Food Industry Litigation and Regulatory Highlights, July – September 2021

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If the summer slide and the start of school kept you too busy to follow what's going on in the food scene, we hear you! Catch up on key developments below in this issue of our Food Industry Litigation and Regulatory Highlights.

The Courts Were Kind to the Food Industry This Summer

This summer brought a series of class action victories to the food industry, including a trio of decisions from the Second and Ninth Circuits, both long-time hot beds for false advertising class actions, as well as four dismissals from the Southern District of New York.

At the appellate level, the Second Circuit affirmed the dismissal of a putative class action challenging Starbucks' claim that its drinks are the "best coffee for you" and that its coffee is "watched over … from the farm to you," despite the use of pesticides to kill roaches at certain retail locations. The Court ruled that the challenged claims were not specific enough to misrepresent a quality or characteristic of Starbucks' coffee, and that no reasonable consumer would interpret them to suggest anything about the use of pesticides in Starbucks' stores.

The Ninth Circuit decertified a class of consumers claiming that Coca-Cola falsely labels its drinks as having no artificial flavors when they contain phosphoric acid, ruling that consumers lacked standing to pursue injunctive relief. According to the Court, the plaintiffs' claims that they "would consider purchasing" Coke in the future if certain disclosures were included or if the product's labels were truthful were insufficient to show an actual or imminent threat of future harm.

Finally, the Ninth Circuit affirmed the dismissal of claims involving Trader Joe's "100% New Zealand Manuka Honey." The Court relied on the FDA's Honey Guidelines, which permit honey to be labeled with the name of a plant or blossom if the producer has reason to believe the designated plant or blossom is the "chief floral source" of the honey. Thus, because plaintiffs' own testing revealed that the product consists of between 57.3% and 62.6% honey derived from Manuka flower, the product's "chief floral source" is the Manuka flower and reasonable consumers would not be deceived by the label. The Court further held that consumers would not interpret the label in the manner suggested by the plaintiff because of: (1) the impossibility of making a honey that is 100% derived from one floral source; (2) the lower cost of Trader Joe's Manuka honey ($13.99) as compared to more

concentrated blends (which sell for more than $266); and (3) the "rating" system displayed on the back label of the product, which should have informed a reasonable consumer's interpretation of the challenged claim.

The Southern District of New York, another popular jurisdiction for food claims and class actions more generally, dismissed four food class actions over the summer. Two S.D.N.Y. judges dismissed similar allegations that the vanilla flavoring in certain products (Mars Dove's vanilla ice cream bars and Aldi, Inc.'s vanilla almond milk) was not derived exclusively or even predominantly from vanilla beans or vanilla extract. *See Garadi v. Mars Wrigley Confectionery US, LLC*; *Parham v. Aldi, Inc.* These Courts joined dozens of others that have dismissed similar claims, finding that no reasonable consumer would construe the challenged labels to make any claims about the *source* of the vanilla flavor, and that the labels simply alert consumers that the products *taste like* vanilla.

The S.D.N.Y. also dismissed a putative class action filed against The Coca-Cola Company, alleging that its Gold Peak® "Slightly Sweet" tea leads consumers to believe the beverage was low in sugar and calories when, in fact, sugar is the second most predominant ingredient. The Court analogized "Slightly Sweet" to "Just a Tad Sweet," which the Eastern District of California previously found to be a "blatant form of puffery." The Court also found that the sugar content was accurately reflected in the Nutrition Facts Panel and therefore could not mislead a reasonable consumer.

A fourth judge in the S.D.N.Y. dismissed claims that Wise's "Cheddar & Sour Cream Flavored" chips should have been labeled as "artificially flavored" due to the presence of diacetyl, which bolsters the product's aroma. The Court found that the label does not imply that the chips' flavor is derived *entirely* from cheddar and sour cream, nor does the label indicate that the chips are flavored with only natural ingredients. The Court also found that any confusion on the label is dispelled by the back of the package which explains that the chips contain cheddar, sour cream, *and artificial flavoring*. Finally, the Court rejected the plaintiff's claim to the extent it was based on an alleged failure to comply with FDA regulations, ruling that it was "well established that 'acts cannot be re-characterized as 'deceptive' simply on the grounds that they violate another statute or regulation (like the identified FDA regulations) which does not allow for private enforcement. This last ruling is significant, as the plaintiffs' bar routinely alleges technical violations of FDA regulations in an attempt to establish deception or falsity.

