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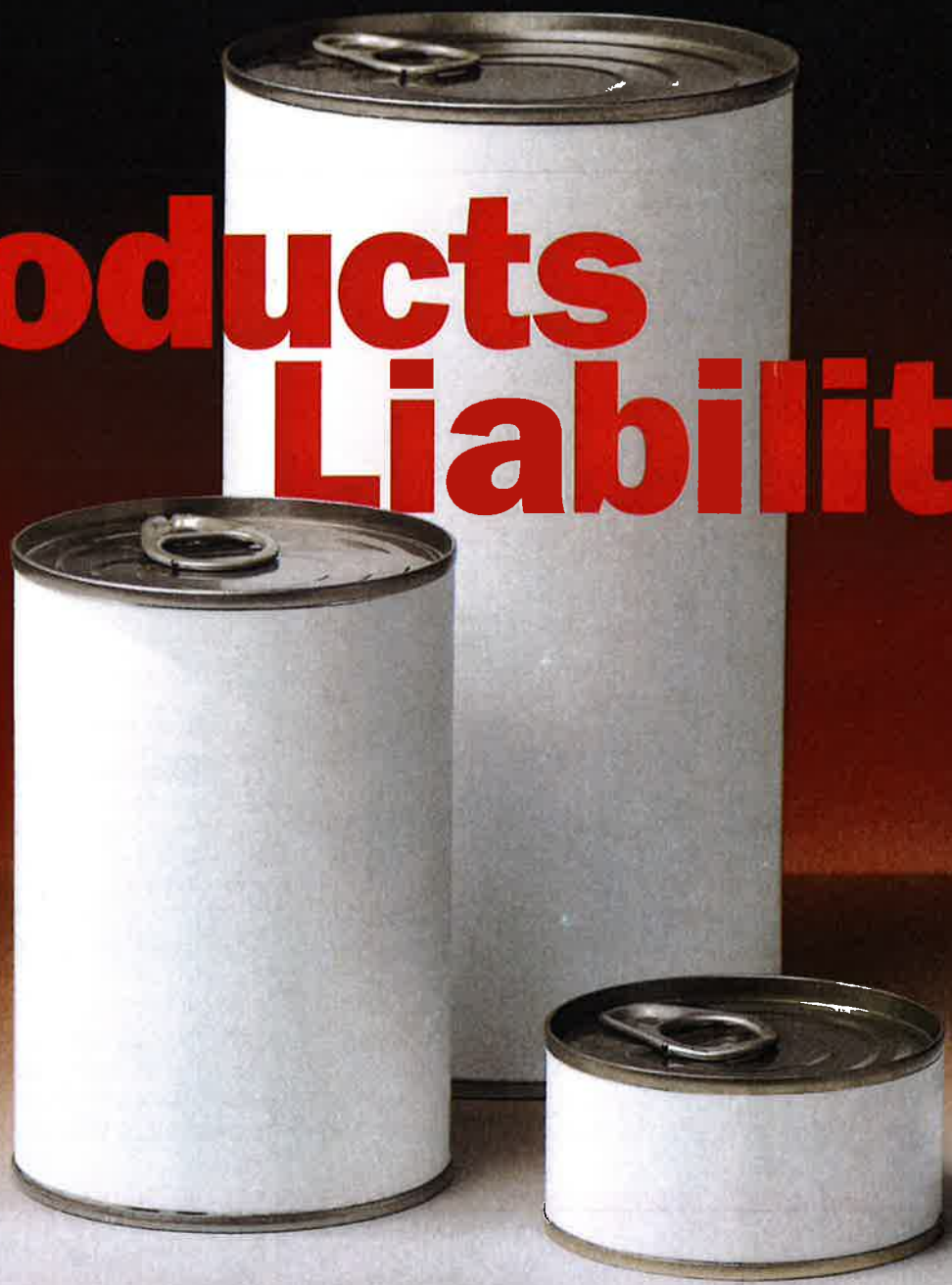
# Trial

November 2014



# Products Liability

What lurks behind the label?



