A Rose by Any Other Name Is a Lawsuit

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This article originally ran in the January/February 2013 issue ***[1]of*** **Food Manufacturing*.***

The courtroom battle over the labeling practices of food manufacturers

William Shakespeare once wrote:
What's in a name? That which we call a rose
By any other name would smell as sweet.

Shakespeare, while perhaps the greatest writer in the English language, would never have made it as a lawyer. Because, as a recent litigation trend makes clear, what is in a name, what label one gives to describe an item, makes a huge difference, at least with regard to the potential liability of a food manufacturer.

One of the most explosive litigation trends in our tort system right now is the large uptick in the number of suits targeting the labeling practices of food manufacturers. Indeed, a huge number of such suits were filed in 2012 alone. And more such suits appear to be on the way in 2013. The New York Times documented this trend in an article on Aug. 18, 2012, titled "Lawyers From Suits Against Big Tobacco Target Food Makers."

The current landscape of such lawsuits can be divided into three categories.

Lawsuits by individuals or groups of plaintiffs against a food manufacturer

Most of the lawsuits related to labeling involve groups of plaintiffs suing a food

manufacturer. Most allege that the labeling of a food item was deceptive. One recent example is the recently-settled suit against the maker of fruit roll-ups alleging deceptive advertising based on the word "fruit"[1]. The plaintiff alleged that she "relied upon the representations [that the product was 'made from fruit'] in making her decision to purchase the products at [a] premium price"[1]. The defendant moved to dismiss. In what may have been a surprise to some in the food industry, the court allowed parts of the case to proceed toward trial.

The chief focus in recent months has appeared to be on foods labeled as "natural" or "healthy." One example is a recent lawsuit filed against a manufacturer of granola bars alleging that the bars were deceptively labeled as "all natural"[2]. Another is a proposed class action challenging "All-Natural" labeling against a manufacturer of nutrition bars when the bars allegedly contain synthetic ingredients. The suit survived the defendant's motion to dismiss in late 2012[3].

Such suits, at least in recent months, have mostly been filed in one of two jurisdictions — California and New Jersey. California appears for now to be the favored forum for these suits based in large part on that state's strong statutory prohibitions against false or deceptive advertising.

These suits have met with mixed success thus far. While some have resulted in multi-million dollar settlements against the food manufacturer and certifications of class actions, others have been dismissed. For instance, one recent case resulted in a settlement that offered consumers who had purchased the allegedly deceptively labeled product $4 for each jar previously purchased, up to $20 total[4]. On the other hand, a California state court recently dismissed a class action against a manufacturer of coconut water, holding that allegations that the defendant's product contained a false nutritional label were preempted by federal law5. The court also found that other claims related to the product's "superior" hydrating powers were allowable puffery[5].

The fate of this litigation, whether it is merely a blip, or as the New York Times suggests, a threat akin to the tobacco litigation, is still undecided as many of them have been filed only recently. Whether these suits move forward and result in large monetary awards will bear watching by those in the food industry.

Lawsuits by one food manufacturer against another

There have also been recent lawsuits by those in the food industry against others in the food industry related to labeling. One example is a lawsuit by a group of sugar growers against Archer Daniels Midland Co. and three other high fructose corn syrup producers, alleging that the defendants conspired to deceptively brand corn syrup as a "natural" product equivalent to sugar[6]. The sugar growers allege that they have lost business as a result of the alleged deception. Recently, the trial court rejected the defendants' motions to dismiss, and allowed the suit to proceed against most of the defendants. By all accounts, the financial stakes are potentially huge, considering the plaintiffs have alleged that the defendants have already spent at least $50 million on their rebranding effort.

Actual and Threatened Lawsuits by Governmental Agencies Against Food Manufacturers

The third category of recent labeling lawsuits is perhaps the most fear-inducing for those in the food industry. It involves actual and threatened lawsuits by governmental agencies against food manufacturers. This is perhaps due to state and local governments "becoming alarmed at the escalating costs of caring for people with diseases [caused by eating unhealthy foods] and are putting pressure on food companies," as noted by the aforementioned New York Times article.

An example of a threatened lawsuit is the recent investigation by New York's attorney general against the makers of energy drinks. The investigation centers on whether these companies are deceiving consumers in a number of ways, including the amount of caffeine in their drinks, the health risks generated by consumption of large amounts of caffeine, whether all of the ingredients in the drinks are properly disclosed, and whether the drinks are dietary supplements or foods. To date, the New York attorney general has issued subpoenas to the energy drink makers as part of the probe. The FDA is reportedly investigating the industry as well.

State and local governments are not the only ones pursuing this strategy. The Federal Trade Commission has won settlements from companies for claims related to a product's health benefits. In addition, public interest groups are also getting into the act, suing over labeling of various food products.

Overview of Proposition 37

On another front, various state legislatures appear to be moving to expand laws requiring accurate labeling of food products. For instance, legislatures in at least 20 states have introduced legislation that would require the labeling of genetically engineered food. Though only one state has passed such legislation thus far (Alaska), it appears to only be a matter of time before more are passed. In fact, in California, a new law requiring labeling of genetically engineered food was narrowly defeated as a ballot initiative in November 2012.

This proposed law, known as Proposition 37, or The California Right to Know Genetically Engineered Food Act, would have required labeling on raw or processed food offered for sale to consumers if it is made from plants or animals with genetic material changed. In addition, Proposition 37 would have prohibited the labeling or advertisement of any such food as "natural" or "all natural." Enforcement of any violations would have been through existing regulations and the Consumer Legal Remedies Act, which includes actual damages, injunctive relief, restitution, punitive damages, and attorneys' fees. Many observers believed that if Proposition 37 had passed, it would have had a huge impact on the food industry — increasing compliance costs and opening the door to a whole new target of litigation. Passage looked likely just a month or two before Election Day with polls showing that the measure was leading by more than 40 points, but a late focus on the proposed law's problems turned the tide and led to a six-point defeat of the Proposition.

However, the battle appears to be far from over. The Proposition 37 campaign

spokeswoman, Stacy Melkin, said after its defeat that they plan to win the labeling debate over the long-term and that "[w]e showed that there is a food movement in the United States, and it is strong, vibrant and too powerful to stop." It appears that there may be a similar ballot initiative in Washington State in November 2013, and there are current legislative efforts to pass similar measures in Connecticut, Vermont, and New Mexico. Moreover, U.S. senators have proposed legislation to permit states to pass laws like Proposition 37 (though the latest effort picked up a mere 26 votes in the Senate).

The stakes in this new wave of lawsuits are high. The addition or omission of literally one word in a label can potentially lead to millions of dollars in liability for a company, millions more in legal fees, and even lead to investigations into such practices by federal and state authorities. Those in the food industry should follow this trend closely and take steps to prepare for possible litigation.

1 Lam v. General Mills, Inc., no. 3:11-cv-05056 (N.D. Calif.)
2 Janney v. General Mills, no. 4:12-cv-03919 (N.D. Calif.)
3 Colucci v. Zoneperfect Nutrition Co., no. 12-2907 (N.D. Calif.)
4 Nutella Marketing and Sales Practices Litigation, no. 3:11-cv-01086 (D. N.J.)
5 Shenkman v. One World Enterprises, LLC, no. BC467165 (Los Angeles County)
6 Western Sugar Cooperative et al. v. Archer-Daniels-Midland Co. et al., case number 2:11-cv-03473 (C.D. Calif.)

Links:
[1] http://e-ditionsbyfry.com/Olive/ODE/RFM/Default.aspx?href=RFM%2F2013%2F01%2F01&pageno=18&view=document