Attention Food & Beverage Industry: False Advertising, Product Liability, and Defamation Litigation is Making an Impact

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Overview

1. The Broadening Scope of Labeling and Safety Issue Targeted by the Plaintiffs’ Bar


3. Food Defamation: Protecting Your Brand
The Broadening Scope of Labeling and Safety Issues Targeted by the Plaintiffs’ Bar

Presented by: Amanda Groves
Ron Rothstein
Overview

• What’s under attack in consumer class actions?

  • Pet Food – Propylene Glycol
  • Homeopathic Medicines
  • Health Claims – Kind Bar
  • Chocolate – Antioxidants
  • Slack Fill
Where Do These Lawsuits Come From?

Investigative Journalism  
FTC Consent Judgments  
NAD Rulings  
FDA Warning Letters  
State Attorneys General  
Hire FDA Consultant - Find Technical Violation of Regulations or Invent Theory

Lawsuits
Who is Behind the Litigation?

Reese Richman LLP

Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.

Law Offices of Howard W. Rubinstein, P.A.

Freed Weiss

Law Offices of Janet Lindner Spielberg

Braun Law

Clifford Law Offices
Who is Behind the Litigation?

• Many of the same lawyers who were involved in securities, asbestos, and tobacco litigation are now focusing their energy on food, beverage, and nutritional supplement products
  • “Lawyers from Suits Against Big Tobacco Target Food Makers,” New York Times (August 18, 2012)

• Business model is based on large attorney’s fee awards through class-wide settlements in favorable forum
Trends in Class Action Filings

- Software/Technology: 16%
- Weight-loss: 3%
- Automotive Cosmetic: 7%
- Dietary Supplement: 19%
- Retail: 6%
- Pharmaceutical: 10%
- Home Appliance: 3%
- Food: 26%
- Fashion/Jewelry: 3%
Trends in Class Action Filings

- Performance claim: 45%
- "Natural" claim: 13%
- Food labeling / nutrition content: 26%
- General deception: 6%
- Data privacy: 7%
- Lack of substantiation: 3%
Pet Food

• In April 2015, a major pet food manufacturer sought to dismiss a proposed class action that claims its dog food products contain animal toxins including the flavoring chemical propylene glycol, arguing that the suit targets a safe product based on “trendy social media hysteria”

• The manufacturer slammed the allegations claiming that the dry “kibble” dog food products contain propylene glycol, which is used as antifreeze in automobiles. The manufacturer argued that propylene glycol is not just a common flavoring ingredient, but also one that is in the U.S. Food and Drug Administration’s list of “generally recognized as safe” ingredients

Ingredients
Ground yellow corn; chicken by-product meal; soybean hulls; whole wheat flour, rice flour; chicken, soy flour, animal fat preserved with mixed tocopherols (form of Vit. E); water; meat and bone meal; propylene glycol; sugar; animal digest; dicalcium phosphate; salt; phosphoric acid; tricalcium phosphate; sorbic acid (a preservative); dried carrots; dried green beans; calcium propionate (a preservative); choline chloride; l-Lysine monohydrochloride; Vit. E supplement; potassium chloride; zinc sulfate; yellow 5; ferrous sulfate; red 40; manganese sulfate; yellow 6; niacin; Vit. A supplement; blue 2; calcium carbonate; copper sulfate; Vit. B-12 supplement; calcium pantothenate; thiamine mononitrate; garlic oil; pyridoxine hydrochloride; riboflavin supplement; Vit. D-3 supplement; calcium iodate; menadione sodium bisulfite complex (source of Vit. K activity); folic acid; biotin; sodium selenite;
Pet Food

- Plaintiff argues: “It is important to underscore that plaintiff is not alleging that the manufacturer used a bad batch of propylene glycol; he is alleging that any use of propylene glycol is toxic for dogs”

- Defendant: “Propylene glycol is specifically permitted in dog food (as well as many other human foods) under federal law and is affirmatively not the toxic ‘anti-freeze’ ingredient alleged by plaintiff”

- Propylene Glycol is GRAS:

  TITLE 21--FOOD AND DRUGS
  CHAPTER I--FOOD AND DRUG ADMINISTRATION
  DEPARTMENT OF HEALTH AND HUMAN SERVICES
  SUBCHAPTER B--FOOD FOR HUMAN CONSUMPTION (CONTINUED)
  PART 184 -- DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

  Subpart B--Listing of Specific Substances Affirmed as GRAS

  Sec. 184.1666 Propylene glycol.
  (a) Propylene glycol (C3H8O2, CAS Reg. No. 57-55-6) is known as 1,2-propanediol. It does not occur in nature. Propylene glycol is manufactured by treating propylene with chlorinated water to form the chlorohydrin which is converted to the glycol by treatment with sodium carbonate solution. It is also prepared by heating glycerol with sodium hydroxide
Fire Ball – Propylene Glycol

