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Food and Beverage Labeling Litigation: Recent Trends

BY LAUREN AGUIAR, MICHAEL POWELL AND HANNAH SOWELL

The COVID-19 pandemic that upended the country last year put health even more top of mind for individuals, and food labeling litigation and regulation has reflected novel developments consistent with consumers' increased focus on healthy products. From the rollout of plant-based proteins that test our understanding of what it means to be "meat," elixirs masquerading as cures for the virus, and new takes on what it means to be "all natural," recent months presented food and beverage manufacturers, class action plaintiffs, and regulators with myriad new labeling issues. The Biden administration is yet another factor likely to impact this area going forward, so the issues implicated in recent food labeling legal action—the conflict between labeling requirements and the First Amendment, the efficacy of administrative action versus private litigation, and the role of agency guidance—will remain relevant in the near future.

LAUREN AGUIAR *is a partner, and* MICHAEL POWELL *and* HANNAH SOWELL *are associates, at Skadden, Arps, Slate, Meagher & Flom's New York office.*

State Action Spurs Private Litigants

There can be no question that plant-based proteins are no longer just a niche market but have officially entered the mainstream. Beyond Meat's market cap climbed almost 800% within two months of its mid-2019 IPO (Carmen Reinicke, *Beyond Meat extends its post-IPO surge to 734%, breaking the $200-a-share threshold for the first time (BYND)*, Business Insider (July 23, 2019)), McDonald's unveiled the "McPlant" sandwich in November 2020 (Danielle Wiener-Bronn, *McDonald's announces new chicken sandwich and 'McPlant' burger*, CNN Business (Nov. 10, 2020)), and Starbucks plans to roll out oat milk to every store in the nation by spring 2021, Adam Campbell-Schmitt, *Starbucks Will Offer Oat Milk Nationwide Next Year*, Food & Wine (Dec. 10, 2020)). With their growing popularity, however, has come increased attention to how these products must be labeled to avoid misleading consumers, including whether they can be labeled "meat" and "milk" without confusing consumers who may be expecting animal products.

Impossible Burger with french fries. A 4-ounce Impossible patty with American cheese, lettuce, onion, and fresh tomato served at Umami Burger's King Street location.

Numerous states have passed legislation prohibiting the products from being labeled in a way that suggests they are animal-based. The "Oklahoma Meat Consumer Protection Act" signed into law in May 2020 and effective in November 2020 requires the sellers of plant-based "meats" to add a disclaimer that the products are plant-based that is "uniform in size and prominence to the name of the product." Okla. Stat. Ann. tit. 2, §5-107 (2020). Louisiana's even more stringent "Truth in Labeling of Food Products Act," in effect as of October 2020, prohibits "[r]epresenting a food product as meat" altogether if not derived from various animal carcasses, along with restricting labels on products such as nut milks. La. Stat. Ann.

§3:4744(B)(4) (2020). Similar legislation is pending or has passed in numerous states, and a national bill (the "Real MEAT Act") imposing a disclaimer requirement similar to Oklahoma's was introduced in the House at the end of 2019 before failing in committee. See H.R. 4881, 116th Cong. (2019).

The purveyors of plant-based proteins have taken steps to challenge these new laws. Both the Oklahoma and Louisiana statutes were immediately challenged on First Amendment grounds. See Compl. for Declaratory and Injunctive Relief, *Upton's Nats. Co. v. Stitt*, 2020 U.S. Dist. LEXIS 216883 (W.D. Okla. filed Sept. 16, 2020) (No. 20-938-F), ECF No. 1; Compl. for Declaratory and Injunctive Relief, No. 20-cv-00674-BAJ-EWD, *Turtle Island Foods SPC v. Michael G. Strain* (M.D. La. filed Oct. 7, 2020), ECF No. 1. Plaintiff Upton Naturals Co. faced an early loss in the U.S. District Court for the Western District of Oklahoma, where the court rejected the company's request for an injunction of the new legislation. The court explained that "even with the use of the 'VEGAN' term or the '100% VEGAN' term," packaging for products like "Ch'eesy Bacon Mac" remained "potentially misleading." *Upton's Nats. Co. v. Stitt*, No. CIV-20-938-F, 2020 U.S. Dist. LEXIS 216883, at *8-9 (W.D. Okla. Nov. 19, 2020). California-based Miyoko's Kitchen, in contrast, brought a successful First Amendment challenge to regulations that prohibited the labeling of its "vegan butter" as "butter." In partially granting Miyoko's motion for a preliminary injunction to prevent enforcement of the law, the U.S. District Court for the Northern District of California observed that the defendant California regulators had presented no evidence that the labeling ban prevented public harm, which "made it exceedingly difficult to ascertain the *advancement* of a legitimate governmental interest, to *any* degree." Order Granting in Part and Den. in Part Mot. for Prelim. Injunctive Relief, *Miyoko's Kitchen v. Ross*, No. 20-cv-00893-RS (N.D. Cal. Aug. 21, 2020), ECF No. 46 (emphasis in original). However, the court declined to issue a preliminary injunction against the legislation insofar as it prohibited the labels "hormone free" and "revolutionizing dairy with plants," holding that the former was not actually true because plants contain hormones and the latter "denote[d] direct interaction with animal-based milk products" in a way that was "plainly misleading." Id. at 6, 12-14.