OUR 50Th YEAR

# When 'All Natu Is Anything But

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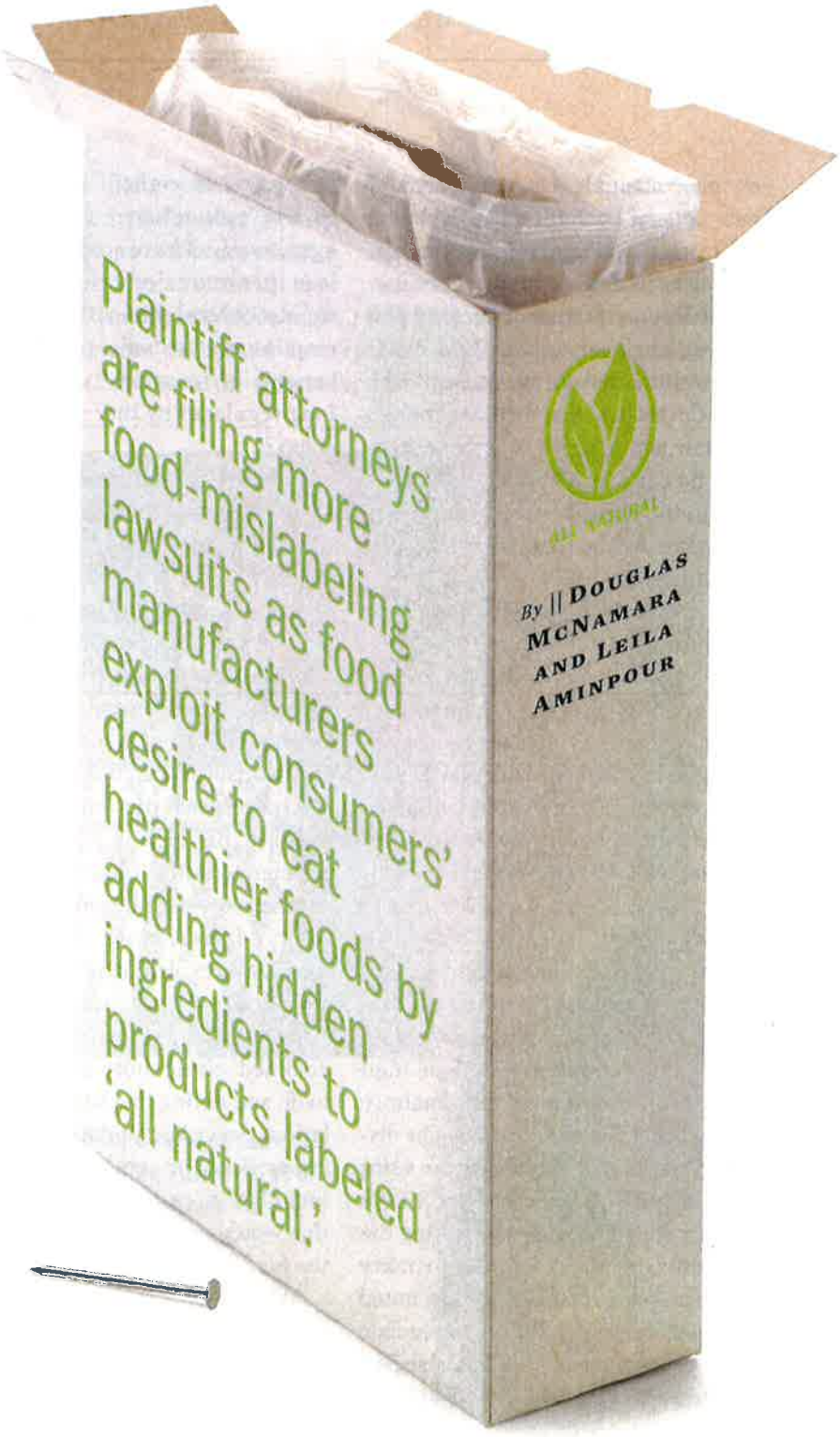


By || Douglas McNamara and Leila Aminpour

Food-mislabeling lawsuits have become more common over the past several years. Consumers concerned with eating healthy are looking for nutritious products made with natural ingredients. Food manufacturers are trying to cash in on this sentiment and advertise their products as "all natural"—sometimes even when they are not.

