Litigation Trends in Packaging Claims

by Michael C. Cannata and Frank Misiti

From Cheez-It snacks to shampoo products and supplements, courts across the United States have recently weighed-in on consumer perception of claims made on product packaging. Given the inherent risks associated with false and misleading product packaging, it is mission critical that manufacturers undertake best efforts to ensure the accuracy of claims made on packaging.

Failure to undertake such efforts could result in legal action by consumers.

Second Circuit Reinstates Suit Against Kellogg's re Whole Grain Labels

A federal appellate court recently allowed consumers to continue their lawsuit against the Kellogg Co., claiming that the labels on boxes of Cheez-It crackers were misleading (Mantikas v. Kellogg Co., 910 F.3d 633 [2d Cir. 2018]).

Consumers who purchased boxes of Cheez-It crackers labeled "whole grain" or "made with whole grain" in large print in the center of the boxes' front panels alleged the labels were false and misleading because they would cause a reasonable consumer to believe the grain was predominantly whole grain when, in fact, the primary grain was enriched white flour. The district court dismissed the complaint, and the plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit.

On appeal, the court ruled that plaintiffs' complaint should not have been dismissed. In its decision, the court explained that the plaintiffs' "core allegation" was the whole grain statements were misleading because they communicated to the reasonable consumer that the grain in the product was predominantly, if not entirely, whole grain.

Contrary to the "reasonable expectations" communicated by the whole-grain claims, the court said the grain in the Cheez-Its was predominantly enriched white flour. The court decided that although the front of the boxes accurately set forth the amount of whole grain in the crackers per serving—one version said it had 5 g per serving and the other said it had 8 g per serving—the labeling was "nonetheless misleading" because the labels falsely implied the grain content was "entirely or at least predominantly whole grain," but the amount of enriched white flour "substantially" exceeded the whole grain portion.

The court was not persuaded by Kellogg's contention that a reasonable consumer would not be deceived by the whole-grain claims because the side panels of the packaging disclosed "Nutrition Facts" that revealed that a serving size of Cheez-Its was 29 g and the list of ingredients named "enriched white flour" as the first (and thus the predominant) ingredient. The court reasoned that the specification on the side panels of the packaging did not adequately dispel the inference communicated by the front of the package that the grain was predominantly whole grain because it did not tell what part of the 29 g total weight a grain of any kind and it did "not indicate the ratio of whole grain to white flour." The court concluded the disclosures on the side of the box did not render the consumers' allegations of deception implausible because "reasonable consumers" should not be expected "to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."

Federal Court Allows Class Action Claims to Proceed Against Shampoo Manufacturers

A federal district court ruled that consumers could bring class action claims against L'Oréal USA Inc., and Matrix Essentials LLC (collectively, the "defendants") over a hair care product line called Matrix Biolage Advanced Keratindose Pro-Keratin + Silk (Price v. L'Oreal USA, Inc., 2018 U.S. Dist. LEXIS 138473 [S.D.N.Y. Aug. 15, 2018]).

Consumers alleged that the names of the three products in the product line—Matrix Biolage Advanced Keratin + Silk Shampoo, Pro-Keratin + Silk Conditioner, and Pro-Keratin + Silk Renewal Spray—would lead reasonable consumers to believe that the three products contained keratin, when in fact they did not. The consumers asserted that everyone who purchased the products paid a price premium because of the defendants' misrepresentations on the product labels. Defendants denied the product labels were misleading and that they had any effect on the products' pricing. The consumers moved to certify various classes against the defendants.

The court certified two classes to proceed as a class action. First, it certified a class of all persons residing in the state of New York who purchased any of the three products after Jan. 26, 2013, for the plaintiffs' consumer protection and breach of contract claims. Second, it certified a separate class of all persons residing in California who purchased any of the three products after Jan. 26, 2013, for the plaintiffs' consumer protection and breach of warranty claims.

The court explained that, during the class period, millions of units of the products were sold nationwide to salons for resale to consumers, and a substantial portion of those sales came from New York and California. It added that a common question was whether a reasonable consumer would expect the products contained keratin.

The court pointed out consumer class actions of the type brought by the plaintiffs in this case—designed to recover

"relatively small price premiums in comparison to the expense and burden of litigation" —were "clearly superior to the alternative of forcing consumers to litigate on principle." The court concluded "class members' interests" would best be served by a joint action, and class action litigation was the superior method of resolving the plaintiffs' claims.

