoided with a disclaimer or use of a different adjective. In doing so, however, a company should avoid creating a trail of "hot" documents emphasizing potential legal liability for pursuing a particular marketing strategy.

Of course, there are many kinds of company conduct that cannot be changed. For example, the "at risk" substance may be essential and there may be no ready substitute, or the allegedly misleading statement may be part of a costly advertising or branding campaign. In these cases, the company may need to prepare for litigation instead.

MAIN THEMES TO CONVEY AT TRIAL IF A PRIVATE SURGEON GENERAL SUES YOUR COMPANY

If litigation is the art of telling a story effectively, a litigation strategy starts with the identification of themes. The strongest factor favoring defendants is that private Surgeon General plaintiffs are unsympathetic. This is because, in the typical private Surgeon General case, the:

- Consumers are unharmed.
- Infraction is hypertechnical.
- Science is suspect.
- Claims are implausible.
- FDA (or other regulator) has studied the issue and decided the public is not at risk.

Companies facing claims exhibiting these characteristics should not be shy in advancing these themes to a court. If used correctly, these themes underscore a story that is potentially even more damning: these cases are lawyer-driven.

LEGAL DEFENSES TO PRIVATE SURGEON GENERAL SUITS

Defendants need to be ready to present to the courts strong legal defenses. Fortunately, there are plenty of these. The challenge, however, is in winning these cases at the pleading stage to avoid the cost of protracted discovery and further litigation. Unfortunately, that task has been made more difficult in the last two years due to the waning force of the preemption defense and the US Court of Appeals for the Ninth Circuit's decision in *Williams v. Gerber Products Co., 552 F.3d 934 (9th Cir. 2008)* (see *Implied Preemption* and *Full Disclosure is Not Always a Complete Defense (Williams v. Gerber)*).

PREEMPTION

Many private Surgeon General cases attack practices or labels that the FDA has found to be lawful. In these circumstances, the complaint may be subject to a preemption defense. For example, the Federal Food, Drug and Cosmetic Act (FDCA) establishes a comprehensive federal scheme of food regulation to ensure that food is safe and is labeled in a manner that does not mislead consumers (*21 U.S.C. §§ 341-350f*). Although preemption can be a powerful defense to private Surgeon General suits, recent cases indicate that courts may be less likely to dismiss cases on federal preemption grounds (see *Express Preemption* and *Implied Preemption*).

Express Preemption

Express preemption of state law occurs when Congress passes a law and expressly notes the preemptive effect of the law. The FDCA expressly preempts state laws that require food manufacturers to include nutritional information on their packaging that is "not identical" to federal requirements (*21 U.S.C. § 343-1(a)*). The phrase "not identical" means information that is different from, or in addition to, federal requirements (*21 C.F.R. § 100.1(c)(4)(i)(ii)*).

In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig. illustrates how some courts have dealt with express preemption under Section 343-1 of the FDCA where state law imposes obligations that are different from federal law. In In re Bisphenol-A, a Missouri federal court dismissed, as preempted, plaintiffs' claims challenging a manufacturer's failure to disclose the presence of BPA in baby products such as baby bottles and reusable drink containers. The court so held because the amount of BPA in the products was shown to be "insignificant," and FDA regulations expressly permitted manufacturers to not disclose the presence of BPA at "insignificant levels" (see *No. 08-md-1967, 2009 WL 3762965, at *5-6 (W.D. Mo. Nov. 9, 2009)*).

However, where a state law purports to impose obligations on product sellers that merely parallel federal law, courts have held that state law is not expressly preempted by Section 343-1. In *In re Farm Raised Salmon Cases*, for example, plaintiffs sued various grocery stores under California's UDAP for selling artificially colored "farmed" salmon without disclosing the use of color additives to consumers. Even though the FDA already had regulations governing the disclosure of color additives, the California Supreme Court held that plaintiffs' claims were not expressly preempted by Section 343-1(a) because the duty imposed by California's UDAP (disclosure of color additives) was identical to federal law (see *42 Cal. 4th 1077 (Cal. 2008)*, cert. denied sub nom. *Albertson's, Inc. v. Kanter, 129 S. Ct. 896 (2009)*).

