Reminger
ATTORNEYS AT LAW est. 1958

Dear Clients & Friends,

We are pleased to present you with the Late Fall 2016 Edition of the Reminger Co., LPA Product Liability Group Newsletter. The attorneys in our group continue to achieve success in defending our clients. The Results section in this newsletter highlights some of our successes in both motion practice and in trial.

We are also happy to share with you that our Product Liability Litigation Practice Group was ranked as Metropolitan Cleveland Tier 1 by *U.S. News and World Report's* 2017 Rankings for the fourth consecutive year. We are very proud of this distinction as it is based on client feedback and directly reflects our clients' satisfaction and approval of our work.

We have included an article on food labeling and products liability. We hope that you find this information useful even if it does not directly impact your business.

We are thankful for our relationships with our clients and for the opportunities you have provided in allowing us to continue to serve your legal needs. We hope that all of you enjoy the holidays and upcoming winter season, and look forward to the opportunity to work with you in the future.

Sincerely,

Michael Gilbride and Robert Yallech
Products Liability Practice Group
Co-Chairs

Recent Results

Judgment Affirmed
May 2016: Plaintiff appealed summary judgment in favor of defendant on claims of negligence and products liability.

Favorable Outcome
April 2016: Defense of mesothelioma asbestos wrongful death claim.

Motion to Dismiss Granted
December 2015: Defense of product liability claim.

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newsletter

Food Labeling and Products Liability

INTRODUCTION

Food is one of the most basic and important substances for sustaining human life. It is so important that the United States created an entire department just for its regulation: the Food and Drug Administration. One of the hotly debated subjects in realm of food is the use of genetically modified organisms (GMOs), and whether foods containing GMOs must be labeled as such. This article will explain some of the recent trends of state-regulated food labeling GMOs, the risks associated with an improper label, and what it all means for manufacturers.

LAW CONCERNING GMOs

Background

The concept of GMOs is hardly new. Ever since human beings began transitioning into an agricultural lifestyle, the need to create produce that was resistant to diseases and pests--yet suitable for human consumption--was of the utmost importance[1]. But by the mid to late 20th century, technology along with new scientific understanding of DNA, made bioengineering a quicker and somewhat simpler task. In recent years, debate has begun over whether the use of GMOs is safe, and in some instances if it is even considered "natural."

Vermont: Consumer Protection Rule 121.

In June of 2016, the State of Vermont passed Consumer Protection Rule 121 which was cited for being the harshest law concerning GMO labeling to date. CP 121.02 required any foods made with GMOs to be clearly and conspicuously labeled as "Produced with Genetic Engineering[2] ." This included both unpackaged and packaged foods.

CP 121.02 allowed for three different distinctions of the label: "Produced with Genetic Engineering," "Partially Produced with Genetic Engineering," and "May Be Produced with Genetic Engineering." Foods were eligible for the "Partially" label if it contained less than 75% of genetically

engineered material by weight and were eligible for the "May Be" label if, after a reasonable inquiry, the manufacturer still does not definitively know.

The penalties for violating Consumer Protection Rule 121 range from a notice from the state Attorney General that a manufacturer had 30 days to comply with the labeling requirement, to a $1,000.00 per day per product violation fine. As a result of Vermont's Consumer Protection Rule 121, many manufacturers and retailers of food were amending their labels to include the necessary lines to conform to the new law. However, Vermont's law was quickly preempted by the Federal Government.

Amendments to the Agricultural Marketing Act of 1946.

In July 2016, the United States Congress passed a bill that proposed amendments to the Agricultural Marketing Act of 1946[3] (herein referred to as "the Amendments"). These changes were viewed as less severe than the requirements of Vermont's Consumer Protection Rule 121. Furthermore, Section 293(e) of the Amendments expressly preempted any similar law that directly or indirectly established a labeling requirement for foods containing bioengineered ingredients. This essentially voids Vermont Consumer Protection Rule 121 or any other state law making the Amendments the law of the United States concerning GMO labeling for food in interstate commerce. President Obama signed the bill shortly after Congress sent it to him for approval.

