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Get Ready For The 2nd Wave Of Food Labeling Litigation

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The ongoing Filippo Berio olive oil litigation in the Northern District of California offers food companies a cautionary example, both for traditional labeling issues and for the trend toward litigation based on product testing. The plaintiff in Kumar v. Salov North America Corp., No. 4:14-CV-02411 (N.D. Cal. Feb. 3, 2015) alleges that Salov's Filippo Berio oil is deceptively labeled as "Imported from Italy," and that independent product tests on the "Extra Virgin" varieties show these to be of less-than extra-virgin quality. In response to Salov's motion to dismiss, the court has narrowed the issues but is allowing the bulk of plaintiff's claims to proceed.

Salov produces and markets a variety of olive oils under its Filippo Berio brand. The front label of each bottle says "Imported from Italy," while the back label informs consumers that the product is "Packed in Italy," with component olive oils from Greece, Italy, Spain and Tunisia. In her complaint, Kumar alleges she purchased a bottle of Filippo Berio Extra Virgin Olive Oil after assessing only the front label, believing she was buying oil made solely from Italian olives. Because this was not the case, and because she interprets implementing regulations for the Tariff Act of 1930 as requiring these other counties to be disclosed in close proximity to the word "Italy," she sued. She brings claims against Salov for violating California's Consumers Legal Remedies Act and for false advertising and unfair competition, seeking to represent a class of all California purchasers of similar Salov products.

Kumar's attorneys also had several bottles of Salov's "Extra Virgin" oils independently tested for quality, finding that none met the various international, national and California standards for extra virgin oil. (For the uninitiated, there are multiple grades of olive oil, ranging from extra virgin, to virgin, down to refined olive pomace oil, the differences including the quality of the olives, the method of extracting oil and the chemical composition of the resulting oil.) In particular, Kumar alleges that the clear Filippo Berio bottles allow light to degrade the oil to below-extra-virgin quality before the labeled "best by" date. On this basis, Kumar added claims for breach of contract and fraud, on behalf of California and national classes of Salov "Extra Virgin" purchasers, and breach of the covenant of good faith and fair dealing, on behalf of California "Extra Virgin" purchasers. She seeks injunctive relief, compensatory damages and punitive damages.

Salov moved to dismiss the claims of both the California "Italian" class, and the California and national

"Extra Virgin" classes. First, Salov argued that Kumar's claims are implausible and that she lacks standing. Because Kumar alleged she read the "best by" date on the back label, she must have seen the nearby statement informing consumers the product was "Packed in Italy," and so she could not have been injured. Salov also asserted that "Imported from Italy" is not deceiving to a reasonable consumer, because it "simply reflects the country from which the bottle was brought to the United States." Similarly, Salov argued that Kumar lacks standing to seek injunctive relief because she now knows the origin of the oils in the product and so cannot again be deceived. For the extra virgin claims, Salov contended that Kumar lacks standing because she does not allege that her bottle of oil had degraded to below-extra-virgin quality: "[t]he defects she alleges in the bottles her lawyer bought do not suffice …." Salov also asserted that there is no private right of action under the Tariff Act of 1930 (while maintaining that Salov's products are in compliance), that Kumar fails to plead her fraud claims with the particularity required by Rule 9(b), and that her contract-based claims fail for lack of privity.

The court met Salov partway, dismissing the contract claims but allowing the remaining claims to proceed. On the imported-from-Italy allegation, the court rejected Salov's argument that Kumar must have read, or should have read, the disclaimer on the back of the bottle. The court drew on language from prior California labeling cases, which note that a reasonable consumer is not "expected to look beyond misleading representations on the front of the box to discover the truth." The court also could not decide, as a matter of law, that a reasonable consumer would not interpret "Imported from Italy" to mean the product contains only Italian oil. The court rejected Salov's Tariff Act argument, noting that a federal law may predicate a private right of action under state law, that Salov failed to offer authority showing the Tariff Act prohibits a private right of action and that Salov's other Tariff Act arguments could not be resolved on a motion to dismiss.

In response to Salov's argument against injunctive relief, the court found that future injury to Kumar was possible because "statements will be no less false in the future than they were when Kumar read them," and she "could not be any more confident that they were true." Salov's reasoning would "result that a class action plaintiff alleging misleading labeling … could never seek injunctive relief on behalf of the class."

The court was not persuaded by Salov's argument that Kumar needed to have her "Extra Virgin" bottle tested, finding that Kumar's theory does not "require that she prove the particular bottle of oil she purchased had, in fact, degraded to the point of not being extra virgin." Because consumers are entitled to receive oil of the correct quality "by design," the "happenstance" of whether Kumar's own bottle was not defective did not defeat her claim. The court also rejected Salov's Rule 9(b) argument, finding that Kumar had provided sufficient detail at the pleading stage as to the who, what, when, where and how of the alleged fraud.

Salov fared better on the contract and covenant of good faith and fair dealing claims. The court agreed that Kumar failed to allege privity, and that this was necessary to establish a contract between the parties because Kumar did not allege breach of express warranty, in which privity would not be required. The court was not convinced that statements on a product label could even be the basis for a contract, though it left the matter undecided.

Kumar's lawsuit is only one example of the ever-increasing number of food labeling lawsuits on file. By this point, food manufacturers should all assume that potential plaintiffs (and their lawyers) are scrutinizing every label in the aisle of their local grocery store. But this lawsuit is also an example of a second wave of food labeling litigation. Now companies should also be aware that their products could be independently tested for compliance with all labeling claims and regulatory standards. Even small

deviations may be the basis for a lawsuit, and courts may not require that the plaintiff's own purchase even be tested.

Being prepared to respond to a product testing claim is thus more important than ever. Companies should be prepared with their own test results, documented production standards and quality-control protocols, ensuring that all labeling claims can be substantiated. In addition, manufacturers should consider what other standards, aside from U.S. Food and Drug Administration labeling regulations, could be implicated by their labeling claims and invite a cause of action. Finally, periodic labeling review and risk assessment is advisable, to help a company identify potential issues and stay ahead of the ever-shifting trends in food labeling litigation. With these precautions, plaintiffs' lawyers may look elsewhere for their next meal.

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