Food and Personal Care Product Litigation and Regulatory Highlights – March 28, 2022

Kristi L. Wolff, Jaclyn M. Metzinger

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This month's update kicks off spring with a *Best in Show* throwback ad comparing dog flea and tick medication, pivots to claims for survivalist ready-to-eat meals (don't even try to act like you saw that coming), highlights FDA's recently-issued voluntary recall guidance, provides a food court update on the latest ingredient class actions and cleans up with a pet food win in the Tenth Circuit on "fresh" and "regional" claims. Call it March madness because there's a lot going on. Let's get started…

NAD

Best in Show NAD evaluated whether flea and tick medications were fairly compared via a television advertisement reminiscent of the beloved film *Best in Show*. The challenged ad featured a comparison of NexGard and Bravecto in a dog show setting. The host announces: "Welcome. It's time to see which chew is best in show for long-lasting flea and tick protection." As shown below, a disclosure appears on the bottom the screen stating "BRAVECTO Chews for Dogs kills fleas, prevents flea infestations, and kills ticks (black-legged tick, American dog tick, and brown dog tick) for 12 weeks. BRAVECTO Chews also kills lone star ticks for 8 weeks. NexGard is approved for 30 days." By week 12, the host declares Bravecto the "clear winner".

NAD determined that, viewing the commercial in its entirety, the commercial blends duration of action claims with a comparative superiority message and that one reasonable interpretation of the commercial is that Bravecto is superior to NexGard in protecting dogs from flea infestations. Further, NAD determined that the presentation and plain language of the disclosure were inadequate to explain that dosing intervals were the basis for the product comparison, not overall efficacy. NAD recommended discontinuing the advertisement. Merck is appealing to the NARB. For more on this

"apples to oranges" comparison and, better yet, a picture of cute dogs, check out Gonzalo Mon's blog post and podcast episode here.

Not #1 NAD reviewed baby wipes testing to determine whether Water Wipes could substantiate claims that its wipes were the "#1 wipe against the causes of diaper rash" and a similar "clinically proven" claim. As support for its claims, the advertiser relied on the results of its "Baby Skin Integrity Comparison Survey" (BaSICS Study), involving home use tests of three baby wipe brands on infants from birth to eight weeks old. NAD identified several concerns about the design of the BaSICS Study, including:

- The study universe was too narrow to support the broad #1 claims;
- The study's failure to attempt to control for the use of skin creams and lotions to treat infants with diaper rash, which could significantly impact the role of the wipes in preventing diaper rash; and
- The study did not attempt to blind the branding and marketing on the packaging itself, which could have biased the survey participants' responses.

Based on this, NAD found that the "#1" and "clinically proven" claims were unsubstantiated.

Delivering Social Justice? NAD initiated a challenge against app-based delivery service DoorDash relating to the following claim: "We are donating $1 million, with $500,000 going to Black Lives Matter and $500,000 to create a fund to be directed by the Black@DoorDash ERG (Employee Resource Group) towards state and local organizations." In response to the inquiry, DoorDash provided documentation that substantiated donations exceeding $1 Million to various state and local organizations pursuant to its Black@DoorDash ERG. NAD determined that the documentation adequately substantiated the claim.

These kinds of campaigns, frequently called commercial co-ventures, are subject to various state registration and bonding requirements in addition to advertising laws. For more resources on these campaigns, check out our commercial co-ventures resources.

Sign of the Times And finally, if your tastes tend more toward preparing for the end of days, check out NAD's decision regarding advertising for survival food kits. In a challenge that explores a range of advertising issues, one among them is whether the name of the meal kit – "3-Month Survival Food Kit" or "1-Year Survival Food Kit" conveys any messages about serving size, caloric content, or adverse effects of consuming the food for the stated period. NAD determined that no implied claims were conveyed by the names alone but suggested that the advertiser modify disclosures regarding the number of calories offered in each kit to ensure that they are clear and conspicuous.

This decision stands in contrast to FTC's Dietary Supplements: An Advertising Guide for Industry, which explains that product names can convey claims. See the Identifying Express and Implied Claims section here.

