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## SELLING THE FOOTLONG SHORT: HOW CONSUMERS INCH TOWARD SATISFACTION IN COSTLY FOOD CLASS ACTION LITIGATION

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### INTRODUCTION

Chances are, if you have ever purchased an item, you are among the many unnamed members of a litigation class action lawsuit. According to a report published in March 2017 by the Perkins Coie Food Litigation Group, the food and beverage industry has become a top target for class actions and individual lawsuits, with nearly 10 class action filings in Illinois, and over 140 filings nationwide, in 2016 alone.<sup>1</sup> The uptick in consumer fraud lawsuits involving food and drink means more money for lawyers, but has left consumers with

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<sup>1</sup> David T. Biderman, Julie L. Hussey, Charles C. Sipos, *Food Litigation 2016 Year in Review: A Look Back at Key Issues Facing Our Industry*, at <https://dpntax5jbd3l.cloudfront.net/images/content/1/7/v2/171826/2017-Food-Litigation-YIR-FINAL-2.pdf> (Mar. 28, 2017) (finding the number of food class action lawsuits filed each year has significantly increased since 2008, with California remaining the favored jurisdiction with over 60 cases filed; however, Illinois remains popular with just under 10 actions filed in 2016).

little relief.<sup>2</sup> In many states, lawyers have found that vague laws on unfair and deceptive practices are conducive to extracting large settlements from food companies. Whether plaintiffs are seeking monetary relief for being purposefully misled, or simply hoping to call out businesses for their puffery; attorneys are undoubtedly the real victors.

This Article evaluates the Seventh Circuit's decision in *In re Subway Footlong Sandwich Marketing and Sales Practice Litigation* to explore the effects of excessive attorney fee awards on consumer fraud class actions, and to determine how, if at all, food litigation could be more equitable to consumers. Part I will explain the evolution of class actions, which eventually culminated in the passage of more defined fairness standards. Part II will discuss current trends in food and drink class action litigation. Part III will focus on *In re Subway Footlong Sandwich Marketing and Sales Practice Litigation*, highlighting how courts can underestimate the value of injunctive relief in light of exorbitant attorney's fees. Part IV will suggest limitations and guidelines the legal community should consider in the wake of interminable food marketing class action lawsuits.

### RISE OF THE CLASS ACTION LAWSUIT

The class action lawsuit as it exists today is mainly a product of statutes and rules. The origin can be traced to England's courts of chancery.<sup>3</sup> In the 12<sup>th</sup> century, England allowed litigation on behalf of

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<sup>2</sup> Settlement Agreement, Guoliang Ma, et al. v. Harmless Harvest, Inc., No. 2:16-cv-07102-JMA-SIL. Available at: <https://www.foodlitigationnews.com/wp-content/uploads/sites/12/2017/05/Ma-et-al.-v.-Harmless-Harvest-Inc.-Settlement-Agreement.pdf>. (proposing that while the makers of Harmless Coconut Water would engage in product label reviews, attorney's fees would be awarded in the amount of \$575,000); *see also* Birbrower v. Quorn Foods, Inc., No.2:16-cv-01326-DMG (C.D. Cal. dismissed Sept. 11, 2017) (proposing a settlement whereby Quorn would no longer market their products as being made from mushrooms or truffles but class counsel would receive over half the settlement fund, \$1.35 million).

<sup>3</sup> Raymond B. Marcin, *Searching for the Origin of Class Action*, 23 CATH. U.L. REV. 515, 517 (1974) ("All trace their origins, however to the unwritten practice of English Chancery at a time before the adoption of our own judicial system.").

villages and parishes with an 1125 writ of Henry III to the archbishop of Canterbury, which stated, “according to our law and custom of the realm . . . villages and communities . . . ought to be able to prosecute their pleas and complaints in our courts and in those of others through three or four of their number.”<sup>4</sup>

Early examples of group or class litigation include a 12<sup>th</sup> century case, *Master Martin Rector of Barkway v. Parishioners of Nuthampstead*.<sup>5</sup> Nuthahampstead chapel was once an independent church, but it eventually became a member of the church of Barkway.<sup>6</sup> After merging with the Barkway church, a dispute arose about the rector receiving a payment of tithes in return for his services.<sup>7</sup> This dispute could be viewed as a religious class action, related to how much ministerial service could be bought with local tithes.<sup>8</sup>

Furthermore, a 14<sup>th</sup> century case identified as *Discart v. Otes* is an example of a judicially created class action.<sup>9</sup> In this case, which concerned currency used in the Channel Islands, the justices decided that instead of ruling, they would pass the matter on to the King’s Council, so that Discart and all others with similar claims could receive a single, binding judgment.<sup>10</sup> This created a new type of suit, the “Bills of Peace,” whereby one person sued in the hopes of resolving the matter in favor of themselves and other similarly situated persons.<sup>11</sup> Alas, the class action was born.

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<sup>4</sup> Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes of Collective Litigation*, 39 ARIZ. L. REV. 687, 690 (1997).

<sup>5</sup> Susan T. Spence, *Looking Back . . . In a Collective Way: A Short History of Class Action Law*, ABA BUSINESS LAW SECTION, (July/Aug. 2002), <https://apps.americanbar.org/buslaw/blt/2002-07-08/spence.html> .