The Amendments give the Secretary of Agriculture two years to develop rules and regulations regarding the labeling of foods containing GMOs. However, the difference between the Amendments and Rule 121 is Section 293(b)(2)(D) of the Amendments which states:

> In accordance with subsection (d), require that the form of a food disclosure under this section be in **text, symbol, or electronic or digital link,** but excluding Internet website Uniform Resource Locators not embedded in the link, with the disclosure option to be selected by the food manufacturer.

The way Section 293(b)(2)(D) reads gives manufacturers the ability to choose what specific label will be on foods that contain genetically modified ingredients. This gives the manufacturers a great amount of power over the labeling requirement, while still complying with the Amendments.

Currently, many of the regulations concerning GMO labeling are still uncertain because under the Amendments, the Secretary of Agriculture is given two years to "establish a national mandatory bioengineering food disclosure standard with respect to any bioengineered food and any food that may be bioengineered" and to "establish such requirements and procedures as the Secretary determines necessary to carry out the standard." One provision not included in the Amendments as they are written now is a section concerning sanctions for violating the Amendments. While the Amendments provide the framework, the details of GMO labeling will not be entirely clear until the Secretary of Agriculture provides them.

Case Study: *In re ConAgra Foods, Inc.,* 90 F. Supp. 3d 919 (C.D. CA 2015).

In 2015, a class action lawsuit was brought against ConAgra Foods in federal court in the Central District of California. Several plaintiffs residing in eleven different states[4] brought the action against ConAgra alleging various claims but mostly relating to consumer sales protection violations, deceptive and unfair trade practices, and unjust enrichment under the states' individual laws.

The central issue was a product ConAgra Foods marketed called "Wesson Oil". It was a cooking oil that was labeled "100% natural." Wesson Oil contained GMOs which the plaintiffs contended were not natural, and therefore made the labeling on the oil false.

The legal issue presented at this particular hearing was whether to certify the plaintiffs as a class when pursuing their claims against ConAgra Foods. The Court in this case analyzed each claim under each state's respective laws to determine if the class could pursue the claims. The very specific legal issues that the Court addressed in *ConAgra Foods* was whether each claim was appropriate to bring in a class action setting. When determining if a class action should be certified as such, the court must determine that (1) class is so numerous that normal joinder is impractical, (2) there are questions of law or fact common to the class, (3) the claims/defenses of the parties are typical of the claims/defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class[5].

The Court concluded that the class met the all of the requirements of Fed. Civ. R. 23(a). Originally when the plaintiffs filed their motion for class certification on all of the claims, the Court denied it on the basis that the plaintiffs could not show evidence of class-wide inducement and reliance nor was there sufficient evidence regarding the materiality of the "100% natural" label at issue. This specific action, the plaintiffs filed an amended motion for a class certification to address these issues.

California

The California plaintiffs alleged that ConAgra Foods violated the California's Unfair Competition Law (UCL), False Advertising Law (FAL), and the Consumer Legal Remedies Act (CLRA). The Plaintiffs also alleged that ConAgra violated California Commercial Code 2313 (express warranty provision) and 2314 (implied warranty of merchantability).

The Court held that the UCL, FAL, and CLRA claims were allowed to proceed under a class certification because it was a matter of "common sense" if the 100% natural label would induce a common consumer into purchasing the product. The court also concluded that the breach of an expressed warranty claim was appropriate for a class certification because, citing precedent, "each of the elements was subject to common proof."

The Court however denied class certification on the breach of the implied warranty of merchantability. Two reasons led to this denial. First, the implied warranty of merchantability only requires that a product provides a "minimum level of quality." Second, the Court stated that a plaintiff

must be in vertical privity of a defendant in order to bring such a claim. The Court further illustrated that this requirement was not met because the plaintiff's purchased the product from retailers and not ConAgra Foods itself.

Colorado

The Colorado plaintiffs alleged that ConAgra Foods violated the state's Consumer Protection Act (CPA) at Colorado Revised Statute 6-1-101, Colorado Revised Statutes 4-2-313 (express warranty law) and 4-2-314 (implied warranty of merchantability), and that ConAgra was unjustly enriched.

