COUGHLIN DUFFY LLP

ATTORNEYS AT LAW

Emerging Trends and Targets in U.S. Class Action Litigation

11 October 2012

Suzanne C. Midlige, Esq.
Kelly A. Waters, Esq.

350 MOUNT KEMBLE AVENUE
P.O. BOX 1917
MORRISTOWN, NEW JERSEY 07962-1917
PHONE: (973) 267-0058
FACSIMILE: (973) 267-6442

WALL STREET PLAZA
88 PINE STREET, 28TH FLOOR
NEW YORK, NEW YORK 10005
PHONE: (212) 483-0105
FACSIMILE: (212) 480-3899

WWW.COUGHLINDUFFY.COM

I. Introduction

The filing of class action lawsuits[1] in the United States Federal Courts continues to rise in number and in the total value of potential claims. While some common targets remain the same, such as pharmaceutical and medical device companies, new targets are emerging; spanning all industries, from food and supplement manufacturers to fast food restaurants, energy companies, internet and technology companies. As will be discussed in this paper, class actions filed in the United States federal courts have continued to be filed in historic numbers in the first half of 2012. However the targets of litigation have been changing.

The past twelve months have also proved to be an active year for clarification of class action precedent by the United States Supreme Court in that a number of rulings have been handed down, that, as discussed herein, are likely to have widespread and long-lasting effects on how class actions are litigated in U.S. federal courts, and to a lesser extent, in the state courts. Likewise, pending before the United States Supreme Court are the cases of *Amgen v. Connecticut Retirement Plans*, 11-1085[2] and *Standard Fire Insurance Co., v. Knowles*, 11-01450 (hereinafter referred to as "*Standard Fire*"), both of which address issues that impact class action litigation.

II. Class Actions Seven Years After the CAFA and the Import of *Standard Fire*

In *Standard Fire*, the United States Supreme Court will determine whether a named plaintiff can defeat a defendant's right of removal from state to federal court under the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d) [hereinafter referred to as "CAFA"] by filing a stipulation that attempts to limit the damages sought. This includes limiting damages of absent putative class members, to less than the $5 million threshold for federal jurisdiction when the defendant established that the actual amount in controversy, absent the "stipulation," exceeds $5

million, so as to destroy federal jurisdiction. [3] To fully understand the import of the issue presented in *Standard Fire*, a brief review and update of the case and the CAFA is required.

In 2005, the proponents of the CAFA stated that the CAFA "does not change substantive law – it is, in effect, a procedural provision only."[4] During testimony before the United States House of Representatives, John H Beisner, on behalf of the U.S. Chamber Institute for Legal Reform testified that "the statute set out to accomplish three primary goals: (1) to 'assure fair and prompt recoveries for class members with legitimate claims'; (2) to 'restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction'; and (3) to 'benefit society by encouraging innovation and lowering consumer prices.'"[5]

In enacting the CAFA, Congress sought to establish a strong presumption in favor of federal jurisdiction over class actions, rather than under a state's jurisdiction. The CAFA provides defendants with the right to remove putative class actions from state to federal courts in all cases seeking class treatment that are (i) filed in a state other than the defendant's state of incorporation or principal place of business; and (ii) have an amount in controversy over $5 million.[6] The United States Supreme Court recently reiterated that "Congress enacted CAFA to 'enable defendants to remove to federal court any sizeable class action involving minimal diversity of citizenship.'"[7]

In *Standard Fire*, Greg Knowles ("Knowles") filed a putative class action complaint in the Circuit Court of Miller County, Arkansas, against The Standard Fire Insurance Company ("Standard Fire"), alleging breach of contract due to underpayment of claims for loss or damage to real property made pursuant to certain homeowner's insurance policies. Knowles' home had been damaged by hail; he retained a general contractor to repair the damage and submitted the

claim to Standard Fire for reimbursement. Plaintiff was not fully reimbursed as the fee for a general contractor's overhead and profit ("GCOP") was not reimbursable. Plaintiff filed his Complaint on behalf of himself and a purported class of persons injured by defendant's alleged breach of contract for failing to pay GCOP under homeowners' insurance contracts. Additionally, Knowles filed a stipulation limiting his and the purported class' recovery to less than $5 million.

Standard Fire subsequently removed the case to federal court; specifically the United States District Court for the Western District of Arkansas. Standard Fire asserted, among other things, that although Knowles signed a stipulation limiting his and the purported class' recovery, Plaintiff's counsel failed to sign a stipulation that they would not seek or accept an award of attorneys' fees that would allow the total amount in controversy to exceed state court jurisdictional limits. Standard Fire also maintained that Plaintiff lacked the authority to place a limit on recovery that would bind the other class members. [8]

Knowles successfully moved to remand the case from federal court back to state court citing his binding stipulation. The federal District Court, in granting Knowles' Motion to Remand, found that he had shown with a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5 million.[9] The District Court explicitly questioned whether a plaintiff may meet his burden of proof by stipulating at the time the complaint is filed that he will not seek more than the federal jurisdictional minimum for himself and the putative class. Applying the Eighth Circuit Court of Appeals[10] decision in *Bell v. Hershey Co.*, which provides that "if a defendant removing a case under the CAFA proves the amount in controversy by a preponderance of the evidence, the burden shifts to the plaintiff, to establish to a legal certainty that the claim is for

less than the requisite amount,"[11] the District Court found the stipulation valid. The Court further rejected Standard Fire's objections that (1) the wording of "will not seek" is less than "refused to accept" and (2) the stipulation included attorneys' fees as well.[12]

Standard Fire unsuccessfully petitioned the Eighth Circuit to file an interlocutory appeal of the remand order, which was denied without explanation. Likewise, Standard Fire petitioned for rehearing, with petition for rehearing *en banc*. While this petition was pending, the Eighth Court of Appeals issued an order in *Rowling v. Nestle Holdings, Inc.,* 666 F.3d 1069 (8th Cir. 2012) that affirmed an order of remand to the state court under the CAFA based on a stipulation by the named plaintiff purporting to limit the damages of putative class members to below $5 million.[13] Following the *Rowling* decision, the Eighth Circuit denied Standard Fire's petition for rehearing *en banc*. Thereafter, Standard Fire filed a Petition for a Writ of *Certiorari* with the Supreme Court presenting the following question:

> When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant established that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?[14]

On 31 August 2012, the Supreme Court granted *certiorari* in this case. In its Petition, Standard Fire alleges that the Eighth Circuit erred and that the CAFA does not allow a plaintiff to represent absent putative class members without court authorization or to impose a binding limitation on the amount potentially recoverable. Standard Fire further argued that to permit a named plaintiff to stipulate to a binding cap on damages of people he/she does not represent, would violate the due process rights of the proposed class members. By way of opposition,

Knowles maintains that there is no CAFA jurisdiction in this case, and that the Stipulation is binding.[15]

As of this writing, the Supreme Court has not heard oral argument in *Standard Fire*. Should the Court uphold the Eighth Circuit's decision in *Standard Fire* we anticipate a resulting increase in the use of such "stipulations" to keep the recovery to below $5 million to defeat federal court jurisdiction. The decision would also encourage forum shopping as plaintiffs seek to keep cases in state courts that may be perceived as more "plaintiff friendly." We will continue to monitor this anticipated decision by the Supreme Court and the resulting trends in the months to come.