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> A tithe is one-tenth part of something, generally produce or personal income, set apart and paid as a contribution to a religious organization.

<sup>9</sup> Marcin, *supra* note 3, at 521-23.

<sup>10</sup> *Id.* at 521.

<sup>11</sup> Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1326 (1932) (noting that one concern about consolidating many suits into

### A. *Class Actions in the United States*

In the mid 19<sup>th</sup> century, the Supreme Court promulgated Federal Equity Rule 48, which expressly provided for “group representative litigation.”<sup>12</sup> While this new codification allowed cases involving numerous parties to proceed on a representative basis, the rule was clear that the judgment of the court had no binding effect on absent class members.<sup>13</sup> Eleven years later, the Supreme Court ignored Rule 48’s closing remarks and held that a judgment in a representative suit did indeed bind absent class members.<sup>14</sup>

Early in the 20<sup>th</sup> century, Congress enacted the Federal Rules of Civil Procedure.<sup>15</sup> Included in these rules was Rule 23, which still regulates class action lawsuits today.<sup>16</sup> It was not until 1966, however, that the Supreme Court advisory committee amended Rule 23 to explicitly provide that class action judgments would bind all members of the class who did not opt out of the suit.<sup>17</sup>

Under Rule 23, plaintiffs seeking to proceed under a class action must plead and prove: (1) an adequate class definition, (2) ascertainability, (3) numerosity, (4) commonality, (5) typicality, and (6) adequacy.<sup>18</sup> Additionally, plaintiffs must demonstrate that separate

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one hearing was the “crowding and confusion in the courtroom if each party had their own lawyer”).

<sup>12</sup> Nikita Malhotra Pastor, *Equity and Settlement Class Actions: Can There Be Justice for All in Ortiz v. Fibreboard*, AM. U. L. REV. 49, NO. 3, 773, 785 (February 2000).

<sup>13</sup> *Id.* at 785 n.63.

<sup>14</sup> *See* *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853) (holding “[f]or convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court”).

<sup>15</sup> The Federal Rules of Civil Procedure, effective September 16, 1938, govern civil proceedings in United States district courts.

<sup>16</sup> Fed. R. Civ. P. 23.

<sup>17</sup> For comparison of the old and new versions of Rule 23, *see* 39 F.R.D. 69, 94-98 (1966).

<sup>18</sup> Fed. R. Civ. P. 23(a).

adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims, declaratory or injunctive relief is appropriate based on the defendant's acts with respect to the class generally, or that common questions predominate and a class action is superior to individual actions.<sup>19</sup>

As such, class actions were intended to do more than simply provide a manageable way to deal with numerous plaintiffs; the primary purpose was to increase the efficiency and economy of litigation.<sup>20</sup> Additionally, the Supreme Court noted that class actions provide an opportunity for people with individually insignificant claims to band together and seek relief.<sup>21</sup> As civil rights leaders, environmentalists, and consumer advocates began utilizing this useful procedural litigation device, modern class action case law and Rule 23 became increasingly important.

### *B. Protecting Consumers Under the Class Action Fairness Act of 2005*

After the 1980s and 1990s, the wave of mass litigation in asbestos, lead, and dangerous drugs began to wind down. Tort-reform laws capped the damages plaintiff could obtain, and new heightened pleading standards made it harder to bring deficient lawsuits.<sup>22</sup> As such, plaintiff's lawyers set their sights on a new profit-making target: consumer-fraud class action litigation. Consumer-fraud cases were relatively easy to file and class action lawyers had a plethora of plaintiffs at their disposal because millions of people purchase and consume products every day. However, class members have yet to

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<sup>19</sup> Fed. R. Civ. P. 23(b).

<sup>20</sup> See *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 148 (1982).

<sup>21</sup> See *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (stating that class actions serve not only to protect the defendant from inconsistent obligations, but protect the interests of absentees while providing a convenient and efficient means of settling similar lawsuits).

<sup>22</sup> John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 *LOY. L.A. L. REV.* 1021, 1030(2002).

recover grand sums through these lawsuits, even though the attorneys continue to receive big payouts.

Looking to cash in quick, class action lawyers began filing consumer-fraud suits in waves.<sup>23</sup> In order to combat this uptick in filings, business groups and tort reform supporters lobbied for more legislation to restrict class action lawsuits.<sup>24</sup> These actions led to the Class Action Fairness Act of 2005 (“CAFA”), which placed large class-action lawsuits in federal court, removing them from historically more receptive state courts.<sup>25</sup> Interestingly, while business groups bogged down by excessive consumer-fraud cases urged this reform, CAFA itself claimed to protect consumer class members from excessive attorney’s fees.<sup>26</sup> In part, CAFA intended to curtail attorneys’ abilities to tie their fee awards to the nominal value of coupons made available to a settlement class.<sup>27</sup> Where coupons provided the only basis for relief, the portion of attorney’s fees awarded to class counsel would be based on the value that the class members receiving the coupons redeemed, rather than the face value of all coupons issued.<sup>28</sup> Thus, attorney’s fees are not based on the recovery by the class, rather, they are “based upon the amount of time class counsel reasonably expended working on the action.”<sup>29</sup>

<sup>23</sup> See *Jeckle v. Crotty LLP*, 85 P. 3d 931 (Wash. App. Div. 3 2004) (alleging that a physician engaged in consumer fraud rather than malpractice where he advertised his own weight-loss drugs to his patients).