Ninth Circuit Awards Judgment to Defendants in Vitamin E Case

A federal district court in California rejected a consumer's false advertising claims against manufacturers of vitamin E supplements that claimed, on their labels, to "support cardiovascular health" and to "promote immune function" "immune health" "heart health" and "circulatory health" (Dachauer v. NBTY Inc., 2019 U.S. App. LEXIS 887 [9th Cir. Jan. 10, 2019]).

NBTY Inc. and Nature's Bounty Inc. make the vitamin E supplements in question. A consumer who purchased one bottle of the supplements for health reasons sued the manufacturers, claiming the labels' statements violated two California laws against false advertising because the supplements did not prevent cardiovascular disease (CVD) and might increase the risk of all-cause mortality. The district court granted summary judgment in favor of the manufacturers, and the plaintiff appealed to the Ninth Circuit.

The Ninth Circuit affirmed the district court's decision on the grounds that for dietary supplements, the Federal Food, Drug and Cosmetic Act (FD&C) distinguishes between "disease claims" and "structure/function claims" manufacturers make about their products.

A structure/function claim "describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans" or "characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function," but "may not claim to diagnose, mitigate, treat, cure or prevent a specific disease or class of diseases." On the other hand, a disease claim "claims to diagnose, mitigate, treat, cure or prevent disease," either explicitly or implicitly.

The court held that the FD&C preempted the plaintiff's claims regarding the manufacturers' assertions the supplements promoted and supported cardiovascular, circulatory and heart health to the extent that the plaintiff argued that the manufacturers' structure/function claims were false or misleading because their supplements did not prevent CVD.

The court also decided the plaintiff's all-cause mortality claim had to fail. It observed that the plaintiff cited no evidence that vitamin E supplements caused an increased risk of all-cause mortality, as opposed to simply being useless at reducing all-cause mortality. In any event, the court pointed out the manufacturers did not claim that their supplements reduced all-cause mortality.

In Atkins Nutritionals Case, Federal Court Permits Some Claims Over 'Net Carbs' Labeling to Move Forward

A federal district court in New York ruled certain claims challenging "Net Carbs" labels on food products manufactured by Atkins Nutritionals Inc., could move forward while others had to be dismissed (Colella v. Atkins Nutritionals Inc., No. 17-cv-5867 [KAM] [E.D.N.Y. Dec. 7, 2018]).

In the lawsuit, the plaintiff asserted that the following three "Net Carbs" labels on Atkins Nutritionals' food products were "false, misleading, and likely to deceive" consumers:

- the use of the phrase "Xg Net Carbs" while excluding sugar alcohols;
- the use of the phrase "Only Xg Net Carbs;" and
- Atkins Nutritionals "Counting Carbs" label, which explained the calculation method for Net Carbs and stated that sugar alcohols "minimally impact blood sugar."

The plaintiff alleged the claims were likely to deceive consumers because Atkins Nutritionals claimed sugar alcohols "minimally" impacted blood sugar, but sugar alcohols had been proven to "have a significant impact on blood sugar levels."

Atkins Nutritionals moved to dismiss the lawsuit that the court granted and denied in part. In its decision, the court first ruled the plaintiff's state law claims relating to Atkins Nutritionals' use of the phrase "Xg Net Carbs," and its explanation of the calculation method for Net Carbs that subtracted sugar alcohols and fiber from total carbohydrates were preempted by the FD&C. The court reasoned that "Net Carbs" nutrient content claims were not prohibited under federal law, so they could not be challenged under state laws.

The court, however, also determined that the plaintiff's claims regarding the "Only Xg Net Carbs" statement on labels—an implied nutrient content claim—were not preempted. The court explained that an implied nutrient content claim suggested to consumers that a nutrient was present in a certain amount. The court said the foods might be misbranded under the FD&C because Atkins Nutritionals used the term "only" on certain food labels without clarifying such foods were not "low carbohydrate." But the court's analysis may not have been entirely correct. While FDA has defined many nutrient content claims, FDA's regulations do not define any terms to describe the amount of carbohydrate in food.

Finally, the court ruled the plaintiff's claims relating to the portion of the "Counting Carbs" information box on the label were not preempted. According to the court, Atkins Nutritional's statement in its "Counting Carbs" information box regarding the impact of sugar alcohols on blood sugar levels was not a nutrient content claim. The court explained it was not "a quantitative statement about sugar alcohols" and it did not imply sugar alcohols were present in the labeled items in a certain amount. As such, the court concluded, it did not fall under the FDA regulation for nutrient content claims or other health related claims and was outside the law's preemption provision.

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