

Class Action Litigation Report[®]

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Food

Sugar Suits: The Next Tobacco?

BNA Snapshot

- Attorneys predict upswing in suits over foods with added sugar that are marketed as healthful
- New suits challenge cereals, snack bars, and beverages may be next
- General Mills says suits lack merit; sugar group says appropriate consumption of sugar, nutrient-rich diet not mutually exclusive



By Julie A. Steinberg

Sept. 22 — Will suits over added sugar in foods, including breakfast cereals, snack bars and beverages, be the next tobacco litigation?

Some think so.

“A lot of lawyers are drawing an analogy between added sugar and tobacco,” Maia Kats, litigation director of the Center for Science in the Public Interest in Washington, told Bloomberg

BNA.

The analogy might not be a perfect fit, Kats said, but there are parallels.

“Excessive amounts of sugar are harmful to people,” Kats said. “I think that industry is aware of that harm, and to the extent they are packaging the product as nutritious, with that knowledge, that is going to be an area for litigation exploration.”

To the extent companies position highly sugared products as healthful overall, there is going to be increased litigation, she said.

Added sugars are those not naturally occurring in foods, but added during processing.

“We’re going to see a level of interest in added sugar beyond anything we’ve experienced to date,” she said.

Some who represent food and beverage makers may disagree over the merits of the suits, but they concur that litigation over added sugar is expected to see a surge.

Sugar is “the vilified ingredient du jour,” defense attorney Dale Giali of Mayer Brown in Los Angeles said at a recent Food and Drug Law Institute conference in Washington.

The American Sugar Association didn’t have a comment concerning the prospect of litigation over added sugars in foods.

But, more generally, the trade group for sugar makers said in a recent statement, “When consumed appropriately, added sugars and a nutrient-rich diet are not mutually exclusive.”

Cereal in Crosshairs

Recent suits include a trio of sprawling, multi-count complaints alleging that the labels on dozens of cereals and snack bars make general health or wellness representations that mask the products’ high sugar levels (*Truxel v. Gen. Mills Sales, Inc.* , N.D. Cal., No. 16-4957, complaint filed 8/29/16; *Hadley v. Kellogg Sales Co.* , N.D. Cal., No. 16-4955, complaint filed 8/29/16; *Krommenhock v. Post Foods LLC* , N.D. Cal., No. 16-4958, complaint filed 8/29/16).

The suits name General Mills, Inc., Kellogg Sales Co., and Post LLC as defendants.

And CSPI has filed a would-be class suit of its own against General Mills. The complaint alleges the company's labeling for one line of products in particular—Cheerios Protein cereals— focuses on negligible amounts of extra protein and downplays high amounts of added sugar (*Coe v. Gen. Mills, Inc.* , N.D. Cal., No. 16-5112, amended complaint filed 8/24/16).

“If you have products where you have an abundance of imagery on a label of something healthful, and never mention that sugar is a predominant ingredient along with those other ingredients, it is problematic,” Kats said.

Cereals Defended

General Mills says the cereal litigation lacks merit.

“Cereal has long been established as a nutritious and wholesome way to start the day, and General Mills continues to stand behind the quality of these products and the accuracy of the products’ labels,” the company said in a statement e-mailed to Bloomberg BNA.

“We are leading the way in increasing consumption of whole grain, and we currently offer 38 cereals with 9 grams of sugar or less per serving, including Cheerios with 1 gram of sugar and Kix, Corn Chex and Fiber One 80 Calorie Honey Squares with 3 grams of sugar,” the company said.

“Our consumers have told us they want a variety of choices and we are committed to continuing to deliver what our consumers want.”

Representatives of Post and Kellogg couldn't be reached for comment.

No Surprise

The recent suits are no surprise, Giali told Bloomberg BNA. Giali represents food and beverage manufacturers but isn't involved in the cereal litigation.

“For a long time, plaintiffs' attorneys and a certain segment of food writers have been bemoaning sugar,” he said.