<sup>24</sup> William Branigin, *Congress Changes Class Action Rules*, WASHINGTON POST, (Oct. 1, 2017), <http://www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html>.

<sup>25</sup> *Id.*

<sup>26</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 stat. 4 (Feb. 18, 2005) §2. (finding that “Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”)

<sup>27</sup> S. REP. NO. 109-14, at 14, 30 (2005)

<sup>28</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 stat. 4 (Feb. 18, 2005) § 1712.

<sup>29</sup> 28 U.S.C §1712(b)(1).

Despite this commendable language, neither federal nor state courts have changed the way they approach class action lawsuits. Many courts continue to approve coupon-based class action settlements, without a heightened level of scrutiny.<sup>30</sup> Moreover, federal courts considering settlements post-CAFA have often assumed that the standards remained the same.<sup>31</sup> Despite courts' hesitancy to view class actions differently post-CAFA, courts have used it in evaluating requested attorney's fees.<sup>32</sup> Even still, while CAFA may have helped streamline a method for calculating attorney fee awards, the legislation did little to quell the number of consumer-fraud based class action cases. Instead, savvy class action lawyers have turned their attention toward less regulated areas, such as food and drink advertising.

#### CURRENT TRENDS IN FOOD AND DRINK CLASS ACTION LITIGATION

Over the last decade, the number of consumer fraud class actions filed has skyrocketed. The nationwide filings for 2016 were nearly forty-seven percent higher than in 2012.<sup>33</sup> Undoubtedly, part of the increase is caused by consumers' growing desire for transparency.<sup>34</sup> For instance, the public has grown leery of food and other products

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<sup>30</sup> See *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55-64 (D.D.C. 2010) (holding that though coupon settlements "pose a particular risk of unfairness and unreasonableness," no additional scrutiny is called for by §1712(e)).

<sup>31</sup> See *In re Tyson Foods, Inc.*, No. RDB-08-1982, 2010 WL 1924012 (D. Md. 2010) (approving coupons for Tyson products to settle a false advertising class action without any mention of CAFA).

<sup>32</sup> See *True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010) (finding that "while the lodestar method of awarding fees is permissible under CAFA, the Court . . . is particularly wary of using the lodestar . . . where the benefit achieved for the class is small and the lodestar award is large").

<sup>33</sup> *Supra* note 1.

<sup>34</sup> *The 2016 Label Insight Transparency ROI Study*, LABEL INSIGHT (Oct. 18, 2017), <https://www.labelinsight.com/Transparency-ROI-Study> (A 2016 consumer study found that forty percent of consumers said they would switch to a new brand if it offered more product transparency.).

that are advertised as “natural.”<sup>35</sup> As a result, plaintiffs’ attorneys have rushed in to aid disgruntled consumers. Although these consumer class action lawsuits were based upon a number of different issues, it was not until the Supreme Court’s decision in *AT&T Mobility LLC. v. Concepcion*, which upheld a company’s right to enforce contracts limiting consumers’ ability to band together in class actions lawsuits, that food-based class actions became even more appealing.<sup>36</sup>

### A. *All Natural and Healthy Claims*

The first wave of food class action litigation focused on marketing that claimed food products were “natural,” “nutritious,” or contained “nothing artificial.” Generally, the claims argued that the products contained some synthetic ingredient or that the production process rendered the product no longer natural. In one notable case, a judicial panel in Missouri consolidated dozens of suits, all of which alleged that Coca-Cola Simply Orange, Minute Maid Pure Squeezed, and Premium orange juices deceived consumers into thinking that the juices were 100% pure.<sup>37</sup> Despite labels touting that the juices were “100% Pure Squeezed,” plaintiffs claimed that the addition of added flavorings, including orange essence oils, made the labels deceptive to consumers.<sup>38</sup> More specifically, plaintiffs sought to certify classes of purchasers of Coca-Cola orange juice products, asserting that Coca-Cola failed to disclose its use of added flavors in these products.<sup>39</sup> Such omissions, plaintiffs claimed, deceived consumers into buying

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<sup>35</sup> *Id.* (finding that more than half of the people surveyed felt they had to use their own definition of “healthy” rather than the label itself)

<sup>36</sup> 563 U.S. 333, 357 (2011).

<sup>37</sup> Emily Field, *Judge Unsure On Orange Essence Oil in Coke Juice MDL*, LAW 360 (Nov. 10, 2017), <https://www.law360.com/articles/758539>.