The Court held that the CPA claim was allowed to proceed because it satisfied the common question of inducement and/or reliance. Under Colorado's CPA law, a violation occurs if a label has the "capacity or tendency to deceive a reasonable customer."

The express warranty and implied warranty claims were also allowed to proceed. Under Colorado law, reliance was not required for either of these two claims and was instead replaced with causation (namely, the labeled caused people to pay more for the oils). The Court found that the plaintiffs could show evidence that the "100% natural" label caused the plaintiffs to spend more money on the product.

The Court denied the plaintiffs to pursue the unjust enrichment claim under Colorado law. The Court denied this particular claim because, under Colorado law, an unjust enrichment analysis was highly dependent on individual facts from each plaintiff and was therefore inappropriate for a class action.

Florida

The Florida plaintiffs alleged that ConAgra Foods violated the Florida's Deceptive and Unfair Trade Practices Act (DUTPA) at Florida Annotated Statues 501.201 and that ConAgra Foods was unjustly enriched. The DUTPA claim was allowed to proceed because the standard under a Florida DUTPA claim is one of a "reasonable consumer. That eliminates the need to show actual reliance by an individual plaintiff and is proper for a class action.

The unjust enrichment claim was not allowed to proceed. While the Court recognized that some Florida courts have allowed class actions to proceed on theories of unjust enrichment, this case was different because this claim required individual inquiries into whether ConAgra Foods was actually unjustly enriched by the plaintiffs in this case.

Illinois

The Illinois plaintiffs alleged that ConAgra Foods violated the state's Consumer Fraud and Deceptive Business Practices Act (CFDBPA) at 815 Illinois Compiled Statutes 505/1 and that ConAgra was unjustly enriched. The Court allowed both of these claims to proceed.

With regard to the CFDBPA claim, the Court found that the common issue between all plaintiffs under this law was the potential that the "100% natural" label on the oils at issue was a material misrepresentation. If the plaintiffs were able to show that the label caused them, as a class, to purchase the oil under the impression that there were no GMOs, then the common issue predominates over the individual issues.

With regard to the unjust enrichment claim, under Illinois law, if an unjust enrichment claim is also brought with a CFDBPA claim in a class action, whether an unjust enrichment action can proceed as a class is determined by whether a CFDBPA claim can proceed as a class action. Because the Court in this case determined the CFDBPA claim was allowed to proceed as a class, the court allowed the unjust enrichment claim to proceed as a class as well.

Indiana

The Indiana plaintiffs alleged that ConAgra Foods violated Indiana Code 26-1-2-313 (express warranty law), Indiana Code 26-1-2-314 (implied warranty of merchantability), and that ConAgra Foods was unjustly enriched. The court allowed the unjust enrichment and the implied warranty claims proceed as a class while denying the express warranty claim to proceed as a class.

With regard to the unjust enrichment claim, the Court said that the predominance of the class issue was present because the plaintiffs alleged the "100% natural" label to be fraudulent and misleading. If true, this would be a common issue to all plaintiffs asserting the unjust enrichment claim against ConAgra Foods.

With regard to the implied warranty claims, the Court granted certification on these because there was no privity (explained directly below) requirement as with the expressed warranty claims. The plaintiffs just needed to show that there was an implied warranty, the warranty was broken, and that the breach of that warranty was the proximate cause of any loss. The Court agreed with the plaintiffs that they could show the proximate cause element on a class wide scale and therefore allowed these claims to proceed.

With regard to the expressed warranty claims, the Court ultimately denied them because they plaintiffs did not plead any sort of privity between themselves and the manufacturers. In Indiana, privity would exist in this case if the plaintiffs purchased the oils from ConAgra Foods directly, but that did not happen in these cases. However, Indiana recognized an exception to the privity requirement. The exception states that a buyer can be held liable for an expressed warranty violation if the manufacturer "has made representations to a buyer in the chain of distribution in advertisements on product labels, and the buyer relied on those representations." However, the exception was not plead. Because there was no privity between the plaintiffs and ConAgra Foods and the privity exception was not plead, the Court denied the express warranty claims.