In food-mislabeling cases, food companies have advanced two principal defenses on their motions to dismiss: federal preemption and primary jurisdiction.[1] If a case survives the motion to dismiss, the next hurdle is class certification, where defendants argue lack of standing, lack of predominance, and the inability to calculate damages. Although plaintiffs are having increasing success surviving the motion to dismiss, class certification may be hampered by the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*.[2] But properly defining the class and using creative damages models can provide some avenues around that.

In moving to dismiss a food-mislabeling claim, defendants have argued that plaintiffs' state law claims are preempted by FDA regulations of the terms chosen and that determining the terms' definition lies solely within the FDA's primary jurisdiction.[3] They rely on the Supremacy Clause and cases asserting that an adverse verdict can have the force of regulation.[4] Under the primary jurisdiction doctrine, a court can refuse to hear a case, determining that "the initial decisionmaking responsibility should be made by the relevant federal agency rather than the courts."[5]

Defendants have succeeded with preemption and primary jurisdiction arguments where the FDA has expressly defined the terms in the food labels at issue. For example, in *Young v. Johnson & Johnson*, the plaintiffs alleged that Johnson & Johnson violated various state consumer protection laws when it misrepresented that its butter substitute, Benecol, contained "no trans fat" and that it was "proven to reduce cholesterol."[6] FDA regulations state that if a

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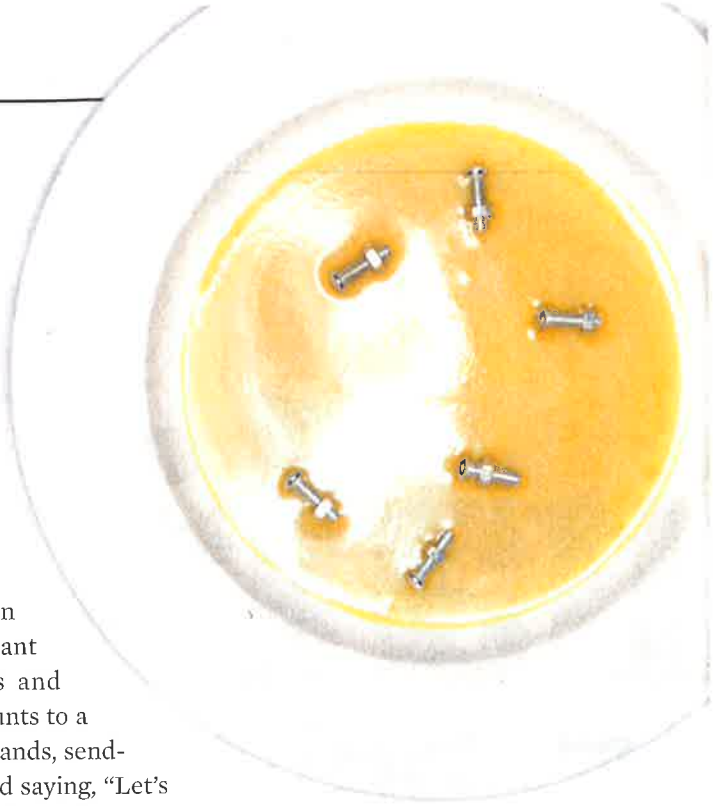

serving "contains less than 0.5 grams [of trans fat], the content, when declared, shall be expressed as zero."[7] FDA regulations also state that cholesterol-reduction claims are permitted on food and beverage labels as long as they are "complete, truthful, and not misleading."[8] The Third Circuit held that "because Young's state law action seeks to impose standards that are not identical to those set forth in the regulations, it is expressly preempted by the [Nutrition Labeling and Education Act]."[9]

But the FDA has chosen not to define descriptors like "all natural" and "natural."[10] Having declined to expressly regulate those terms, courts have permitted plaintiffs to advance their state consumer law claims to address whether foods with genetically modified ingredients or unexpected preservatives correspond with what the reasonable consumer would deem "all natural."

