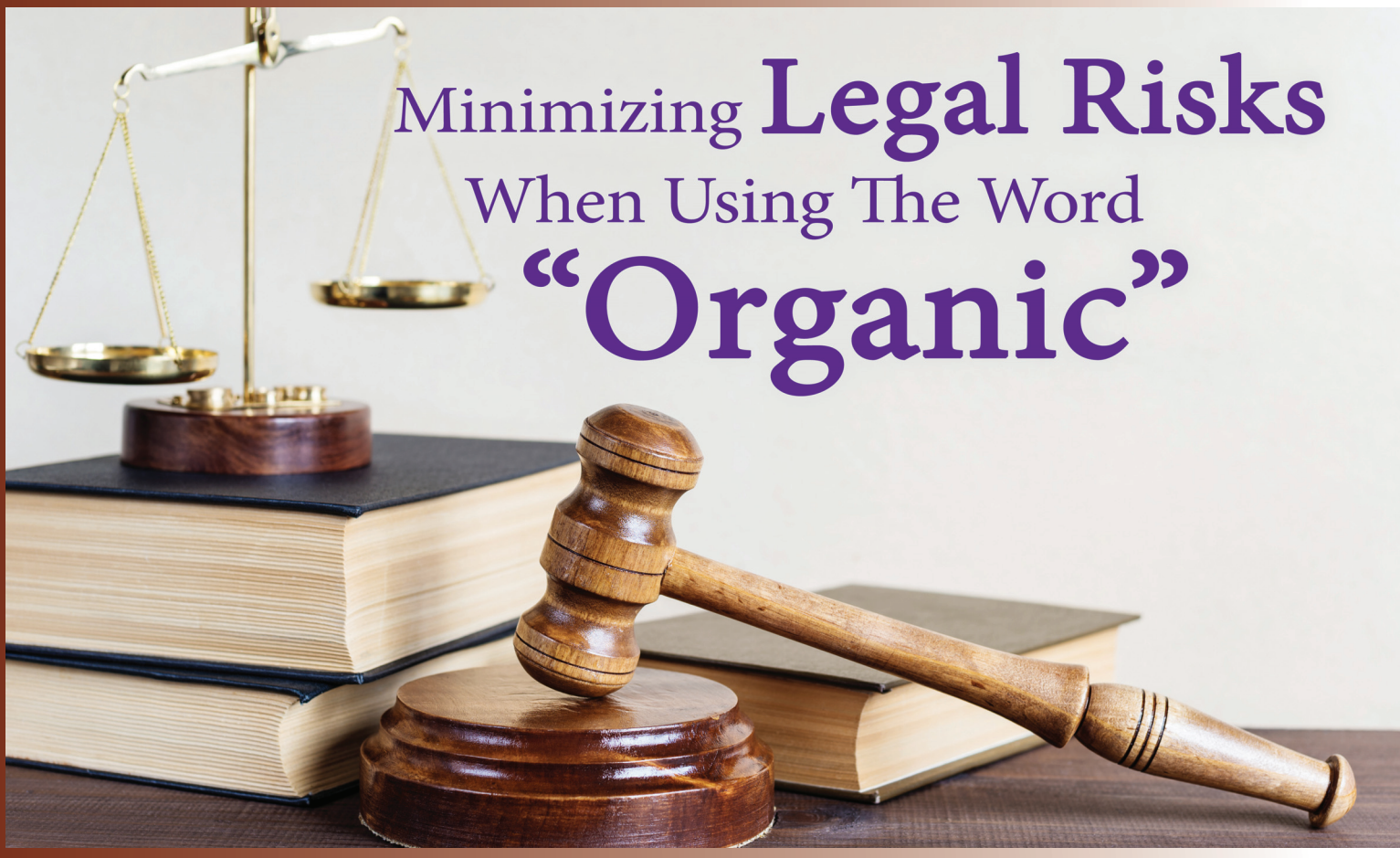

Minimizing Legal Risks When Using The Word "Organic"

By Nancy A. Del Pizzo, Esq.

"Organic." If you say that word to most dietary supplement marketers, they are quick to enthusiastically respond either that they have "organic" products or they plan to have "organic" products … and soon. But how these semantics play out in product branding, labeling, marketing and advertising can land that enthusiasm on the other side of a cease and desist letter, or worse, in court and facing a potentially hefty, viable damages claim.

The use of the word "organic" is not only subject to regulations promulgated by administrative agencies like the U.S. Department of Agriculture (USDA), it is separately and additionally subject to federal and state laws governing, at the very least, false advertising and unfair competition. It behooves anyone in the business of marketing and selling "organic" dietary supplements, or planning to market and sell them, to have knowledge of these requirements or seek counsel before expending money, time and other resources developing a marketing plan that includes the use of the word "organic" in promotional materials or attempting to register a trademark with that word included in the proposed mark. And it is important to note that compliance with one statute does not necessarily translate into compliance with another.

