

CD corporate disputes

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In-house counsel and arbitration

EXPERT FORUM

**Building a global information
governance & discovery
programme – leadership &
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HOT TOPIC

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FOREWORD

Welcome to the twenty-eighth issue of *Corporate Disputes*, an e-magazine dedicated to the latest developments in corporate and commercial disputes. Published quarterly by Financier Worldwide, *Corporate Disputes* draws on the experience and expertise of leading experts in the field to deliver insight on litigation, arbitration, mediation and other methods of dispute resolution.

In this issue we present features on the role of in-house counsel in arbitration and on Sweden's modernised Arbitration Act. We also look at: building a global information governance & discovery programme; fighting for jurisdiction; remedies and damages in securities litigation; defeating class certification; disputes in the food & beverage industry; due process paranoia in international arbitration; bias of arbitrators; data protection in international arbitration; expert determinations in complex commercial agreements; cross-border differences protecting confidential information; and more.

Thanks go to our esteemed editorial partners for their valued contribution: Charles River Associates (CRA); FTI Consulting LLP; Shook, Hardy & Bacon; the BVI International Arbitration Centre (BVI IAC); the Chartered Institute of Arbitrators (CIArb); the International Centre for Dispute Resolution (ICDR); and the New York International Arbitration Center (NYIAC).

– Editor

MINI-ROUNDTABLE

MANAGING AND RESOLVING DISPUTES IN THE FOOD & BEVERAGE INDUSTRY



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Timothy S. Snail, PhD is a vice president at Charles River Associates (CRA). For two decades, he has provided expert economic advice and testimony in damages matters in a variety of contexts. He has appeared in antitrust, false advertising, breach of contract and general commercial damages matters in courts and international arbitration proceedings in North America.

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Jim Muehlberger has more than three decades of experience successfully defending class actions and multidistrict litigation throughout the US. The leader of numerous litigation teams, Mr Muehlberger has successfully defended more than 100 individual and third-party payor class actions alleging false advertising, unfair business practices, consumer fraud, product liability and RICO.

CD: To what extent have you seen a recent rise in disputes across the food & beverage sector? Why does the sector seem to be a fertile ground for litigation?

Snail: In the US, there is a rising tide of food & beverage class action litigation in matters alleging false or deceptive advertising and unfair competition. While most of these cases have been filed in California federal district courts, an increasing proportion are now being filed in other jurisdictions, such as New York which now accounts for a third of filings, Illinois, Missouri and Florida. Many of these cases now do not survive motions to dismiss due to courts' stricter scrutiny and companies' efforts to avoid the most disputed labelling and packaging claims. In recent decisions, courts have emphasised the role of the 'reasonable consumer' defence. Although food & beverage classes are rarely certified, the classes often involve millions of putative members. Even small monetary claims per class member can give plaintiffs substantial settlement leverage and encourage case filings. While several courts have accepted plaintiffs' class-wide damages models in granting class certification, at least one commonly asserted model relying on conjoint analysis was recently rejected by the 9th US Circuit Court of Appeals in *Zakaria v. Gerber*.

Muehlberger: The number of food and beverage class actions has been climbing for more than a decade. Our research found that approximately 20 food marketing class actions were filed in 2008; by 2016, the number had jumped to more than 170 new actions per year. Plaintiff's attorneys have targeted this area because they have found it to be lucrative and full of potential plaintiffs – after all, everybody eats, and when a class action is settled, on an individual or class basis, the plaintiff's attorneys often receive one-third or more of the settlement amount.

CD: What types of dispute seem to be common within the sector? For example, what specific trends are you seeing with regard to class actions and product liability cases?

Muehlberger: Fraud and other consumer-protection claims make up a large part of the litigation in the food and beverage sector. Many complaints focus on the claims a manufacturer lists on the packaging, such as whether a product is 'natural' if it contains artificial ingredients, genetically modified organisms or traces of pesticides. Each year seems to bring a new ingredient for plaintiff's attorneys to focus on; recently, for example, we have seen a number of cases focused on whether malic acid is used as a preservative or a flavouring ingredient. Slack-fill cases, in which plaintiffs argue

that opaque packages contain too much empty space, have also been filed consistently over the last few years.