III. The Year in Review – Landmark Decisions Affecting How Class Actions Are Litigated

In 2011, the United States Supreme Court issued three decisions that are having and will continue to have long-lasting effects on the manner in which class actions are litigated. Although we have written on these decisions in prior papers, we include a short summary so as to provide a lens within which to view the recent trends and targets of class action litigation.

A. The "Commonality" Requirement in Certifying Class Actions - *Wal-Mart Stores, Inc. v. Dukes*

In *Wal-Mart Stores, Inc. v. Dukes*,[16] Betty Dukes, a 54-year- old California employee, on behalf of herself and the purported class, alleged that Wal-Mart discriminated against them on the basis of their sex by denying them equal pay or promotions, and job assignments in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e-1 *et. seq*. Plaintiffs sought injunctive and declaratory relief, back pay and punitive damages on behalf of themselves and a nationwide class.[17]

Plaintiffs' claims against Wal-Mart included that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decision making of each one of Wal-Mart's thousands of managers – thereby making every woman at the company victim of one common discriminatory practice."[18] Plaintiffs sought to certify a Rule 23(b)(2) class that permits injunctive or declaratory relief. [19] The United States District Court and the United States Court of Appeals for the Ninth Circuit certified the class which contained approximately 1.5 million women who worked in 170 different job classifications in more than 3,400 stores across the United States. [20]

Justice Antonin Scalia, writing for the majority of the Supreme Court in a 5 to 4 Justice decision, ruled that class certification was improper. In reaching this decision the Supreme Court made three important decisions on class action law. First, the Court imposed rigorous new standards to be applied when deciding whether commonality exists under *Fed.R.Civ.P.* 23(a)(2). In particular, the Court clarified that "[t]he crux of the *Dukes* case is commonality – the rule requiring a plaintiff to show that "there are questions of law or fact common to the class".[21] Additionally, commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury"; not that they have all suffered a violation of the same provision of law.[22] "Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim" which the Court also found, was necessary in this case.[23] As Justice Scalia noted,

> Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.* [24]

By agreeing that Wal-Mart did not have any express corporate policy against the advancement of women, plaintiffs/respondents had to demonstrate with significant proof that "Wal-Mart operated under a general policy of discrimination." The Court found such proof absent from the case. Ultimately, without significant proof of commonality, class certification was improper.[25]

The second clarification gleaned from the Supreme Court's decision in *Dukes* is that certification of a class under *Fed.R.Civ.P.* 23(b)(2) is rarely, if ever, appropriate class where claims for monetary relief are not merely incidental to the injunctive or declaratory relief sought.[26] Here, plaintiffs/respondents sought back pay, which as the Court ultimately found is not equitable in nature and not merely incidental to an award of injunctive or declaratory relief.[27] Often, class action proponents seek to certify a class under this part of the rule as arguably, the more rigorous requirements of predominance, superiority, notice and the right to opt out, as required under Rule 23 (b)(3) are eliminated. [*cf. Fed.R.Civ.P.* 23(b)(3)]. Many class action plaintiffs – like the *Dukes* plaintiffs - seek injunctive relief and then attempt to boot strap claims for monetary damages to their claims for injunctive relief. The Court stated,

> In other words, Rule 23(b)(2) applies when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each single class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.[28]

The Court held that without the protections of *Fed.R.Civ.P.* 23(b)(3), claims for monetary damages lacked due process for claimants who can be unwittingly bound by class actions facially seeking injunctive or declaratory relief, but also seeking monetary damages.

Lastly, the Court ruled that Wal-Mart has a right to litigate individual class members' damages on a case-by-case basis, rather than through sample test cases.[29] In earlier decisions the Supreme Court ruled that a defendant in pattern-or-practice employment cases is entitled to an

individual determination for each plaintiff as to whether that plaintiff is entitled to back-pay and, if so, how much.[30] In *Dukes*, the Ninth Circuit Court of Appeals determined that back-pay damages could be determined by what the court called a "Trial by Formula."[31] Conceptually, a sample set of class members' owed back-pay would be selected. A special allocation master would then be appointed to determine the back-pay owed. The percentage of sample claims determined to be valid would then be applied to the entire remaining class and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery without individualized damages proceedings.[32]

In rejecting this approach, the Supreme Court ruled "defendants in back-pay cases are entitled to an individual damages determination that cannot be abridged by resort to statistical sampling."[33] This ruling is obviously an important victory for corporate defendants litigating against consumer class actions. It is grounds for arguing in all class actions that each individual plaintiff must prove his entitlement to damages and, if so, the amount.

B. Enforcement of Arbitration Clauses and Class Action Waivers in Consumer Contracts - *AT&T Mobility, LLC v. Concepción*

In *AT&T Mobility, LLC v. Concepción*,[34] a divided Supreme Court in a 5-4 decision ruled that arbitration clauses that prevent class actions in consumer goods and services contracts are generally enforceable under the Federal Arbitration Act, 9 U.S.C. § 2 (hereinafter referred to as "FAA"). In *Concepción*, plaintiffs, like many consumers, entered into a commitment for a service contract for cellular phone service with AT&T Mobility ("AT&T"). In connection with the service contract, the Concepción family was promised a free cellular telephone. AT&T did provide the cellular phone to the Concepción family and did not charge them for the device. AT&T did however, charge them $30.22 in sales tax based on the devices' retail value.