This article provides an overview of the state of the law on the use of the word "organic" and how that law intersects with industry regulations.

USDA Requirements For "Organic" Use

The Organic Foods Production Act of 1990 (OFPA), 7 U.S.C .§ 6501 et seq., was intended to promote baseline standards for labeling, producing and selling organic products. In fact, the three main purposes of OFPA are:

1. "To establish national standards governing the marketing of certain agricultural products as originally produced products;

2. To assure consumers that organically produced products meet a consistent standard; and,

3. To facilitate interstate commerce in fresh and processed food that is organically produced."

7 U.S.C. § 6501. The task of setting forth those standards is given to the USDA and codified under 7 U.S.C. §§ 6517-6518, 6521(a). And the USDA promulgated its regulations under the National Organic Program (NOP). 7 C.F.R. 205.1 *et seq*. At a minimum, per OFPA and NOP, if a dietary supplement seller wants to market its product using the word "organic," that product must be certified by an authorized certifying entity. *See* 7 U.S.C. §§ 6504-6505, 6514(a), 6515, 6519; 7 C.F.R. §§ 205.300(a), 205.302(c). More specifically, the USDA has promulgated regulations for distinct uses of the word "organic." They include: "100 Percent Organic," "Organic," and "Made With Organic." *See id*.

To be able to market a dietary supplement as "100 Percent Organic," all of the ingredients in the supplement must be certified (by an authorized certifier) as organic; any aids used to process the product must be organic; and, the product labels must include

the name of the authorized certifying agent on their information panels. Also, the organic ingredients must be identified on that label. To be able to market a dietary supplement as "organic," all of the agricultural ingredients in the supplement must be certified (by an authorized certifier) as organic; a total of five percent of the product may contain non-organic ingredients (excluding water and salt); and, the product labels must include the name of the authorized certifying agent on their information panels. As well, the organic ingredients must be identified on that label. Only products that meet the requirements for "100 percent organic" and "organic" may use a USDA organic seal and market the product as "100 percent organic" or "organic," as identified above.

Any product that has not received certification from an authorized certifier cannot be referred to as "organic" and cannot use the USDA organic seal.

Finally, to be able to market a dietary supplement as "made with organic," at least 70-percent of the product's ingredients must be certified (by an authorized certifier) as organic; the product must be produced using a method not excluded under USDA regulations and non-organic ingredients must be listed on the USDA's approved list; and, the product labels must include the name of the authorized certifying agent on their information panels. As well, the organic ingredients must be identified on that label. Dietary supplement manufacturers whose products meet this criteria may identify up to three ingredients or ingredient categories using the prefix "made with organic" followed by the identification of one to three ingredients. The USDA organic seal must not be used with these products, and these products must not be represented as organic or include the over-reaching language "made with organic ingredients."

In late 2016, the USDA published an informative "cheat sheet" outlining these requirements. See www.ams.usda.gov/sites/default/files/media/Labeling%20Organic%20Products.pdf.

There are civil penalties for violating OFPA and NOP. Generally, federal or state prosecutors will enforce violations, although the USDA itself also may engage in administrative proceedings to handle violations. To get a sense of these proceedings, you can review some of the USDA's administrative decisions online. See www.ams.usda.gov/services/enforcement/organic.

Depending on the facts, violating USDA regulations could have far greater financial implications separate from and in addition to penalties for noncompliance with the regulations. This includes a risk of being sued for false and misleading advertising.

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False and Misleading Advertising of "Organic" Products

A dietary supplement company that uses the word "organic" falsely or in a way that misleads consumers to believe that, for example, all of its dietary supplements are organic (when none or only some have organic certification) may, in addition to a federal or state prosecutorial or USDA administrative action, risk a false advertising claim by a competitor or consumer under a federal statute like the Lanham Act (15 U.S.C. §§ 1125) and/or ancillary state statutes, involving additional claims under state statutory and/or common laws.

The Lanham Act is a powerful statute. Plus, some state unfair competition statutes (like in New Jersey) largely mirror the Lanham Act. Violations of the Lanham Act could result in an order to turn over all profits made on the violative product to the claimant. And if the claimant can prove an intentional violation, those damages could be trebled and may include attorneys' fees. Notably, where a company makes the business decision to disregard a cease-and-desist letter, they are also (perhaps unknowingly) increasing their risk for having to remit intentional damages.

Some dietary product executives may believe that a Lanham Act claim should be readily dismissed because the USDA regulates the use of the word "organic." That belief is not far-fetched since some courts have found that OFPA preempts certain claims. However, where a company is falsely or misleadingly promoting all of its products as organic or using the word "organic" in promotional materials, or even as a trademark, in a false and misleading fashion, a skilled intellectual property litigator will know how to prepare a complaint that would not face preemption. A review of some recent cases is instructive on this issue.