<sup>38</sup> *Id.*

<sup>39</sup> *In re Simply Orange Orange Juice Marketing and Sales Practices Litigation*, No. 4:12-md-02361-FJG, 2017 WL 3142095, at \*1 (W.D. Mo. July 24, 2017).

these products at premium prices.<sup>40</sup> And while the court did certify the class, the outcome is still pending.<sup>41</sup>

Disputes arising over broad, undefined nutritional claims provided another avenue for litigation. Even where the labels themselves did not assert nutritional claims, creative lawyers argued that the images in commercials and on product packaging could be interpreted as purposefully misleading and deceptive to consumers. In 2012, one California mother filed a lawsuit alleging that she was surprised to find that Nutella had little to no nutritional value, despite TV commercials touting quality ingredients.<sup>42</sup> The commercial further claimed that moms could use Nutella “to get [the] kids to eat healthy foods.”<sup>43</sup> Although the lawsuit was met with much ridicule, the judge ultimately sided with the mother, finding that Nutella would need to change its marketing campaign and also modify its front labels to indicate the fat and sugar content of each jar.<sup>44</sup>

In 2016, consumers filed a false advertising lawsuit against Krispy Kreme, alleging that the company’s donut fillings lacked essential vitamins and nutrients because the filling did not contain real fruit.<sup>45</sup> The case was voluntarily dismissed without prejudice; however, plaintiff’s counsel still maintained that Krispy Kreme did not provide an ingredient lists for its doughnuts and had they done so, consumers would have known that the products did not contain the premium ingredients Krispy Kreme led customers to believe were in

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Laurent Belsie, *Nutella Settles Lawsuit. You Can Get \$20*, CHRISTIAN SCI. MONITOR (Apr. 27, 2012) at <https://www.csmonitor.com/Business/new-economy/2012/0427/Nutella-settles-lawsuit.-You-can-get-20>.

<sup>43</sup> *Id.*

<sup>44</sup> Ryan Jaslow, *Nutella Health Claims Net \$3.05 Million Settlement in Class-action Lawsuit*, CBS NEWS (Apr. 27, 2012), <https://www.cbsnews.com/news/nutella-health-claims-net-305-million-settlement-in-class-action-lawsuit/>.

<sup>45</sup> *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 2-16-cv-08338-SVW, 2017 BL 78889, at \*1 (C.D. Cal filed Feb. 27, 2017).

the doughnuts.<sup>46</sup> In yet another lawsuit, the plaintiff argued that Gerber Puffs' labels were false and misleading because they depicted fruits and vegetables though the product itself contained no real fruits or vegetables.<sup>47</sup>

The spike in outlandish claims is partially due to the Food and Drug Administration's ("FDA") inability to define "natural."<sup>48</sup> Current FDA policy states that "natural" means "nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food."<sup>49</sup> After a request from two federal judges and petitions from consumers and businesses, the FDA began accepting public comments on how to define "natural."<sup>50</sup> Initially, the closing period was May 10, 2016; however, the FDA extended the deadline for filing public comments to April 26, 2017.<sup>51</sup> Consumers, food producers, and plaintiffs' attorneys alike await a statement by the FDA, which could either fuel new litigation or lead to additional dismissals.

### B. Slack Fill Claims

Many lawyers are claiming consumers are getting less than they bargained for when they get more packaging than product. These types

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<sup>46</sup> Richard Craver, *False Advertising Lawsuit Against Krispy Kreme Voluntarily Dismissed*, JOURNAL NOW (Apr. 27, 2017), [http://www.journalnow.com/business/business\\_news/local/false-advertising-lawsuit-against-krispy-kreme-voluntarily-dismissed/article\\_ec3d74be-1b15-5b2f-a1e3-921bf71007ff.html](http://www.journalnow.com/business/business_news/local/false-advertising-lawsuit-against-krispy-kreme-voluntarily-dismissed/article_ec3d74be-1b15-5b2f-a1e3-921bf71007ff.html).

<sup>47</sup> *Henry v. Gerber Prods. Co.*, No. 15-cv-02201-HZ, 2016 BL 125480, at \*1 (D. Or. Apr. 18, 2016).

<sup>48</sup> Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2, 302, 2, 407 (Jan. 6, 1993).

<sup>49</sup> *Id.*

<sup>50</sup> See FDA Request for Comments re the "Use of the Term 'Natural' in the Labeling of Human Food Products," 80 Fed. Reg. 69, 905 (proposed Nov. 12, 2015).

<sup>51</sup> See Use of the Term "Healthy" in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period, 81 Fed. Reg. 96, 404 (proposed Dec. 30, 2016).

of claims are known as “slack fill” litigation.<sup>52</sup> FDA regulations already restrict the use of useless slack-fill. Extra room in the packaging is allowed only when it serves a specific purpose, such as to protect the content of the package, a required component of the manufacturing process, or is the result of inevitable product settling.<sup>53</sup> However, these guidelines have not prevented lawyers from actively seeking out packages that may contain unnecessarily unfilled space.

Courts have already dismissed many slack fill lawsuits.<sup>54</sup> Judges determined that a consumer need only read the number of ounces or the quantity count on the packaging to determine the amount of product they are actually purchasing.<sup>55</sup> Despite many courts’ view that the reasonable consumer should simply read the packaging, some food producers have acknowledged their customers’ dissatisfaction and have offered coupons or other incentives to appease the public.<sup>56</sup>

### C. Deception Claims

Apart from attacking the nutritional value or the slack fill of a product, lawyers are zeroing in on broader deceptions allegedly taking place. Coffee companies, like Starbucks, have been accused of tricking consumers into thinking they were getting more coffee than they were receiving because the cups were not filled to the brim.<sup>57</sup> Another lawsuit against the maker of Tito’s Vodka alleged the brand’s

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<sup>52</sup> Bob Fiedler, *Slack Fill: Reducing Risks and Improving Bottom Line Profits*, CHAINANYLTICS (June 2, 2014), <http://www.chainalytics.com/slack-fill-reducing-risks-improving-bottom-line-profits/>.