Plaintiffs, feeling cheated, filed a class action against AT&T in the United States District Court for the Southern District of California, alleging false advertising and fraud.[35]

AT&T moved to compel arbitration based on the provision in the service contract that required arbitration of all disputes and further required the parties to proceed in their individual capacity and not as a plaintiff or class member in any purported class or representative proceeding. The District Court denied AT&T's motion to compel arbitration and the United States Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court held that the FAA preempted the state court rule which classified most collective arbitration waivers in consumer contracts as unconscionable.[36] Justice Scalia, writing for the majority, held that "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[37] Although the Supreme Court upheld the enforceability of the arbitration clause under the FAA, it recognized a carve-out provision of the FAA as a potential avenue to avoid such clauses under certain circumstances. The FAA specifically "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" [38] The Court noted,

> This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress or unconscionability.' But not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.[39]

Accordingly, the FAA is preemptive where it applies and requires states to uphold arbitration clauses, but such clauses may be found unconscionable under certain state-law doctrines, such as where the contract is deemed to be a contract of adhesion.[40] The resulting trends are discussed below.

C. When Absent Class Members Are Bound By Decisions Prior to Class Certification - *Smith v. Bayer Corp*

The third case heard by the Supreme Court during the 2011-2012 term that has had an impact on the manner in which class actions are litigated is the case of *Smith v. Bayer Corp.* [41] *Smith* involved two class actions. The first was an action filed by George McCollins in West Virginia state court that Bayer Corp. removed to the United States District Court for the District of West Virginia, which was subsequently transferred to the United States District Court for the District of Minnesota under an order of the Judicial Panel on Multi-District Litigation.[42] The second class action was filed by Keith Smith in state court in West Virginia, and could not be removed to federal court because the plaintiff had sued several West Virginia defendants.[43] Both class actions alleged that Bayer Corp. had violated consumer protection statutes and had breached implied warranties when Bayer Corp. sold an allegedly defective cholesterol reducing medication, commonly known as Baycol.[44] The federal court considered the issue of class certification in the McCollins' matter before the state court reached the issue in Smith's case. In the McCollins matter, the federal court denied class certification under *Fed.R.Civ.P.* 23 on the ground that each class plaintiff would have to show actual injury thus defeating a finding of predominance and superiority under Rule 23(b)(3).[45]

Thereafter, Bayer Corp. moved in federal district court for an injunction ordering the West Virginia state court to not consider a motion for class certification filed by Mr. Smith. The federal district court enjoined the West Virginia state court from hearing the class certification motion under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283.[46] The United States Court of Appeals for the Eighth Circuit affirmed. In a unanimous decision, the Supreme Court reversed and held that the federal court exceeded its authority under the relitigation exception to the Anti-Injunction Act.[47] In so holding, the United States Supreme

Court noted that in a putative class action "the mere proposal of a class . . could not bind persons who were not parties." [48]

While part of the rationale in *Smith* was that absent class members could not be bound in a class action where a class had yet to be certified, this rationale, (although helpful in the *Standard Fire* case), did not protect Bayer Corp. from having to defend against duplicative class actions. Notwithstanding that it was decided in 2011, it is important to note that *Smith* is a pre-CAFA lawsuit.[49] This is important as there are protections for class action defendants under the CAFA that would serve to protect defendants against duplicative class actions.

With this review of the recent Supreme Court decisions, we now turn our attention to the trends that have followed.

IV. Trends in Class Action Litigation

A. Trends As a Result of *Dukes and Concepción* – Decertification of Nationwide Classes, Increase in Expense for Class Discovery and Enforcement of Arbitration Clauses

Since the Supreme Court's ruling in *Dukes*, we have seen a number of purported class actions denied class certification as a result of not meeting the commonality requirement and an increase in state specific class actions as opposed to nationwide class actions. In fact, a number of courts have denied class certification to plaintiffs seeking to pursue class actions against insurers based on *Dukes.*[50] Such suits have included claims for breach of contract, failure to provide under-insured motorist coverage, bad faith and violations of states' unfair or deceptive trade practices laws.[51]

Although we are beginning to see some reported decisions addressing discovery issues, *Dukes* may also provide support for individualized discovery against plaintiffs, including

discovery regarding damages. By way of example, since *Dukes* rejected the 'Trial by Formula' method for determining damages, "discovery relating to the damages of each plaintiff can be used to show commonality does not exist."[52] Likewise, discovery may be sought to show that absent class members have no claims and/or may be precluded from seeking compensatory damages if the case were certified under Rule 23(b)(2).[53] While increased discovery may assist to defeat class certification, the other side of the equation is that class certification discovery will be more expensive as plaintiffs will more likely seek to develop the facts before the certification stage. While some judges do not allow class merit discovery before a class is certified, this might lead to less of a distinction between class and merits discovery.[54]

Moreover, although the Supreme Court upheld the arbitration provision in *Concepción*, another emerging trend is that some courts have "latched onto the exception left open in *Concepción* and have not enforced arbitration clauses in consumer contracts. Those courts have found that arbitration clauses are unconscionable not because of general state law prohibitions against arbitration but because the proponent of the arbitration clause acted unconscionably in the formation of the contract."[55]

An example of how some state courts have found ways to avoid the mandate set forth in *Concepción*, is the case of *KPMG LLP v. Cocchi.*[56] In *KPMG LLP v. Cocchi,* plaintiffs filed a putative class action in Florida state court against various defendants including KMPG, for damages suffered as a result of investments made with Bernard Madoff. With respect to KPMG, the class action alleged negligent misrepresentation, professional malpractice, aiding and abetting a breach of fiduciary duty and violation of Florida's Deceptive and Unfair Trade Practices Act (hereinafter referred to as "FDUTPA").[57] KPMG moved to compel arbitration under the FAA on the grounds that the audit service agreement between it and the funds'

management company contained an arbitration clause.[58] The trial court denied the motion, and the state appellate court affirmed on the ground that "[n]one of the plaintiffs . . expressly assented in any fashion to the [audit services agreement] or the arbitration provision." [59]

The United States Supreme Court granted *certiorari* and reversed. In so doing, the Supreme Court reaffirmed that "[t]he Federal Arbitration Act reflects an 'emphatic federal policy in favor of arbitral dispute resolution."[60] Further, the Court held that "[a]greements to arbitrate that fall within the scope and coverage of the [FAA] . . . must be enforced in state and federal courts." [61] As such, some authors are opining that traditional claims have become more difficult to pursue as a result of *Concepción* in that the ability to bring class actions over sales of products involving a consumer contract has been limited.[62]

B. Aggressive Use of Motion Practice to Narrow the Issues and/or Deter Additional Filings

Motions to dismiss, motions for class certification and motions for summary judgment continue to be routinely filed in federal class actions. In the federal securities class action related field, data has provided insight into the process of litigating a securities class action and the relationship between the litigation strategy and the settlement. Although statistical data on the relationship between litigation strategy and settlement in non-securities class action is not available on an industry specific basis, from a practical standpoint, aggressive pre-answer motions to dismiss are an effective defense strategy in that they force plaintiffs to address identified weaknesses in their pleadings before the defendant provides an answer to the complaint or engages in discovery. Moreover, pre-answer motions to dismiss often force plaintiffs to narrow their claims and can be instrumental in facilitating an early resolution of the dispute. However, although, a motion to dismiss may force the plaintiffs to further support or refine their pleadings, assistance from the court with an outright denial is not always certain.

