

## Class Action MVP: Mayer Brown's Dale Giali

By **Ben James**

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When the plaintiffs bar set its sights on false advertising suits against the food industry and targeted Mayer Brown LLP client Nestle USA Inc., the firm's Dale Giali shifted his focus to fighting those high-stakes cases and has since racked up a series of wins that landed him on Law360's list of

Class Action MVPs.

Los Angeles-based partner Giali, who started off doing general consumer class action and antitrust work, said it became apparent in about 2008 that plaintiffs attorneys were filing a growing number of suits accusing defendants like Nestle, the world's biggest food company, of deceiving consumers.

Mayer Brown, which had already been handling antitrust and general litigation matters for Nestle, was poised to step in when the company found itself caught up in the wave advertising litigation.

"When they found themselves in the crosshairs of the consumer class action false advertising cases, we certainly made it quite clear to Nestle that we were ready, willing and able to assist them in any way appropriate," Giali recalled.

Exactly what caused the boom in false advertising class actions over food remains unclear, but Giali said possible catalysts include securities class actions drying up because of changes in federal law, and high-value settlements in private and government lawsuits over Dannon Co.'s Activia yogurt, which plaintiffs claimed was advertised as providing health benefits that weren't backed up by science.

At the same time, more products were being advertised as "functional food" that were said to have positive health effects for the consumer, Giali noted.

From 2009 through 2011 there was a "meteoric expansion of lawsuits filed against the food industry as to numerous types of labeling claims," according to Giali, who added that the once-surging numbers of such suits has reached a plateau, but remain at a high level.



Dale Giali

“We have seen over last five years an influx of plaintiffs lawyers, who clearly have the time and excess capacity to take on these cases, expanding into this field,” Giali said.

Giali pointed to a late October 2013 win he and other Mayer Brown lawyers secured for Nestle in a proposed nationwide false advertising class action over the labeling of Buitoni stuffed pasta products as “all natural” as an important decision.

“That is a very hot area of the false advertising siege against the food industry, and make no mistake about it, it's a war,” Giali said of “all natural” claims. “The cases are being filed at an incredible clip.”

It's extremely tough to get a class action challenging “all natural” labeling thrown out early in a case because judges need to accept a lawsuit's allegations as true when ruling on a motion to dismiss, Giali pointed out. And, he added, defining exactly what qualifies as natural is tricky even for government experts like those at the U.S. Food and Drug Administration.

However, Giali and Mayer Brown got that case — *Pelayo v. Nestle* — thrown out with prejudice on a motion to dismiss.

“It is what I'd call an exceptional decision in the sense that very few other food companies have obtained that kind of result,” Giali said.

More recently, Giali helped steer food manufacturer Kind LLC to a victory in a case accusing it of violating Illinois consumer protection laws by saying products had “no refined sugar” despite including an ingredient called “evaporated cane juice.”

Though an amended complaint was filed and the case is still pending, Mayer Brown convinced the court to grant a motion to dismiss in July and rule that the plaintiff — who sued over Kind's Vanilla Blueberry Clusters and five other products — hadn't adequately alleged that she had been injured or deceived.

In April, Giali obtained a partial dismissal of a consolidated proposed class action against Gerber Product Co. alleging that the company falsely advertised baby probiotic products. Giali, who also got the Gerber litigation — at one point 10 cases in six jurisdictions — consolidated in New Jersey, called the litigation “the incredible shrinking case.”

Another case where Giali prevailed was filed in federal court in Florida and accused Amy's Kitchen Inc. of disguising sugar in its products as evaporated cane juice. In that suit the plaintiff sued over a slew of products despite having only purchased a handful of those products herself, Giali said.

Amy's argued in a motion to dismiss for that the plaintiff couldn't sue over products she hadn't purchased and convinced the court to toss more than 57 products from the case in December 2013.

Then, because the suit invoked Florida law, Giali was able to get it dismissed from federal court because the amount of damages at issue no longer met the \$5 million jurisdictional threshold in the Class Action Fairness Act.

The question of whether the amount in controversy should be based on the sales of products at issue when the suit was filed or on only those still in play after a court rules on what's appropriate to include was an issue of first impression in the Florida federal court, Giali said.

The plaintiffs sought reconsideration of the ruling that cleaved away the 57 out of 60 original products, but the court denied that motion and dismissed the case in March. A subsequent appeal was dismissed in July.

According to Giali, the false advertising class actions he defends against are products of the plaintiffs bar as opposed to genuinely injured consumers.

“It's quite clear this is a litigation mill,” he said. “These come from the lawyer side, they don't come from the consumer side.”

--Editing by Emily Kokoll.

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