<sup>53</sup> See 21 C.F.R. §100.100.

<sup>54</sup> See *Bush v. Mondelez Int’l, Inc.* No. 16-cv-02460, 2016 WL 5886886, at \*1 (N.D. Cal. Oct. 7, 2016).

<sup>55</sup> *Id.* at \*3; see also *Fermin v. Pfizer, Inc.*, 215 F. Supp. 3d 209 (E.D.N.Y. 2016).

<sup>56</sup> See Complaint, *Wurtzburger v. Kentucky Fried Chicken*, No. 1:16-cv-08186 (S.D.N.Y.) (filed Sept. 29, 2016 and removed to federal court from the Supreme Court of the State of New York, Dutchess County).

<sup>57</sup> See *Strumlauf v. Starbucks Corp.*, 192 F. Supp. 3d 1025 (N.D. Cal. 2016).

advertisements misled consumers into believing that the vodka was handmade in an “old fashioned pot.”<sup>58</sup>

In 2016, lawyers filed dozens of class action lawsuits against Parmesan cheese producers and distributors.<sup>59</sup> These cases were consolidated and transferred to the Northern District of Illinois.<sup>60</sup> In *In re 100% Grated Parmesan*, the lawsuits did not assert any physical injury.<sup>61</sup> Instead, plaintiffs argued they had been deceived by cheese packaging labels that claimed it contained “100% Grated Parmesan Cheese.”<sup>62</sup> In reality, the products contained anywhere from 2% to 8% of the food additive cellulose; lawyers claimed the ads intentionally misled consumers into believing each product was made of nothing but cheese.<sup>63</sup> As of August 24, 2017, District Court Judge Feinerman granted the defendants’ motions to dismiss, finding the descriptions on the labels were ambiguous, not deceptive. The court explained that a reasonable consumer should “still suspect that *something* other than cheese might be in the container.”<sup>64</sup> Regardless of the specific claim being made, food and beverage class action litigation has continued to rise, and shows no signs of stopping.

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<sup>58</sup> See Steven Trader, *Vodka Drinkers Seek Cert. in Tito’s ‘Handmade’ False Ad Suits*, LAW360 (Jan. 11, 2016), <https://www.law360.com/articles/745073/vodka-drinkers-seek-cert-in-tito-s-handmade-false-ad-suits>.

<sup>59</sup> Glenn G. Lammi, *Food Court Follies: Judge Grates Parmesan-Cheese Multidistrict Litigation*, FORBES (Aug. 31, 2017), at: <https://www.forbes.com/sites/wlf/2017/08/31/food-court-follies-judge-grates-parmesan-cheese-multidistrict-litigation/#6ec172c344af>.

<sup>60</sup> *In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, No. 16 C 5802, 2017 WL 3642076, at \*1 (N.D. Ill. Aug. 24, 2017).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2; see Lydia Mulvany, *The Parmesan Cheese You Sprinkle on Your Penne Could Be Wood*, Bloomberg, at: <https://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood> (Feb. 16, 2016).

<sup>64</sup> *In re Parmesan*, at \*7.

EXPLORING THE RELATIONSHIP BETWEEN EXCESSIVE ATTORNEY'S  
FEES AND LACK OF CONSUMER TRUST IN *IN RE SUBWAY FOOTLONG  
SANDWICH MARKETING AND SALES PRACTICE LITIGATION*

Many food and beverage class action lawsuits are arguably insubstantial; however, many claims genuinely important to consumers end up getting dismissed because the benefit to class counsel is disproportionately high in comparison to the value provided to class members. But, even when courts dismiss cases or refuse to certify classes, many companies opt to privately settle, often securing hundreds of thousands of dollars for the attorneys.<sup>65</sup> For instance, in *In re Subway Footlong Sandwich Marketing and Sales Practice Litigation*, the Seventh Circuit reversed the district court's decision to certify the class, determining that these consolidated class actions should have been "dismissed out of hand."<sup>66</sup> The Seventh Circuit considered three claims in the case: a standing claim, a class certification claim, and a settlement approval claim.<sup>67</sup> For the purposes of this Article, only the last two claims are discussed. Understanding the relationship between exorbitant class action attorney's fees and consumer dissatisfaction requires a description of both the lower court and appellate court's discussion of the issues.

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<sup>65</sup> Lisa A. Rickard, *Litigation Against Food Companies is Increasing, But Who Benefits?* FOODDIVE (Feb. 28, 2017), <http://www.fooddive.com/news/litigation-against-food-companies-is-increasing-but-who-benefits/436988/>.

