What One Firm's Filings Reveal About Labeling Class Actions

By **Jessica Miller, Nina Rose and Jordan Schwartz** (March 11, 2021, 7:43 PM EST)

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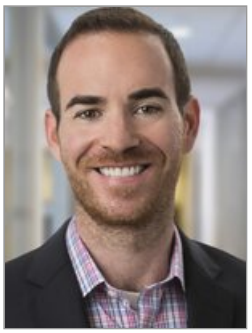

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Late last year, in a Law360 guest article titled "**The State of Consumer Class Actions Amid COVID-19**," we provided an empirical analysis of current consumer class action filings, explaining that while the ongoing pandemic has slowed the filing of consumer class action complaints, the one category of class action lawsuits where filings have increased is putative false labeling actions.

In that same article, we noted that one law firm in particular, New York-based Sheehan & Associates PC, filed 15 of the 38 labeling class action complaints that were filed in federal courts in October, alleging various theories of deception with respect to a spate of consumer products — in particular, vanilla-flavored foods.

In an effort to better understand this trend, we have now examined the labeling class action filings in New York federal courts during the months of December, January and February to determine the percentage of lawsuits filed by the Sheehan firm and the nature of those actions. The results confirm that the Sheehan firm is in fact the most prolific filer of putative labeling-based class actions in New York.

Of the approximately 14 labeling class actions filed in December in federal court in New York, 11 were filed by Sheehan; of the approximately 16 labeling class actions filed in federal court in New York in January, 14 were filed by Sheehan; and of the approximately 33 labeling class actions filed in February in federal court in New York, 11 were filed by Sheehan.[1]

The Sheehan firm has filed numerous lawsuits alleging that the vanilla-flavor labeling of yogurt, milk, dairy, ice cream, tea and other food and beverage products is deceptive, because the flavor does not come exclusively from vanilla beans. Recently, courts have dismissed some of these lawsuits for failure to state a claim.[2]

For example, in Steele v. Wegmans Food Markets Inc., plaintiffs brought claims against a grocery store and food manufacturer in the U.S. District Court for the Southern District of New York, alleging that its vanilla ice cream deceived consumers into thinking that the ice cream got its flavoring exclusively from natural vanilla sources.[3]

The court dismissed the action in July of last year, because the complaint had failed to allege a plausible theory of deception. As the court explained: "What is misrepresented? The ice cream is vanilla flavored. The sources of the flavor are natural, not artificial."[4]

Similarly, in Wynn v. Topco Associates, filed in the Southern District of New York in January, plaintiffs allege that the packaging of the defendant's vanilla almond milk misleads consumers into believing that the beverage's flavor derives entirely from natural vanilla sources, when in fact the product

supposedly includes non-vanilla flavor. The court dismissed the lawsuit, reasoning that the front label does not say anything about the source of the vanilla flavor or its ingredients, which the plaintiffs expressly conceded contained at least some real vanilla.[5]

In the wake of these dismissals, the Sheehan firm has brought several new vanilla-focused class actions on behalf of different plaintiffs, challenging the labeling of ice cream bonbons, ice cream, almond milk coffee creamer, protein powder, and half and half. Several of these new lawsuits appear to recycle the same theories of deception that were recently rejected.

For example, Cavallero v. G.T. Japan Inc., a lawsuit filed last month in the Southern District of New York against a maker of bonbons, alleges that the packaging is deceptive because it fails to disclose that the product's flavor is derived from artificial non-vanilla sources.[6]

McCauley v. Cooperative Regions of Organic Producer Pools — a similar lawsuit filed in the same court last month against the maker of organic half and half creamer — alleges that the labeling is deceptive because it supposedly misleads consumers into believing that the product's vanilla flavor is derived exclusively from natural vanilla.[7]

These lawsuits are based on the same core allegation that multiple courts have already found to be implausible — that a representation that a food or beverage has vanilla flavoring means that the flavoring is derived exclusively from natural vanilla.