• Propylene glycol has recently sparked some controversy in human food and drink products as well. In October 2014, Sazerac Co. announced it was recalling batches of its Fireball Cinnamon Whiskey product from Sweden, Norway and Finland, saying that it mistakenly shipped them batches that were meant for the U.S.
Fire Ball – Propylene Glycol

• **Huffington Post:**
  • “Fireball Whisky Recalled In 3 Countries Over Antifreeze Ingredient”
    • “The U.S. Food and Drug Administration says propylene glycol is ‘generally recognized as safe’ for use in food, where it is used to enhance flavor by absorbing water. Sazerac, the New Orleans-based beverage company that owns Fireball, puts more propylene glycol in its drinks sold in America and Canada than in Europe”

• **Men’s Journal:**
  • “Yes, There’s Propylene Glycol in Your Fireball”
    • “Fireball Cinnamon Whisky claims to ‘taste like heaven,’ but its parent company, Sazerac, is feeling the burn after bottles of the famous 66-proof drink were yanked from shelves in Sweden, Norway, and Finland for containing too much of the potentially toxic chemical propylene glycol”

• **The Whisky Reviewer**
  • “Sazerac Insists Fireball Whisky Safe”
    • “The ingredient is ‘generally recognized as safe (GRAS)’ by the U.S. Food and Drug Administration up to 50 grams per KG. In Canada, its use is limited to ‘good manufacturing practice’ with no defined numerical limit. It is used in the Fireball flavor in very small quantities, less than 1/8th of the amount allowed by US FDA regulations”
Alcohol Claims

• In May 2015, a Florida federal judge tossed a proposed class action accusing Maker’s Mark Distillery of misleading consumers into thinking its bourbon is “handmade,” finding that the term’s literal meaning obviously can’t be applied to liquor

• Judge: No reasonable consumer could believe otherwise, and said the two named plaintiffs who claimed they purchased the bourbon because it was handmade failed to provide a consistent, plausible explanation of what the term meant to them

• “This is understandable,” … “Nobody could believe a bourbon marketed this widely at this volume is made entirely or predominantly by hand”

• The plaintiffs also stumbled when they argued that the company could have used some machines but not others that are “too big or too modern,” the judge said, questioning whether anyone would benefit from using small or old machines
Alcohol Claims

• Similar complaints against Fifth Generation Inc., the maker of Tito’s Handmade Vodka
In January 2015, a California federal judge denied Hyland’s Inc.’s preemption arguments in a class action alleging that it misrepresents that its homeopathic products fight colds and influenza quickly and effectively.

Judge explained that this is not a lack of substantiation case, “Rather, plaintiffs claim that using the word ‘effective’ is false because defendants’ products are not effective, period.” … “A claim of this sort is not inconsistent with FDA labeling requirements. The FDA prohibits the sale of ‘misbranded drugs’"
Homeopathic Medicines

• Judge King said that since plaintiffs contend that they can prove that Hyland’s Cold n’ Cough 4 Kids products are ineffectual such evidence makes a triable issue of fact whether the products are misrepresented.

• According to deposition testimony, “the result of the study showed that there was no statistically significant difference between Cold n’ Cough 4 Kids and a placebo,” the judge said. “These results tend to show that Cold n’ Cough 4 Kids has no more effect than a sugar pill, and if that is true, then at least one of the class products could not possibly be ‘effective’ in any sense of the word that a reasonable consumer would understand it to mean”
Chocolate – Antioxidants

• In March 2015, a California federal judge dismissed a consumer class action against a major chocolate manufacturer alleging it misled customers about antioxidants in its chocolate and cocoa products, ruling that the evidence didn’t show the labeling was likely to misinform a reasonable consumer

• “There is insufficient evidence that the ‘natural source of flavanol antioxidants’ statement on the challenged products was likely to mislead reasonable consumers and that the label statements were therefore unlawful on that basis”

• “Even if the court were to accept [Plaintiff’s] personal logic to arrive at the conclusion that the phrase … misleads consumers because it appears to violate FDA regulations, ‘not every regulatory violation amounts to an act of consumer fraud’”
Chocolate – Antioxidants

• Judge:
  • Under California law, Plaintiff can’t obtain relief by arguing how consumers could react; he must show how consumers actually do react. “Without such proof, [Plaintiff] does not satisfy the UCL’s ‘reasonable consumer’ test”

  • “Plaintiff didn’t prove he lost money or property or demonstrate economic injury as required by the UCL,” the judge said

