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REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
APR-JUN 2023 ISSUE



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PERSPECTIVES

TRENDS IN US CONSUMER CLASS ACTIONS

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Any company that sells a product or service to US consumers should be aware that there has been a sharp spike in class actions brought under state consumer protection laws. There were over 500 such cases filed in 2021 and over 600 in 2022. Behind the scenes, many, many more class actions are threatened and resolved. Companies on the receiving end of these class actions should, unfortunately, continue to expect them – and in even greater numbers.

The good news for industry is that there are pre-emptive steps companies can take to protect against class actions and position themselves for a successful defence if one is filed. Monitoring and

tracking class actions filed throughout the country allows us to foresee class action trends and best position clients even before cases are threatened or filed. Below, we discuss some of the hottest areas we observed in 2022.

Safety claims and failure to disclose product contamination

In addition to challenging marketing claims that a product is ‘safe’, ‘non-toxic’ or lacking ‘harsh chemicals’, there were dozens of class actions last year – many of which are still ongoing – that allege a product contains a dangerous ingredient or contaminant. Many of these cases are spurred by



third-party investigations whose reliability has been questioned by the Food and Drug Administration (FDA) and courts. Nonetheless, these cases continue to be filed in large numbers. Companies should make sure to have proper substantiation for any safety-related claims and should monitor for trends, including particular contaminants the plaintiffs' bar is targeting.

Environmental claims

As advertisers make environmental claims a greater focus of their marketing strategy, class

actions challenging these claims have spiked too. In 2022, some of the main targets included claims about carbon neutrality, recyclability and biodegradability. Companies that make such claims should make sure they disclose any limitations applicable to their claims in compliance with law, as many of these cases challenge alleged implied messages not actually stated on the product's packaging or in advertising. Notably, the Federal Trade Commission (FTC) is expected to update this year its 'Guides for the Use of Environmental Marketing Claims', also known as the 'Green Guides',



which could affect the types and number of class actions brought in this area.

'Healthy' claims

Another hot area companies should be monitoring are class actions alleging that a product is falsely advertised as 'healthy'.

Over the last two years, there have been several large settlements of class actions challenging such advertising claims. Companies making these claims should keep a close eye on the FDA's proposed changes to its regulations concerning the labelling of foods as 'healthy'. Compliance with the anticipated regulations could give companies a strong pre-emption defence to putative class actions.

Place of origin and 'made in the USA' claims

Companies often like to tell consumers where they make their products. Sometimes consumers may see value in a product being 'made in the USA'. Other times, consumers may see value in a product having a foreign origin, for example pasta from Italy or tortillas from Mexico. The plaintiffs' bar has not hesitated to swoop in and file class actions alleging a company is overstating the extent to which its products are made in a particular location. Many of these cases challenge packaging or advertising not on the ground the advertiser expressly claimed its product was made somewhere, but because

imagery or language on the package supposedly implied that message.

These cases do not always fare well. For example, a court granted the defendant's motion to dismiss in a case alleging the consumer believed yogurt came from Iceland because the label "only contains the brand name" Icelandic Provisions, "a nonspecific painted image (which does not refer to Iceland), and the word 'traditional Icelandic' on the package". Companies making 'made in the USA' claims should also be alert to the FTC's rules and guidance on this subject, as this has become an area of increasing focus for the Commission.

Number of servings claims


When the plaintiffs' bar finds a case theory it likes, attorneys tend to bring those cases in droves. Several class actions that alleged powdered coffee products stated the wrong number of servings the container makes settled for tens of millions of dollars. That has led to many more suits challenging 'number of servings' claims on not only coffee products but also other powdered products like infant formula. Manufacturers should make sure their labels' math checks out to avoid these suits.

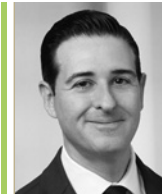
Ingredient-related claims

There are a variety of ingredient claims that have been targeted by the plaintiffs' bar, but the two most common are that a product, often but not

always a food or beverage, is advertised in a manner that allegedly conveys it contains the ingredient corresponding to its flavour (e.g., honey or lemon) when it does not contain that source ingredient (as opposed to its flavour) at all or in any meaningful amount; or that suggests the product does not contain any or certain types of artificial ingredients or flavours, when it allegedly does. The latter type of cases have fared better in court, but both continue to be filed in large numbers.

Clinically proven claims

Advertising claims that a product is 'clinically proven' to provide a health or cosmetic benefit often draw scrutiny from competitors. Over the last few years, we have also seen an increase in class actions challenging these claims, typically without the plaintiff submitting any clinical studies of the defendant's product. Courts have dismissed some of these cases because they amount to 'lack-of-substantiation' claims, which improperly place the burden of substantiation on the defendant, when it is the plaintiff who must plausibly allege the defendant's advertising is false to get past the pleading stage. 



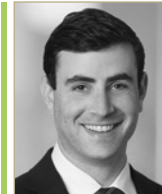
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