In re Farm Raised Salmon Cases is particularly interesting because it also discusses the interplay between FDCA Sections 337(a) and 343-1. FDCA Section 337(a) expressly forbids private plaintiffs from suing to enforce the FDCA. In this case, however, the court concluded that the plaintiffs could bring state-law claims to remedy conduct that might also violate the FDCA (Section

337(a) notwithstanding) because defendants failed to show that Congress clearly intended to impliedly preempt, through Section 337(a), state-law causes of action that were expressly authorized by Section 343-1 (see *42 Cal. 4th at 1098*). The court's decision, therefore, effectively gives plaintiffs an end run around Section 337(a) by recognizing a private right of action to enforce the FDCA through parallel state laws. However, other courts have come out differently on this issue (see *Fraker v. KFC Corp., No. 06-cv-1284, 2007 WL 1296571 (S.D. Cal. Apr. 30, 2007)* (private plaintiffs' state-law UDAP claims impliedly preempted by Section 337(a)).

Implied Preemption

Implied preemption of state law may occur even where federal statutes are silent with respect to preemption, if there is other evidence of congressional intent to preempt state law. Specifically, federal law can impliedly preempt state law where either:

- Congress has indicated an intent to occupy an entire field, to the exclusion of the states, by the scope and reach of its regulations (field preemption).
- Compliance with both federal and state law is impossible, or state law stands as an obstacle to accomplishing federal policy (conflict preemption).

Claims of implied preemption have fared worse for defendants ever since the Supreme Court's decision in *Wyeth v. Levine, 129 S. Ct. 1187 (2009)*. In a 6-3 decision, the Court recognized that there is a "presumption against preemption" in regards to areas historically regulated by states, and held that drug companies are not always shielded from personal injury claims even if the FDA approved their products and packaging.

Cases concerning claims over products that use the adjective "natural" illustrate how the preemption argument has played out for food manufacturers in recent years. For example, in *Holk v. Snapple Beverage Corp.*, the US Court of Appeals for the Third Circuit addressed conflict preemption principles in a HFCS case where the defendant was sued over its label that stated the product was "all natural" even though it contained HFCS, which allegedly does not occur in nature (see *575 F.3d 329 (3rd Cir. 2009)*). In finding plaintiff's claims not preempted, the Third Circuit relied on the presumption against preemption because food labeling has been an area historically governed by state law. That the FDA had issued extensive regulations was not sufficient to overcome this presumption, according to the court. As the Third Circuit explained, if Congress intended all state labeling laws to be preempted, the preemption clause would be meaningless. Other cases involving claims of "all natural" or "100% natural" where the product used HFCS have come out much the same on the preemption issue (see, for example, *Wright, No. 08-cv-1532, 2009 WL 3247148* and *Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028 (N.D. Cal. 2009)*).

PRIMARY JURISDICTION

Another potentially powerful weapon available to defendants involved in private Surgeon General suits is the doctrine of primary jurisdiction, which allows courts to stay proceedings (or dismiss a complaint without prejudice) pending the resolution of an issue within the special competence of an administrative agency, such as the FDA (see *Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008)*). In determining whether to dismiss on primary jurisdiction grounds, courts typically consider whether:

- The case raises issues that are within the jurisdiction of a regulatory agency.
- The agency has regulatory authority over an entire industry or activity.
- Proper determination of the issues requires expertise and uniformity in administration.

(See *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc., 307 F.3d 775, 781 (9th Cir. 2002).*)

Private Surgeon General cases are often tailor-made for a primary jurisdiction defense and, indeed, several courts have recognized it. In *Aaronson v. Vital Pharmaceuticals, Inc.*, for example, a district court in California dismissed a UDAP and false advertising case that charged the defendant with advertising its energy drinks as having unique drug qualities and as safe and healthy. In dismissing the case, the court reasoned that the FDA was in a better position to make a determination about the safety of the product and dietary supplements (see *No. 09-cv-1333, 2010 WL 625337, at *1-2 (S.D. Cal. Feb. 17, 2010);* see also *Coyle v. Hornell Brewing Co., No. 08-cv-2797, 2010 WL 2539386, at *3-5 (D.N.J. Jun. 15, 2010)* (staying case for six months to give the FDA an opportunity to determine if HFCS qualifies as "natural"); cf. *In re Paxil Litig., 218 F.R.D. 242, 248 (C.D. Cal. 2003)* (denying class certification under Federal Rule of Civil Procedure (FRCP) 23 and noting disapproval of plaintiffs' attempt to use the court as a forum to "second-guess" the FDA's prior approval of Paxil's safety and efficacy)). Courts that view private Surgeon General cases as lawyer-driven and involving uninjured, unsympathetic plaintiffs may be even more inclined to rule in the defendant's favor on this issue.