While the Sheehan firm continues to file vanilla-based lawsuits that perpetuate this theory, it is also advancing slightly modified vanilla-related theories in other lawsuits, presumably to fill the holes that led to the dismissals previously discussed. For example, in Binns v. HP Hood LLC — a case filed in the Southern District of New York in January involving a product labeled as "Vanilla Ice Cream With Ground Vanilla Beans" — the plaintiff alleges that the beans do not provide any actual vanilla flavor at all. Rather, they are supposedly "purely aesthetic."[8]

In Newton v. Orgain Management Inc., a case challenging the "Vanilla Bean Flavor" label of nondairy protein powder that was filed in the U.S. District Court for the Eastern District of New York in January, the plaintiff alleges that the product "does not contain any appreciable amount of flavoring from vanilla beans."[9] Only time will tell whether these modified vanilla-labeling-based theories are sufficiently different from those previously rejected to withstand motions to dismiss, and proceed to discovery.

The Sheehan firm has also filed a bevy of lawsuits outside the vanilla realm. Seventeen of those lawsuits have targeted food or beverage manufacturers, while 13 have been filed against a wide array of other industries, including baby formula makers, toiletry manufacturers, health care manufacturers, apparel companies and others. For example:

- Babb v. Zarbee's Inc., filed in the Southern District of New York last month, alleges that the images of a bumble bee and an ivy leaf on the front of certain cough syrup, as well as various claims on the company's website and in online marketing, mislead consumers into believing that all of the product's ingredients are natural.[10]

- Alonzo v. William Grant & Sons Inc., filed in the Southern District of New York last year, alleges that while a brand of rum is labeled with the number 18 above the words "slow aged," the product is really a mix of younger and older rums with a purported average age of 18 years.[11]

- Dill v. Under Armour Inc., filed in the Eastern District of New York last year, alleges that the company makes a number of different misrepresentations about its line of athletic clothing on both the label and on the company's website.[12]

- In Sanchez v. Avadim Health Inc., filed in the Southern District of New York last year, the plaintiff alleges that the labeling on a brand of a muscle relief foam contains misleading claims about the product's ability to provide pain relief, and also challenges statements on the product's website, which supposedly misrepresent that the foam is "clinically proven" to provide the touted benefits.[13]

- Ferguson v. Duracell U.S. Operations Inc., filed in the Southern District of New York last year, alleges that the statements "Extra Life" and "Extra Power" on certain batteries mislead consumers into believing that the products provide additional power and a longer shelf life and active-use life than other similar products.[14]

- Lyons v. Royal Oak Enterprises LLC, filed in the Southern District of New York in January, alleges that the labeling on certain charcoal is deceptive, because the product supposedly contains harmful chemicals and does not deliver the advertised "cleaner burn."[15]

- Nieves v. The Procter & Gamble Co., filed in the Southern District of New York in January, alleges that the labeling on a brand of toothpaste misleads consumers into believing that the product can repair receding gums.[16]

To the extent these claims survive motions to dismiss and obtaining profitable settlements, the firm likely will continue filing such suits, and other plaintiffs counsel will likely expand their presence in this area as well.

To be sure, some false labeling suits may have merit. But the overwhelming majority of these claims are based on highly literal, highly selective and otherwise unreasonable interpretations of accurate product labeling that is understood by — or, in some cases, completely irrelevant to — most consumers.

As a result, it is critical that companies faced with consumer class actions — including, in particular, labeling and marketing class actions — develop and consistently follow a measured strategy for responding that deters, rather than invites, future litigation.

It is also important to convey the concern to courts that if plaintiffs lawyers are simply paid to go away without having to expend resources actually prosecuting highly dubious cases, there is no risk to filing dozens or even hundreds of suits across the country, further clogging the nation's already taxed judicial system with meritless claims.

Defendants should also find ways to convey to courts that these lawsuits are not intended to address any real deception. Rather, these suits typically turn on a small phrase or image on a package that is taken out of context by the lawyer to develop a theory of false labeling.

Particularly when it comes to food, the U.S. Food and Drug Administration has standardized requirements regarding the information that must be included on the labeling for a food product or over-the-counter medication — including the product's ingredients, serving size, total net weight and nutritional information. Consumers who are particular about the contents of their purchases know that information is there, and can look at it to obtain the very information that plaintiffs often complain is being misrepresented elsewhere on the packaging.