FDA + USDA

Updated Voluntary Recalls Guidance FDA published *Initiation of Voluntary Recalls under 21 CFR Part 7, Subpart C*, which is an update to draft guidance issued in April 2019. The guidance describes steps that all FDA-regulated firms should take to prepare for recalls, including identifying appropriate personnel and training them on their responsibilities, identifying reporting requirements, use of adequate coding, and maintaining records. In addition, the guidance discusses procedures relating to

initiating and executing a recall and how FDA works with recalling firms. Comments may be submitted here.

PFAS FDA issued new test results regarding PFAS levels in a range of foods and shared an update on the voluntary market phase-out of certain short-chain PFAS used in food packaging. From the agency's summary: Results from the FDA's most recent survey of the general food supply show that 89 of 92 food samples had no detectable levels of PFAS. Three seafood samples—tilapia, cod, and shrimp—had detectable levels of PFAS. The food samples analyzed were collected for the FY2021 regional collection of the Total Diet Study (TDS) and are the fifth set of general food supply testing done by the FDA. To date, there have been 10 samples with detectable PFAS out of 532 TDS samples the FDA has tested since 2019. Based on the best available current science, the FDA has no scientific evidence that the levels of PFAS found in the TDS samples tested to date indicate a need to avoid any particular food.

- Alleged presence of PFAS in non-food products is being used as the basis for false advertising lawsuits involving a range of cosmetics and even underwear. Check out this link for a few recent examples. Companies seeking to evaluate risk around PFAS should look carefully at ingredients and warning language to determine whether disclosures are adequate.
- On a related note, our friends at Kelley Green Law Blog wrote about EPA's recent release of PFAS data and plans to eliminate a de minimis exemption for PFAS here.
- In addition, Washington state is considering legislation to ban PFAS and other chemicals from cosmetics and personal care products. SB 5703, the Toxic-Free Cosmetics Act, would ban PFAS, phthalates, and formaldehyde, among other chemicals. If enacted, the new law would become effective in 2025.

Tech Talk As part of FDA's New Era of Smarter Food Safety initiatives, on March 21, the agency will air the third episode in a quarterly podcast series which focuses on the development and use of new technologies to accelerate prevention of food safety problems and speed responses to foodborne-illness outbreaks.

Climate Smarts USDA announced details of the Partnerships for Climate-Smart Commodities opportunity on February 7, 2022. Through this new program, USDA will finance partnerships to support the production and marketing of climate-smart commodities via a set of pilot projects lasting one to five years. Pilots will provide technical and financial assistance to producers who implement climate-smart practices on a voluntary basis on working lands; pilot innovative and cost-effective methods for quantification, monitoring, reporting and verification of greenhouse gas benefits; and market the resulting climate-smart commodities.

- As we wrote about last month, climate-beneficial claims are getting an are likely to continue to get a significant amount of attention from consumers, regulators, and the plaintiffs' bar.

FTC + State AGs

Looking to Make Money? Whether it's food or package delivery, sale of cosmetics or dietary supplements, or another interest-earning venture, the FTC is concerned about potentially deceptive earnings claims. To that end, the FTC released an Advanced Notice of Proposed Rulemaking (ANPR) on earnings claims as it embarked on a mission to adopt a rule that would give the FTC, in its own words, "an important new tool to return money to consumers injured by deceptive income claims, and to hold bad actors accountable with civil penalties." Importantly, the ANPR also suggests that

the rule could do more than just change the FTC's enforcement tools and also seek to substantively change the standard that has long been applied in analyzing earnings and lifestyle claims. Interested parties will have 60 days from publication in the Federal Register to submit comments and respond to the FTC's questions and requests for evidence. Check out the full blog post and podcast from Donnelly McDowell and John Villafranco to learn more about past enforcement and where the agency is headed.

But Are You Who You Say You Are? The State AG's joined the FTC in expressing concern about impersonation scams such as deceptive mail solicitations and phone calls that appear to come from government agencies. Our State AG team analyzes the multi-state efforts and what's likely to happen here.

Class Action Update

The courts served up a bit of a mixed bag in February, deciding a number of dispositive motions in the voluminous "ingredient" class action docket.