Snail: While food & beverage class actions often challenge product labelling, ingredients or packaging, the nature of cases filed has evolved. The majority of cases filed now involve allegedly false labelling claims, while the proportion of case filings that involve slack-fill claims have ebbed following defendants' numerous victories and their apparent willingness to litigate. On the rise are claims relating to multifunction ingredients, such as malic acid and sorbic acid, trace amounts of allegedly harmful ingredients, such as glyphosate, products made with 'real' ingredients, country of origin, for example with olive oil, or locally-sourced claims, prevalent in coffee and alcoholic beverages, artisanal or 'craft' claims, as seen in beer, and environmentally-friendly claims. We are also seeing an uptick in cases asserting healthy impressions that are at odds with allegedly unhealthy ingredients, such as sugar, following class certification by the Northern District of California in the Kellogg cereals matter. Another trend affecting food companies is a rise in antitrust litigation, for example price-fixing claims involving food products, monopsonistic conspiracy claims involving suppressing prices of inputs to meat processing, and no-poaching provisions in franchise and employment agreements.

CD: Once a dispute has emerged, how should companies go about assessing appropriate methods for resolving it? How important are early case evaluation and potential settlement discussions, for example?

Muehlberger: The glut of cases in the false labelling area can help companies and their counsel predict how courts will receive class action complaints focused on particular ingredients. Many courts have been unreceptive to plaintiff's attorney's arguments, and counsel should be able to identify when a case is worth defending or if a settlement will be the best option. Individual plaintiffs are typically eligible for small amounts in damages, so in putative class actions pertaining to labelling claims and other allegations, fending off class certification can effectively dispose of a case. Opposing class certification becomes top priority if a motion to dismiss is denied.

Snail: When companies and their counsel seek to evaluate the strength of arguments early in a case, they may seek the assistance of expert witnesses or their staff to assess the viability of their economic arguments and those that will likely be put forth by opposing experts given the available discovery materials. Counsel may also engage experts or their

staff to perform preliminary monetary calculations under various assumptions for settlement purposes.

CD: Depending on the circumstances, what methods can food & beverage companies use to calculate the extent of damages connected to a dispute?

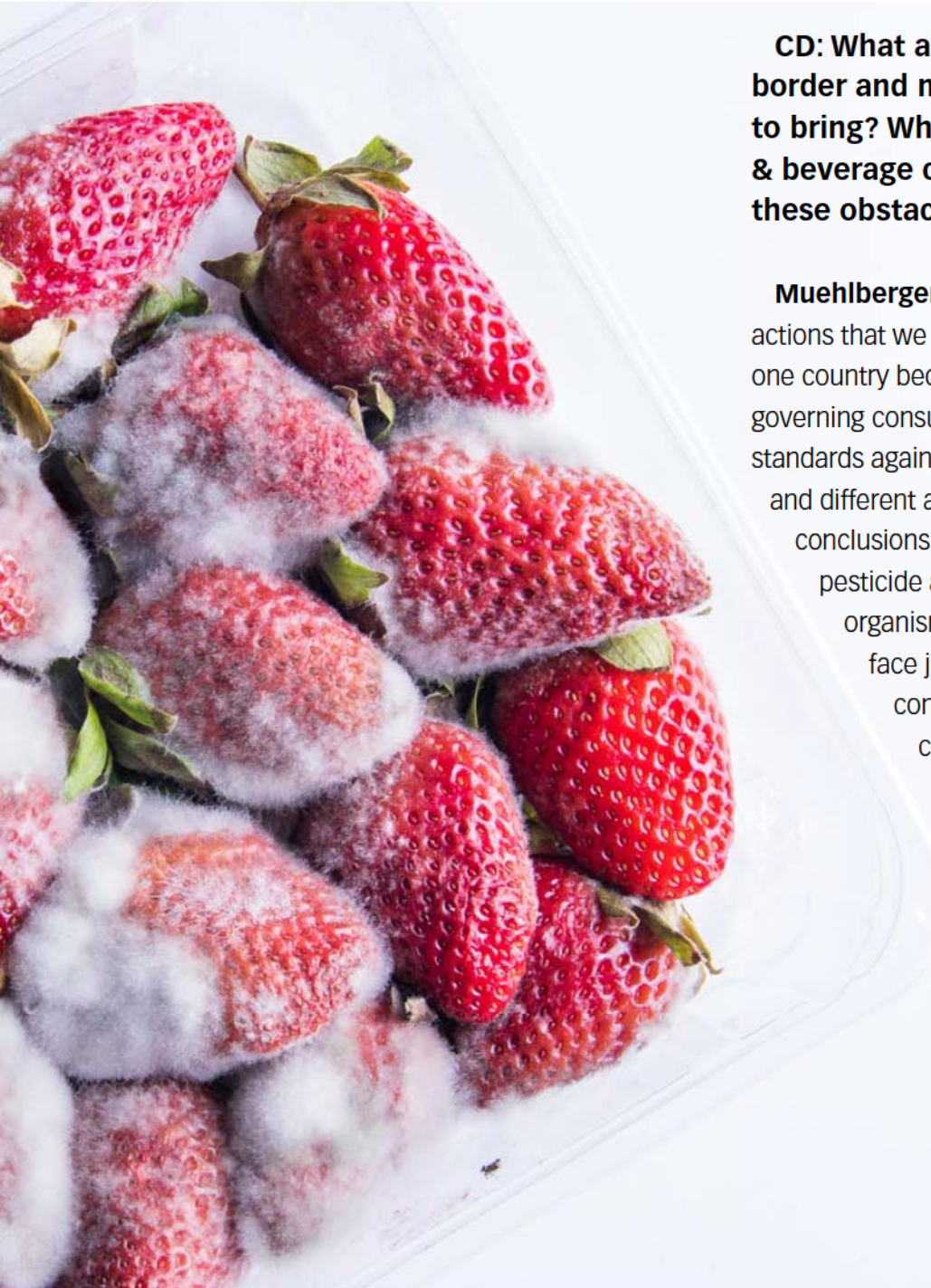
Snail: Food & beverage false advertising class actions most commonly assert three types of damages models. The model viewed as most appropriate for restitution is that the alleged conduct resulted in a 'price premium', with damages reflecting the difference between the price actually paid and the value received. If plaintiffs received the benefit of the bargain, they were not damaged. Plaintiffs have also asserted 'full refund' models. Courts have generally rejected these models, except where the product was worthless or the allegedly falsely advertised aspect was of no value to purchasers. Plaintiffs have also asserted that defendants were unjustly enriched due to the alleged conduct; courts have generally held that these damages, if appropriate, must flow from the alleged misrepresentation. Damages models often rely on survey-based techniques, such as conjoint analysis, or hedonic regression analyses of actual purchases, both of which may have significant limitations for specific applications.

