Increased Litigation Regarding Food And Beverage Product Labeling Creates Risk For Manufacturers

By Christopher P. Fitzgerald

This article will discuss the recent rise in food and beverage labeling litigation, assess the claims advanced in recently filed lawsuits, and address the potential pitfalls for food and beverage manufacturers in defending against these claims.

In recent years, class-action litigation concerning the labeling of food and beverage products has become increasingly prevalent around the country. According to one report, as of November 2021, class-action lawsuits against food and beverage manufacturers had increased by over one thousand percent since 2008. (See ***https://www.npr.org/2021/11/12/1055030251/meet-the-lawyer-who-is-driving-the-law-suits-against-food-and-beverage-companies***) Massachusetts is no exception to this recent trend, and the federal courts in Massachusetts have seen their fair share of this litigation, as evidenced by recent cases filed against Post Consumer Brands, LLC, Reily Foods Company, Conagra Brands, Inc., and Polar Corp. This article will discuss the recent rise in food and beverage labeling litigation, assess the claims advanced in recently filed lawsuits, and address the potential pitfalls for food and beverage manufacturers in defending against these claims.

The labeling of food and beverage products sold in the United States is largely governed by federal law. The Federal Food, Drug, and Cosmetic Act ("FDCA") is administered by the FDA and seeks to ensure nationwide near uniformity in how food is labeled. The FDCA provides that "[a] food shall be deemed to be misbranded ... [i]f ... its labeling is false or misleading in any particular." 21 U.S.C. § 343(a). Because the FDCA contains an express preemption provision, states are precluded from promulgating labeling requirements that are not identical to those provided for under federal law. See 28 U.S.C. § 343-1(a). However, recent decisions from the Massachusetts federal courts, and the First Circuit in particular, suggest that plaintiffs in these cases may be able to pursue state law claims in certain limited circumstances, notwithstanding the preemption issue. As a result, manufacturers may have to defend against claims based upon state consumer protection statutes, which often provide significant remedies to aggrieved plaintiffs.

While many of the claims advanced by consumers may seem bizarre to the everyday consumer, defending against these claims, which are more often than not styled as class-action lawsuits, is a time-consuming and costly process. Recent decisions from the First Circuit have indicated a willingness to hold manufacturers' feet to the fire, and an increased willingness to give some plaintiffs their days in court.

Recent Dismissals by the USDC

Two recent decisions out of the Massachusetts federal district court have been favorable to food and beverage manufacturers, resulting in the dismissal of claims of misleading labeling of the popular cereal Honey Bunches of Oats (Lima et al., v. Post Consumer Brand, LLC, 2019 WL 3802885 (D. Mass. 2019), and a regional soda manufacturer's ginger ale products (Fitzgerald et al., v. Polar Corp., 2020 WL 6586628 (D. Mass. 2020).

In Lima v. Post Consumer Brands, LLC, a class-action lawsuit, the plaintiffs alleged that the labeling of Honey Bunches of Oats with Almonds was misleading in that it led consumers to believe that the cereal's primary sweetener was honey, as opposed to

Christopher P. Fitzgerald of Conn Kavanaugh Rosenthal Peisch & Ford LLP regularly works with in-house counsel, national counsel, and an array of expert witnesses in the defense of product liability claims. In addition to his product liability experience, Chris also has experience defending professional liability claims, premises liability claims, and complex business disputes at every stage of litigation, including trial.

high fructose corn syrup or other sweeteners. Although the plaintiffs conceded that the cereal contained *some* honey, and that the ingredients list was accurate, they contended that the product's labeling, which included a honey dipper dripping with honey and the outline of a bee in flight, created the misleading impression that the cereal's primary sweetener was honey. Plaintiffs alleged that they paid a premium for the cereal because most consumers believe that honey is "better for you than sugar" and that as such, the value of the cereal they bought was "materially less than Post's marketing implied."

The fundamental question before the court was whether the cereal's labeling was false or misleading in any particular. The court noted that although there is not a determinative standard for when branding is misleading, "courts have generally evaluated [such allegations] under a reasonable consumer standard and have not found that standard necessarily inconsistent with FDA regulations." Relying upon that standard, the court found that the cereal's packaging was not misleading. Ultimately, a critical fact in support of the court's finding for Post was that the cereal contained *some* honey. The court also noted that honey, as used in the product labeling, was reasonably understood by the plaintiffs to represent a flavor as well as an ingredient. The court found that "a brand name that offers some indication of a product's contents is not … required to list out every ingredient," and, as such it held that the product labeling did not run afoul of the FDCA's labeling requirements. (Plaintiffs appealed the court's dismissal and that case, as well as other similar cases filed throughout the country, have reportedly been settled.)

In Fitzgerald v. Polar Corp., another aspiring class-action suit, the plaintiff alleged that the labeling on Polar's ginger-ale beverage products that claimed that the product was "MADE FROM REAL GINGER" was false and deceptive where those products were not made with real ginger root, but rather ginger compounds.