However, not all courts are persuaded by the primary jurisdiction defense. Some courts view these cases as alleging nothing more than garden-variety false advertising and deception claims, which courts handle all the time without having to defer to the expertise of a government agency (see, for example, *In re Bisphenol-A Polycarbonate Plastic Prods. Liab. Litig., No. 08-md-1967, 2009 WL 3762965, at *2-3*). But even these cases illustrate how fact-bound and individual each analysis is. For defendants, the challenge is to demonstrate that a particular complaint is not just garden-variety deception and that allowing the private Surgeon General case to proceed would implicate or undermine complex policy decisions better left to those with the day-to-day oversight and expertise.

ABSTENTION

Closely related to preemption and primary jurisdiction is the abstention doctrine, which allows courts to refuse to hear cases in certain situations. Many state UDAP statutes allow courts to decline their equitable jurisdiction in cases where a legislative or

regulatory body has affirmatively permitted certain conduct (see, for example, *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 541 (Cal. 1999)*). Alternatively, some courts refuse to grant equitable relief if it entangles them in a complex area that is already subject to oversight by an agency having day-to-day supervision responsibilities (see, for example, *Desert Healthcare Dist. v. PacifiCare FHP, Inc., 94 Cal. App. 4th 781, 794-96 (Cal. Ct. App. 4th Dist. 2001)*).

INDEMNITY DEFENSE FOR RETAILERS

Retailers may have a special defense. Federal law provides that retailers are not liable for selling an adulterated or misbranded food or drug if they act in good faith and have a written guaranty from the manufacturer (*21 U.S.C. § 333(c)*). Most states have enacted similar statutes (see, for example, *Ark. Code Ann. § 20-56-205* (Arkansas); *Cal. Health & Safety Code § 110245* (California); *Conn. Gen. Stat. § 21a-95* (Connecticut); *Fla. Stat. ch. 499.069* (Florida); *La. Rev. Stat. Ann. § 40:640* (Louisiana); *Mass. Gen. Laws ch. 94, § 193* (Massachusetts); *N.Y. Educ. Law § 6825, N.Y. Agric. & Mkts. Law § 214* (New York) and *N.C. Gen. Stat. § 106-124* (North Carolina)).

COMPLIANCE WITH AGENCY REGULATIONS

Most private Surgeon General cases do not arise in a vacuum. Usually, there is a body of statutory or regulatory law that has addressed the subject already. In the case of TFAs, for example, the FDA instructs that any trace amounts of less than 0.5 grams per serving "shall" be rounded down, meaning that they are disclosed in the "Nutrition Facts" box as "0 grams" (*21 C.F.R. § 101.9(c)(2)(ii)*). A lawsuit that seeks to compel disclosures of trace amounts of TFAs below that 0.5 gram threshold should obviously raise eyebrows. Moreover, the regulation itself, even if it does not have the force of preemption, can become a principal defense.

This was illustrated recently in *Levinson v. Johnson & Johnson Consumer Cos., Inc.*, where the plaintiffs claimed that J&J's baby shampoo contained the banned substances 1,4-dioxane, formaldehyde and methylene chloride (see *No. 09-cv-3317, 2010 WL 3024847 (D.N.J. Aug. 2, 2010)*). The court initially dismissed all claims arising from the first two compounds for lack of standing, but allowed the claims to proceed as to the third. On reconsideration, the court dismissed the methylene chloride-based claims as well. The court noted that the FDA banned only the use of methylene chloride as an "ingredient" in cosmetic products, and that FDA regulations excluded from the definition of "ingredient" those substances that are present in a cosmetic at "insignificant levels" (*21 C.F.R. §§ 700.3 & 701.3(1)*). Because FDA regulations did not ban the presence of methylene chloride to the extent it was not an "ingredient" (as defined), and because the plaintiffs failed to allege that methylene chloride was present in concentrations sufficient to constitute an "ingredient," the court dismissed the case. *Levinson* therefore demonstrates that even if an FDA regulation does not preempt a state-law action, it may still control the outcome of the case.

DEFICIENT PLEADING

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that a district court should grant a motion to dismiss for failure to properly plead a claim if the complaint does not contain enough facts to support a claim that is "plausible on its face" (*550 U.S. 544, 570 (2007)*). In *Ashcroft v. Iqbal*, the Court explained that a claim is plausible on its face where the plaintiff pleads factual content sufficient to allow the court to draw a "reasonable inference" that the defendant is liable for the alleged misconduct (*129 S. Ct. 1937, 1949 (2009)*).

