Consumer Litigation

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What's the Risk?: Recent Trends in Advertising Class Actions

Staying on top of the latest trends can go a long way toward being able to mitigate risk for your business.

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Advertising class actions have continued to be a significant concern for virtually every consumer-facing business, with hundreds of new cases filed in the past year across various industries. While it may not be possible to eliminate the risk of being sued, staying on top of the latest trends, including the particular types of claims being targeted in your industry, can go a long way toward being able to mitigate risk and anticipate particularly risky claims that your business should be aware of when making marketing strategy decisions.

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Number of Servings or Units

The plaintiffs' bar has continued to focus on cases alleging that a product yields fewer servings than advertised. These cases most frequently arise in the context of powdered or granulated foods such as protein powder, baby formula, oatmeal, and coffee. For example, in *Devey v. Big Lots*, the plaintiff alleged that Big Lots deceptively advertised that its ground coffee canisters could produce "up to 210" six-ounce servings of coffee. *Devey*, No. 6:21-cv-06688 (W.D.N.Y. Oct. 12, 2022). Such cases have also been filed against other consumer products companies that advertise the number of units in a product, or the number of uses that a product can yield, including, for example, *Thomas v. P&G*, alleging that P&G falsely advertised that its Bounty 12-pack "Singles Plus" paper towels equaled 18 "Regular Rolls"; and *Adeghe v. P&G*, alleging that P&G falsely advertised Tide Free & Gentle laundry

detergent as containing enough product to wash 64 loads of laundry. *Thomas*, No. 1:22-cv-02218 (N.D. Cal. Apr. 8, 2022); *Adeghe*, No. 7:2022-CV-10025 (S.D.N.Y. Nov. 25, 2022).

Several of these cases have been dismissed at the pleading stage, including *Devey*, where the court found that the plaintiff engaged in "selective reading" of the ground coffee brewing instructions by focusing solely on the instructions for brewing a single serving and overlooking brewing instructions for larger batches that deliver a higher coffee yield. However, other cases have settled, some for significant sums, and these cases show no signs of letting up.

Deceptive Pricing

Cases alleging that companies—in particular, outlet and fast-fashion clothing retailers—engaged in deceptive pricing schemes by advertising "fictitious" discounts have been around for years. While those cases continue to be filed, they are now being joined by cases alleging other types of deceptive pricing schemes. For example, this year, plaintiffs filed class actions against major big-box retailers, alleging that the point-of-sale prices that consumers were charged were higher than advertised shelf prices. And, in the food world, with food delivery becoming ever more prevalent, multiple class actions have been filed against delivery services (including restaurants that offer these services), alleging that they engaged in deceptive pricing by charging higher prices for delivery than in the store.

"Natural" and "Plant-Based" Claims

Cases alleging that foods, beverages, and other consumer products are falsely advertised as "natural" or "plant-based" continue to be filed with regularity. While these cases have historically met with mixed success, this has not deterred the plaintiffs' bar from pursuing this same theory against new (and old) product categories. For example, this year, alternative meat products have been targeted, with two cases filed against Beyond Meat alleging that its "all natural" and "made from plants" claims are false because its products contain methylcellulose, which the plaintiffs contend is a synthetic ingredient. *See Don Lee Farms v. Beyond Meat, Inc.*, No. 2:22-cv-03751 (C.D. Cal. 2022); *Roberts v. Beyond Meat*, No. 1:22-cv-02861 (N.D. Ill. 2022).

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"No Artificial Flavors" and "No Artificial Preservatives" Claims

Cases targeting "no artificial flavors" and "no artificial preservatives" claims have historically fared better for plaintiffs than "natural" claims. Some of these cases have resulted in significant settlements, including in the seven-figure range. *See, e.g.*, *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-cv-22335 (S.D. Cal.) (settled in 2020 for $5.4 million). It is therefore unsurprising that these claims continue to be a focus for the plaintiffs' bar.

There are a few key ingredients that are repeat targets in these class actions, including, in particular, citric acid, malic acid, ascorbic acid, xylitol, glycerin, and maltodextrin. Manufacturers should be mindful that if their product contains one of these ingredients and they are making a "no" or "free of" artificial flavors or preservatives claim, they are likely to be an attractive target for members of the plaintiffs' bar focused on these types of claims.