U.S. Courts are increasingly tightening the requirement that a class plaintiff allegedly injured by a company's marketing claim demonstrate actual injury prior to class certification.[63] In response to early motions to dismiss, courts are dismissing complaints after concluding that allegedly false claims were literally true and therefore cannot give rise to liability.[64]

Another frequent challenge to class action complaints involving consumer fraud claims, is that the plaintiffs failed to allege fraud with particularity as under the Federal Rules of Civil Procedure 9(b). Although some courts are allowing cases to proceed where plaintiffs can allege that they saw and relied on an allegedly false marketing claim, many cases have been dismissed when the plaintiffs cannot describe with sufficient detail facts that answer the questions who, what, where, when or how.

C. Use of Social Media to Create an Opt-Out From a Consumer Class Action

Another new, potential trend in the class action field is being credited to Plaintiff Heather Peters who opted out of a nationwide class action settlement with American Honda Motor Company[65] and used social media to help her case. The Honda Class Action case consists of five consolidated class actions, the first of which was filed in March 2007. The Honda plaintiffs allege that Honda automobiles use more fuel than advertised and suffer early deterioration of the car battery in case of frequent stop-and-go driving during warm weather.

The case settled at the end of 2011 with 11 February 2012, as a deadline for "opting out"[66] of the class settlement, as set forth in the Settlement Notice. Instead of accepting the settlement that would have paid her approximately $100 to $200 in a monetary award and a $1,000 credit towards the purchase of a new car. Plaintiff, who is an attorney, "opted out" of the class settlement and brought her own litigation in the California Small Claims Division on 29 November 2011. Plaintiff contended that the original mileage performance of the car, and the

utility of the later provided software update, were misrepresented to her, in advertising and otherwise, causing her pecuniary damages. Significantly, throughout the class litigation, Plaintiff used a social media website to gather information and testimonials from other Honda owners. Plaintiff also encouraged others to opt-out as well and created her own website www.dontsettlewithhonda.com.

On 1 February 2012, the Los Angeles County Superior Court Commissioner Douglas Carnahan issued a decision in Plaintiff's favor finding that Honda misrepresented the mileage of Plaintiff's hybrid vehicle and awarded a total of $9,867 in damages (a new battery, fuel costs, future fuel losses, a tax credit, value diminution and interest). Honda appealed to the Small Claims Appeal Department of the Superior Court of the State of California. On 8 May 2012, Superior Court Judge Gray entered judgment in favor of Honda. In so holding, Judge Gray found that Honda's advertising regarding fuel economy is regulated by the Environmental Protection Agency ("EPA") and Federal Trade Commission ("FTC") requirements; that Defendant complied with such requirements, that the mileage advertised could be achieved and that some of the sales slogans were mere "puffery."

Although the plaintiff was ultimately unsuccessful, it remains to be seen if other plaintiffs will attempt to avail themselves of social media in the prosecution of class action litigation.

D. Consumer Fraud Class Actions Following Government Regulatory and/or Consumer Protection Group Activity

As is further discussed in this paper, food companies are facing heightened scrutiny of their product labeling and advertising by regulatory agencies, consumer groups and the plaintiffs' bar. "The result has been a dramatic increase in putative class action lawsuits, a trend that will likely continue as the FTC and the Food and Drug Administration ("FDA")[67] take a more active role in assessing food labeling and advertising.[68]

Regulatory initiatives and "Dear Industry" letters are being followed by class action lawsuits filed under state consumer fraud statutes and federal and state regulations.[69] For example, and as discussed more fully below, the class action lawsuits against yogurt manufacturer, Chobani, Inc. directly quoted from FDA Commissioner, Dr. Margaret Hamburg's, "Dear Industry" letter in support of its claims that Chobani Inc. falsely labeled its products. In addition to regulatory initiatives, there exist in the United States consumer groups, such as the Center for Science in the Public Interest, who regularly bring consumer fraud class actions challenging the labels of such household items as Ben & Jerry's ice cream.[70]

California and New Jersey appear to be home to the majority of filings of consumer fraud class actions against food companies. Both jurisdictions have friendly consumer fraud statutes which in general prohibit unlawful, unfair or fraudulent practices and are generally liberally interpreted by the courts.[71] In addition to violation of the relevant state consumer fraud statutes, plaintiffs generally also assert breach of express or implied warranty claims, which depending on the jurisdiction do not require reliance.

V. Targets of Litigation

A. Pharmaceutical and Medical Device Manufacturers

While the Supreme Court decisions of *Dukes* and *Concepción* have provided corporate defendants with additional tools to challenge class actions, pharmaceutical and medical device manufacturers are targeted in class actions at steady rates. Just recently reported (3 October 2012) is that more lawsuits are being filed against Bayer Corp. in connection with Bayer's manufacture and sale of YAZ® and Yasmin® birth control, including death, blood clots, heart attacks and stroke. These lawsuits allege that the contraception is linked to serious side effects. It is further reported that Bayer has so far paid approximately $402 million to settle some YAZ® and Yasmin® lawsuits, while reserving significant funds for future settlements. [72]

Merck Corp., another regular defendant in mass tort and class action litigation, is also now facing a newly-filed anti-trust class action over Merck's MMR vaccine, used to inoculate children against mumps, measles and rubella. On 20 September 2012, a Consolidated Amended Class Action Complaint was filed in the federal court, Eastern District of Pennsylvania.[73] Plaintiffs allege that Merck's MMR vaccine is not as effective as Merck claims alleging anti-trust violations as well as violations of state consumer protection laws and breach of contract. The suit's anti-trust allegations contend that Merck's misrepresentation, as to the efficacy of the vaccine, "deterred and excluded competing manufacturers" and promoted Merck's monopoly of the relevant market. As of this writing, Merck has not responded to the Consolidated Amended Class Action Complaint.