<sup>66</sup> *In re Subway Footlong Sandwich Marketing and Sales Practices Litig.*, 869 F.3d 551, 557 (7th Cir. 2017) (quoting *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016))

<sup>67</sup> *Id.*

*A. The District Court*

In January 2013, an Australian teenager photographed his Subway Footlong sandwich and uploaded it to Facebook.<sup>68</sup> The image showed that his foot-long sandwich was only eleven inches long.<sup>69</sup> The post went viral, and shortly thereafter lawyers began investigating potential consumer protection claims against Doctor's Associates, the parent company of Subway.<sup>70</sup> In the same year, the named plaintiffs and their counsel filed complaints in several different courts, each alleging that Subway unfairly and deceptively marketed its sandwiches resulting in each plaintiff receiving less food than he or she had bargained for.<sup>71</sup> Thereafter, Subway requested that the Judicial Panel on Multidistrict Litigation transfer the individual actions to a single district for consolidation. However, while waiting for the panel to agree to the request, the parties agreed to mediation.<sup>72</sup> During this time, the parties engaged in initial informal discovery which led the plaintiffs to recognize the difficulties of obtaining class certification on claims for monetary damages and as such, decided to seek only injunctive relief.<sup>73</sup> While the Panel had agreed to consolidate the cases in one district, the parties continued to attend mediation sessions; by March 2014 the parties had agreed to a settlement.<sup>74</sup>

As part of the settlement, Subway agreed that for a period of four years, it would engage in a number of inspection measures designed to ensure that the Subway loaves were at least twelve inches long.<sup>75</sup> Additionally, Subway agreed to post notices in stores, and on its

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<sup>68</sup> In re Subway Footlong Sandwich Marketing and Sales Practices Litig., 316 F.R.D. 240, 242 (E.D. Wis. 2016), *rev'd* 869 F.3d 551 (7th Cir. 2017) (hereafter referred to as "*Subway I*").

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 243.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

website, informing consumers of the possibility of shorter loaves of bread.<sup>76</sup>

Presented before the district court were the plaintiffs' motion for final approval of a settlement, class counsel's motion for attorneys' fees, and an incentive award for the named plaintiffs.<sup>77</sup> Though the court had preliminarily approved the settlement, unrepresented objector Theodore Frank, disputed the settlement's benefit to the class.<sup>78</sup>

The district court first considered whether the total value of the settlement, \$525,000 plus the value of the injunction, was reasonable.<sup>79</sup> The court found that it was, given that the plaintiffs could not likely recover more than that amount.<sup>80</sup> Despite the reasonableness, the objector argued that the monetary component of the settlement should be allocated to the named and absent class members, rather than just to the named plaintiffs and the class counsel.<sup>81</sup> However, the court determined that this was an impractical request, considering the costs of informing the class members of the settlement, processing the claims and opt-outs, and distribution of payment.<sup>82</sup> As such, rather than leaving everyone out in the cold, the court found it reasonable to use the funds to compensate counsel and the named plaintiffs.<sup>83</sup>

Additionally, the objector argued that the named plaintiffs and class counsel were inadequate representatives of the absent class because the injunctive relief would not actually benefit the class members.<sup>84</sup> Because Subway had already pledged to ensure that all Subway Footlong sandwiches would be twelve inches, the objector

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<sup>76</sup> *Id.* at 244.

<sup>77</sup> *Id.* at 242.

<sup>78</sup> *Id.* at 245.

<sup>79</sup> *Id.* at 247.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 248.

argued that the “new” practices would not provide class members with any benefit they do not already enjoy.<sup>85</sup> The court disagreed, stating that the injunctive relief would now provide a mechanism for actual enforcement of best practices because class members could enforce violations by filing motions for contempt sanctions.<sup>86</sup>

The court next considered whether the settlement only benefitted future Subway customers. Because many Subway patrons are often repeat customers, the court found that there is a strong likelihood of them purchasing a Subway sandwich again in the future.<sup>87</sup> This, the court determined, meant that the injunctive relief did benefit the current class members as well as future customers.<sup>88</sup> Next, the court disagreed with the objector’s argument that the settlement was unfair and the named plaintiffs were inadequate class representatives because the named plaintiffs would each receive a \$500 incentive, while all the absent class member received no monetary relief.<sup>89</sup> Instead, the court argued that because it was not practical to distribute damages to the class in the first place, awarding \$5000 to the named plaintiffs would not diminish the amount of damages received by the class overall.<sup>90</sup>

The district court was then left to determine whether the class counsel’s fees were reasonable.<sup>91</sup> Typically, the reasonableness of attorneys’ fees is calculated by the “lodestar method”.<sup>92</sup> Objector Frank however, did not actually contend that class counsel’s requested fee exceeded what was reasonable under the lodestar computation.<sup>93</sup> Instead, he disputed the reasonableness of counsel appropriating the

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<sup>85</sup> *Id.* at 249.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 250.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 252.

<sup>92</sup> *Id.*; the lodestar method calculates the hours reasonably expended on the case multiplied by a reasonable hour rate. The court may then adjust the fee up or down based on additional factors.

<sup>93</sup> *Id.*

entire cash value of the settlement for themselves.<sup>94</sup> In its analysis of the issue, the court determined that because the defendant had already agreed to the fee, the award was reasonable.<sup>95</sup> Further, the court noted that given the modest value of the settlement, any remaining amount not given to the attorneys could not feasibly be distributed to the class members.<sup>96</sup> As such, the court held that the reasonableness of the fee should be measured “by the value of the injunctive relief in relation to what the class members have given up in exchange for that relief.”<sup>97</sup> Viewed in this way, the court found that by approving all aspects of the settlement, including the attorneys’ fees, the injunctive relief would end the alleged deceptive marketing practices and allow for consumer class members to hold Subway accountable were they to violate the settlement terms.<sup>98</sup>

### B. *The Seventh Circuit Discussion*

After having unsuccessfully objected to the settlement, class objector Theodore Frank, appealed to the Seventh Circuit.<sup>99</sup> In the opinion, Judge Diane Sykes stated that even though the standard of review is deferential to the district court, in this case, the district judge is similar to a fiduciary of the class.<sup>100</sup> As a fiduciary, the judge is held to a higher duty of care and must give the requirements of class certification “undiluted, even heightened, attention.”<sup>101</sup> Because Rule 23(a) requires that class representatives “fairly and adequately protect the interests of the class,” it was essential for the court to consider the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *In re Subway Footlong Sandwich Marketing and Sales Practices Litig*, 869 F.3d 551 (7th Cir. 2017) (hereafter referred to as “*Subway 2*”).