Flavorings

The years 2020 and 2021 saw an explosion of putative class actions challenging the use of the term *vanilla* to describe food and beverage products, where the vanilla flavoring allegedly was not derived exclusively from the vanilla bean plant. Following a series of decisions dismissing those claims at the pleading stage, the plaintiffs' bar began to set its sights on other flavors, including "chocolate," "smoked," "fudge," "strawberry," and "honey." These cases have met with somewhat mixed results, with many sharing the same fate as their "vanilla" predecessors. Nonetheless, we expect this trend to continue into 2023.

"Healthy" Labeling

The plaintiffs' bar has had some success in recent years with cases alleging that food and beverages, particularly cereals, are falsely advertised as being healthy when, in fact, they contain a high sugar content that makes them unhealthy. Some of these cases have resulted in multimillion-dollar class-wide settlements.

A significant development that may curtail these class actions is the U.S. Food and Drug Administration's (FDA's) proposed changes to its regulations regarding the labeling of foods as "healthy." Under current regulations, a food can be labeled as "healthy" if it contains less than a certain amount of total fat, saturated fat, cholesterol, and sodium and contains at least 10 percent of the recommended daily value of certain nutrients. The

existing regulations do not place a limit on added sugars. However, this past September, the FDA proposed changes that would incorporate a limit on added sugars. If these changes are adopted, clear regulatory limits on the amount of added sugar that a food labeled as "healthy" is allowed to contain may provide a new defense in these cases.

"Safe" and "Nontoxic" Claims

With increased consumer focus on health and safety in recent years, we have also seen a spike in cases challenging advertising of products (particularly household cleaners) as "safe" or "nontoxic." Plaintiffs argue that the reasonable takeaway is that the advertised product will not cause *any* harm or irritation, however minor, even if misused. Of course, any substance if misused can be harmful, including water. Advertisers defending these claims therefore generally argue that *nontoxic* means that the advertised product will not result in a risk of serious harm. Nonetheless, some courts have been reluctant to dismiss these cases at the pleading stage, crediting plaintiffs' allegation that a reasonable consumer could understand *nontoxic* to mean that the products do not pose *any* risk of harm to humans, animals, and/or the environment.

Undisclosed Contaminants

After the congressional report on heavy metals in baby foods that came out in 2021, we saw an explosion in consumer class actions alleging that baby food manufacturers falsely advertised their products as healthy and failed to disclose the presence of heavy metals. While some of those cases continue to work their way through the courts, we have seen an uptick this year in other cases alleging failure to disclose contaminants in various products, including heavy metals in human and pet food products; benzene in sunscreen, body sprays, and hair products; and per- and polyfluoroalkyl substances (PFAS) in fast-food packaging and cosmetics.

Most of these cases are still in the early stages, but as some of the baby food cases are being decided, they can serve as a helpful guide for articulating some of the problems with plaintiffs' theories. For example, the court in *Kimca v. Sprout Foods, Inc.* found that the plaintiffs "fail to plausibly allege a key inference necessary for standing" because they do not "establish[] that the levels of heavy metals in the Baby Food Products are unsafe." *Kimca*, 2022 U.S. Dist. LEXIS 7462 (D.N.J. 2022).

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Place of Origin

The Federal Trade Commission (FTC) prohibits marketers from making unqualified "Made in USA" claims unless (a) "final assembly or processing of the product occurs in the United States"; (b) "all significant processing that goes into the product occurs in the United States"; and (c) "all or virtually all ingredients or components of the product are made and sourced in the United States." Made in USA Labeling Rule, 16 C.F.R. pt. 323.2 (2021).

In recent years, plaintiffs, citing the FTC rule, have filed a plethora of cases against advertisers making "Made in USA" claims. More recently, these cases have been joined by others alleging that companies are falsely advertising U.S. places of origin—for example, that King's Hawaiian Rolls are falsely advertised as being made in Hawaii—as well as non-U.S. places of origin. In deciding these cases, courts tend to distinguish between advertising claims explicitly touting that a product has been "made in" a certain location versus those that merely tend to evoke a certain locale. For example, in *Sinatro v. Barilla America, Inc*., the court denied Barilla's motion to dismiss, where the advertiser held itself out as "Italy's #1 brand of pasta" with a website that "markets the Barilla brand and company as undeniably Italian." *Sinatro*, No. 22-cv-03460 (N.D. Cal. Jun. 11, 2022). In contrast, in *Steinberg v. Icelandic Provisions, Inc.*, the court granted the defendant's motion to dismiss because the label "only contains the brand name, a nonspecific painted image (which does not refer to Iceland), and the words 'traditional Icelandic' on the package." *Steinberg*, No. 21-cv-05568 (N.D. Cal. Jan. 25, 2022).