  • “[Plaintiff] proffers no evidence to show economic injury, but rather claims that his purchases are ‘legally worthless’ because they are inaccurate representations of what he thought he was purchasing”
Health Claims – FDA Scrutiny

• In April 2015, the Food and Drug Administration warned Kind LLC that several of its products are misbranded as “healthy” and that the labeling falsely claims some of the snacks are low-fat or rich in antioxidants
  
  • Letter takes issue with Kind Fruit & Nut Almond & Apricot, Kind Fruit & Nut Almond & Coconut, Kind Plus Peanut Butter Dark Chocolate + Protein, and Kind Plus Dark Chocolate Cherry Cashew + Antioxidants bars
Health Claims – FDA Scrutiny

• FDA claims:

  • Kind’s claims that the products are “pretty much the nirvana of healthful tastiness,” when in fact they contain more fat and saturated fat than the definition of “healthy” allows

  • “These amounts exceed 1g of saturated fat per 40g RACC”

  • “These amounts also exceed the maximum of 15% of calories from saturated fat in the ‘low saturated fat’ definition. Accordingly, your products do not meet the requirements for use of the nutrient content claim ‘healthy’ on a food label”

  • The bars contain at least three times the amount of fat allowed under a “low fat” definition, and Kind has failed to note that the products are not low in fat near its labeled claims that they are a good source of fiber, the FDA says

  • The “no trans fat” claim on the products’ labels do not include a disclosure statement to see the product’s nutrition information for saturated fat content, which could open the door to the agency’s discretionary enforcement because saturated fats can act on cholesterol levels in a similar manner to trans fats
Kind Bar Filings

Recently filed cases:

- **Jackson v. Kind LLC**, filed May 15, 2015 in Central District of California
- **House v. Kind LLC**, filed May 11, 2015 in Northern District of California
- **Molina v. Kind LLC**, filed May 6, 2015 in Middle District of Florida
- **Galvez v. Kind LLC**, filed April 24, 2015 in Central District of California
- **Cooper v. Kind LLC**, filed April 24, 2015 in Northern District of California
- **Bustamante v. Kind LLC**, filed April 22, 2015 in Southern District of California
- **McDonald v. Kind, LLC**, filed April 17, 2015 in Central District of California
- **Kaufer v. Kind LLC**, filed April 17, 2015 in Central District of California
- **Short v. Kind LLC**, filed April 17, 2015 in Eastern District of New York
- **Molina v. Kind LLC**, filed April 16, 2015 in Hillsborough County Circuit Court, Florida
Slack Fill Cases

• In September 2014, Procter & Gamble and Unilever were hit with class actions in New York federal court alleging their Old Spice, Axe, Degree and Gillette deodorants are sold in oversized packaging that misleads consumers into thinking they’re buying more product than they’re getting

  • The lawsuits allege the consumer goods companies are lying to customers about the value they’re getting with packaging that could fit more product than what’s actually inside, according to the complaints

  • Containers that are about 5.75 inches high and 2.75 inches wide, according to the suit. But the product inside is 3 inches long and 2.5 inches wide, the plaintiffs contend

  • “The size of the container has nearly 3 inches of slack-fill in height and is designed to give the false impression that there is more product than actually packaged,” the plaintiffs contend
Slack Fill Cases

Recently filed slack fill cases:

- **Greenstein v. Mariani Packing Co.**, filed May 5, 2015 in Orange County Superior Court (Defendant’s products, sold at 99 Cents Only Stores, contain illegal amounts of slack-fill, deceiving plaintiff into thinking there was more product than there actually is)

- **People of The State of California v. Unilever**, filed April 21, 2015 in Orange County Superior Court (Defendant packages its Axe hair styling products in containers that contain non-functional slack fill which misleads consumers into believing there is more product than there actually is)

- **Huffman v. General Nutrition Corporation**, filed March 26, 2015 in District of Columbia Superior Court (Dietary supplements sold by defendants and purchased by plaintiff contained too much “non-functional slack-fill,” or empty space in a container and was misrepresented in its packaging)

- **Marte v. McNeil-PPC Inc and Johnson & Johnson**, filed March 9, 2015 in Southern District of New York (Class action alleging misleading and deceptive practice of packaging its MOTRIN pain-reliever and fever reducer products in “slack-fill” containers that give the false impression that the Class is buying more product than they actually receive)

- **Witte, individually and on behalf of the general public v. General Nutrition Corporation**, filed February 6, 2015 in District of Columbia Superior Court (Defendants allegedly misled purchasers of some of their products by inflating the amount of “slack-fill” included in some dietary supplement packaging)
Got HFCS? A Report from the Front Lines of Product Liability and False Advertising Litigation Involving High Fructose Corn Syrup