<sup>100</sup> *Id.* at 555 (citations omitted).

<sup>101</sup> *Id.*

interests of the unnamed class members.<sup>102</sup> Judge Sykes recognized, as many other judges have, that class action settlements often serve to benefit everyone but the actual class: class counsel seeks a settlement to get fees and the defendant, such as Subway, supports the settlement to avoid liability and negative press.<sup>103</sup>

As such, the Seventh Circuit considered whether the settlement provided any meaningful benefit to the class.<sup>104</sup> Judge Sykes decided that because the risk of a slightly shorter sandwich was the same before and after the settlement, the approved settlement was utterly worthless.<sup>105</sup> The court ultimately held that when a class settlement results in fees for class counsel, but yields no meaningful benefits for the class, it is “no better than a racket.”<sup>106</sup> Even class members’ ability to hold Subway in contempt of the settlement was deemed to be worthless.<sup>107</sup>

*Subway 2* is a clear illustration of the effect exorbitant attorneys’ fees have on class action lawsuits. Whether Subway truly engaged in misleading or deceptive advertising is almost entirely obfuscated by the fact that the settlement served only to line the pockets of class counsel. The Seventh Circuit held where a worthless settlement provides a worthless remedy, thus leaving “zero plus zero [to] equal [] zero,” the case should be dismissed from its advent.<sup>108</sup>

#### WHERE DOES THIS LEAVE THE REASONABLE CONSUMER?

The language of Rule 23 clearly states that a primary concern in class action lawsuits is the fair and adequate protection of the class interest.<sup>109</sup> CAFA’s passage in 2005 was, at least in part, intended to

<sup>102</sup> FED. R. CIV. P. 23(a)(4).

<sup>103</sup> *Subway II*, 869 F. 3d at 556.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 256-57.

<sup>106</sup> *Id.* at 256.

<sup>107</sup> *Id.* at 257.

<sup>108</sup> *Id.*

<sup>109</sup> FED. R. CIV. P. 23(a)(4).

protect consumer class members from excessive attorneys' fees.<sup>110</sup> And, though the Seventh Circuit acknowledged as much in *Subway 2*, it did not provide guidance on what consumers and plaintiffs should do when class action litigation fails to serve as a proper path to resolution or when individual lawsuits prove too costly to bare.

### A. *Do Labels Really Matter?*

One of the difficulties plaintiffs face in pursuing deception-based class action lawsuits is overcoming the “reasonable consumer” standard.<sup>111</sup> In *In re 100% Grated Parmesan*, the plaintiffs alleged they had been deceived by the labels on grated parmesan cheese products.<sup>112</sup> The court stated that the deceptiveness of a statement must be determined by the effect it has on a reasonable consumer.<sup>113</sup> This standard “requires a probability that a significant portion of the general consuming public . . ., acting reasonably in the circumstances, could be misled.”<sup>114</sup> Additionally, the allegedly deceptive act must be viewed in context with the entire packaging.<sup>115</sup> As such, the issue centered on whether the allegedly misleading labels were ambiguous, and if so, would any other part of the label dispel a plaintiff’s confusion.<sup>116</sup> If context cleared up the deception, the claim was defeated, if it did not, then the claim could proceed.<sup>117</sup> The court determined that because the labels were ambiguous and the plaintiffs

<sup>110</sup> See CAFA, *supra* note 26, at (b)(1).

<sup>111</sup> *FTC Policy Statement on Deception*, FTC.GOV (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>112</sup> *In re 100% Parmesan*, 2017 WL 3642076, at \*1.

<sup>113</sup> *Id.* at \*5.

<sup>114</sup> *Id.* (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

only had to read the ingredient list on the back of the product, the reasonable consumer was not likely to be misled.<sup>118</sup>

What the court in *In re 100% Grated Parmesan* lost sight of was that every day, consumers are inundated with advertisements on billboards, in television commercials, and on grocery store displays. Each advertisement attempts to convince the public to purchase its product over another. Food and beverage producers know that successful marketing campaigns affect the average consumer's purchases. In 2015, over \$560 billion was spent on brand marketing, and that amount is expected to increase to over \$740 billion by 2020.<sup>119</sup> More specifically, companies spent roughly \$67 billion dollars on packaging alone in 2015.<sup>120</sup>

Viewed in this light, it is clear that businesses are heavily invested in what goes on their packaging. Companies carefully select the language to be put on their labels in order to distinguish their products from others. The intention is that the words will draw in the public and entice them to purchase the goods. The average shopper may have an idea about the products they are looking for, but often rely on packaging and branding to make a purchase decision.<sup>121</sup> If consumers were persuaded to purchase products by what a label says, companies would not invest so much of their budget on packaging and marketing. As such, consumers "should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."<sup>122</sup> To expect otherwise encourages companies to continue spending their marketing dollars on misleading and ambiguous advertisements.

