ALM | LAW.COM

THE AM LAW LITIGATION DAILY

Litigators of the Week: In Class Action Trial Over PediaSure Label Claims, a Complete Defense Verdict for Abbott

By Ross Todd

February 28, 2025

Our Litigators of the Week are **Gregg LoCascio**, **Michael Glick** and **Tracie Bryant** of **Kirkland & Ellis**, who defended Abbott Laboratories in a rare consumer class action tried to a jury.

The company was accused of misleading California consumers with health and nutrition claims on the labels for PediaSure—a nutritional supplement for children—because of the amount of added sugar in the products.

Last week, after a 17-day trial in Santa Clara County Superior Court, jurors sided completely with Abbott. Not only did they find that the challenged label statements were not false or misleading, but they also found the plaintiffs hadn't relied on the label statements when making purchasing decisions and couldn't show they were harmed by their purchases.

Lit Daily: What is PediaSure? And what exactly was Abbott accused of doing here?

Tracie Bryant: PediaSure is an oral nutritional supplement designed for kids who are behind in growth or who have nutritional shortfalls. Despite PediaSure's robust nutritional profile—each bottle has 27 vitamins and minerals along with a balanced mix of carbohydrates, protein and fat—as well as an undisputedly accurate ingredient label, the named plaintiffs alleged that certain phrases on the PediaSure label, such as "Complete, Balanced Nutrition" and "Nutrition to help kids grow" were misleading. All of plaintiffs' theories ultimately came down to their belief that the product's added sugar content made PediaSure unhealthy and, thus, rendered misleading any label claim that referenced "nutrition." In reality, as we showed at trial, Abbott has consistently reduced and accurately disclosed PediaSure's sugar content, which is necessary to provide carbohydrates and acceptable taste given the protein, vitamins and minerals in the product, and plaintiffs' core accusation that PediaSure is unhealthy was just plain wrong.

What was at stake here for Abbott? And how were you able to narrow the potential damages before this case went to trial last month?

Gregg LoCascio: Abbott prides itself on its scientific research and development of innovative nutrition products, so, reputationally, it was critical to beat back the plaintiffs' allegation that

PediaSure was in any way unhealthy for kids. Given PediaSure's position as the market-leading oral nutritional supplement that is most often recommended by pediatricians, the financial exposure under plaintiffs' various theories was also not small.

Michael Glick: That's a kind way to put it. Plaintiffs' damages theories swung for the fences, presumably to put added pressure on Abbott to settle. Plaintiffs' primary damages demand throughout the case was a full refund—that is, complete restitution of all California PediaSure sales over a nine-year period, which amounted to more than $250 million. On top of that, plaintiffs sought punitive damages in light of their fraudulent labeling allegations, plus a demand that Abbott include a bold warning label on every PediaSure bottle highlighting supposed risks of consuming the product. However, right before trial we successfully eliminated plaintiffs' full-refund theory, as well as their punitive damages and warning label demands, at summary judgment. Our partner **T.J. McCarrick**, who was another key member of this team following his return from a Ninth Circuit clerkship in 2020, led the summary judgment briefing and masterfully presented the damages issues at oral argument, with the court's opinion fully adopting many of his arguments. That decision ostensibly left plaintiffs with only a "price premium" damages theory, although as late as the morning of closing arguments, Tracie had to argue a motion to shut down plaintiffs' attempts to seek even greater damages and inject new, undisclosed damages theories into the trial.

How did this matter come to you and the firm?

LoCascio: Kirkland and each of us have been fortunate to work closely with Abbott on many matters for many years. I've personally defended Abbott on advertising challenges to its products for more than a decade, including defeating class certification on previous California claims against Ensure and Zone-Perfect bars. So when this suit was filed back in 2019, our familiarity with the business and prior success likely positioned us well for the work. I have a pretty clear recollection of when this matter came in, because we worked very closely with Abbott's in-house litigators on a key initial strategy decision in the case: to not invoke our right to remove the case to federal court and stay put in California state court in San Jose. For a variety of reasons over the course of the nearly six-year case, that decision turned out to be the right one.

Who was part of the team and how did you divide the work—both at trial and in motions practice?