Nebraska

The Nebraska plaintiffs alleged that ConAgra Foods violated the Nebraska Consumer Protection Act (CPA) at Nebraska Revised Statutes 59-1601, Nebraska Revised Statute 2-313 (express warranty law), Nebraska Revised Statute 2-314 (implied warranty of merchantability), and that ConAgra Foods was unjustly enriched. However, the Court did not address the Nebraska CPA claim and

its viability to proceed as a class action.

The Court allowed the unjust enrichment claim to proceed because, while there were individual issues present between all of the plaintiffs, the common issue between all of the plaintiffs predominated the individual issues. Furthermore, a Federal District Court case from Nebraska precedent allowed for a class to pursue an unjust enrichment case[6].

The Court denied the expressed warranty claims to be certified for a class action because these claims required too much of an individual inquiry. Under Nebraska law, the plaintiff's had to show that they relied on the "100% natural" label when purchasing the oil. The Court concluded that this was too much of an individualized question to be certified as a class.

The Court granted the implied warranty claims to be certified for a class action because the plaintiffs could show the proximate cause requirement as a class. This was allowed because, under Nebraska law, a "deviation from the standard of merchantability" needs to be shown and that "such deviation caused the plaintiff's injury both proximately and in fact." The Court agreed with the plaintiffs that this could be done on a class scale.

New York

The New York plaintiffs alleged that ConAgra Foods violated New York's Consumer Protection law at New York General Business Law 349, NYC 2-313 (express warranty provision), and that ConAgra Foods was unjust enriched.

With regard to the New York Consumer Protection Law, ConAgra attempted to argue that the plaintiffs' individualized reliance on the "100% natural" label predominated any communal issue. However, under the New York Consumer Protection Law, reliance was not required and plaintiffs just needed to show that they were harmed by a "consumer oriented" "misleading" label. However, the Court said that in order to grant class certification regarding these claims, the evidence needed to be better evaluated in order to "evaluate whether plaintiffs adduced sufficient evidence indicating that they may be able to prove the materiality of ConAgra's representations on a class-wide basis.

With regard to the express warranty claim, New York law does not require reliance on an express warranty, which makes it more likely to be susceptible to class certification. Furthermore, New York law does not require plaintiffs to have "believed the truth of the warranted information." However, identical to the New York Consumer Protection Law claim, the evidence needed to be better evaluated.

With regard to the unjust enrichment claim, the Court declined to certify these claims for a class action because the plaintiffs could not show that common questions predominated in these claims. The Court stated that New York Courts, in unjust enrichment cases, require a showing that "equity and good conscience require restitution." This is typical an element that requires an individualized analysis not suitable for class certification.

Ohio

The Ohio plaintiffs alleged that ConAgra Foods violated Ohio's Consumer Sales Practices Act (CSPA) at O.R.C. 1345.01 and that ConAgra Foods was unjustly enriched. However, the Court did not address the Ohio unjust enrichment claims.

With regard to the CSPA claim, the Court allowed these claims to proceed as a class action because the Ohio CSPA utilizes a "reasonableness standard in determining whether an act amounts to deceptive, unconscionable, or unfair conduct." "If the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class."

Oregon

The Oregon plaintiff's alleged that ConAgra Foods violated Oregon's Unfair Trade Practices Act (UTPA) at O.R.S. 646.605 et seq., O.R.S. 72-3130 (express warranty provision), and that ConAgra Foods was unjustly enriched. However, the Court did not address the express warranty claims.

With regard to the UTPA claims, the Court agreed with the plaintiffs that, under Oregon's UTPA, was subject to class certification because the law contained a causation/reliance element that could be applied to a class. Furthermore, citing Oregon precedent, the reliance could be shown with circumstantial evidence and that a "common understanding" of the misrepresentation was needed. However, the plaintiffs needed to show that the class members "would logically have understood the '100% natural' label to mean no use of genetically modified organisms."