Starting with the dismissals: A New York federal court dismissed a lawsuit alleging that Mars falsely advertised its vanilla ice cream bars as having "milk chocolate" coating when, in fact, the coating contained vegetable oils. The court ruled it was "nothing more than a conclusory leap" to allege that reasonable consumers read statements about milk chocolate "to implicitly mean that the product necessary contains no vegetable oils." Additionally, two different judges in the Northern District of California dismissed cases filed against Kind, LLC and Kashi Co., alleging that various food products were miscalculating the products' protein content in the Nutrition Facts panel. Applicable FDA regulations only require identification of the raw of number of grams of protein in a food product, and allow that calculation to be made using what is known as the "nitrogen" method. If a label makes a protein nutrient claim on the front of the package, however, the Nutrition Facts panel must also include a "% Daily Value" calculated using a different method, the Protein Digestibility Corrected Amino Acid Score ("PDCAAS"). The plaintiffs in both of these cases argued that if a protein nutrient claim is on the label, then both the raw protein content *and* the % Daily Value must be calculated using the PDCAAS method. The court disagreed, finding that such claims are preempted by the FDCA because they would impose labeling requirements that go beyond what the FDA regulations require.

Some courts took a different approach, denying motions to dismiss in several "ingredient" cases and sending them into discovery. For example, an Illinois court sustained a complaint alleging that a product labeled "smoked almonds" suggested that the nuts were actually roasted over an open fire, particularly because the product's red packaging was "evocative of fire." And in California, a judge allowed a "vanilla" yogurt class action to proceed despite three prior dismissals. The court previously ruled that dismissal of the California Unfair Competition Law ("UCL") claim was appropriate because no reasonable consumer would conclude that the yogurt's vanilla flavor was derived only from natural sources and therefore the plaintiff had failed to plausibly allege reliance as required by the UCL. The amended complaint, however, contained allegations that the yogurt violated various FDA regulations, which are incorporated into California state law through the state Sherman Food, Drug, and Cosmetic Law. Since the Sherman Act does not require reliance as measured by a reasonable consumer, nor should the plaintiffs' UCL claim.

And some new filings: We saw a number of new food class action filings following the same trends we have been seeing in recent months including: (1) challenges to the use of "natural flavoring" in Poland's sparkling water (N.D. Illinois); (2) alleged misrepresentation of cacao content in various

Mondelez's dark chocolate products; and (3) allegations relating to the amount of whole grains used in The Cheesecake's Factory's "brown bread" (N.D. Illinois). Infant formula and baby food products were also a target in February, with new actions filed against Abbott Laboratories alleging that various Similac infant formulas are causing infants to develop bacterial infections and gastrointestinal illness (N.D. Illinois and S.D. Florida), against CVS for allegedly misleading label similarities between its infant and toddler formula products (N.D. Illinois), and against Sprout Foods for suggesting its baby food products are healthier than its competitors' products (N.D. California).

In the personal care, supplement, and drug space, new filings included: (1) multiple actions challenging "non-drowsy" claims for over-the-counter cough and flu medicine (C.D. California, S.D.N.Y., M.D. Florida, N.D. Illinois, and E.D. Michigan); and (2) a number of efficacy challenges including to claims that E.T. Browne Drug Co.'s "Tummy Butter" drastically reduces the appearance of stretch marks (Illinois state court) and Mommy's Bliss's gripe water reduces symptoms of colic in newborns (N.D. California).

Finally, the Tenth Circuit affirmed the dismissal of various challenges to pet food marketing claims in *Renfro v. Champion Petfoods USA, Inc.* Specifically, the court ruled that "Fresh" and "Regional" claims were subjective, and that the plaintiffs' suggested meaning—that *all* ingredients were "fresh"—were belied by the rest of the products' packaging. The court also found that Champion's "Trusted Everywhere" claims were inactionable puffery. Finally, the court disagreed with the plaintiffs' allegations relating to Champion's "Biologically Appropriate" claims, finding that no reasonable consumer would interpret the claim to mean that the dog food mirrored the "richness, freshness, and variety" of a dog's natural prey, and was "protein rich and carbohydrate limited."

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Stay tuned for our next monthly update and, in the meantime, check out www.adlawaccess.com for regularly-posted content on all things advertising, privacy, and consumer protection.