Private Surgeon General claims are often implausible. Reflecting this, several courts have been willing to dismiss on this ground.

In *Weberl v. Pepsico*, for example, the plaintiff claimed that the maker of Cap'n Crunch's "Crunch Berries" cereal violated California's UDAP (among other laws) by misrepresenting to consumers that the cereal "derive[d] nutrition" from actual fruit. The court, however, determined that no reasonable consumer would be deceived by either the colorful Crunch Berries pictured on the cereal box or the name of the product, and granted the defendant's motion to dismiss the lawsuit (see *No. 09-cv-4456, 2010 WL 2673860 (N.D. Cal. Jul. 2, 2010)*). Other courts have dismissed similar private Surgeon General cases on this ground (see, for example, *Sugawara v. Pepsico, Inc., No. 08-cv-1335, 2009 WL 1439115 (E.D. Cal. May 21, 2009)* and *Videtto v. Kellogg USA, No. 08-cv-1324, 2009 WL 1439086 (E.D. Cal. May 21, 2009)*).

Courts have also dismissed private Surgeon General cases under FRCP 9(b), which requires fraud to be pleaded with particularity in federal litigation. Courts have interpreted Rule 9(b) as requiring plaintiffs to plead, with specificity, the time, place and specific content of the allegedly false representations and the identities of the parties to the misrepresentation (see *Yumul, No. 10-cv-0927, 2010 WL 3359663, at *2*). In *Yumul*, for example, the plaintiff alleged that Smart Balance falsely advertised its Nucoa vegetable oil margarine product as "cholesterol free" even though the product contained TFAs that are allegedly implicated in elevated levels of so-called "bad" cholesterol. The court dismissed plaintiff's fraud claims because she failed to identify when she saw the particular misrepresentations, the dates on which the purchases were made, the retailers from which plaintiff purchased Nucoa and whether Nucoa's packaging remained consistent throughout the time period in which the purchases were made (see *No. 10-cv-0927, 2010 WL 3359663, at *4-5*).

PUFFERY

"Puffery" is another important defenses in private Surgeon General suits, both when used directly and to reinforce other themes. Puffery is essentially sales talk consisting of statements that no one could reasonably rely on or mistake for claims of fact (see *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 245-46 (9th Cir. 1990)*). Several courts have dismissed private Surgeon General suits on the grounds that defendants' allegedly false statements were in actuality non-

actionable puffery. In the private Surgeon General context, courts have found the following statements to be mere puffery:

- "Optimum nutrition" and "nutritionally, you can't buy a better food than Gerber." (*Tylka v. Gerber Prods. Co., No. 96-C-1647, 1999 WL 495126, at *2-3, *7 (N.D. Ill. Jul. 1, 1999)*).
- "Most wholesome nutritious safe foods you can buy anywhere in the world." (*High Rd. Holdings, LLC v. Ritchie Bros. Auctioneers (Am.), Inc., No. 07-cv-4590, 2008 WL 450470, at *4 (N.D. Ill. Feb. 15, 2008)*).
- "Modified food starch and sugar are FDA approved ingredients. The use of these ingredients in select baby food items provides better product taste and texture without sacrificing nutrition!" (*Tylka, No. 96-C-1647, 1999 WL 495126, at *2-3*).
- "McDonalds can be part of any balanced diet and lifestyle" and "McChicken Everyday!" (*Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 527-29 (S.D.N.Y. 2003)*).
- Fast food "provides the best food" and "can fit into a balanced eating plan." "You can enjoy 'fast food' as part of a sensible balanced diet." (*Fraker, No. 06-cv-1284, 2007 WL 1296571, at *3*).

FULL DISCLOSURE IS NOT ALWAYS A COMPLETE DEFENSE (WILLIAMS V. GERBER)

Until recently, many manufacturers (and their lawyers) believed that proper disclosure of the ingredients in the "Nutrition Facts" panel of a product's packaging immunized them against most claims of deception based on the product label or design. Although that is still possible in many cases and for many labels, a recent Ninth Circuit decision weakened the force of this defense in certain circumstances. As a result, more of these private Surgeon General suits may get past the pleading stage and proceed to expensive discovery.