With regard to the unjust enrichment claims, Oregon allows unjust enrichment actions to be certified as a class action where the members of the class were "subjected to uniform treatment." Because the "100%" natural" label would be considered uniform treatment, the Court allowed these claims to proceed.

South Dakota

The South Dakota plaintiffs alleged that ConAgra foods violated South Dakota's Deceptive Trade Practices and Consumer Protection Law (DTPCPL), S.D. Cod. Laws 57A-2-313 (express warranty law) and 57A-2-314 (implied warranty of merchantability), and that ConAgra Foods was unjustly enriched. However, the Court did not address the express warranty or implied warranty claims under South Dakota law.

With regard to the DTPCPL claim, the Court stated that the violations are subject to class certification because reliance on the "100% natural" label and that label being the causation of any damages could be applied to a class even though South Dakota law was somewhat silent on this issue. Furthermore, ConAgra cited no authority whatsoever on this issue. The Court ultimately concluded that while South Dakota courts generally favor class certification in "questionable cases," the plaintiffs still needed to adduce more evidence of materiality.

With regard to the unjust enrichment claim, the Court allowed these claims to proceed as a class action because a Federal Court in South Dakota previously allowed a class action on a theory of unjust enrichment

to proceed. The Court found, as the South Dakota court found, that common issues arose in that ConAgra's actions were uniform, it was purportedly unfair (this was more so relating to the DTPCPL claim), and that the actions allegedly led to ConAgra being unjustly enriched.

Texas

The Texas plaintiffs alleged that ConAgra foods violated Texas' Deceptive Trade Practices and Consumer Protection Act (DTPCPA) at Texas Business and Commerce Code 17.41 et seq. and that ConAgra Foods was unjustly enriched.

With regard to the DTPCPA claims, while the DTPCPA required a showing that the defendant's actions was the cause in fact of the plaintiff's injuries (which indicates an individual inquiry), the Texas Supreme Court held reliance and causation can be proved on a class-wide basis. For reasons stated previously, plaintiff's alleged that they relied on the "100% natural" label which caused their injuries of paying for oils at issue.

With regard to the unjust enrichment claims, the Court denied class certification on these claims because Texas requires a showing of unconscionability. In Texas, even when people paid the same amount for the same product, an individual inquiry is required to determine each class member's experience. It essentially required a showing that each member felt that it was "unconscionable" for ConAgra to label the oils "100% natural" and not fit for class certification.

CONCLUSION

The law regarding labeling food items that contain GMOs is still unsettled. The Amendments passed in August of 2016 superseded Vermont's Rule 121 making Rule 121 no longer applicable. While the Amendments do provide some rules and guidelines for manufacturers to follow, the Secretary of Agriculture still has until August of 2018 to finalize the penalties, procedures, and standards for any and all food labeling. The Amendments, however, are less harsh and give a bit more leeway to manufacturers than Rule 121.

Even though labeling foods that contain GMOs is still undecided, manufacturers can still have claims brought against them in several states for falsely labeling foods as "natural" when they contain GMOs. These claims can easily lead to a class action lawsuit against a manufacturer as seen in the ConAgra case. At the very least, plaintiffs can establish a prima facie case of: violations of a state's fair trade practices act, breaching an express warranty, breaching an implied warranty, or the manufacturer being unjustly enriched. The claims would ultimately vary state by state. The validity of these claims is still uncertain, but regardless, defending against or settling a class action lawsuit in eleven different states -- like the *ConAgra* case -- can be costly. Close attention must be paid to the Amendments to the Agricultural Marketing Act and the forthcoming rules and regulations regarding the labeling of foods containing GMOs by the Secretary of Agriculture.

This has been prepared for informational purposes only. It does not contain legal advice or legal opinion and should not be relied upon for individual situations. Nothing herein creates an attorney-client relationship between the Reader and Reminger.

The information in this document is subject to change and the Reader should not rely on the statements in this document without first consulting legal counsel.

