

Food and Beverage False Advertising Litigation

By Pooja S. Nair

Despite the COVID-19 pandemic, 2020 saw more false advertising food and beverage cases filed in the United States than any year prior, continuing a trend in this area. One hundred and seventy-seven actions were filed in 2019, up from 164 in 2018, and 145 in 2016 and 2017. To put these numbers in context, only 53 of these cases were filed in 2011. This article offers an overview of some of the food and beverage false advertising and labelling cases filed so far in 2021, and anticipated trends for this type of litigation going forward.

Overview of False Advertising Law and Regulations

Claims about a food or beverage product made on the product's label or in advertising can give rise to allegations of false advertising - essentially that the way the product is labelled is misleading to a reasonable consumer.

US courts have applied what is known as the reasonable consumer test to determine if a product's advertising or labelling is misleading. The reasonable consumer test asks whether an



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advertisement or label would mislead an objectively reasonable consumer, and requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

The Food and Drug Administration (FDA) sets the rules about what information needs to be included on food labels, and sets standards of identity for when certain products may use certain names (for example yogurt or milk). The FDA has not provided labelling guidance in certain areas, for claims such as "healthy," "all-natural" and "plant-based". Lack of regulations about when such terms may be used by food and beverage companies has led to lawsuits claiming such terms are misleading to consumers.

Under the Biden administration, both the Federal Trade Commission (FTC) and FDA have indicated that regulating labelling, standards of identity, and advertising are a priority. Additionally, the House Appropriations Committee

directed the FDA to prioritise some of these labelling and product standards of identity issues to increase clarity for consumers.

Environmental/ Sustainability Claims

Companies touting the environmental actions and sustainability of their products in their advertising and labelling are increasingly facing scrutiny and lawsuits. These lawsuits allege that companies "greenwash" their products in their labelling and communication to consumers by claiming to be environmentally friendly in their business practices, in contrast to employing pollution-generating, unsustainable processes.

For example, in February 2021, consumer groups filed a complaint letter with the FTC against Smithfield, claiming that the company's portrayal of its farming process as environmentally friendly is deceptive and misleading.

In May 2021, a class action suit was brought against Heft's recycling bags, which were marketed as "perfect for all your recycling needs". The class action lawsuit alleged that the bags were not recyclable and were indistinguishable from regular plastic bags. Food and



beverage companies extolling the virtues of their packaging, or claiming that some products are particularly recyclable, must ensure they are able to support such claims.

Flavour Lawsuits

In the past three years, vanilla flavouring has been the focus of the largest number of false advertising cases filed regarding a single word. Claims allege that defendants' "vanilla"-labelled products contain flavouring ingredients that do not come from vanilla beans, and instead come from artificial flavours. In the past few years, courts have considered and dismissed the vast majority of these cases. Defendants continue to have success with early dismissal of these claims—the first half of 2021 saw a string of rejections by the court of these vanilla cases, with Trader Joe's, Whole Foods, and the maker of Dove ice cream bars all successfully defeating lawsuits.

Despite frequently resulting in a dismissal, plaintiff attorneys are determined to continue trying their luck with flavouring lawsuits, branching out to several new products. Most recently, plaintiff firms have had their eyes set on popular snack products. For example, a case was filed in Illinois against Frito-Lay North America, Inc., alleging that Frito-Lay falsely advertised

its Tostitos chips as having a "hint of lime" when, in reality, the chips' lime taste comes from artificial ingredients, not actual limes. Similarly, a lawsuit involving TGI Friday's branded onion rings snacks alleged that the company falsely advertised the product as "onion snacks" when the product does not contain any actual onions, deriving its flavour instead from artificial ingredients.

"All Natural" Claims

Litigation regarding products' use of the term "all natural" remains prevalent in light of the FDA's reluctance to provide guidance concerning the meaning of the term "natural".

On 24 March 2021, a federal judge in New York certified three classes of plaintiffs in a litigation against Kind LLC in which plaintiffs alleged that Kind deceptively marketed several products as "all natural" and "non-GMO" when in truth the products contained synthetic and genetically modified ingredients. The court granted certification despite the fact that the plaintiffs could not provide a concrete definition of the term "natural". In May 2021, parties in a litigation concerning McCormick & Company, Inc.'s use of the term "natural" to advertise several of its products filed

a motion for preliminary approval of a class action settlement. The litigation rested upon the plaintiffs' allegations that McCormick misrepresented several varieties of its spices and seasoning products by labelling them as "natural" when in reality they contained synthetic, artificial and/or genetically modified ingredients, including corn starch, white corn flower, and citric acid.

Trends and Takeaways

In the wake of the global COVID-19 pandemic, consumer class actions and false advertising cases against food and beverage companies continued in full force. Lawsuits filed so far in 2021 indicate that these cases will continue.

Healthy Claims: While "healthy" false advertising cases remained pervasive in 2021, recent announcements by the FDA provide hope that we will finally receive some guidance regarding proper usage of "healthy" terms in the near future.

Increased FTC Activity: The FTC has shown more activity and issued warnings against dietary supplement companies and in the fertility area.

Artificial Flavouring: Although there has been an increase in the number of cases filed, this will not necessarily translate into an increase in victories. Several artificial flavouring cases were filed by the same group of plaintiff firms that are also notorious for filing hundreds of lawsuits alleging false advertising causes of action based on the use of artificial flavouring. These lawsuits are increasingly being dismissed in the early stages of litigation for failure to allege a viable claim.

All-Natural Cases: Plaintiffs continue to find traction with "All Natural" cases, in light of the FDA's reluctance to provide more guidance on what exactly qualifies as "natural". Without further guidance from the FDA, it is likely that class certifications and settlements will continue.