If it is to be assumed that all consumers ignore this information, and instead rely entirely on a single word or illustration on the front of the product label, then there would simply be no point to these labeling requirements. Such common-sense arguments can be successful in convincing courts to reject class claims on the pleadings, or at least sow the seeds of doubt in the mind of the court as the case moves forward.

It is also important to press the fact that these suits may not be initiated by disgruntled

consumers. Discovery may reveal that many proposed class representatives have little to no understanding of the theory of their case, and may provide testimony that directly undermines their claims. It is therefore essential to pursue aggressive discovery of class action plaintiffs to identify, among other things:

- What proof they have that they purchased the product;
- Why they purchased it;
- How many times they purchased it;
- When they first read the product label in full;
- What product marketing they were exposed to;
- How they used the product;
- How long they used it for;
- What benefit they received from it; and
- Whether they have purchased other similar products without the allegedly false labeling/marketing claim for the same amount or more.

It is also worth conveying to the court how many lawsuits have been filed by plaintiffs counsel in recent months, and the cookie-cutter nature of these allegations.

Finally, defendants should develop affirmative evidence to dispute plaintiffs' generalized assertions that all consumers uniformly interpret a labeling or marketing statement the same way — or that all consumers even took that statement into account when purchasing the product. The truth is that most consumers are savvy, and consider the totality of product packaging, advertising and other information from third parties in making purchasing decisions, to the extent they care about the details.

Moreover, consumers also have different and varied reasons for buying products, and there is simply no way to say that any, much less all, consumers would have changed their purchasing decisions if a certain labeling or marketing phrase or image had not been used.

In many cases this can be established, in a persuasive and concrete way, using a reliable consumer survey capable of demonstrating that a significant portion of consumers disagree with the plaintiffs' interpretation of the marketing/labeling statement at issue, understood the supposed truth about the product at the time of purchase, or simply did not care about the alleged misstatement in making their purchasing decision.

In short, while class actions filings have waned overall during the pandemic, proposed consumer labeling/marketing classes are still being filed in large numbers, often by the same plaintiffs

attorneys asserting similar theories against multiple companies.

Class action defendants should be prepared to take control of the narrative in these cases by resisting settlement pressure and stressing to courts that the reality of how consumers consider and buy products is far out of line with the illogical theories crafted by plaintiffs lawyers, especially those responsible for filing a high volume of consumer suits.

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[1] The authors employed the same methodology used in connection with their prior article. Specifically, the results for December 2020 and January 2021 were generated by searching the Bloomberg Law database for class actions docketed in federal district courts with the following associated filing codes: Banks and Banking [*430]; Cable/Satellite TV [*490]; Constitutionality of State Statutes [*950]; Contract - Enforcement of Judgment [*150]; Contract - Franchise [*196]; Contract - Insurance [*110]; Contract - Marine [*120]; Contract - Medicare Act [*151]; Contract - Miller Act [*130]; Contract - Negotiable Instrument [*140]; Contract - Other [*190]; Contract - Product Liability [*195]; Environmental Matters [*893]; Forfeiture/Penalty - Occupational Safety/Health [*660]; Forfeiture/Penalty - Other Food and Drug [*620]; Forfeiture/Penalty - Other [*690]; Miscellaneous [1999]; Other Statutory Actions [*890]; Personal Injury - Airplane Product Liability [*315]; Personal Injury - Airplane [*310]; Personal Injury - Asbestos Liability [*368]; Personal Injury - Assault [*320]; Personal Injury - Federal Employers Liability [*330]; Personal Injury - Health Care/Pharmaceutical Personal Injury/Product Liability [*367]; Personal Injury - Marine Product Liability [*345]; Personal Injury - Marine [*340]; Personal Injury - Medical Malpractice [*362]; Personal Injury - Motor Vehicle Product Liab. [*355]; Personal Injury - Motor Vehicle [*350]; Personal Injury - Other [*360]; Personal Injury - Product Liability [*365]; Personal Property - Other Fraud [*370]; Personal Property - Other Property Damage [*380]; Personal Property - Product Liability [*385]; Personal Property - Truth in Lending [*371]; Statutes: Customer Challenge 12 USC 3410 [*875]; and other [3990]. The nature of the search feature in the Bloomberg Law database returns cases docketed in federal district courts as of a certain date, and includes cases originally filed in the relevant federal court, cases removed from state court to the federal court in which they are now pending and cases transferred from one federal court to another. Accordingly, the term "filed" as used herein includes cases removed from state to federal court and cases transferred from one federal district court to another.

