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CONSUMER ACTIONS

Food Litigation: An Evolving Landscape


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As predicted in July 2010,[1] the number of lawsuits alleging unsubstantiated or inaccurate "health claims" on food products has continued unabated. There have been well over 70 lawsuits filed in the past two years, and the number of actions climbs by the week. The nature of these claims and plaintiffs' reliance on generic state consumer fraud and consumer protection statutes, as well as common law doctrines such as breach of warranty and negligent misrepresentation, remains unchanged. However, there is one marked change worth noting.

Two years ago, the movement against health claims was almost exclusively the province of consumer advocacy groups. Today, the consumer advocacy groups are rivaled by increasingly active federal regulators and state attorneys general. The Food and Drug Administration and the Federal Trade Commission, responding to the Obama administration's commitment to increased federal government coordination in regulating food and beverage products, have embarked on an unprecedented level of interagency collaboration in regulating the food industry.

Those agencies' coordinated efforts, as well as their independent—and at times inconsistent—actions, have not only emboldened the plaintiffs' bar, but also complicated an already unclear litigation environment. In addition, state attorneys general have emerged as major players in the area of food health claims. Their investigations are also spurring copycat consumer class actions. In this increasingly uncertain and litigious climate, now more than ever, food manufacturers need to develop and implement sophisticated, multifaceted strategies to minimize the varied risks to their important consumer brands.

The FDA and FTC Team Up

Soon after he was elected, Obama made increased collaboration and coordination among the various agencies that oversee the food industry a priority, especially with respect to health claims in advertising. As a result, the FDA is no longer the only federal agency scrutinizing food manufacturers' health claims. The FTC has entered the fray as well and is now working hand-in-hand with the FDA.

The FTC has proven to be particularly aggressive. Within the last two years, numerous FTC settlements and at least one proposed consent order have specifically required FDA approval of health claims made on labels. For example, in July 2010, Nestlé HealthCare Nutrition Inc. settled the first deceptive advertising claim brought by the FTC. The FTC had challenged Nestlé's claims that its Boost Kid Essentials children's drink would reduce the risk of colds, flu, and other upper respiratory tract infections.

Under the terms of the settlement, Nestlé agreed to stop making these health claims unless the labeling is specifically approved by the FDA under the Nutrition Labeling Education Act (NLEA). Nestlé also agreed to stop claiming that Boost will reduce children's sick days and the duration of acute diarrhea in children "unless the claims are true and backed by at least two well-designed human clinical studies." Finally, the settlement prohibits Nestlé from making any claims about the health benefits, performance, or efficacy of any probiotic or nutrition drink it sells at retail "unless the claims are true and backed by competent and reliable scientific evidence." The detailed requirements of this settlement, demanding both FDA approval and specific scientific support for particular health claims, were unprecedented and illustrate well the new aggressive role that the FTC is playing in this arena.

Fighting back against this increased level of FTC involvement proved unwise in at least one instance. Two months after Nestlé's July 2010 settlement with the FTC, POM Wonderful sued the FTC in federal court claiming, among other things, that the agency was violating long-standing FTC rules and regulations and POM's First Amendment rights by setting such heightened scientific prerequisites for certain health claims. Just two weeks later, the FTC hit POM with an administrative complaint asserting that POM's claims that its pomegranate juices treat heart disease, prostate cancer and erectile dysfunction are false and unsubstantiated. The FTC's complaint included a proposed order that would require POM to gain approval from the FDA before it put any health claims on its products. The court heard closing arguments on March 6, 2012, and an Initial Decision in this matter is due by May 17, 2012.

Not surprisingly, the plaintiffs' bar is paying attention to the more stringent scientific

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requirements being extracted by the FTC, and multiple class action lawsuits have resulted. For example, a few months after a settlement with Kellogg Company concerning its Frosted Mini-Wheats cereal,[2] a class action lawsuit was filed against Kellogg for false and deceptive advertising and breach of warranty. Plaintiffs made the same basic factual allegations as the FTC complaint. *Dennis v. Kellogg*, No. 3:09-cv-01786 (S.D. Cal.). That case settled in October 2010 for a total of $10.5 million.