Muehlberger: In many cases involving food and beverages, the products are safe to consume but plaintiffs challenge the accuracy of claims made on the label. As a result, courts have largely rejected plaintiffs seeking full refunds for their purchases of safe, fit-for-purpose food. Many plaintiffs assert that

"The glut of cases in the false labelling area can help companies and their counsel predict how courts will receive class action complaints focused on particular ingredients."

*James Muehlberger,
Shook, Hardy & Bacon L.L.P.*

they paid a premium for a product because of the challenged benefit listed on the label, so they argue for a damages model that calculates the alleged difference between the price charged and what the product is 'worth', which often requires price data from competitors to establish. Use of this model can be problematic – for example, members of a class likely paid varying amounts depending on the retailer and region.



CD: What additional challenges do cross-border and multinational disputes tend to bring? What general steps can food & beverage companies take to manage these obstacles?

Muehlberger: The food and beverage class actions that we have seen tend to stay within one country because the regulatory bodies governing consumable products provide the standards against which a product can be judged, and different agencies have reached different conclusions on issues such as ingredient use, pesticide application and genetically modified organism cultivation. Within the US, we face jurisdictional issues navigating state consumer-protection statutes and the courts' interpretations of them, which can vary widely.

Snail: One area where these issues arise is in mergers and acquisitions. The pace of food & beverage sector M&A activity continues to be brisk as companies follow changing consumer preferences that are moving away from processed foods, the search for sales growth and margin improvement partly

by acquiring innovative start-ups, or the pursuit of strategies of specialisation in particular categories. Many of the largest deals have been cross-border transactions. Multinational food & beverage companies may face challenges in undertaking cross-border transactions affecting their operations in different parts of the world that are viewed under different competition regulatory regimes. The international economic conditions under which deals are taking place have become increasingly complex, with the rise of trade disputes and protectionist policies. Parties involved in cross-border transactions have found it beneficial to engage in careful advance preparation to develop well thought-out strategies and anticipatory deal structures. To address competition regulatory concerns, parties seek the assistance of experienced antitrust counsel and economists with global reach.

CD: In your opinion, at what point in a dispute should food & beverage companies seek expert external advice? What benefits can this bring?