In *Williams v. Gerber Products Co.*, the plaintiffs brought a class action against Gerber under California's consumer protection laws for allegedly misrepresenting that its juice products were natural, when in fact they consisted primarily of corn syrup, sugar and juice concentrate. The problem facing plaintiffs, however, was that the ingredients were disclosed in the "Nutrition Facts" box as required by federal law. Gerber moved to dismiss the case, arguing that no reasonable consumer could be deceived. The district court agreed and dismissed the action.

On appeal, the Ninth Circuit reversed, holding that:

- Whether a company's business practices are deceptive should not ordinarily be decided on a motion to dismiss.
- Where product packaging contains an affirmative misrepresentation, the manufacturer cannot rely on the small-print nutritional label to contradict and cure that misrepresentation.

(See *552 F.3d at 939-40.*)

The holding of *Williams* has spread eastward. For example, a federal district court in New York recently cited *Williams* in denying a motion to dismiss in a case alleging that vitaminwater was falsely advertised as healthy (see *Ackerman v. The Coca-Cola Co., No. 09-cv-0395, 2010 WL 2925955, at *16-17 (E.D.N.Y. Jul. 21, 2010)*).

CLASS CERTIFICATION

Defendants in private Surgeon General cases have powerful defenses to class certification. These cases are built around the premise that every consumer relied on the statement or omission in substantially the same manner, and that it was material to each class member's purchase decision. In many cases, however, this is a dubious proposition.

For example, in *Fitzpatrick v. Gen. Mills., Inc.*, a Florida federal court refused to certify a class of consumers claiming General Mills breached an express warranty by misrepresenting the efficacy of its probiotic yogurt, Yo-Plus. The court so held because each plaintiff would have to submit individualized proof as to which particular promise formed the basis of his decision to buy Yo-Plus (see *263 F.R.D. 687, 701 (S.D. Fla. 2010)*; see also *Caro v. Procter & Gamble Co., 18 Cal. App. 4th 644 (Cal. Ct. App. 4th Dist. 1993)* (denying class certification because, among other things, whether misrepresentations induced purchase would vary from consumer to consumer)). The court in *Fitzpatrick*, however, certified the class as to its Florida UDAP claims, because Florida's UDAP does not require individualized proof of reliance on a particular misrepresentation (see *263 F.R.D. at 700*).

Likewise, the Ninth Circuit recently upheld a district court's denial of class certification where the plaintiff sought to represent a nationwide class of all individuals who purchased Natural Balance pet food that was labeled as having been made in the US, but contained an ingredient made in China (see *Kennedy v. Natural Balance Pet Foods, No. 08-56378, 2010 WL 55554 (9th Cir. Jan. 6, 2010)*). In this case, the plaintiff included claims under multiple states' consumer fraud statutes, arguing that the statutes were "substantially similar." However, the Ninth Circuit held that where different states' laws would apply to the claims, the class plaintiff must provide a thorough analysis of the applicable laws to show that common issues predominate, which the plaintiff failed to do.

Furthermore, in *In re Paxil Litig.*, a California federal court refused to certify a class of plaintiffs alleging GlaxoSmithKline concealed from consumers the side effects of discontinuing the use of its antidepressant, Paxil. The plaintiffs sought to certify a class under FRCP 23(b)(3) solely on the issue of whether discontinuing Paxil is capable of causing particular conditions (that is, "general" causation), while allowing the individual class members to bring their own cases to determine whether discontinuing Paxil caused their conditions (that is, "specific" causation). The court dismissed plaintiffs' proposal as unprecedented and inefficient (see *In re Paxil Litig., 218 F.R.D. at 248-50*).

SUMMARY JUDGMENT

If all else fails, defendants can move for summary judgment. Unlike the motion to dismiss stage of the litigation, where plaintiffs' claims can survive as long as they are "plausible," summary judgment requires the party with the burden of proof to actually present evidence supporting his claim. Under many state UDAP laws, a plaintiff cannot meet his burden of showing a "likelihood of deception" unless he commissions a consumer survey (see, for example, *Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1062 (7th Cir. 2000)* and *Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1260 (C.D. Cal. 2003)*). Anecdotal evidence is insufficient (see *William H. Morris Co. v. Group W, Inc., 66 F.3d 255, 258 (9th Cir. 1995)*). Plaintiffs in private Surgeon General cases do not relish the idea of having to pay for expensive consumer surveys.

Contact Us

Practical Law Company
747 Third Avenue, 36th Floor
New York, NY 10017
646.562.3405
plcinfo@practicallaw.com
www.practicallaw.com