Similarly, immediately after the FTC settlement with Nestlé, two class action lawsuits were filed (and later consolidated) in New Jersey federal court alleging violations of the New Jersey Consumer Fraud Act, negligent misrepresentation and breach of warranty. *Scheuerman v. Nestlé Healthcare Nutrition*, No. 2:10-cv-03684 (D.N.J.). In August 2011, plaintiffs survived a motion to dismiss by Nestlé and the case is ongoing. Finally, within two months after the FTC's complaint was filed against POM, there were nine federal class actions pending against POM arising out of the same basic facts, as well as three similar state court cases. The federal cases have since been consolidated before the Judicial Panel on Multidistrict Litigation. MDL No. 2199, *In re: POM Wonderful Mktg. and Practices Litig.*

While the FTC has become decidedly more aggressive, the FDA has purposefully declined to involve itself on at least one hot "health claim"—specifically, the issue of whether high fructose corn syrup (HFCS) qualifies as a "natural" ingredient. The FDA had already flip-flopped on this issue in 2008, first stating that foods containing HFCS cannot properly be labeled as "natural" and then backtracking to say that HFCS might be appropriately considered "natural," depending on how it is produced. But in August 2010, the District Court for the District of New Jersey put the FDA on the spot when it stayed *Holk v. Snapple Beverage*, to seek official guidance on the issue from the FDA. No. 07-3018, 2010 L 3167533.

Two other federal district courts followed suit asking the FDA to issue an opinion on HFCS. *Ries v. Hornell Brewing*, No. 10-1139 (N.D. Cal. Aug. 24, 2010); *Coyle v. Hornell Brewing*, No. 08-2797, 2010 WL 2539386 (D.N.J. June 15, 2010). On Sept. 21, 2010, the FDA declined to take a position on the issue, stating that proceedings to define the term "natural" do not fit into the agency's priorities of improving food safety and Americans' eating habits. The FDA's refusal to definitively rule on this issue has increased the likelihood of inconsistent judicial construction of the term "natural" by the courts, and frustrated attorneys and judges alike.

State Attorneys General

In addition to the risk of consumer class action lawsuits stemming from FDA and FTC regulatory actions, food manufacturers must also understand the high stakes involved in state attorneys general involvement in label enforcement. While The Dannon Company Inc. was busy in 2010 settling class action litigation concerning the health benefits of its DanActive yogurt drink and Activia yogurt products (for $45 million),[3] various state attorneys general were busy investigating those same claims. In December 2010, Dannon entered into a settlement with 39 state attorneys general, agreeing to pay an additional $21 million in the largest multistate attorney general settlement ever made with a food manufacturer. (A victim of the three-pronged attack, Dannon also was hit with claims by the FTC, which it also settled.)

While in Dannon's case, the attorney general investigations followed the class action litigation, attorney general investigations can also spur on separate class action litigation. In one such instance, the Oregon attorney general's office investigated Kellogg for claiming that its Rice Krispies cereal was fortified with nutrients and antioxidants to help support human immune systems. Kellogg agreed to settle the Oregon attorney general's claims by removing the statements from the packaging, discarding two million boxes of cereal that contained them, and donating 500,000 boxes of cereal to food banks. Following the Oregon attorney general claims, Kellogg was hit with multiple class action lawsuits alleging that Kellogg's statements about the health benefits of Rice Krispies were false and misleading. Those suits were consolidated in the Central District of California and, in January 2011, Kellogg agreed to pay $2.5 million to consumers and to donate $2.5 million worth of its products to charity to settle the claims. *Weeks v. Kellogg*, No. 09-cv-08102 (C.D. Cal.). This significant settlement payment was made to dispose of cases that were prompted by a single state attorney general's investigation.

Integrated Team Strategy

What was true in July 2010 is doubly so today. Food companies face a multi-pronged attack on their labeling and branding practices, and must combat not only the more traditional class action activity, but also increasingly aggressive activity from the FTC and state attorneys general. Best practices for food companies in this new landscape demand an integrated team approach, where marketing plans, public policy, lobbying activity, and relationships with state attorneys general are considered in one consolidated strategy. Such collaboration across disciplines will enable food companies to navigate this increasingly difficult area and maintain the good will and consumer recognition that they have worked hard to achieve for their brands.

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1. "Food Litigation: The New Frontier," *New York Law Journal* (July 9, 2010).

2. In April 2009, to settle claims asserted by the FTC, Kellogg agreed to pull its advertising campaign claiming that Frosted Mini-Wheats cereals can improve kids' attentiveness. In June 2010, Kellogg was further prohibited from making claims about the health benefits of any of its foods unless the claims are backed by scientific evidence and are not misleading.

3. "Food Litigation: The New Frontier," *NYLJ* (July 9, 2010).