Nutter insights

OCTOBER 2016

Check the Box to Avoid Food & Beverage Packaging Litigation

Q How can product packaging trigger litigation for food and beverage companies?

Shagha Tousi: Food and beverage companies face the possibility of two sources of litigation based on their product packaging and labeling: regulators and plaintiffs' lawyers. With respect to regulatory action, the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) share overlapping jurisdiction on the labeling of food and beverage products. While FDA enforces regulations on the content of product labeling, FTC enforces instances of allegedly false and deceptive advertising. FDA's primary enforcement tactic is to send a Warning Letter which services as official notice to the company. From there, FDA can seek remedies including injunctions, recalls, seizures, civil penalties, and criminal prosecutions. Similarly, FTC can bring claims for false advertising against the company.

Perhaps more ominous than the threat of regulatory action is that of a consumer class action by the plaintiffs' bar. These claims can vary from product liability claims alleging physical harm to false or misleading advertising claims. Even if the company is in full compliance with FDA and FTC regulations, plaintiffs' lawyers can pick apart the packaging and advertising for any particular product, identify a single lead plaintiff who allegedly was misled into buying the product, and initiate costly and protracted litigation which the company will either have to settle or commit resources to fight.

Q What types of packaging do plaintiffs' lawyers often focus on?

ST: Plaintiffs' lawyers tend to harp on areas where FDA has spoken negatively (e.g., the term "evaporated cane juice") or hasn't defined a term. One example is the term "natural," which FDA has not yet regulated, resulting in active litigation by plaintiffs' lawyers around labels using terms like "natural" or "all natural."

Q Should manufacturers be worried only about what is on their nutrition label or physical product packaging?

ST: No. While many FDA regulations apply specifically to the product's nutrition label, the remainder of the product's physical packaging as well as all of the company websites, tv ads, social media platforms, and other materials touting the product are subjected to regulatory and litigation scrutiny. Even an action as simple as "re-tweeting" another's praise of the product can be deemed to have been adopted by the company.

Q How can a company avoid being subject to a regulatory action or class action litigation on the basis of their product labeling?

ST: Companies should avoid making claims that go beyond scientifically proven attributes of their products or ignore data going in the opposite direction. Definitive statements such as "proven to improve health" and "proven to cause weight loss," as well as undefined terms like "pure" and "wholesome" can be traps. Manufacturers should consult with a food and beverage products liability lawyer to determine if their marketing claims leave them vulnerable.

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Shagha Tousi is a partner in Nutter's Litigation Department and a member of the firm's Business Litigation and Product Liability and Toxic Tort Litigation practice groups. Clients rely on Shagha's counsel to deal with disputes arising with their organization's product marketing initiatives, sales force, and competitors. She advises food and beverage companies, clients in the life sciences industry, and other organizations relying on large sales networks as a core component of their business.

Nutter is a top-tier, Boston-based law firm that provides legal counsel to industry-leading companies, early stage entrepreneurs, institutions, foundations, and families, across the country and around the world. The firm's lawyers are known for their client-centric approach and extensive experience in business and finance, intellectual property, litigation, real estate and land use, labor and employment, tax, and trusts and estates. Co-founded in 1879 by Louis D. Brandeis, who later became a renowned justice of the U.S. Supreme Court, Nutter is dedicated to helping companies prosper in today's fast-paced business environment.

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