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<sup>118</sup> *Id.* at \*6.

<sup>119</sup> John Wolfe, *Marketing Spend on Brand Activation will top \$595 Billion in 2016*, ANA (April 19, 2016), <http://www.ana.net/content/show/id/39647>.

<sup>120</sup> *Id.*

<sup>121</sup> David Court, Dave Elzinga, Susan Mulder, and Ole Jorgen Vetvik, *The Consumer Decision Journey*, MCKINSEY QUARTERLY (June 2009), at <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/the-consumer-decision-journey>.

<sup>122</sup> *William v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

*B. The Legal Community Can Make a Difference.*

Whether the issue at hand involves food and beverage sales practices or some other matter, class action litigation is in need of reform. This Article proposes that, like the the district court in *Subway I*, other courts should reassess the value of injunctive relief as it pertains to food class action litigation.<sup>123</sup> In *Subway 2*, the Seventh Circuit determined that the injunctive relief proposed by the settlement was worthless because despite new quality-control measures and the inclusion of disclaimers in their ads, Subway would never be able to guarantee that each loaf of bread would always be twelve inches long.<sup>124</sup> Unlike the Seventh Circuit, the district court argued that the reasonableness of a class counsel's fee award as well as the settlement itself cannot and should not always be measured by the size of the monetary relief to the class members.<sup>125</sup> Courts should not be immediately dissuaded by the amount of class counsel fees but rather give pause to consider the value of injunctions. Injunctive relief can "preserve each class member's right to bring a subsequent action for monetary damages, either individually or as part of a class action"<sup>126</sup> should a defendant breach the terms of the agreement. By elevating the value of injunctions, plaintiff consumers will maintain at least one modest way of forcing food companies to examine their practices.

Currently, consumers and producers are still waiting for the FDA to issue further guidance on what the term "natural" means.<sup>127</sup> Other regulatory agencies should follow suit and provide clarity on common labeling terms. The more direction provided to companies, the easier it will be for them to tailor their marketing and advertisements accordingly. Furthermore, the more narrowly defined the terms, the easier it will be to differentiate between frivolous and meritorious food-related claims. Additionally, in light of more recent cases such as

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<sup>123</sup> *Subway I*, 316 F.R.D. at 252.

<sup>124</sup> *In re Subway II*, 869 F.3d 551, 556-57 (7th Cir. 2017).

<sup>125</sup> *Subway I*, 316 F.R.D. at 252.

<sup>126</sup> *Id.*

<sup>127</sup> See FDA Request for Comments, *supra* note 48.

the Ninth Circuit's *Gerber Products Co.*,<sup>128</sup> the FTC should consider issuing an updated letter of guidance on what it means to deceive a reasonable consumer. Because it is plausible "that a consumer might rely on the representation [on the label] . . . without looking at the ingredients,"<sup>129</sup> the FTC should factor in what a reasonable consumer relies on in making their purchases.

Finally, Congress should pass the Fairness in Class Action Litigation Act, which would eliminate many of the no-injury class actions while also requiring that a majority of the settlement award go to class members, rather than class counsel.<sup>130</sup> This legislation would "assure fair and prompt recoveries for class members . . . with legitimate claims" as well as "diminish abuses in class action . . . litigation that are undermining the integrity of the U.S. legal system."<sup>131</sup> On March 9, 2017, this bill was passed by the House and has since been sent to the Senate for review. Should this legislation be enacted, class action procedures would undergo several substantive changes.

In an effort to ease any concerns over unmeritorious complaints, under the new act, a court could not certify a class unless there is a "rigorous analysis of the evidence."<sup>132</sup> Additionally, the bill would address several issues relating to attorney's fee awards. First, it would delay payment of class counsel's fees until after the distribution of monetary recovery to the class.<sup>133</sup> Second, rather than tying attorney's fee awards to the total amount of the class settlement fund, the awards would be limited to "a reasonable percentage" of the payments actually distributed and received by class members.<sup>134</sup> Finally, the bill

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<sup>128</sup> See *Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

<sup>129</sup> *Thorton v. Pinnacle Foods Group LLC*, No. 4:16-CV-00158 JAR, 2016 WL 4073713, at \*3 (E.D. Mo. Aug. 1, 2016).

<sup>130</sup> H.R. 985, 115th Cong. §102 (2017).

<sup>131</sup> *Id.* at §102(1)-(2).

<sup>132</sup> *Id.* at §1716(b).

<sup>133</sup> *Id.* at §1718(b)(1).

<sup>134</sup> *Id.* at §1718(b)(2).

would tie the calculation of fees in injunctive classes to the value of the injunctive relief provided to class members.<sup>135</sup>

There appears to be no end in sight for class action litigation based on food and beverage sales and marketing practices; however, rather than dismissing these cases out of hand, legislators, regulatory agencies, and courts should work together to develop better methods of ensuring that these types of lawsuits become more equitable for both plaintiffs and defendants.

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<sup>135</sup> *Id.* at §1718(b)(3).