A previous round of sugar litigation focused on the term “evaporated cane juice,” which plaintiffs said was a misleading word for “sugar.”

The FDA issued a guidance in May that said “evaporated cane juice” should be called sugar on food labels (17 CLASS 588, 6/10/16).

But Giali said, the trio of cereal suits is “a classic example of consumer class action attorneys doing public policy work.” And that, he said, is simply something “we don't need.”

He also said the sugar content is right there on the package in the nutrition facts panel.

The information is readily accessible for any interested consumer, Giali said.

So why an upswing in litigation now?

Kats said consumers are becoming more interested in their health and in purchasing healthy food.

Labels are changing to capture that market, “but the problem exists because the product is not keeping up with the labeling,” she said.

Recent research also supports the finding that added sugar in excessive quantity is linked to obesity, obesity-related diseases like diabetes and cardiovascular disease, and tooth decay, Kats said.

“The science on sugar has become very strong in the last five years, especially with respect to sugar-sweetened beverages,” she said.

Guidelines Disputed

The American Heart Association recommended Aug. 22 that children and adolescents consume no more than 25 grams of added sugar per day, and no more than 8 ounces of sugary beverages a week. The AHA recommended no added sugar for those under 2.

Earlier, the AHA recommended a limit of 36 grams per day of added sugar for men, and 24 grams per women.

The Food and Drug Administration's new nutrition facts regulations will require food manufacturers to disclose the amount of sugar that's added to a product. The new rules, announced in May 2016, take effect in June 2018 for most companies.

According to FDA guidelines, no more than 10 percent of an individual's daily calories should come from added sugar.

But an American Sugar Association statement said the agency's guidelines weren't based on strong scientific evidence.

And the trade group called the AHA's recent added sugar recommendation for children "baffling."

"The AHA is recommending 6 teaspoons of added sugars for an active 16-18-year-old boy—this is just 3% of his calories," the Sugar Association said in an Aug. 24 statement.

"We all want kids in the U.S. and around the world to be healthy—that is a given," the industry group said. "But the added sugars dialogue has lost its scientific integrity."

CSPI's Other Litigation

That dialogue, however, seems to just be heating up. CPSI said it has plans to file new suits soon over added sugar in beverages.

In addition to cereals and beverages, some yogurt, juice products, and even baby food include excessive amounts of added sugar, Kats said.

CSPI in Washington, Michael Reese of Reese LLP in New York, and Kaplan Fox & Kilsheimer LLP in San Francisco represent the plaintiffs in the Coe suit.

David T. Biderman and Joshua A. Reiten, both of Perkins Coie LLP in San Francisco, and Charles C. Sipos of Perkins Coie LLP in Seattle represent General Mills in the Coe suit.

The Law Office of Jack Fitzgerald P.C. in San Diego represents the plaintiffs in the three cereal suits.

Charles C. Sipos of Perkins Coie LLP in Seattle and Jacqueline E. Young of the firm's San Francisco office represent General Mills in the Truxel suit.

Kenneth Kiyul Lee of Jenner & Block LLP in Los Angeles represents Kellogg.

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For More Information

The General Mills complaint is available at http://www.bloomberglaw.com/public/document/Truxel_v_General_Mills_Sales_Inc_Docket_No_416cv04957_ND_Cal_Aug_.

The Kellogg complaint is available at http://www.bloomberglaw.com/public/document/Hadley_v_Kellogg_Sales_Company_Docket_No_516cv04955_ND_Cal_Aug_29.

The Post complaint is at http://www.bloomberglaw.com/public/document/Krommenhock_et_al_v_Post_Foods_LLC_Docket_No_316cv04958_ND_Cal_Au.

The Cheerios Protein complaint is at http://www.bloomberglaw.com/public/document/Coe_et_al_v_General_Mills_Inc_Docket_No_315cv05112_ND_Cal_Nov_09_.