As in the Post case, the plaintiff in Polar claimed that she believed there were tangible health benefits to ginger, which enticed her to purchase Polar brand ginger ale over other similar products. Again, plaintiff claimed that Polar's alleged misrepresentation led her to pay a premium for the product. Because there was not an appreciable amount of ginger in the soda, plaintiff claimed to have been deprived of the benefit of the premium she paid for the soda.

The District Court dismissed plaintiff's claims, including her claim under G.L. c. 93A – the Massachusetts Consumer Protection Act – noting that although the statute is intended to be read liberally, "any reasonable consumer would know ginger ale for what it is – a carbonated drink with ginger flavoring and probably containing an unhealthy amount of sugar." In a footnote, the court endorsed the view of the dissenting judge in a previously issued decision by the First Circuit permitting a plaintiff to proceed with claims against a coffee maker whose Hazelnut Créme Coffee contained no hazelnuts, who stated that "[i]mposing on food producers the costs of defending meritless labeling litigation will have the [undesirable] effect of driving up prices for consumers." Dumont v. Reily Foods Company, 934 F. 3d 35, 47 (1st Cir. 2019) (Lynch, C.J., dissenting).

The trend of increased litigation by consumers against food and beverage manufacturers has shown no signs of slowing.

Recent First Circuit Decisions

In Dumont, the plaintiff claimed that she purchased New England Coffee Company's Hazelnut Créme Coffee because she thought the product contained some hazelnut, which it did not. Plaintiff claimed that the product's labeling was unfair and deceptive, and in violation of the Massachusetts Consumer Protection Act. Although the District Court dismissed plaintiff's claims for failing to meet Fed. R. Civ. P 9(b)'s heightened pleading standards, the First Circuit reversed.

Unlike in Lima, the product packaging in this case did not depict hazelnuts or otherwise suggest the presence of that ingredient in the coffee aside from the product's name. Similarly, the ingredient list did not identify hazelnuts as an ingredient, but instead only identified "100% Arabica Coffee Naturally and Artificially Flavored." In support of its reversal, the First Circuit held that the question of whether the product's labeling was deceptive (i.e. that it would lead a reasonable consumer to believe that the product contained some hazelnut), was one to be answered by a jury.

The court in Dumont also addressed the preemption issue raised by the FDCA. The court held that plaintiff's claims under c. 93A would be impliedly preempted to the extent that plaintiff argued that a violation of FDCA labeling requirements constituted a *per se* violation of the state law Consumer Protection Act. The court nevertheless permitted plaintiff to proceed with her 93A claim to the extent she alleged she was deceived by the labeling "independently of any packaging standards … established under FDCA regulations."

More recently, in Lee v. Conagra Brands, Inc., (Lee et al., v. Conagra Brands, Inc., et al., 958 F. 3d 70 (1st Cir. 2020)) the plaintiff brought claims against Conagra Brands, Inc. and others alleging that Conagra's labeling of Wesson brand vegetable oil as "100% Natural" violated G.L. c. 93A because the product contained genetically modified organisms ("GMOs"). Following the recent trend, plaintiff alleged that she paid a premium for the product based on the representation that the product was "100% Natural," which led her to believe that the product did not contain GMOs. The District Court dismissed plaintiff's claims and again, the First Circuit reversed.

In support of its reversal, the First Circuit noted that a violation of G.L. c. 93A could be based on conduct that is *either* unfair or deceptive. It found that the plaintiff had stated a plausible claim that the categorization of Wesson Oil as "100% Natural" was deceptive. Conagra argued that because the FDA previously had indicated that food labelers have no general freestanding duty to disclose the presence of GMOs, Conagra's labeling could not have been unfair or deceptive. The court rejected that argument, noting that "even if [the FDA's] guidance generally blesses silence regarding GMO ingredients, it falls far short of blessing an affirmative misrepresentation concerning the presence of such ingredients." At bottom, the court found that while Conagra may not have been required to disclose the presence of GMOs, the plaintiff plausibly alleged that Conagra's description of its product as "100% Natural" was misleading in light of the presence of GMOs.

The trend of increased litigation by consumers against food and beverage manufacturers has shown no signs of slowing. While recent decisions by the federal district court in Massachusetts would seem to suggest that particular court views these claims with some level of skepticism, there are other courts, including the First Circuit, that have shown a propensity to give plaintiffs their proverbial day in court.

This type of litigation presents significant risk to food and beverage manufacturers – not only from a liability and cost of litigation perspective, but also from a public relations standpoint. That is particularly true in states like Massachusetts, which have consumer protection statutes that permit the recovery of multiple damages and attorneys' fees. Finding the proper balance between product marketing that will attract consumers and product claims that are reasonably accurate is a delicate task which will require manufacturers to not only be intimately familiar with the FDCA's labeling requirements, but also with the reasonable expectations of consumers. Recent case law suggests that strict adherence to federal regulations may not be sufficient to shield manufacturers from claims. Going forward, manufacturers will need to be vigilant to ensure not only compliance with federal labeling requirements, but also that product labeling adequately informs consumers of what they are buying.