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SPECIAL SECTION: FOOD & BEVERAGE / COVER FEATURE

Food & Beverage Class Actions

Early and comprehensive legal frameworks and defense strategies

By Sascha Henry / Sheppard Mullin Richter & Hampton LLP

The food and beverage industry has experienced an uptick in consumer class action lawsuits. Previously, a food and beverage company's risk of consumer litigation arose principally from personal injury claims if a consumer were to become ill from consuming a product. Now class actions are often filed based on claims that consumers have been misled by the company's advertising or the product's labels.

The trend began with class actions challenging products labeled as "natural," but other advertising claims are increasingly being challenged. Complaints have been filed with respect to the use of the phrase "evaporated cane juice" instead of sugar,[1] labeling of trans fats,[2] claims that products were "imported from" or "made in" certain locations,[3] and whether products were "handmade."[4] Products as diverse as tea, guacamole and almond milk have been the subject of litigation.[5] The Northern District of California, once dubbed the Food Court, is no longer alone. Cases are filed in both federal and state courts across the country. Often, the filing of one lawsuit prompts copycat lawsuits in other jurisdictions.

Unlike single-plaintiff lawsuits, class actions require litigating on two fronts: the actual merits of the lawsuit and whether the case should be treated as a class. Devising a strategy to address both the merits and class certification, early, is vital to successfully and efficiently defending your company.

What Is the Standard for Bringing a False Advertising Lawsuit?

In most jurisdictions facing recent food class actions, the standard is whether a "reasonable consumer" is likely to be deceived.[6] Plaintiffs rely on state consumer protection laws, such as California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, Florida's Deceptive and Unfair Trade Practice Act, and New York's General Business Law § 349. A "reasonable consumer" is not the "least sophisticated consumer" nor "an unwary consumer."[7]

Some courts have dismissed cases, concluding, as a matter of law, that the reasonable consumer is not likely to be deceived by a defendant's advertisements.[8] In one notable case, the court dismissed a lawsuit against a manufacturer that labeled its pasta as "natural." The court reasoned that the "all natural" representation was not misleading because a reasonable consumer is aware that pasta is "not springing fully formed [from] Ravioli trees and Tortellini bushes."[9] Another court dismissed a lawsuit against the manufacturer of "handmade" bourbon, reasoning that "the term obviously cannot be used literally to describe bourbon. One can knit a sweater by hand, but one cannot make bourbon by hand. Or at least, one cannot make bourbon by hand at the volume required for a nationally marketed brand. ... No reasonable consumer could believe otherwise."[10]

Courts have also dismissed cases when the company's labeling has been authorized by the Food and Drug Administration's regulations under the federal Food, Drug and Cosmetic Act and as amended under the Nutrition Labeling and Education Act. The defense is called preemption and can be raised at the motion to dismiss stage.[11]

What Happens if the Class Action Continues Past the Motion-to-Dismiss Stage?

Despite some favorable motion-to-dismiss rulings in food and beverage class actions, whether the advertising misleads a reasonable consumer is usually a question of fact,[12] and the case often proceeds to discovery, after

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which the plaintiff may move to certify the class. Class certification means that the court has allowed the plaintiff to bring the case on behalf of a class of other similarly situated consumers.

Though the plaintiff has the burden to establish, with admissible evidence, that the case is suitable for class treatment, a company should develop a strategy for defeating class certification early in the case. This includes, among other things, locating evidence about whether the allegedly false advertising was uniformly made to the class, whether the advertising was important and whether classwide damages are appropriate.

What Are the Damages?

Some class action complaints request "full refunds," claiming that a mislabeled product is worthless. Courts generally reject full-refund damages models and hold that the proper measure of damages is the difference between the value of the product as represented and the price paid.[13] As one court aptly noted, return of the full retail or wholesale price is not a proper measure of restitution because it fails to take into account the value class members received from the products.[14] In the food and beverage context, for example, consumers receive calories, nutrition, vitamins and minerals.[15] Plaintiffs often engage damages experts who purport to measure the difference between what was represented and the price paid, and attempt to recover that difference multiplied by the total sales of the company for a particular period and jurisdiction.

What About Unknown Class Members?

Many food and beverage products are sold through retailers, and manufacturers often have little information about who buys their product and cannot identify the alleged class. For a class to be certified, it must be "ascertainable." This means that the class definition must be clear and definite enough to allow the court to determine, in a reliable, administratively feasible manner based on objective criteria, whether a particular individual is a member of the proposed class. Courts are still determining what, precisely, qualifies as "reliable" and "objective," particularly where the products at issue are low-value consumables for which the consumer usually lacks any documentary evidence of purchase. For example, the Third Circuit Court of Appeals determined that consumer affidavits are not sufficient to satisfy the ascertainability requirement in the absence of objective records.[16] The Ninth Circuit Court of Appeals is expected to weigh in on this issue in the near future, as a fully briefed appeal tackling this issue is pending before the court.[17]

Early Strategies You Can Use to Defend the Litigation

Before filing the lawsuit, the plaintiff's lawyer has usually spent considerable time researching your company, reviewing consumer reactions to your company's advertising or labeling through social media, and researching your company's executives and public filings. The plaintiff's lawyer has probably identified the merits issues and outlined his or her approach to class certification. To be on the same playing field as the plaintiff, you should begin to devise a strategy to prevail on the merits and at class certification as early as possible.

Don't ignore the demand letter. Some state consumer protection laws require a plaintiff to send the company a demand letter 30 days before filing the lawsuit.[18] Unfamiliar with such letters, companies often ignore them. Use this time period to begin your own investigation.

Talk with your marketing personnel. Find out who was involved in deciding to use the allegedly false advertising and the importance of this advertising. These individuals may have information helpful to the merits of the case, such as why the particular language was chosen and reasons that the plaintiff's interpretation may be wrong. They will also have information to help you devise a strategy to defeat class certification, such as whether the allegedly false advertising is one of hundreds of messages received by the consumers or a single uniform message. Your company's marketing personnel may have studies showing that the advertising was tested on consumers before it went to market and that the plaintiff misunderstands your consumers. They also may have consumer studies showing what is important to consumers and why consumers buy the product that contrasts with the picture the plaintiff attempts to paint.

Talk with your customer service representatives. Find out how your company receives feedback from its consumers and whether and how it retains that feedback. Your customer service representatives may be able to describe what is important to the consumers and what, if anything, bothers them. They may even have information about the plaintiff bringing the claim that can be helpful in understanding more about the dispute. (And they may soon be receiving inquiries about the lawsuit.)

Research your judge and the plaintiff's counsel. Find out whether your judge has dealt with any food and beverage class actions. Knowing whether the judge has dismissed these class actions at the motion-to-dismiss stage, the judge's views on accepting damages models and the judge's history certifying class actions will greatly assist in devising a plan for efficiently litigating this case. While it may be tempting to simply answer the complaint, doing so may mean you miss the only opportunity to educate the judge about your case before the motion for class certification. Similarly, find out how often the plaintiff's lawyer has sued your company or similar companies, and his or her experience and litigation strategy.

This early investigation will help you advise your company on how to effectively and successfully address this litigation. It will assist you in identifying whether an early, individual resolution is appropriate or whether the case should be litigated. If the case will be litigated, this investigation helps you frame the issues for responding to the complaint, approaching discovery and preparing to oppose class certification.

To review the footnotes to this article, visit http://www.metrocorpcounsel.com

Sascha Henry
A partner with the Business Trial Practice group at Sheppard Mullin, co-chairing the firm's food and beverage industry team and class action defense team.
shenry@sheppardmullin.com