Presented by: Neil Murphy
S.F. v. Archer-Daniels-Midland et al.  
(U.S. District Court, W.D.N.Y.; Judge Skretny)

Plaintiff’s Complaint:

• 14-year-old minor plaintiff

• HFCS is a “toxin”

• Plaintiff alleged that she developed type 2 diabetes as a result of consuming foods containing HFCS

• Food and beverage companies were not named as defendants
S.F. v. Archer-Daniels-Midland
(U.S. District Court, W.D.N.Y.; Judge Skretny)

• Plaintiff alleged that she developed type 2 diabetes from consuming these foods (among others):
S.F. v. Archer-Daniels-Midland
(U.S. District Court, W.D.N.Y.; Judge Skretny)

Plaintiff’s Expert Robert H. Lustig:

• “Sugar is a toxin. Plain and simple”
• “Sugar is the most destructive force in the universe”
• “100 percent orange juice is worse for you than soda”
• “[L]awsuits are a great way to get the food industry and the government’s attention”
S.F. v. Archer-Daniels-Midland
(U.S. District Court, W.D.N.Y.; Judge Skretny)

Rule 12 Motion to Dismiss:

• *Twombly*—Proximate Cause: Implausible that consuming foods containing HFCS was proximate cause of plaintiff’s diabetes, given myriad other potential causes (diet, genetics, exercise, etc.)

• Other grounds:
  • Failure to plead that HFCS is unreasonably dangerous
  • Failure to plead safer alternative design
  • No market share liability
S.F. v. Archer-Daniels-Midland
(U.S. District Court, W.D.N.Y.; Judge Skretny)

Judge Skretny Opinion on Causation (April 2014):

“Yet, even accepting the allegations in the complaint as true, there is little in it to suggest that Plaintiff could prove that her consumption of some foods containing HFCS over the course of her life was a substantial factor in causing Type 2 diabetes. In other words, aside from idly listing various common foods she has eaten, Plaintiff offers limited facts that might lead this Court to believe that she could ultimately show that it was her consumption of these foods, and specifically the HFCS found within these foods (manufactured by these defendants) that led to her disease”

“It may be possible that HFCS caused Plaintiff to develop Type 2 diabetes, but (based on the facts in the complaint) is it plausible?”

“But even assuming Plaintiff could surpass this hurdle, her claims fail for other reasons”
S.F. v. Archer-Daniels-Midland
(U.S. Court of Appeals, Second Circuit)

Summary Order (December 2014):

• Panel: Chin, Carney, and Sweet (Pelman judge)
• Affirmed dismissal
  • Failure to allege safer alternative design
  • No market share liability
• Did not reach causation issue
Western Sugar v. Archer-Daniels Midland et al.  
(U.S. District Court; C.D. Ca.; Judge Marshall)

Corn Refiners Association Educational Campaign:
Sugar Industry Lanham Act Claim—Alleged False Statements:

- Nutritional and metabolic equivalence claims:
  - “Sugar is sugar”
  - “Your body can’t tell the difference”
- HFCS is “natural”
- HFCS is “corn sugar”
Food Defamation:
Protecting Your Brand

Presented by: Erik Connolly
Food “Issues” Regularly Appear in News and Social Media

- Over 4,000 food blogs
- Over 90 current food-related petitions on change.org
- Over 20,000 Yahoo! food groups
- Daily coverage of food “issues” by 24-hour news organizations
Food Products Under Attack

• Chicken production
• Pork production
• Sandwich meat
• Bread
• Cheese
• Vegetable juice
• Chips
• Hard candies
• Chocolate
• Girl Scout cookies

Just last 2 weeks
Attacks Can Cause Significant Damage

• Large number of individuals and groups present themselves as “champions” of the truth about food
• Social media ensures rapid and widespread dissemination of attacks
• 24-hour news cycle ensures coverage by more mainstream organizations
• Entrenchment of false idea is difficult to overcome
Threshold Issues in Food Defamation

• Does the publication express a pure opinion or facts about product?

• Does the publication state or imply a false fact?
Actions Based on Facts, Not “Pure Opinion”

• Where is the statement published?
• Who made the statement?
• What else was said in the publication?
• Can you prove the statement is not true?
Actions Based on False Facts Stated and Implied

• Direct statements and implications are actionable

• Totality of the publication will determine implication

• Publishers cannot use “escape clauses” to avoid false implication

• Commentators can help identify implication of publication
Factors to Consider Before Filing Food Defamation Complaint

- Lingering Impact of Damage to Brand
- Sufficient Evidence of Actual Malice
- Application of State SLAPP Statutes
- Media/ Social Media Reaction to Lawsuit
Questions?
Thank You.

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