B. Insurance Companies

Insurers likewise, continue to be a favored target of the class actions plaintiff's bar. Putative class action suits over the past twelve months involve insureds' claims against life insurers for allegedly prematurely terminating disability benefits;[74] insureds' claims against a professional liability insurer for allegedly misusing software to process claims;[75] and actions on behalf of persons of Armenian descent against life insurers whose policies were issued or in effect in the Ottoman Empire between 1875 and 1923.[76] [77]

C. Health Insurance Industry

The past several years, has seen an increase in class action litigation involving the health insurance industry. Some reports suggest that this increase can be attributed in part to the increased restrictions on securities class action and the considerable amounts of money at stake in the health insurance arena due to the volume and expense of claims.[78] The areas of dispute focus on out–of-network reimbursement for providers at usual and customary rates (hereinafter

referred to as "UCR") and the limited reimbursement for treatment of particular conditions such as eating disorders, autism[79] and fertility.[80]

D. Energy Companies

In 2012, a number of consumer fraud class actions against energy suppliers were filed in federal courts in New York, New Jersey and Maryland. The genesis of these lawsuits can be traced back to the early 1990s, when a number of states began to deregulate their electric utility industries. Some of the stated goals of the reorganization of the electric utility industry were to increase competition and to deregulate within the industry.[81] Restructuring occurred in New York and New Jersey in 1996; and in the State of Maryland in 1999. As a result, in these states, electricity consumers now had a choice of their energy supplier. In essence, the new energy suppliers would compete against local utilities to supply the electricity. However the delivery of electricity to the homes would remain the job of the local utilities.

As a result of deregulation of the energy industry, in at least the above-noted states, a number of consumer fraud class actions were filed in federal court. The class actions assert that the energy companies engaged in fraudulent and deceptive schemes by promising customers competitive market-based rates and savings on their energy bills if they switch from their local utility company or other energy supplier to the defendant's company. Plaintiffs alleged these representations were a bait-and-switch trap, as within one or two billing cycles, the defendants increased the customers' rates well above the market rates.[82]

One of the first consumer fraud class action filed against an energy company was filed in federal court in the Southern District of New York in October of 2011, and is captioned, *Angela Wise, Gideon Romm v. Energy Plus Holdings, LLC*.[83] The Defendant, Energy Plus Holdings, LLC, (hereinafter "Energy Plus") is accused of luring consumers into switching electricity

suppliers based on offers of frequent flier or other travel reward points, or offers of "cash back," and by falsely promoting and advertising to charge competitive rates.[84] In fact, the plaintiffs assert that Energy Plus' rates are substantially higher than those charged by other providers. Plaintiffs bring claims under state consumer fraud statutes and seek damages as well as injunctive relief, counsel fees and costs.[85]

Energy Plus also appears as the target defendant in the federal class actions filed to date in New York, New Jersey and Maryland. In Pennsylvania, a state court class action lawsuit was recently filed on 2 October 2012.[86] The Attorney General of Connecticut also filed a complaint with Connecticut's Public Utilities Regulatory Authorities seeking an investigation into the manner and operation of Energy Plus.[87]

Procedurally, the federal court class actions are in their early, pre-answer motion stage. In *Wise*, plaintiffs recently filed a Second Amended Complaint, which will likely be the subject of a motion to dismiss. The New Jersey federal class actions were consolidated on 14 September 2012, and no motions have yet been filed. It will be of interest to see whether additional federal class actions are filed in Connecticut in response to the action of the State's Attorney General. We will continue to follow the developments in this industry.

E. Food Product and Beverage Manufacturers

The explosion in class action filings can be realized when one looks at the number of filing against food product manufacturers. Armed with an American consuming public that has become more health conscious and is continuously searching for wholesome, natural foods to maintain a healthy diet, there has been an overall rise in claims against food manufacturers regarding the information contained on the product labels. Product labels have assumed an important role in assisting consumers in making healthy food choices. As noted by FDA

Commissioner Margaret Hamburg during an October 2009 media briefing, "studies show that consumers trust and believe the nutrition facts information and that many consumers use it to help build a healthy diet." [88]

Given the prevalence of obesity and diet-related diseases in the United States, since the early 1990s, the FDA and the food industry have worked together to create a uniform national system of nutrition labeling, which includes the now-iconic "Nutrition Facts" panel on most food packages.[89] Manufacturers have responded to consumers' demand for nutritious foods by including nutrition information on their products and highlighting healthy ingredients, all in an effort to influence consumer purchasing decisions. The results of a recent FDA Food Label and Package Survey found that approximately 4.8% of food products sold in the United States had either a health claim or a qualified health claim on the food package, and that more than half (53.2%) of the food products reviewed had nutrient content claims on the packaging.[90]

In recent years the number of consumer class actions challenging health and nutrition marketing claims made in relation to food and drinks has expanded dramatically.[91] Between the end of the second quarter and the beginning of the third quarter 2012, there were approximately 25 consumer fraud class actions filed against food manufacturers in U.S. federal courts. Generally, the allegations sound in fraud and violations of federal and state regulations governing the labeling of food products and ingredients.[92] Some believe that food-related claims have expanded so dramatically because companies have increased advertising focused on health and benefit claims.[93] Notwithstanding the increased number of filings, the *Concepción* decision, discussed above, will influence the ability to bring a class action over the sale of products involving a consumer contract. Some believe that this decision may have curtailed claims against sellers of financial products, consumer credit or cellular services. [94]

As claimed in the litany of misbranded food products cases, consumer class action plaintiffs claim that food manufacturers continue to utilize unlawful food labeling claims despite express guidance from the FDA. These cases are known as "misbranded food product" cases as plaintiffs allege, *inter alia*, that failure to provide truthful, accurate information on the labels of packaged foods results in the food being misbranded and as such the misbranded food cannot legally be manufactured, held, advertised, distributed or sold.

1. Chobani® Greek Yogurt and the Alleged Use of the Misleading Term "Evaporated Cane Juice"

By way of example, three federal consumer class actions were filed this past year against the New York based Chobani, Inc., a manufacturer of yogurt. [95] *Kane v. Chobani, Inc*. is a putative class action brought on behalf of:

> all persons in the state of California who, within the last four years, purchased Defendant's Greek yogurt products: (1) labeled with the ingredient "Evaporated Cane Juice" and/or (2) labeled "All Natural Ingredients" and/or "Only Natural Ingredients" but which actually contains artificial ingredients, flavorings, coloring and/or chemical preservatives (the "Class"). [96]

Plaintiffs challenge the advertising and labeling of several flavors in the Chobani® Greek Yogurt brand. Specifically, plaintiffs claim that Chobani's use of the misleading term "evaporated cane juice" violates state unfair competition laws and constitutes a breach of express warranty; that Chobani's claim that its products are "all natural" and/or have "only natural ingredients" is false as the products contain artificial ingredients, flavorings, coloring and/or chemical preservatives; and that several flavors in the Chobani® Greek Yogurt brand fail to meet the Standards of Identity for, Milk, Milk Products and Frozen Desserts and, thus, are misbranded as defined by the FDCA. Finally, the *Kane* action alleges that Chobani's conduct violated, among other laws, California's Business and Professions Code § 17500, et seq., California's