It's not all good news, though, and the courts declined to dismiss a number of other food complaints, including claims that (1) Celsius Holdings' sparkling water were deceptively marketed as containing "real" juice when, in fact, they were allegedly flavored with "natural flavor;" and (2) Cooper Cane's wines were made in Oregon when, in fact, the wine was allegedly bottled in California.

New Food Filing Trends: Is Chocolate the New Vanilla?

This summer brought the filing of at least six new class actions challenging various label representations involving chocolate and fudge: *Karlinski v. Costco Wholesale Corp.* ("chocolate almond dipped" ice cream bars); *Rice v. Dreyer's Grand Ice Cream Inc.* (ice cream bars "dipped in rich milk chocolate); *Cashman v. Ferrara Candy Company* (Keebler Fudge Stripe cookies); *Bartosiake v. Bimbo Bakeries USA Inc.* (Entenmann's chocolate fudge iced cake); *Lederman v. The Hershey Company* (hot fudge topping); *Huston v. Conagra Brands, Inc.* (Duncan Hines Chewy Fudge Brownie Mix). These cases all allege that the products' ingredients are comprised partially or primarily of vegetable oils instead of the dairy ingredients that consumers expect in real chocolate or fudge.

In addition to new "natural" and "place of origin" filings, a significant trend is also beginning to form with respect to health and nutrient claims, including sugar content (*Cleveland v. Campbell Soup Co.*,

Alabama state court, and An*drade-Heymsfield v. NextFoods Inc.*, Southern District of California), Vitamin C (*Wagner v. Molson Coors Beverage Co.*, Northern District of California; *Marek v. Molsen Coors Beverage Co.*, Northern District of California), and protein content (*Brown v. Natures Path Foods, Inc.*, Northern District of California, and *Brown v. The J.M. Smucker Co.*, Northern District of California; *Paschoal v. Campbell Soup Co.*, Northern District of California; *Nacarino v. Kashi Co.*, Northern District of California).

Links from Law360 (subsc. req'd.)

National Advertising Division

Sustainability and humane animal treatment claims were front and center before NAD in two cases.

Safe Catch, Inc. (Pouched and Canned Tuna) Case No. 6911. NAD determined that certain mercury testing claims made by Safe Catch, Inc., a manufacturer of pouched and canned tuna, were substantiated, including claims that every tuna used to make Safe Catch tuna is tested for mercury, claims that its tuna has the "lowest mercury" and "lowest mercury limit" of any brand and use of the name "Safe Catch". NAD also considered the claim "100% Sustainably Caught Wild Tuna".

In support of its claim, the advertiser explained that 100% of the tuna it purchases are caught using sustainable methods based on factors considered relevant to the standards set by the Monterey Bay Aquarium Seafood Watch ("Seafood Watch"), the Marine Stewardship Council, the National Oceanic & Atmospheric Administration Fisheries Office of Sustainable Fishing, and Greenpeace. In addition, Safe Catch albacore tuna are purchased from a Marine Stewardship Counsel-certified sustainable seafood fishery, which catches the fish using the pole and line method. Further, Safe Catch Elite Tuna and Wild Ahi Yellowfin Tuna are caught in a manner consistent with the sustainable fishing standards set by Seafood Watch. Safe Catch also noted that it makes its sustainability policy available on its website.

However, NAD recommended that Safe Catch discontinue claims that implied that Safe Catch is healthier than other tuna brands, such as "only tuna endorsed by the American Pregnancy Association," and certain claims that implied that other tuna brands are less safe.