Bryant: The three of us and T.J. split the 13 trial witnesses, eight of which were experts. Mike and I cross-examined the two named plaintiffs, and with T.J., we split the Abbott fact witnesses and six of the experts. Gregg handled what turned out to be a multi-day voir dire, opening statement, closing argument, as well as the cross-examinations of plaintiffs' medical expert, Dr. Robert Lustig, and consumer survey expert, Dr. J. Michael Dennis. Plaintiffs called Dr. Lustig, a well-known author and outspoken advocate against sugar consumption, as their leadoff witness, and Gregg's cross-examination of him helped set the tone for the entire trial.

Glick: We were also fortunate to have an all-star cast of associates, **Gabi Durling**, **Alyssa McClure**, **Emily Snoddon**, **Riley Satterwhite** and **Amanda Maze-Schultz**, who powered through not only the 17-day trial, but also the frenzied run-up to trial, which included full merits discovery,

summary judgment, expert briefing and all trial prep over an eight-month period.

LoCascio: Gabi, Alyssa and Emily deserve extra props for arguing motions in limine, in addition to key witness and voir dire prep and pulling together a closing deck that anticipated everything that plaintiffs threw our way.

Bryant: Indeed. Talk about three outstanding, next-generation trial lawyers!

Often in a case like this, when a class is certified, the defendants settle. Why did Abbott press on with this case all the way through trial?

LoCascio: That is certainly the typical outcome and, presumably, what plaintiffs were banking on here. Plaintiffs hired the very same experts from many of the prior California added sugar cases and their counsel referred to those matters and their settlements from their initial notice letter all the way through trial. Obviously, taking any defense case to trial always carries risk, but Abbott's legal team is very hands-on and we had regular strategic discussions about each side's trial strengths and weaknesses over the course of the case. Ultimately, Abbott's firmly held belief that PediaSure delivers complete, balanced nutrition to help children grow and that its labeling was truthful and accurate went a long way in their decision to take the case to trial. That conviction turned into a core theme of our case. As I said during both opening and closing: "Abbott has waited almost six years for a jury to hear the evidence in this case. Because when you haven't done anything wrong, you stand up for your product and defend yourself."

What were your key trial themes and how did you drive them home with jurors?

Glick: First and foremost, our task was to convince the jury that PediaSure is, in fact, a healthy product, particularly for the children for whom it is primarily intended. Our lead fact witness and corporate representative throughout the trial was a registered dietitian nutritionist who had worked on PediaSure and other nutritional products for many years and was also responsible for ensuring its labels met FDA and other regulatory requirements. Afterwards, the jury told us they found her testimony critical and credible, both on direct and cross. We also called as one of our experts a pediatrician and past president of the American Academy of Pediatrics, who explained her use of the product with her patients. In closing, we emphasized that the jury had heard from only one pediatrician and only one nutritionist, who both supported Abbott, while plaintiffs based their case on a non-practicing doctor and admitted "anti-sugar crusader."

Bryant: The other primary theme we played up was reminding jurors that this is a product purchased and used in the real world—by families who are often purchasing these products on the recommendation of a pediatrician (as opposed to perusing product labels in supermarket aisles) and for use with children with nutritional gaps that are often picky-eaters. As Gregg told the jury during opening, the case was "not a referendum on whether kids should eat more kale and less cookies"; it was about whether specific labeling statements misled reasonable consumers and how PediaSure stacks up against other things kids eat in the real world. We reinforced that theme with nearly every witness throughout the trial and Gregg again emphasized it in his closing.

You called out the fact that one of the named plaintiffs here had been involved in two prior class action settlements and the other was a lawyer. Did you worry at all about coming off as too aggressive? These were, after all, mothers

who claimed they had been misled about something they bought for their children.

LoCascio: That was something we thought about a lot, particularly how to get our points across and raise issues with the plaintiffs' credibility without alienating the jury. Those cross-examinations required the right tone and exceptional touch. Recognizing each of our strengths and styles, early in our trial planning I came right out and said that I thought Tracie and Mike should do the cross examinations of the two named plaintiffs.

Glick: No pressure, right Tracie? We made a conscious effort not to attack the plaintiffs themselves, but rather directly but respectfully make clear to the jury how their allegations were not credible. Put simply, in a false labeling case where the jury is to apply a reasonable consumer standard, we took the position that the plaintiffs' stated reliance on these statements and the alleged misrepresentations about PediaSure were anything but reasonable. As just one example, both plaintiffs claimed to vividly remember relying on a statement in relatively small print on the side of the PediaSure label when purchasing the product, yet claimed to have paid no attention to the far larger FDA-mandated Nutrition Facts panel right next to that statement that disclosed the actual amount of sugar in every bottle. Yet one of the plaintiffs had previously sued another food company over an ingredient issue and the other was a lawyer who had worked on regulatory and labeling issues for her employer. Ultimately, their story never struck us as credible, and I think the jury agreed.

