Food and Beverage Labeling Litigation: Recent Trends

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The food and beverage industries introduced numerous technologies and products over the past year and a half that have raised new questions about advertising practices and presented novel legal issues regarding how goods are labeled. Meatless meat, COVID "cures" and the eternal debate over what it means for a product to be "all natural" have given rise to changes in labeling law, spurred by private litigants and regulators.

Manufacturers and States Face Off Over Meatless Meats

With "McPlant" sandwiches appearing alongside Big Macs throughout the country,[1] the growing mainstream acceptance of plant-based proteins by consumers seems undeniable. As the technologies develop to make pea protein and soy acceptable alternatives to beef, questions have arisen regarding how these products should be labeled when sold to consumers.

Numerous states have recently passed legislation that prohibits labeling plant-based proteins in a way that suggests they are animal-based. The Oklahoma Meat Consumer Protection Act enacted in May 2020 requires a seller of plant-based "meats" to add a disclaimer to packaging — "uniform in size and prominence to the name of the product" — indicating that the product is plant-based. Louisiana's even more stringent Truth in Labeling of Food Products Act prohibits "[r]epresenting a food product as meat" altogether if it is not derived from various animal carcasses. Similar legislation is pending or has passed in other states.

Plant-based protein sellers have not passively accepted these restrictions. Food producers immediately challenged both the Oklahoma and Louisiana statutes on First Amendment grounds.[2] In Oklahoma, plaintiff Upton's Naturals Co. sustained an early loss after 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,"[3] packaging for products like "Ch'eesy Bacon Mac" remained "potentially misleading." Plaintiff Miyoko Kitchen had slightly more success with a First Amendment challenge to California regulations that prohibited the labeling of its "vegan butter" as "butter." Although the company's challenge to the prohibition of the label "revolutionizing dairy with plants" failed because it supposedly "denoted direct interaction with animal-based milk products" in a way that was "plainly misleading," the plaintiff succeeded in preliminarily enjoining the enforcement of the law insofar as it prohibited labeling vegan butter as "butter."[4]

The FTC and FDA Partner To Stem Claims of Spurious COVID-19 Cures

In 2020 and the first half of 2021, the Federal Trade Commission and Food and Drug Administration waged their own war on improper labeling. In particular, they have joined forces to crack down on spurious COVID-19 treatment claims.[5] Agency actions

[1] McDonald's Announces New Chicken Sandwich and 'McPlant' Burger," cnn.com (Nov. 10, 2020).

[2] *See* Complaint, *Upton's Nats. Co. v. Stitt*, No. CIV-20-938-F, ECF No. 1 (W.D. Okla. filed Nov. 9, 2020); Complaint, No. 20-cv-00674-BAJ-EWD, ECF No. 1., *Turtle Island Foods SPC v. Michael G. Strain* (M.D. La. filed Oct. 7, 2020).

[3] *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).

[4] Order Granting in Part and Denying in Part Motion for Preliminary Injunctive Relief, *Miyoko's Kitchen v. Karen Ross*, No. 20-cv-00893-RS, ECF No. 46 (N.D. Cal. Aug. 21, 2020).

[5] *See* Protecting Americans From COVID-19 Scams, U.S. Food & Drug Administration (July 21, 2020), (testimony from OCI Assistant Commissioner Catherine Hermsen describing FDA/FTC collaboration).

have frequently targeted vendors of dietary supplements masquerading as COVID-19 treatments. The FDA and FTC have each issued over 100 warning letters to vendors marketing supplements as COVID-19 cures.[6]

The FTC in particular has shown that its warning letters have teeth. The agency issued a warning letter in May 2020 to a doctor on the grounds that he falsely advertised certain vitamin products as preventing or treating COVID-19.[7] Less than a year later, the FTC filed a complaint against the doctor and his company, Quickwork LLC, alleging that its representations violated the new federal COVID-19 Consumer Protection Act.[8] This action reflects how seriously the FTC considers its charge under the law, which imposes monetary penalties on those who engage in deception in connection with claims of treating, preventing or diagnosing COVID-19.[9]

New Agency Guidance and Standards Shed Light on Evergreen Labeling Issues

Agency guidance has also provided direction to manufacturers and sellers on labeling issues. Both a new Department of Agriculture standard and FDA guidance provide much-needed clarity to companies on labeling products containing genetically modified organisms — an often litigated issue.[10] Though the USDA's National Bioengineered Food Disclosure Standard has generated litigation over its requirement to use the term "bioengineered" instead of "genetically modified" in labeling,[11] it serves as an important countrywide guidepost in a challenging area of labeling law.

Litigation also continues over the intersection of "all natural" labeling and GMOs. The FDA does not mandate that labels disclose GMOs, but some courts have found that "all-natural" labels are misleading when the product contains GMOs.[12] In *Lee v. Conagra*, the U.S. Court of Appeals for the First Circuit reversed dismissal of a consumer's class action claim on grounds that Wesson Oil's "100% Natural" label was misleading in light of the presence of GMOs. Manufacturers and sellers should continue monitoring such private litigation to determine how the new FDA guidance may impact courts' interpretation of this unsettled area of the law.

[6] *See* *Fraudulent Coronavirus Disease 2019 (COVID-19) Products*, U.S. Food & Drug Administration (last visited June 4, 2021); Warning Letters, Federal Trade Commission (last visited June 4, 2021).

[7] FTC Warning Letter (May 21, 2020).

[8] *United States of America v. Nepute*, 21-cv-00437, Dkt. No. 1 (E.D. Mo. filed April 15, 2021) ECF No. 1.

[9] *See* COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-260; *see also* "First FTC Case Filed Under New COVID-19 Consumer Protection Act," Federal Trade Commission (April 15, 2021).

[10] *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).

[11] *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.

[12] *Lee v. Conagra Brands, Inc.*, 958 F.3d 70, 77-79 (1st Cir. 2020).