

## **An Economic Perspective On Food Labeling Cases**

*Law360, New York (May 30, 2013, 12:06 PM ET)* -- Manufacturers of retail food products are facing an increasing frequency of consumer class actions alleging false or misleading advertising, particularly with respect to labels or advertising copy describing products as “natural” or more generally as healthy or nutritious. In these litigations, as often is the case in class actions more generally, the class certification stage is a critical battleground for the parties, representing, in many instances, the decision point for summary judgment or settlement.

An important question in the class certification process is the evaluation of the predominance of common issues with respect to consumer injury and damages. In order to certify a class, Federal Rule 23(b) requires the court to determine that “questions of law or fact common to class members predominate over any questions affecting only individual members.” This requirement is necessary for a class approach to be superior to individualized trials in terms of both the fairness and the efficiency of the adjudicating process.

The question of predominance can be informed by economic analysis — in particular, through an examination of the behavior of consumers and retailers, including pricing, consumer preferences and purchasing decisions. To date, however, the extent to which economic issues have been addressed at the class certification stage of the litigation, as opposed to the liability and damages stages, has depended somewhat on the specific legal interpretation applied in particular cases.

Motions for class certification in cases involving claims of false advertising or deception with respect to food labeling have met with mixed success on the predominance issue.

For example, in November 2011, a California district court certified a class of consumers alleging deception with respect to advertising and labeling of Ferrero’s Nutella product.[1] The Ferrero court found that all potential class members shared a “common contention” regarding Ferrero’s allegedly false claim and that while individualized issues, such as consumers’ dietary preferences, “may prove relevant to the merits of their case,” the court determined that such assessments could be made after the class certification stage. The Ferrero court therefore found that the predominance standard was met, at least with respect to a class of California consumers, without performing any analysis of the relevant economic factors.[2]

In contrast, an August 2010 decision by a New York district court denied class certification in a consumer claim against Snapple Beverage Corp. regarding the “All Natural” description on Snapple labels.[3] Unlike in Ferrero, in addition to analyzing the common contention related to consumers’ exposure to the allegedly false claims, the Snapple court analyzed the specific methods proposed by the plaintiffs to assess liability and damages for individual consumers.

After reviewing expert testimony from both sides, the court excluded the opinion of the plaintiffs’ damages expert and denied class certification, finding, “Individualized inquiries would therefore be required in order to determine whether class members in fact paid a premium for Snapple beverages, and whether any such premium was attributable to the ‘All Natural’ labeling.”

The contrast between the two approaches taken by the Ferrero and Snapple courts is reminiscent of similar questions that have been addressed recently in antitrust and employment class actions — in particular, through decisions such as *In re Hydrogen Peroxide* and *Wal-Mart v. Dukes*.<sup>[4]</sup> These cases demonstrate a trend toward a greater requirement for economic and statistical analysis at the class certification stage, which is more in line with the Snapple decision.

Under the approach taken by the Ferrero court, in which the predominance standard is applied only to the question of whether consumers all were exposed to false claims, the role for economic analysis could be limited at the class certification stage.

Under the Snapple approach, however, assessing predominance requires a demonstration through economic analysis that common facts or methods can be used to establish: “impact” or “injury” to each consumer in the proposed class; and the amount of damages suffered by each consumer.

Although courts often view these inquiries separately, to an economist, they are two sides of the same coin: Confirming the fact of injury to the consumer is equivalent to measuring positive damages.

Generally, a consumer’s damages in a false advertising case are equal to the amount of money needed to make the consumer “whole” — that is, to compensate the consumer for the harm caused by the false claim. A demonstration of predominance under the Snapple approach is therefore inherently an exercise in economic analysis, requiring a comparison of the value actually received by the consumer with the value the consumer would have received if the allegedly false labeling had been true (the “but-for” value) or, equivalently, the price actually paid.<sup>[5]</sup>

Measuring the actual value received by a consumer and the but-for value the consumer would have received absent the false labeling requires a fact-intensive economic inquiry. That inquiry should address questions related to individual consumers’ behavior and preferences, including, for example:

- Was the consumer aware of the false claim?
- Was the consumer misled by the false claim?
- Was the false claim a reason for purchase?

- Would the consumer have been willing to purchase the product for the same price in the absence of the false claim?
- If not, what price would the consumer have been willing to pay, and what was the consumer's next-preferred choice of product?

Under some circumstances, one may be able to obtain estimates of the average preferences for a broad class of consumers through surveys or other common evidence. However, unless it could be shown that all class members had identical characteristics, those averages would not inform a determination of individual preferences outside of the subset of the class included in the surveys or specifically covered by the other available common evidence.

Thus, individual questions with respect to consumer behavior and preferences are critical to the determination of whether each member of the proposed class was injured by the false claims as well as the measurement of the values of those injuries. Determining how each class member was affected by the false claim would require information specific to that consumer, potentially obtainable only through an interview or other individualized inquiry.

The question of predominance also arises when determining the actual amount consumers paid for the product. Retail prices often vary across regions, store types (grocery, convenience, mass merchandise, etc.) and over time.

Retail products also may be subject to discounting through coupons or rebates. Although sales data from checkout scanners or consumer surveys may shed light on the average amounts paid by broad groups of consumers, determining individual class members' expenditures is again likely to require individualized inquiries.

Similarly, the availability, pricing and characteristics of products which may represent each consumer's available alternatives likely depend on, among other factors, the consumer's preferences, preferred shopping locations and the relevant time frame of actual purchases. Again, it is likely that these facts could only be developed through individualized inquiries.

This discussion makes clear that the questions relevant to a determination of damages for each class member generally will require individual-specific facts and economic analysis. However, the decision of whether such evidence should be evaluated at the class certification stage, as opposed to the liability and damages stages, apparently has not been consistently applied by the courts in false advertising cases.

Recent key decisions in antitrust and employment class actions indicate a trend toward more detailed analysis of economic data at the class certification stage. Whether that trend takes hold in the world of false advertising litigation remains to be seen.

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[1] In re Ferrero Litigation, No. 11-CV-205 H (CAB) (U.S. Dist. Ct., S.D. CA), Order Granting Motion for Class Certification, November 14, 2011.

[2] The plaintiffs conceded that differences in state-level consumer protection laws could preclude a national class definition.

[3] *Weiner v. Snapple Beverage Corp.*, 07 Civ. 8742 (DLC) (U.S. Dist. Ct., S.D. NY), Sealed Opinion and Order, August 3, 2010.

[4] See, for example, John H. Johnson, "The Standards for Class-Certification Expert Testimony after In re Hydrogen Peroxide Antitrust Litigation," *Antitrust Report*, n. 2, 2009; and Stephen J. Newman, "Use of Expert Testimony at the Class Certification Stage after Wal-Mart v. Dukes," *Class Action Watch*, June 20, 2012.

[5] Other damages approaches are also possible. For example, under some statutes, unjust enrichment damages (disgorgement of profits gained as a result of the false claims) may be a permitted remedy. In a disgorgement scenario, the issue of predominance arises in the determination of a method for allocating those disgorged profits across members of the proposed class using common facts, rather than individualized inquiries for each class member.