Bryant: All three of us have kids. We get it—as parents we are all just trying to do what's best and get our kids fed on any given day. But because the plaintiffs claimed that they were duped while supposedly also being careful to avoid sugar in their kids' diets, we did have to also undermine their credibility by putting in evidence about their other grocery store purchases. However, we knew that we had nothing to gain by trying to shame the plaintiffs for their other dietary decisions, so we tried hard to stay away from anything close to that. Despite that, we were unsurprisingly accused during plaintiffs' closing argument of "attacking" the plaintiffs. When we spoke with the jurors afterwards, those claims did not resonate and they said that because plaintiffs had brought this case, they had no reservations about our polite, but pointed, questions during cross-examination.

What can other defendants take from how Abbott litigated this case?

Bryant: It's easy to say after it turns out well, but don't underestimate the ability of smart jurors to see through plaintiffs' rhetoric and accusations about corporate greed, provided you have the facts to push back against those allegations. We were fortunate to have a smart and attentive jury. Although the plaintiffs tried to argue that Abbott didn't care about kids and was only interested in their bottom line, we emphasized from voir dire throughout the trial that companies' decisions are really the actions of their employees. Many jurors in the venire and several who ended up on the jury worked for large companies themselves. We showed how Abbott's employees cared about science and worked hard to develop healthy products that were below all industry and governmental guidelines on sugar intake. And despite the plaintiffs' repeated efforts to cherry-pick a word or phrase out of an internal Abbott document, we had our witnesses explain the context and show how plaintiffs were mischaracterizing the facts. Preparing our witnesses to

tell Abbott's story and remain credible on cross-examination was key in winning that credibility battle at trial.

LoCascio: I'd add that the early case analysis and jury research we did with the client on this case was extraordinarily useful. There aren't that many data points on consumer class actions being tried to a jury, but they present a host of interesting issues to consider when it comes to jury selection and trial themes. When dealing with a food product, recognizing that every juror has real world experience reading labels, or not, at the grocery store and how to factor that into your trial presentation could probably be its own CLE course, but I'd say those juror experiences can be very helpful to the defendant in certain cases.

What will you remember most about this matter?

Glick: That Abbott had the faith in our team to take this long-running case the distance and to defend itself before a jury. Once consumer class actions like this are certified, there can be tremendous pressure to settle, but Abbott never wavered. I've had great fortune to work on many cases with Abbott over the past decade-plus and in particular in the past few years. Many companies talk about having the conviction to try difficult cases, but Abbott is serious about it and we lived that here. They were serious about defending their product and we were so glad to be able to help them.

Bryant: I started working on this matter six years ago when I was still an associate so, in a lot of ways, I grew up on this case. Given that, I have a lifetime of memories—and a lot of "firsts," both professionally and strategically as we figured out how to try a case like this in an ever-changing world. It's hard to choose just one moment. But, like most trial lawyers, the moment you hear the verdict has been playing on a loop in my mind since it came back. There were several questions on the verdict form but the first question was a good indication of the final outcome. The jurors filed back in with really impressive poker faces, the judge reviewed the form, then handed it to the deputy to read. My sister who teaches breathwork would cringe at this but I'm pretty sure I wasn't breathing until they read the first answer. It's hard to describe the feeling at that moment but a lot of it was just overwhelming gratitude. I was grateful to the client for believing in our team; to Gregg and Mike for believing in me; for everyone's dogged commitment to the case and hard work over many years; to my family for supporting me over the years; and to so many more. It's a great feeling!

LoCascio: It may seem cliché, but I have to say the team; particularly the exceptional courtroom lawyering of my three partners, Mike, Tracie and T.J., each of whom I got to proudly watch handle more witnesses than I did at trial. I remember when each of them joined Kirkland as new associates and they have since grown into three incredibly talented trial lawyers, each with very different, but very effective courtroom styles. While we worked on this case for almost six years, the last six weeks working shoulder to shoulder together was an experience I won't forget. And, of course, capping it off with a win makes those memories all the more enjoyable.