For example, in *Janney v. General Mills*, the plaintiffs alleged the "all natural" label of Nature Valley granola bars was deceptive, because the bars contain nonnatural ingredients, such as high fructose corn syrup and high maltose corn syrup.[11] General Mills sought dismissal, claiming that defining the word "natural" is solely within the FDA's primary jurisdiction.[12] In rejecting the company's preemption and primary jurisdiction arguments, the court noted the FDA's consistent refusal to regulate "natural" on food and beverage labels.[13] Because the FDA had failed to issue express guidance on the descriptor, the court concluded, "any referral to the FDA would likely prove futile."[14]

The decisions sensibly distinguish the applicability of the two defenses. Both preemption and primary jurisdiction defenses are extraordinary incursions of federal power onto state lawmaking and implicate both a state's Tenth Amendment right to pass its own consumer protection laws and a citizen's Seventh Amendment right to file suit when aggrieved. There is a presumption against federal preemption of state law, especially in areas long regulated by the states.[15]

Primary jurisdiction is an especially significant intrusion on a state's and citizen's rights: It amounts to a court throwing up its hands, sending a plaintiff home, and saying, "Let's just wait and see if the federal government ever does anything about this." Because the issue is not as much the science as it is the common legal issue of what misleads the ordinary consumer, primary jurisdiction has been wholly rejected for "all natural" claims.[16]

The federal courts may be growing weary of these cases and have asked the FDA to explain whether genetically modified foods can be called "all natural."[17] But the agency has consistently declined, citing more important work to do and noting that the existing regulations describe "all natural" as "nothing artificial or synthetic . . . has been included in, or been added to, a food that would not normally be expected in the food."[18]

While likely frustrating to food sellers and some courts, the FDA's decision not to offer a definition that becomes both a floor and a ceiling may serve consumers better. One can reasonably suspect that the main reason food companies want the term "all natural" defined by the FDA is so the term can be aggrandized to include ingredients the reasonable consumer would *not* expect to be there. As long as the plaintiff saw the representation, courts will deny motions to dismiss, finding it an issue for the jury to decide what the reasonable consumer would view as "all natural."

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## Class Certification

When opposing class certification, food companies argue that consumers purchase foods for many reasons outside of health claims on the label, such as taste and price.[19] This implicates ascertainability of the class and predominance under Federal Rule of Civil Procedure 23(b)(3).[20]

For example, in *State ex rel. Coca-Cola v. Nixon*, the plaintiffs claimed that Coca-Cola misled consumers into believing that fountain Diet Coke, which included saccharin, was the same product as bottled Diet Coke, which included NutraSweet.[21] The court refused to certify the class, stating that the class was not ascertainable, as it was both overbroad and indefinite. The class was overbroad because it included a large number of uninjured members: The plaintiff's own

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expert witness testified that only 20 percent of consumers would stop consuming fountain Diet Coke if they knew it contained saccharin, meaning that 80 percent of the class was not injured by the alleged misrepresentation.[22] The class was indefinite in that any potential injury was based on each class member's personal dislike of saccharin, a subjective rather than objective criterion.[23]

Another recent development regarding ascertainability is whether class members can prove they purchased the mislabeled product, without having to resort to affidavits. In *Carrera v. Bayer Corp.*, the Third Circuit held that a consumer class alleging misrepresented diet supplements failed where it was unlikely all class members kept their receipts and where the purchase could not be proved by the defendant's sales records.[24] The court held that relying on "self-serving affidavits" to show class membership would violate the defendant's due process rights, as well as those of the absent class members.[25] California federal courts handling food-mislabeling cases have rejected *Carrera* as inconsistent with precedent and incompatible with consumer class actions.[26] Moreover, the defendant's due process rights should extend only to ensuring it does not pay more than it should to the class—defendants lack standing to complain about who actually cashes the check.[27]