"Clinically Proven" Claims

"Clinically proven" claims are a hot target for false advertising class actions, just as they are at the National Advertising Division (NAD). However, unlike at NAD, in class actions, the burden is on the plaintiff to plead, and ultimately prove, that the "clinically proven" claim is false or misleading. In *Yamasaki v. Zicam*, the plaintiff challenged Zicam's "clinically proven to shorten colds" claim, alleging that the studies supporting that claim were inadequate. *Yamasaki*, 2021 U.S. Dist. LEXIS 205494 (N.D. Cal. 2021). The court granted Zicam's motion to dismiss, finding that the complaint lacked factual allegations to support a reasonable inference that Zicam's "clinically proven" claim was actually false.

ESG Issues

As environmental, social, and corporate governance (ESG) issues have become more important to companies and to consumers, plaintiffs are increasingly targeting

environmental and sustainability claims, with a particular focus right now on carbon offset and recyclability claims. In assessing these claims, courts often look to the FTC's Green Guides, so advertisers making environmental claims should ensure that they are in strict compliance with those Green Guides.

"Carbon neutral" claims are challenged on various grounds. Advertisers typically substantiate "carbon neutral" claims by calculating the carbon emissions generated by their products or services and then purchasing carbon offsets from certifying bodies and other companies that engage in carbon-reducing activities like tree planting. Class-action plaintiffs have challenged these "carbon neutral" claims on various grounds. For example, in *Dwyer v. Allbirds*, the plaintiff argued that Allbirds' method of calculating the carbon footprint of its products was unreliable and incomplete. However, the *Dwyer* court dismissed these allegations, finding that the plaintiff's qualms with Allbirds' chosen methodology did not render the claims that Allbirds was making about its carbon offsets untrue. *Dwyer*, No. 7:21-cv-05238-CS (S.D.N.Y. 2022),

More recently, the plaintiffs' bar has taken to attacking the very concept of making a "carbon neutral" claim based on the purchase of offsets. For example, in *Dorris v. Danone Waters of America*, the plaintiff argued that reasonable consumers understand *carbon neutral* to mean carbon free, but the manufacture and shipping of the defendant's water bottles still release carbon into the atmosphere regardless of whether the defendant's purchases of carbon offsets adequately cover those emissions. *Dorris*, No. 7:2022-cv-08717 (S.D.N.Y. 2022). These cases are in their nascent stages, so we have yet to see if they will be viable—but we would not be surprised to see more filed before we get clearer guidance from the courts.

"Recyclable" claims increased against plastic drink bottle manufacturers. This year saw a series of class actions filed against plastic drink bottle manufacturers, alleging that their "100% recyclable" claims are deceptive because components of the bottles (e.g., labels and caps) are not recyclable or are made from types of plastic that sometimes do not end up being recycled due to capacity limits of local recycling facilities. For example, in *Duchimaza v. Niagara Bottling, LLC*, the plaintiff alleged that the defendant's "100% recyclable" claim is misleading because the bottles' caps and labels are not recyclable. The *Duchimaza* court granted the defendant's motion to dismiss, noting that the FTC Green Guides permit unqualified "recyclable" claims even where "minor incidental components" (e.g., bottle caps and labels) are not recyclable. *Duchimaza*, 2022 U.S. Dist. LEXIS 139837 (S.D.N.Y. 2022).

Animal Welfare. Animal welfare claims have increasingly become a target for the plaintiffs' bar. Several of these cases have been dismissed at the pleading stage. For example, in *Dwyer*, the court found that depictions of "happy" sheep in "pastoral settings" were "obviously intended to be humorous" and would not be understood as making a factual claim on which consumers could rely. *Dwyer*, No. 7:21-cv-05238-CS. The court held that these depictions and the statement that "Our Sheep Live the Good Life" were "classic puffery." *Id.* However, other animal welfare cases have survived motions to dismiss, and we expect more cases of this variety to be filed in 2023 and beyond.

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