[1] *See* "The History and Future of GMOs in Food and Agriculture," by B.M. Chassy, http://www.ask-force.org/web/History/Chassy-History-Future-2007.pdf (last accessed 11/3/2016).
[2] https://consumermediallc.files.wordpress.com/2016/06/final-rule-cp-121.pdf (last accessed 11/3/2016).
[3] http://www.nbcnews.com/health/health-news/congress-passes-gmo-food-labeling-bill-n609571 (last accessed 11/3/2016).
[4] California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, and Texas.
[5] *See* Fed. Civ. R. 23(a).
[6] *See Cortez v. Nebraska Beef, Inc.,* 266 F.R.D. 275 (D. Neb. 2010).

Recent Results (continued)

Motion For Summary Judgment Granted
November 2015: Defense of negligence and products liability claim.

Complaint dismissed
September 2015: Defense of product liability claim.

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Logan Hughes

Products Liability Shareholder Spotlight

"My grandfather was a gentleman in all matters – hard-working, strong, direct, put others before himself, and he never stopped learning.

He taught me with a zealous spirit to solve problems. Our clients deserve nothing less."

-Logan Hughes

Logan serves as a shareholder in Reminger Co., L.P.A.'s Indianapolis Office, and is also the Chair of the firm's Drug and Medical Device practice group. He has a decade of trial experience representing defendants in civil litigation. He has a broad civil litigation practice, encompassing the defense of medical providers, drug and medical device designers, manufacturers, and distributors, hospitals, dentists, professional and commercial service providers, construction and utility companies, product manufacturers, commercial transportation companies, governmental entities, directors and officers, retail and hospitality businesses, and insurance companies.

He has first chair trial experience in cases involving medical providers, dental providers, utility companies, and numerous businesses.

Logan has lectured at educational seminars for lawyers on the subjects of the Indiana Rules of Evidence and Medical Malpractice.
He is known to clients for his vigorous investigation to reach the heart of a legal dispute early in the process. He has achieved numerous dismissals for his clients when the party bringing the lawsuit withdraws in response to his zealous advocacy.

Education

-J.D., Indiana University School of Law Bloomington, 2004
Staff Editor of Indiana Journal of Global Legal Studies
-Pepperdine University School of Law
-B.A., Wabash College, 2001

Bar Admissions

-State of Indiana, 2004
-State of Illinois, 2005
-U.S. District Court, Northern and Southern Districts of Indiana, 2004
-U.S. District Court, Northern District of Illinois, 2005
-U.S. Court of Appeals, Seventh Circuit, 2014
-Trial Bar, U.S. District Court, Northern District of Illinois, 2015

Honors and Recognitions

-Achieved a defense verdict in a medical malpractice jury trial in Marion County in October 2013 after only 14 minutes of juror deliberation.

- Played offensive guard and appointed to the Academic All-American Football squad at Wabash College.

-Recognized as a Rising Star in the *Indiana Super Lawyers Magazine* from 2013 through 2016.

Professional Memberships

- Indiana Bar Association
- Indianapolis Bar Association
- Defense Trial Counsel of Indiana
- Defense Research Institute

Reminger's Product Liability Practice Group represents manufacturers, importers, and distributors of various products including automobiles, boats, medical devices, pharmaceuticals, and industrial machinery.

Best Lawyers BEST LAW FIRMS U.S.News & WORLD REPORT 2017

Nationally recognized, we serve major multi-national corporations as well as small market entrepreneurs. Members of this practice group are admitted to the bar in Ohio, Kentucky, West Virginia, Tennessee, Michigan and Indiana.

Our attorneys have successfully tried to verdict cases with 'bet the company' exposure and national media attention. Their technical expertise and advocacy abilities obtain outstanding results at trial, during discovery and in mediations and negotiations. They are known personally to the scientific community and are able to obtain the assistance of prominent, highly qualified consultants in the physical and material sciences.

In addition to the typical products case, our attorneys have appeared before the U.S. Consumer Product Safety Commission to address the broad based issues concerning product recalls and nationwide corrective action programs.

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