Classwide damages will not be accurately assessed if the individual reasons for purchasing the food predominate over the allegedly deceptive descriptor. Thus Rule 23(b)(3)'s predominance inquiry presents the second major battleground in food labeling class actions. California is a frequent venue for food-mislabeling cases, because individual reliance on a misrepresentation or omission is presumed if the class was likely to have seen uniform misrepresentations.[28]

Defendants likely will argue that the Supreme Court's *Comcast* decision added another stop to the predominance inquiry. *Comcast* was an antitrust case where the only damages evidence came from an expert who calculated damages based on a liability theory rejected by the trial court.[29] After *Comcast*, one court decertified a food labeling class action, finding that the plaintiffs failed to present a damages model that would pay only class members who bought the defendant's pomegranate juice due to the health claims and not because of

other attributes such as taste, hydration, or vitamins.[30]

However, other judges have had no problem certifying food-mislabeling cases post-*Comcast*. In *Ebin v. Kangadis Food, Inc.*, the seller of supposedly "100% pure olive oil" was allegedly selling pomace oil at the premium price of pure olive oil.[31] The court found that damages existed regardless of why a consumer bought the oil—even if the consumer wanted pomace oil, he or she overpaid due to the price markup the misrepresentations permitted the defendant to charge.[32] A California federal district court recently certified two class actions asserting "all natural" claims, finding the plaintiffs could use their expert's promised-regression analysis to tease out the materiality of the "all natural" descriptor from other economic factors to determine a classwide damage figure.[33]

These decisions suggest that some of the same survey analyses used in patent cases to decipher reasonable royalty payments, and in antitrust cases to determine overcharges due to price fixing, may soon become common in consumer class actions. Favorable survey evidence can help prove liability by showing that the health claim was material to the ordinary consumer and can help with damages by quantifying how much consumers were willing to pay for the represented benefit. For example, a conjoint analysis, where consumers' preferences are tested and assigned "part-worths," may be one method to isolate how much the "all natural" claim mattered and can be subtracted from the purchase price to create a damages model.[34]

Food manufacturers know "all natural" labels matter to consumers—that is why these terms show up on food and beverage labels in the first place. Before filing a food-mislabeling case, lawyers considering litigation to stop misleading

**MORE ON FOOD MISLABELING**

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*Litigating Tort Cases*, by Roxanne Conlin and Gregory Cusimano
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claims should assess whether the FDA has regulated the particular label claim at issue—and the misleading term's uniformity and materiality. They should also consider how they will prove classwide damages. With limited involvement of federal agencies, the consumer class action may be the best way to deter food manufacturers from exploiting health concerns by mislabeling their products.