Beverly-Song Act (California Civil Code § 1790, et seq.), and the Magnuson-Moss Act (15 U.S.C. § 2301, et seq.).[97]

The *Rosales* case, filed shortly after *Kane,* while advancing similar theories, presents a different strategy than *Kane* in that it seeks to certify a multi-state class of consumers and a California only class of consumers.[98] Interesting to note is that both classes in *Rosales* define the purchasers as:

> consumers who purchased Chobani® Greek Yogurt with evaporated cane juice and/or Chobani® Greek Yogurt Champions™ with evaporated cane juice, within the applicable statute of limitations period, in the United States for personal use until the date notice is disseminated."[99]

The inclusion of the words "within the applicable statute of limitations period" is intended to defeat any challenge by a defendant that the class is unmanageable in that the applicable statute of limitations cannot be determined for all class members. Likewise, the use of the words "for personal use" is an attempt by the plaintiffs to fall within each state's consumer fraud statute.

The *Rosales* plaintiffs' claims arises from Chobani, Inc.'s common practice of using the misleading term, evaporated cane juice, in its labeling and omitting information identifying evaporated cane juice as an added sugar or syrup on its Chobani® Greek Yogurt and Chobani® Greek Yogurt Champions™ products. In *Rosales*, plaintiffs further allege that Chobani's false, misleading and deceptive advertising message violates state unfair competition laws and constitutes a breach of express warranty.

Bernaz v. Chobani, Inc., Case No. 12-cv-02845, filed 6 June 2012, (E.D.N.Y.) is also a putative class action complaint against Chobani, challenging the same alleged false advertising on the same grounds.[100] As of 6 August 2012, these three cases have been consolidated under the *Kane* caption and pending before the court is Plaintiff's Motion for a Preliminary Injunction.

Plaintiffs' motion for a preliminary injunction seeks a determination of whether Chobani® Greek Yogurt products, as currently labeled and formulated, are misbranded in violation of state law thus requiring an injunction against further sales of the product as is. By this motion, Plaintiffs appear to be preempting a motion to dismiss by Chobani in an attempt to obtain part of the requested relief on a class-wide basis. Plaintiffs' request for damages is not part of the injunction application. We will continue to monitor this litigation as it develops in the federal court including whether the court certifies the class.

2. "Natural" in the Label and Other Health Related Claims

In August of 2012, the New York Times reported that more than a dozen lawyers who took on the tobacco companies have filed 25 cases over a four-month period preceding the article against food and beverage manufacturers such as ConAgra Foods, PepsiCo, Heinz, General Mills and Chobani, Inc. in connection with the labeling and advertising of their products.[101] The consumer fraud class actions alleged that the food manufacturers are misleading consumers and violating federal regulations and state consumer protection statutes by wrongly labeling products and ingredients.[102] The food and beverage manufacturers counter that the suits are without merit, an example of "litigation gone wild and driven largely by the lawyers' financial motivations."[103]

One such defendant is Tropicana Products, Inc., a division of PepsiCo., Inc. Initially, 20 consumer fraud class action lawsuits were filed nationwide, alleging that Tropicana and PepsiCo. marketed their orange juice as fresh from the grove, yet added chemically engineered "flavor packs" to their juice so that it would taste the same year-round. These suits have been consolidated and transferred to the Western District of Missouri, under a Multi-District Litigation ("MDL") captioned, *In re: Simply Orange Orange Juice Marketing and Sales Practice Litigation.*[104] A Master Consolidated Complaint was filed on 14 August 2012, to which all

defendants have moved to dismiss. Defendants have asserted, *inter alia*, that plaintiffs have no standing as they have not asserted a sufficient injury.

Another food manufacturer that was subject to multiple consumer fraud class actions, filed in different jurisdictions, was Ferrero, USA, Inc. ("Ferrero"). In February 2011, Athena Hohenberg filed a consumer fraud class action lawsuit in the federal court in the Southern District of California against Ferrero in connection with the company's manufacture of Nutella®.[105] Plaintiff complained that she purchased Nutella® after being exposed to and relying upon advertisements and representations that Nutella® is a "healthy breakfast" and is "nutritious."[106] However, as alleged by plaintiff, Nutella® contains 70% saturated fat and processed sugar by weight. Plaintiff further alleged that "both these ingredients significantly contribute to America's alarming increases in childhood obesity, which can lead to life-long problems."[107] Subsequent to the filing of the *Hohenberg* class action, two additional consumer fraud class actions were filed: one in the federal court in Southern District of California[108] and one in the District of New Jersey.[109] The three federal class actions were consolidated under the *Hohenberg* caption, as the three cases presented similar allegations.

The procedural history of the Nutella® Class Action illustrates the trends in companies' defense to class action lawsuits and use of aggressive pre-answer motions to defeat plaintiffs' claims. In the action against Ferrero, after the consolidation of the three consumer fraud class actions and within 30 days of the filing of a Master Consolidated Complaint, Ferrero moved to dismiss the Master Consolidated Complaint alleging, among other things, that plaintiff failed to state a claim under the various state consumer fraud statutes. By Order dated 30 June 2011, the Court granted in part, and denied, in part, the Motion to Dismiss and permitted the plaintiffs to file an Amended Complaint "to amend or cure any deficiencies".[110] Thereafter, plaintiffs filed a

First Amended Complaint on 3 July 2011, to which Ferrero again moved to dismiss. Within two weeks of the defendant filing its second motion to dismiss, plaintiffs moved for class certification.[111] The Court denied the second motion to dismiss and on 15 November 2011, granted plaintiff's motion for class certification. The Court ultimately certified a class of "all persons who, on or after 1 August 2009, bought one or more Nutella products in the state of California for their own or household use rather than resale or distribution."[112] Within three (3) days of the decision on the motion for class certification, the matter was set down for a settlement conference and by January 2012, the Court granted a Joint Motion for Preliminary Approval of the Settlement. Ferrero ultimately settled the class actions for $3 million and an agreement to change select labeling and marketing statements as well as change a TV advertisements and claims on the company's website.[113]

VI. Conclusion

The United States Supreme Court's decisions in *Dukes*, *Concepción* and *Smith*, will continue to impact the manner in which federal court class actions are litigated. These decisions have changed the standards relating to proving "commonality" under *Fed.R.Civ.P.*23 (a)(2), limiting the recovery of damages under a Rule 23(b)(2) class, and requiring individualized proof of individual class members' damages. These proof requirements, along with providing specific guidelines as to when an arbitration agreement will be enforced, provide corporate defendants with additional tools to defend against federal court class actions.