Butterball, LLC (Butterball Turkey Products) NAD Case No. 6930. In a challenge brought by Animal Outlook, a not-for-profit animal rights organization, NAD determined that Butterball Turkey LLC provided a reasonable basis to substantiate its humane treatment claims where they were used in close proximity to claims about or an explanation of its American Humane Association Certification ("AH Certification"). These included claims such as the following:

- "Commitment to animal care and well-being."
- "It is our responsibility to produce health, high-quality turkeys in a responsible way."
- "Animal Care and Well-Being is central to who we are as a company, and we are committed to maintaining the health and well-being of our turkeys."
- "From our family farms to our processing facilities, we commit significant resources to strengthen our already rigorous standards for animal care and well-being."

However, as to more general "humane" claims and comparative statements relating to turkey care, NAD recommended that Butterball discontinue the statements because the advertiser did not provide evidence to substantiate all reasonable interpretations of those claims.

FDA/USDA

FDA's virtual Summit on E-Commerce: Ensuring the Safety of Foods Ordered Online and Delivered Directly To Consumers is coming up on October 19-21. Originally announced in July, the event is part of FDA's New Era of Smarter Food Safety blueprint. Given the rise in online food sales, particularly during the pandemic, the goal of the summit is to identify courses of action to address potential food safety vulnerabilities, including those that may arise in the "last mile" of delivery.

Topics for discussion during the summit include:

- Types of B2C e-commerce models (e.g., produce and meal kit subscription services, ghost kitchens, dark stores)
- Safety risks associated with foods sold through B2C e-commerce
- Standards of care used by industry to control these safety risks
- Types of delivery models (e.g., third-party delivery, autonomous delivery models)
- Regulatory approaches to food sold through B2C e-commerce, including challenges and gaps that need to be addressed
- Labeling of foods sold through B2C e-commerce

FDA/USDA Cooperation on Jointly-Regulated Establishments. FDA and USDA's FSIS announced an updated Memorandum of Understanding regarding dual jurisdictional establishments (DJE), which are establishments regulated by both agencies. The MOU improves upon previous information exchange by:

- Adding headquarters-level contacts for each agency to improve awareness of findings or emerging issues that may warrant more than local or regional coordination.
- Updating the types of findings to be shared to reflect advances in understanding microbiological food hazards, including microbiological or other sampling findings in DJEs or products, which may provide information about sanitary conditions in those establishments or indicate serious adverse health consequence of products under either agency's jurisdiction. These results will include microbe characteristics (e.g., serotype, whole genome sequence, antimicrobial resistance profile, etc.) where applicable, and other information related to categorizing and tracking pathogens.

FDA Export Certification Guidance. FDA issued Export Certification Guidance for Industry to provide a general description of FDA's export certifications, which may be requested by foreign governments seeking assurances that products may be legally marketed in the United States or meet specific regulations.

USDA Seeking Comments on Labeling of Meat or Poultry Products Made From Cultured Animal Cells. USDA's FSIS released an Advanced Notice of Proposed Rulemaking on September 3 requesting comments pertaining to the labeling of meat and poultry products comprised or containing cultured cells derived from animals subject to the Federal Meat Inspection Act or the Poultry Products Inspection Act. Some of the issues for comment include the following:

1. Should the product name of a meat or poultry product comprised of or containing cultured animal cells differentiate the product from slaughtered meat or poultry by informing consumers

the product was made using animal cell culture technology? If yes, what criteria should the agency consider or use to differentiate the products? If no, why not?

2. What term(s), if any, should be in the product name of a food comprised of or containing cultured animal cells to convey the nature or source of the food to consumers? (e.g., ‘‘cell cultured’’ or ‘‘cell cultivated.’’) …

3. If a meat or poultry product were comprised of both slaughtered meat or poultry and cultured animal cells, what unique labeling requirements, if any, should be required for such products?

4. What term(s), if used in the product name of a food comprised of or containing cultured animal cells, would be potentially false or misleading to consumers?

5. What term(s), if used in the product name of a food comprised of or containing cultured animal cells, would potentially have a negative impact on industry or consumers.

Comments can be submitted through November 2, 2021.

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