For instance, in late 2015, the Supreme Court of California overturned dismissal of a case brought by an individual against Ohio-based Herb Thyme Farms, Inc. where the individual alleged that the company violated false advertising laws by marketing its conventionally grown herbs using the word "organic" on its label. See Quesada v. Herb Thyme Farms, Inc., 62 Cal.4th 298 (Cal. 2015). The Court outlined the dispositive facts in its opinion, noting that: a) Thyme Farms had multiple farms in California, and just one of those farms used organic growing methods and had received organic certification from an authorized certifier; and, b) for marketing and distribution, the company packed, labeled and processed its conventionally grown products with its organically grown products in the same facility, blended the herbs together, sold both using the trademark, "FRESH ORGANIC," and further marketed some conventionally grown herbs using the word "organic" in its product materials.

There, the company argued that Quesada's claims were preempted by OFPA. But the court disagreed, largely because Quesada's claim was that Herb Thyme knowingly and intentionally marketed and advertised products that were not organic as "organic," as opposed to challenging the validity of the organic certification the company had obtained. Quesada signals the importance of maintaining a marketing

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Equipment&Packaging

In-Sight Laser Profiler for Highly Accurate Part Dimension Verification

Cognex Corporation (Massachusetts) introduced the In-Sight Laser Profiler, a measurement system that verifies part dimensions. Cognex vision tools, accurate object detection and the EasyBuilder interface make the new profiler an intuitive and highly reliable tool for obtaining height, gap, position, and angle measurements and detecting defects on the factory floor, according to the company.

Part profile verifications are used across a wide range of industries, including automotive, electronics, consumer products, and food and beverage, to ensure parts are manufactured within specified tolerances. Slight dimensional variations can adversely affect product quality, consumer safety and brand integrity. The In-Sight Laser Profiler identifies these issues before they reach customers.

By allowing users to set up inspection applications in a few easy steps, this new measurement system eliminates the complexity required by other laser profiling solutions. Additionally, the In-Sight Laser Profiler also makes it easier to monitor production line activity from anywhere on the factory floor using a web-enabled laptop, tablet or smartphone.

For more information, visit www.cognex.com.

Conventions&Meetings

Vitafoods Asia

The seventh annual Vitafoods Asia, an event dedicated to the nutraceutical, functional food and beverages and dietary supplement industries, will take place in Singapore for the first time from September 5-6 in the Sands Expo and Convention Centre at Marina Bay Sands.

This year, the conference program differs from its usual format, as it will instead be divided into two segments: high-level Master classes and a Digestive Health & Microbiome Summit. This new approach was developed to meet and exceed the needs and business objectives of industry visitors.

For more information, visit www.vitafoodsasia.com.

Vitafoods™ Asia

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Legalities

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plan that incorporates specific identification of those products that are organic certified so that a customer who sees the USDA seal, or the word "organic," cannot mistake non-organic products for those that are organic.

In another case, this time in a California federal court, and involving a hair care manufacturer, a company sued its competitor (Moroccanoil, Inc. v. Vogue Int.'l, No. 10-cv-10048), alleging, in part, that the competitor used a trademark, ORGANIX, to sell hair care products that contained fewer than 70 percent organic ingredients. And, thus, that its trademark falsely or mistakenly lead customers to believe all products under the mark were organic. That case settled in late 2012 after two years of litigation. Shortly after that case settled, the same defendant was named as a defendant in a class action (Golloher v. Todd Christopher Int.l, Inc. d/b/a Vogue Int'l, No. 12-cv-06002) for largely the same reason. There, consumers faulted the company for selling its products under the trademark, ORGANIX, and further, for marketing the products as organic, and alleged that such use represented false and misleading advertising. That matter settled as well, in 2014 after another two years of litigation. Notably, a review of records at the U.S. Patent & Trademark Office showed that Florida-based Todd Christopher International, Inc. now uses the mark, OGX, for its products, and the mark, ORGANIX, that it previously owned and used, has been canceled. Also notable is that the company's ability to obtain federal registration for its trademark did not insulate it from liability under false advertising and unfair competition theories.

Knowledge should be a critical component of any marketing plan that involves the use of the word "organic," whether in advertising materials or in the brand name itself. The above resources are a starting point for any dietary supplement company that wants to minimize its legal risks in the organic space. **NIE**

Nancy A. Del Pizzo is a partner at Rivkin Radler LLP. Her practices focus on intellectual property. She is a seasoned litigator and provides transactional counseling on trademarks and copyright, including registration applications and prosecution where applicable. She has litigated false advertising claims in various industries, including on behalf of dietary supplement companies.