While there is some divergence in the application of *Concepción,* on the whole, the Supreme Court's recent rulings clarify class action precedent for consistent interpretation by the federal courts, especially in the context of consumer fraud class action lawsuits. We will continue to evaluate and monitor the application of the Supreme Court's decisions by the District

Courts as well as the regulatory environment for increased scrutiny of food labeling and advertising and actions brought by states' Attorneys General. We anticipate that activist consumer groups, as well as consumers, will continue to attempt to influence public opinion through the use of social media. The next year will be very telling as to how Corporate America litigates class actions – in the media or the court room.

---

[1] This paper will discuss non-securities class action lawsuits, unless otherwise noted.
[2] *Amgen* is discussed in detail in *Financial and Securities Litigation Update: Trending, Scandals and More. . .* presented along with this paper and is mentioned here for completeness.
[3] *Standard Fire Insurance Co. v. Knowles*, 11-01450, Petitioner's Brief in Support of Petition For a Writ of Certiorari, p. 4. ("*Standard Fire*")
[4] S.Rep.No. 109-14, at 61(2005)(accompanying passage of the CAFA in February 2005). *See also, Id.* at 56("[CAFA] is court reform – not tort reform. It would simply allow federal courts to handle more interstate class actions. It makes no changes in substantive law whatsoever.")
[5] Testimony of John H. Beisner on Behalf of the U.S. Chamber Institute for Legal Reform before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives, "Class Actions Seven Years After the Class Action Fairness Act, 1 June 2012", *citing* Pub.L. 109-2, §2(b)(1)-(3).
[6] 28 U.S.C. §1332(d)
[7] *Smith v. Bayer Corp.*,131S.Ct. 2368, 2382 (2011).
[8] *Standard Fire*, Petitioner's Brief in Support of Petition For Writ of *Certiorari*, p.10.
[9] *Id*. at 9.
[10] The Eight Circuit Court of Appeals is the federal court with appellate jurisdiction over the District Courts from the States of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. As such, its decisions are binding on District Courts in these states.
[11] *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009).
[12] *Standard Fire,* Petitioner's Brief in Support of Petition For Writ of *Certiorari*, p.9.
[13] *Rowling v. Nestle Holdings Inc.,* 666 F.3d 1069, 1074 (8th Cir. 2012)
[14] *Standard Fire,* Petitioner's Brief in Support of Petition For Writ of *Certiorari*, p.i.
[15]*Knowles*, Brief in Opposition to Petition for Writ of *Certiorari*, p.10.
[16] *Wal-Mart Stores, Inc. v.* Dukes, 131 S.Ct. 2541, 2547 (2011).
[17] *Id.* Of note is that plaintiffs did not seek compensatory damages and did not allege that Wal-Mart had any express corporate policy against the advancement of women. Rather, plaintiffs asserted that their local managers' discretion over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful disparate impact of female employees.
[18] *Id*. at 2548.
[19] *Fed.R.Civ.P.* 23(b)(2). Rule 23(b)(2) generally applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."
[20]*Dukes*, 131 S. Ct. at 2547.
[21] *Id.* at 2550; *citing Fed.R.Civ.P.* 23(a)(2).
[22] *Id*., at 2551.
[23] *Id.* at 2552.
[24] *Id*. (emphasis in the original).
[25] *Id*.
[26] *Id.* at 2557.
[27] *Id.*
[28] *Id*.
[29] *Id.* at 2561.
[30] *Id.*

[31] *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 625-627 (9th Cir. 2010).
[32] *Dukes*, 131 S. Ct. at 2561.
[33] *Id.*
[34] *AT&T Mobility v. Concepción*, 131 S.Ct. 1740 (2011).
[35] *Id.* at 1744.
[36] *Id.* at 1748.
[37] *Id.* at 1753.
[38] *Id.* at 1748.
[39] *Id*.; *citing Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 618, 687, 116 S.Ct. 1652 (1996); *see also Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S.Ct. 2520 (1987).
[40] Jacobus, Alan P. and Knapp, Eric J., Volume 12, Issue # 5, *Mealey's Litigation Report: Class Actions* 46 (2012)(hereinafter referred to as "Mealey's Litigation Report").
[41] *Smith v. Bayer Corp.*, 131 S.Ct. 2368 (2011).
[42] *Id.* at 2373.
[43] *McCollins v. Bayer Co., Circuit Court of Cabell County, West Virginia*. (filed Aug. 2001).
[44] *Smith*, 131 S.Ct. at 2374.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 2375.
[48] *Id.* at 2379.
[49] *Id*. at 2368.
[50] *Mealey's Litigation Report: Class Actions*, at p. 7; *see, e.g. Martin v. State Farm Mut. Auto. Ins. Co*., 809 F. Supp. 2d 496 (S.D.W.Va. 2011)(finding no commonality under *Dukes*); *Scott v. First Am. Title Ins. Co.,* 276 F.R.D. 471 (E.D. Ky. 2011)(same); *Corwin v. Lawyers Title Ins. Co.,* 276 F.R.D. 484 (E.D. Mich. 2011)(same); *Cholakyan v. Mercedes Benz USA, LLC,* , 2012 WL 1066755 (C.D. Cal. 28 Mar. 2012)(class certification defeated on *Dukes* grounds.)
[51] *Martin v. State Farm Mutual Auto Ins. Co.,* 809 F.Supp. 2d 496, 500 (SDWVA 2011).
[52] *Mealey's Litigation Report: Class Actions* at 7.
[53] *Id.*
[54] *See for e.g.*, *Artis v. Deere & Co.*, No. C-10-5289 WHA (MEJ), 2011 WL 2580621 (N.D.Cal. 29 June 2011)(rejects defendant's argument that *Dukes* should preclude discovery of individual evidence regarding putative class members.)
[55] *Mealey's Litigation Report: Class Actions* p. 8; *see, e.g*., *Lau v. Mercedes Benz USA, LLC*, 2012 WL 370557 (N.D. Cal. 31 Jan. 2012).
[56] *KPMG LLP v. Cocchi*, 132 S.Ct. 23 (2011).
[57] *Id.* at 24.
[58] *Id*. at 25.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] Biderman, David T. and Bass, Joren S., *Trends in Food Labeling and Nutrition Class Actions*, American Bar Association, Section of Litigation, Class Action and Derivative Suits, 30 April 2012.
[63] *Chavez v. Nestle USA, Inc*. , 2011 U.S. Dist. LEXIS 58733 (CD Cal. 2 May 2011).
[64] *Mason v. Coca-Cola Co.*, 774 F.Supp. 2d 699 (DNJ 2011).
[65] *Lockabey v. American Honda Motor Co.,* No. 37-2010-000877550-CU-BT-CTL (Cal. Super. Ct.).
[66] To "opt out" of the class action, Ms. Peters had to provide written notice to the Court that she did not want to be bound by the class settlement.
[67] The Food and Drug Administration (FDA or USFDA) is an agency of the United States Department of Health and Human Services, one of the United States federal executive departments. The FDA is responsible for protecting and promoting public health through the regulation and supervision of food safety, tobacco products, dietary supplements, prescription and over-the-counter pharmaceutical drugs (medications), vaccines, biopharmaceuticals, blood transfusions, medical devices, electromagnetic radiation emitting devices (ERED), and veterinary products. The FDA is led by the Commissioner of Food and Drugs, appointed by the President with the advice and consent of the Senate. The Commissioner reports to the Secretary of Health and Human Services. The 21st and current Commissioner is Dr. Margaret A. Hamburg.