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## Notes

1. Some of these lawsuits are also subject to multidistrict litigation. *See e.g. In re Frito-Lay N.A., Inc., "All Natural" Litig.*, 2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013).
2. 133 S. Ct. 1426 (2013).
3. *See Holk v. Snapple Bev. Co.*, 575 F.3d 329, 338–39 (3rd Cir. 2009) (defendant argued unsuccessfully that consumer fraud claims as to "all natural" are implicitly preempted by federal regulations); *see also Janney v. Gen. Mills, Inc.*, 944 F. Supp. 2d 806 (N.D. Cal. 2013) (defendant sought dismissal, arguing any decision regarding the meaning and use of the label "natural" should be made by the FDA).
4. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2619–21 (1992).
5. *Janney*, 944 F. Supp. 2d at 811 (citing *Syntek Semiconductor Co. v. Microchip Tech.*, 307 F.3d 775, 780 (9th Cir. 2002)).
6. 525 Fed. Appx. 179 (3d Cir. 2013).
7. *Id.* at 183 (citing 21 C.F.R. §101.9(c)(2)(ii)).
8. *Id.* at 184 (citing 21 C.F.R. §101.14(d)(2)(iii)).
9. *Id.* at 185; *see also Lam v. Gen. Mills, Inc.*, 859 F. Supp. 2d 1097 (N.D. Cal. 2012) (holding that the plaintiffs' state law claims were preempted because FDA regulations expressly allow a product to be "labeled as 'fruit flavored' or 'naturally flavored' even if it does not contain fruit or natural ingredients"); *Turek v. Gen. Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011) (holding that plaintiffs' claims regarding the labeling of inulin in chewy bars were preempted by the Nutrition Labeling and Education Act).
10. *Janney*, 944 F. Supp. 2d at 812.
11. *Id.* at 806.
12. *Id.* at 810.
13. *Id.* at 811.
14. *Id.* at 815 ("[I]n repeatedly declining to promulgate regulations governing the use of 'natural' as it applies to food products, the FDA has signaled a relative lack of interest in devoting its limited resources to what it evidently considers a minor issue, or in establishing some 'uniformity in administration' with regard to the use of 'natural' in food labels."); *see also Astiana v. Ben & Jerry's Homemade, Inc.*, 2011 WL 2111796 at *15 (N.D. Cal. May 26, 2011) (stating that the FDA has given no firm guidance on the use of an adjective such as 'natural' on a food label); *Lockwood v. ConAgra Foods*, 597 F. Supp. 2d 1028, 1034 (N.D. Cal. 2009) ("Although the FDA acknowledges that consumers are being misled by the use of the term 'natural,' it has declined to adopt any regulations governing this term. This inaction is consistent with an intent not to occupy the field.").
15. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009).
16. *See e.g. In re Frito-Lay N.A., Inc. "All Natural" Litig.*, 2013 WL 4647512 at * 8; *Janney*, 944 F. Supp. 2d at 811–15; *Krzykwa v. Campbell Soup Co.*, 946 F. Supp. 2d 1370, 1374 (S.D. Fla. 2013).
17. *Cox v. Gruma Corp.*, 2013 WL 3828800 at *2 (N.D. Cal. July 11, 2013).
18. 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).
19. *In re POM Wonderful, LLC*, 2014 WL 1225184 at *3 (C.D. Cal. Mar. 25, 2014).
20. *Id.* at *1.
21. *St. ex rel. Coca-Cola v. Nixon*, 249 S.W.3d 855 (Mo. 2008). Federal courts have held similarly. *See e.g. Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006).
22. *Coca-Cola*, 249 S.W.3d at 862.
23. *Id.*
24. *Carrera v. Bayer Corp.*, 727 F.3d 300, 308–10 (3rd Cir. 2013).
25. *Id.* at 310.
26. *See e.g. Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559 at *5 (N.D. Cal. May 30, 2014) (noting *Carrera* is not the law in the Ninth Circuit); *Lanovaz v. Twinings N.A., Inc.*, 2014 WL 1652338 at * 3 (N.D. Cal. Apr. 24, 2014) (holding that reading ascertainability so broadly that it insulates defendants who deliberately eschew recording sales would likely "be the death of consumer class actions"); *Astiana v. Kashi Food Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'"); *Ries v. Ariz. Bevs. USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (holding that consumers' failure to retain receipts does not defeat ascertainability because otherwise "there would be no such thing as a consumer class action").
27. *See e.g. Hilao v. Est. of Ferdinand Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (holding that a defendant's interest is "only in the total amount of damages for which it will be liable," not in how that sum is allocated among class members); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendants' but rather those of the silent class members."); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 699 (S.D. Fla. 2004) (rejecting the defendants' challenge to the plaintiffs' proferred damages methodologies, noting that "assuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation, and such individual damages allocation issues are insufficient to defeat class certification").
28. *See e.g. In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 156–57 (Cal. App. 2d Dist. 2010) (holding that causation may be established on a classwide basis by a showing of materiality; if a material representation is made to the entire class, an inference of reliance arises as to the class).
29. *Comcast*, 133 S. Ct. at 1433.
30. *In re POM Wonderful, LLC*, 2014 WL 1225184 at * 3.
31. 297 F.R.D. 561 (S.D.N.Y. 2014).
32. *Id.* at 571–72.
33. *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559 at *17 (N.D. Cal. May 30, 2014); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901 at *24 (N.D. Cal. May 23, 2014).
34. Conjoint analysis has been used frequently in patent cases. *See e.g. TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1022–23 (N.D. Cal. 2013).