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Meanwhile, some consumers have commenced actions under the theory that sellers of plant-based proteins mislead consumers by touting the inclusion of plants. For example, Burger King faced a putative class action brought by the vegan buyers of its meatless "Impossible Whopper." The plaintiff in that case claimed that he had been "duped" into purchasing the sandwich because the marketing of the plant-based patty had not disclosed that it would be broiled on the same grill as the beef patties used in standard Whoppers. The U.S. District Court for the Middle District of Florida disposed of the suit on a motion to dismiss, holding that Burger King had "promised a non-meat patty and delivered." *Williams v. Burger King*, No. 19-24755-SINGHAL, 2020 U.S. Dist. LEXIS 158249, at *13 (S.D. Fla. July 20, 2020).

The FDA Partners With the FTC To Keep COVID Cure Claims in Check

Private litigation is not the only avenue for shaping labeling law. The pandemic, and the cross-agency task force formed by the FDA and the FTC to regulate the sale of COVID-19 "cures," provides ample proof that federal regulators also are on the front lines of these issues. See *Protecting Americans from COVID-19 Scams (written testimony only)*, U.S. Food & Drug Administration (July 21, 2020) (testimony from OCI Assistant Commission Catherine Hermsen describing FDA/FTC collaboration).

The sellers of dietary supplements purporting to offer COVID-19 treatments are a frequent target of regulatory action. These supplements have long been the subject of a separate regulatory framework that prohibits sellers from "misbranding" them as drugs but does not require pre-market FDA approval. See *Dietary Supplements*, U.S. Food & Drug Administration (Aug. 16, 2019) (describing Dietary Supplement Health and Education Act of 1994). Companies that sought to leverage this latitude in the midst of the pandemic, however, have faced swift action by the FDA and the FTC. The agencies have issued over 100 warning letters to companies selling products that purport to prevent or treat COVID-19, including dozens of dietary supplements and similar "treatment-adjacent" ingestible products, such as "tinctures," "elixirs," and "teas." See *Fraudulent Coronavirus Disease 2019*

(COVID-19) Products, U.S. Food & Drug Administration (Feb. 18, 2021); *Warning Letters*, Federal Trade Commission (last visited Feb. 25, 2021).

Such warning letters appear to have been effective in controlling improper labeling: Of the 146 products listed on the FDA's "Fraudulent Coronavirus Disease 2019 (COVID-19) Products List," more than 100 have achieved a "corrective status" designation indicating that the improper labeling claims have been removed. See *Fraudulent Coronavirus Disease 2019 (COVID-19) Products*, U.S. Food & Drug Administration (Feb. 18, 2021). The FTC has taken action to follow up on its warnings. In July 2020, the FTC filed a lawsuit against dietary supplement manufacturer Golden Sunrise Pharmaceutical based on alleged advertising of its "nutraceuticals" as FDA-approved treatments for COVID-19. Compl. for Permanent Inj. and Other Equitable Relief, *Federal Trade Commission v. Golden Sunrise Pharmaceutical*, No. 1:20-cv-01060 (E.D. Cal. filed July 30, 2020), ECF No. 2. The FTC alleged that in response to its warning letter, the defendant had simply replaced the term "COVID-19 virus" in its marketing with generic terms like "the virus." Id. ¶ 42. That alteration was not enough to satisfy the FTC; despite the company stipulating to a preliminary injunction enjoining usage of COVID-19 treatment claims, the FTC has not dropped the suit and the litigation continues. See Stipulation to Prelim. Inj. as to Defs. Golden Sunrise Nutraceutical, Golden Pharmaceutical, and Huu Tieu, *Federal Trade Commission v. Golden Sunrise Pharmaceutical*, No. 1:20-at-00540 (E.D. Cal. filed Aug. 27, 2020) ECF No. 30.

These relatively aggressive actions by the FDA and FTC seem to have been effective in curbing many advertising and labeling missteps by US companies. While one might expect a degree of consumer and competitor lawsuits against companies making COVID-related treatment claims, a review of federal and state dockets reveals very few recent cases by private litigants.

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New Standards Provide Potential Clarity on Long-Litigated Labeling Issues

The USDA and the FDA recently provided guidance on a frequently-litigated subject: labeling for genetically modified organisms (GMOs). See *Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants: Guidance for Industry*, Food & Drug Administration (Rev. March 2019); *National Bioengineered Food Disclosure Standard*, 83 FR 65814, Vol. 83, No. 245 (Dec. 21, 2018). This has the prospect to shape the ever-frequent litigation over the use of "all-natural" labels for products containing ingredients from GMOs. That the FDA does not require the disclosure of GMOs has not prevented courts from finding the "all-natural" label nonetheless misleading, as the First Circuit recently held in *Lee v. Conagra*. Observing that the FDA had only an "informal" policy guiding the usage of "natural" labels, the court reversed dismissal of one consumer's class action claim that Wesson Oil's representation as "100% Natural" was misleading given the inclusion of GMOs. *Lee v. Conagra Brands*, 958 F.3d 70, 77-79 (1st Cir. 2020).

The USDA may help steer companies in the right direction: Its "National Bioengineered Food Disclosure Standard" aims to impose a national standard for labeling GMO foods. This standard itself has generated litigation by GMO opponents objecting to the agency's decision to require labels with the term "bioengineered" rather than "genetically modified." See First Am. Compl. for Declaratory and Equitable Relief, *National Grocers v. Perdue*, No. 20-5151-JD (N.D. Cal. filed Oct. 2, 2020), ECF No. 19. Nevertheless, the standard provides much-needed guidance to companies in an area traditionally fertile for false advertising claims.