[2] See, e.g., Wynn v. Topco Assocs. LLC , No. 19-CV-11104 (RA), 2021 WL 168541, at *7 (S.D.N.Y. Jan. 19, 2021) ("[T]he Court finds that Plaintiffs have failed to allege a material misrepresentation of fact or omission since, as discussed above, a reasonable consumer would not conclude that the word 'vanilla' on the product's label communicates that the flavor derives exclusively from real vanilla"); Barreto v. Westbrae Natural Inc ., No. 19-CV-9677 (PKC), 2021 WL 76331, at *4 (S.D.N.Y. Jan. 7, 2021) ("Barreto attempts to plead claims by alleging that the labeling is deceptive and misleading in misrepresenting the source of the product's vanilla flavor as being derived exclusively or predominately from the vanilla plant. Reviewing Barreto's Complaint in the light most favorable to her, Barreto does not plausibly allege that the labeling on Westbrae's product would deceive or mislead a reasonable consumer. Westbrae's motion to dismiss will be granted"); Cosgrove v. Blue Diamond Growers , No. 19 CIV. 8993 (VM), 2020 WL 7211218, at *3-4 (S.D.N.Y. Dec. 7, 2020) ("Defendant's Product does not use the words 'vanilla bean' or 'vanilla extract,' nor does it use language such as 'made with vanilla' or anything similar. The Product makes one representation — that it is vanilla flavored — and Plaintiffs do not allege that the Product did not deliver on that representation. This alone is fatal to Plaintiffs' case"), appeal pending; Pichardo v. Only What You Need Inc. , No. 20-CV-493 (VEC), 2020 WL 6323775, at *3 (S.D.N.Y. Oct. 27, 2020) ("There is no basis ... to conclude that a reasonable consumer would be misled by the label to believe that all (or even most) of the vanilla taste comes from vanilla extract").

[3] Steele v. Wegmans Food Markets Inc. , 472 F. Supp. 3d 47, 50 (S.D.N.Y. 2020).

[4] Id.

[5] Wynn, 2021 WL168541, at *4-5.

[6] See Compl. ¶¶ 3, 67, Cavallero v. G.T. Japan Inc., No. 7:21-cv-01077 (S.D.N.Y. 2021).

[7] See Compl. ¶¶ 2, 6, McCauley v. Cooperative Regions of Organic Producer Pools, No. 7:21-cv-01548 (S.D.N.Y. Feb. 21, 2021).

[8] See Compl. ¶¶ 19, 27, Binns v. HP Hood LLC, No. 7:21-cv-00319 (S.D.N.Y. 2021).

[9] See Compl. ¶ 3, Newton v. Orgain Management Inc., No. 1:21-cv-00062 (E.D.N.Y. 2021).

[10] See Compl. ¶¶ 1-4, Babb v. Zarbee's Inc., No. 7:21-cv-01493 (S.D.N.Y. filed Feb. 2021).

[11] See Compl. ¶¶ 2, 18, 20, Alonzo v. William Grant & Sons Inc., No. 1:20-cv-10937-JMF (S.D.N.Y. 2020).

[12] See Compl. ¶ 1, Dill v. Under Armour Inc., No. 1:20-cv-06066 (E.D.N.Y. 2020).

[13] See Compl. ¶ 3, Sanchez v. Avadim Health Inc., No. 1:20-cv-10272 (S.D.N.Y. 2020).

[14] See Compl. ¶¶ 3, 6, Ferguson v. Duracell U.S. Operations Inc., No. 7:20-cv-10734 (S.D.N.Y. 2020).

[15] See Compl. ¶¶ 4-5, Lyons v. Royal Oak Enterprises LLC, No. 7:21-cv-00524-NSR (S.D.N.Y. filed Jan. 2021).

[16] See Compl. ¶¶ 6-7, Nieves v. The Procter & Gamble Co., No. 7:21-cv-00186 (S.D.N.Y. filed Jan. 2021).