Snail: Litigation is often complex and long lived, creating many unexpected challenges for companies. In the early stages of litigation, counsel often seek the assistance of economic and industry experts to think through potential issues that might arise, identify key types of information that would be needed to carry out analyses, identify potential

fact witnesses and vet information produced to the parties. For example, at the outset of matters involving alleged false advertising and unfair competition, experts may assist companies and their counsel in developing a deeper understanding of their marketing and sales practices and competitors' reactions, determining whether third-party reports and data sources could reduce discovery burdens, ascertaining whether additional survey research is warranted and assessing potential exposure under various factual assumptions and damages theories. Early expert assistance helps ensure that there is sufficient material in discovery to support key arguments and assumptions in the development of reliable testimony.

Muehlberger: Outside counsel can help food and beverage manufacturers comply with governmental agency rules and labelling guidelines before litigation is contemplated. If a potential liability is identified – such as the use of plaintiff's attorneys' targeted ingredient du jour – outside counsel can help track how courts are interpreting complaints related to the ingredient so that case evaluation is simpler if a case is filed against the company later. Many plaintiff's attorneys file cut-and-paste complaints against numerous companies, so observing how courts have received nearly identical complaints can be helpful for manufacturers and their counsel.

CD: What proactive steps can food & beverage companies take to mitigate potential disputes and manage litigation risks?

Muehlberger: Complying with federal regulations is a top priority; in addition to ensuring that federal agencies will not pursue action against a company, compliance can be a defence to complaints that invoke federal regulations or guidelines as grounds for litigation. Many US courts have dismissed allegations that the Food and Drug Administration (FDA) previously addressed; for example, courts refused to hold companies liable for the use of trans fats during the grace period between when FDA banned their use and the date that enforcement of the ban took effect. Outside counsel can help food and beverage manufacturers stay up-to-date on relevant rules and other compliance issues.

Snail: In light of the risks of substantial settlements, penalties and judgments, food & beverage companies must continually reassess their litigation and regulatory risk mitigation strategies. Developing effective strategies may involve considering the unique aspects of the products and

nature of the customers and distribution channels. It may require the efforts of many different individuals, such as scientists, marketing and sales personnel executives and consultants. An important step in the

“In light of the risks of substantial settlements, penalties and judgments, food & beverage companies must continually reassess their litigation and regulatory risk mitigation strategies.”


*Timothy Snail,
Charles River Associates*

process is to identify the types of claims commonly brought against food & beverage companies, for example in consumer class actions, competitor suits or government investigations alleging false advertising or unfair competition. Companies may find it informative to follow trends in litigation, as well as cases involving competitors or those selling similar products or using similar marketing and sales practices. Companies may be advised to proactively review labelling, packaging and supply chain issues that may arise in such litigation.

CD: What do you believe is the outlook for the food & beverage sector over the next 12 months or so? Are there any particular trends and developments likely to make disputes more prevalent?

Snail: There will continue to be high-stakes litigation involving food & beverage companies in areas such as false or deceptive advertising and unfair competition, product liability, breach of warranty claims in the business-to-business context, and antitrust. For example, the false advertising litigation landscape may be influenced by several factors. Changing consumer preferences and innovative technologies are drawing companies into new product categories for which the litigation risk is still relatively unknown. Overlapping with this are planned changes to regulations and laws, such as the new Nutrition Facts panel with a listing of added sugars, bioengineered food disclosures, and anticipated changes, such as the FDA definition of 'natural'. Shifts in cases filed with evolving types of claims, such as pairing ingredient claims with overall impression claims or environmentally-friendly claims,

and the increased use of social media in marketing and advertising may bring companies into uncharted waters. These trends could affect litigation for years to come. We also anticipate that plaintiffs' theories of liability and damages theories will continue to evolve over time in response to food & beverage trends as well as the viability of their arguments in the courts.

Muehlberger: Food and beverage putative class action filings show no signs of letting up. In the US, the FDA has indicated that it is investigating several issues that could prompt plaintiff's attorneys to pursue new lawsuits, including the use of animal-associated terms to apply to plant-derived products such as 'almond milk' or 'veggie burger'. In addition, a recent federal reclassification of hemp has prompted the introduction of many products that contain cannabidiol (CBD). CBD cannot be used in food and beverage products legally yet, but many companies describe the effects of its use in personal care products in terms likely to be challenged in court; in fact, several companies have already received FDA warning letters about the benefits they promise from their products. 



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Charles River Associates (CRA)

Charles River Associates (CRA) provides independent economic and financial analysis of litigation matters; guides businesses through critical strategic issues to become more profitable; and advises governments and regulatory agencies on the economic impact of policies and regulations. Clients depend on us for rigorous, fact-based analysis, deep knowledge of multiple industries, and objective, tailored solutions to complex problems. Headquartered in Boston, the firm has offices internationally.

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