[68] Brew, Sarah L., Eads, Kristin R., and Toeniskoetter, Steven B., *Food Labeling Remains Ripe for Consumer Fraud Class Actions* (April 2012).
[69] *Id.*
[70] *Id*.
[71] *Id.*
[72] www.lawyersandsettlements.com.
[73] *In Re: Merck Mumps Vaccine Antitrust Litigation*, Master File No. 2:12-cv-03555.
[74] *Sunshine v. Reassure Am. Life Ins. Co.*, 2012 WL 748669 (E.D. Pa. 6 Mar. 2012).
[75] *Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, 2011 WL 6371901 (S.D. Ohio 20 Dec. 2011).
[76] *Movsesian v. Victoria Versicherung AG*, 2012 WL 589457 (9th Cir. 23 Feb. 2012).
[77] *Mealey's Litigation Report: Class Actions* p. 2.
[78] Bunn, Andrew O., *Emerging Trends in Health Care Class Actions* (2012), p. 27.
[79] *See, e.g. Churchill v. Cigna Corp*., 2011 WL 3563489 (E.D. Pa. 12 Aug. 2011)(In finding *Dukes* inapposite to this case, district court certified a class of participants in ERISA plans covered by Cigna who sought to challenge Cigna's alleged blanket policy of denying coverage for two treatments for autism.).
[80] *Id*.
[81] Bunn, Andrew O., *Emerging Trends in Health Care Class Actions* (2012).
[82] *Yue Yu, et. al. v. Energy Plus Holdings LLC and Energy Plus Natural Gas, LP*, Case No. 12-cv-0267, filed 2 May 2012 (United States District Court, District of New Jersey).
[83] *Angela Wise, Gideon Romm v. Energy Plus Holdings, LLC*, Case No. 11-cv-07345, filed 18 October 2011 (United States District Court, Southern District of New York).
[84] *Id.*
[85] *Id*.
[86] *Christina Harley v. Energy Plus Holdings, LLC*, Philadelphia Court of Common Pleas, filed 2 October 2012.
[87] *George Epsen, Attorney General of the State of Connecticut v. Energy Plus Holdings, LLC*, State of Connecticut, Public Utilities regulatory Authorities, filed 26 July 2012.
[88] Transcript for FDA's Media Briefing on Front of Pack Labeling, Media Call Transcript (20 October 2009) available at http://www.fda.gov/downloads/NewsEvents/Newsroom/Media Transcripts/UCM187809.pdf.
[89] Open Letter to Industry from FDA Commissioner Dr. Margaret Hamburg, dated 3 March 2010, (hereinafter referred to as "Open Letter")].
[90] *Rosales, et. al. v. Chobani, Inc*., Case No. 12-cv-2071, Complaint, paragraph 16.
[91] Biderman, David T. and Bass, Joren S., *Trends in Food Labeling and Nutrition Class Actions*, American Bar Association, Section of Litigation, Class Action and Derivative Suits, 30 April 2012.
[92] Strom, Stephanie, *Lawyers from Suits Against Big Tobacco Target Food Makers*, New York Times, 18 August 2012.
[93] Biderman, David T. and Bass, Joren S., *Trends in Food Labeling and Nutrition Class Actions*, American Bar Association, Section of Litigation, Class Action and Derivative Suits, 30 April 2012.
[94] Biderman, David T. and Bass, Joren S., *Trends in Food Labeling and Nutrition Class Actions*, American Bar Association, Section of Litigation, Class Action and Derivative Suits, 30 April 2012.
[95] *Kane v. Chobani, Inc.*, Case No. 12-cv--02425, Filed 14 May 2012, (U.S. District Court, Northern District of California); *Rosales, et. al. v. Chobani, Inc*. Case No. 12-cv-2071, Filed 22 August 2012, (U.S. District Court, Southern District of California) and *Bernaz v. Chobani, Inc.,* Case No. 12-cv-02845, Filed 6 June 2012 (U.S. District Court, E.D.N.Y.).
[96] *Kane*, at paragraph 93.
[97] *Id.*
[98] *Rosales, supra*, paragraphs 38 and 39.
[99] *Id.*
[100] *Bernaz v. Chobani, Inc.*, Case No. 12-cv-02845 (E.D.N.Y. Filed 6 June 2012).
[101] Strom, Stephanie, *Lawyers from Suits Against Big Tobacco Target Food Makers*, New York Times, 18 August 2012.
[102] *Id.*
[103] *Id.*
[104] *In re: Simply Orange Orange Juice Marketing and Sales Practice Litigation*, Case No. 12-cv-02391(United States District Court, Western District of Missouri, filed 25 June 2012).

[105] *Athena Hohenberg, et.a l. v. Ferrero USA, Inc.,* Case No. 11-cv-0205 (U.S.D.C., Southern District of California, filed 2 February 2011).
[106] *Id*., Complaint, ¶ 10.
[107] *Id*.
[108] *Laura Rude-Barbato v. Ferrero USA, Inc.,* Case No. 11-cv-0249 (U.S.D.C., Southern District of California).
[109] *Marnie Glover v. Ferrero USA, Inc.,* Case No. 3:11-01086(U.S.D.C. District of New Jersey).
[110] *Athena Hohenberg, et.a l. v. Ferrero USA, Inc.,* Case No. 11-cv-0205 (U.S.D.C., Southern District of California, filed 2 February 2011).
[111] *Id*., Plaintiffs' Motion for Class Certification, filed 1 August 2011.
[112] *Id*., Court's Order granting Class Certification, filed 15 November 2011.
[113] *Id*., Class Action Settlement Agreement, filed 19 January 2012.