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Prepare for Product Labeling Class Action Now, Part I

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This article is part one of a two-part examination of product labeling class actions.

Be prepared . . . "for any old thing," advised Boy Scouts of America founder Robert Baden-Powell. Over 100 years later, those words are more than insightful scoutcraft recommendations. In today's burgeoning consumer fraud/product labeling class action environment, they are a mandate for companies' management, in-house counsel, and marketing departments that want to survive the sharp uptick in suits premised upon consumer product labels' language, such as "organic," "natural," "healthy," "clinically proven," and "pure." Sunscreen, yogurt, cereal, baby shampoo, deodorant, orange juice, milk, soap, toothpaste, vitamins, margarine, sneakers, granola bars, baby food, ice cream, diet margarita drink mix, bottled water, cosmetics—even cranberries and cat litter—have been targets. Labeling litigation has indeed, grown to encompass "any old thing."

Spiking over the past two years, product labeling class actions invoke state consumer protection statutes (usually in New Jersey or California) and allege that an advertisement's or label's language is false, misleading, or deceptive, and that consumers would not have purchased the item without it. Plaintiffs seek compensatory damages (e.g., purchase price, trebled in many states), the value difference between the as-received and as-advertised product, attorneys' fees, and various equitable relief (e.g., changes to labels and ads). For nationwide classes, the alleged damages could be crippling to many companies.

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While companies cannot block these filings outright, here are a few issues that general counsel should be thinking about—now—in order to better position the organization, should it become a defendant:

E-Discovery

An ounce of prevention is worth a pound of cure—Benjamin Franklin's advice rings true as ever in litigation's digital age. Pre-suit e-discovery preparation is preferable to post-suit scrambling to locate relevant e-data. An adverse inference sanction for e-discovery missteps can ring a case's death knell, even if the substantive or class action defenses have merit. In a product labeling class action context, e-discovery involves a number of significant considerations:

- **Removal:** To remove a plaintiff's state case to federal court (i.e., most defendants' preferred venue) under the Class Action Fairness Act of 2005 (28 U.S.C. Sections 1332(d), 1453, and 1711-1715), defendants must file for removal within 30 days after receiving service of the complaint (28 U.S.C. 1446(b)), and the amount in controversy must exceed $5 million. Knowing where the sales data are for a given product with the particular label language at issue (and for the pertinent state[s] and class period at issue)—and how to access this information quickly—is imperative.
- **Hold Trigger:** Keep in the company's fold experienced outside counsel who are well-versed in the pertinent states' laws, especially as to when document-preservation obligations arise (e.g., cease routine e-record destruction and preserve hard-copy documents). For example, the duty to preserve evidence almost everywhere arises "when a party reasonably believes that litigation is foreseeable" and may arise many years before litigation commences. Consumer-plaintiffs often file private lawsuits after seeing Food and Drug Administration (FDA) warning letters or Federal Trade Commission (FTC) action against companies, products, or labels posted on agency websites. Since plaintiffs so frequently piggyback private class actions after FDA

or FTC web postings, query whether governmental agency action within the food industry could trigger the litigation hold duty before a complaint or subpoena is even received.

- **"Predominance":** Opposing certification of class action consumer fraud product labeling claims almost always involves arguments that individualized questions of law or fact unique to each class member predominate over common ones, thereby failing Fed. R. Civ. P. 23(b). To equip their certification opposition arsenal, a company should retain in a systematic and defensible manner the documents that illustrate differences in consumers' individualized exposure to and reliance upon its labels and advertisements—which can vary across the board in significant ways, including: the content, time period, and geographic reach of TV and radio commercials for the product at issue; the content and time period of website ads for the product; and the specific language and timeframe of specific product labeling. In other words, not every proposed class member might have been exposed to the same ads and labels. Variations across print and television advertising, labels, websites, and other communications suggest absence of Rule 23 predominance. Moreover, specificity-in-pleading requirements like that of Fed. R. Civ. P. 9(b) require complaints to say which particular labels and ads class members saw and when; deficient pleadings are subject to motions to dismiss. Of course, effective use of these strategies depends upon retaining a company's substantive history of ads and labels.
- **Organizational Knowledge:** Effective record retention policies will keep institutional knowledge alive no matter how often employees move on. Defensible e-discovery practices consider, for example: (1) The files of employees who have transferred departments within the company but know all successive iterations of the relevant time period's labels and TV, radio, Internet, and print ads for a challenged product. Such knowledge can provide a keyword list to run searches for relevant e-discovery in the corporation's records (i.e., the adjectives in various versions of ads about the challenged product). (2) The files of employees who have left the company but knew about previous scientific studies undertaken by the company that would substantiate the claims on a challenged label. (Counsel should also be involved in the regular and consistent pre-suit practice of maintaining the records on which labels are based, to more efficiently demonstrate those practices were in place as of the times the labels were used.)
- **Costs:** The costs of getting to the e-discovery finish line can be large, but consulting with e-discovery and consumer fraud class action outside counsel who know the current law in your jurisdiction is indispensable. *See, e.g., Boeynaems v. LA Fitness International, LLC*, 285 F.R.D. 331 (E.D. Pa. 2012) (holding that plaintiffs who were seeking broad e-discovery regarding class certification issues should share in the production costs because "discovery burdens should not force either party to succumb to a settlement that is based on the cost of litigation rather than the merits of the case").

Be Proactive, Not Reactive

- To say that consumer fraud product labeling class actions disrupt a business is like saying that a rattlesnake bite "stings a little." For example, time spent identifying relevant documents and devoting personnel to depositions means resources diverted from the company's "real business," especially when plaintiffs pursue certification of nationwide classes. Targeted companies will perceive use of state consumer fraud statutes in the product labeling context as unfair and frustrating, and upper management with a strong sense of pride in their companies' products might take these suits personally, but organizations that want to weather this storm will still *prepare now*. Since nationwide classes have the potential to bring even large corporations to the financial brink, a company that contemplates now how to oppose class certification and defend labeling claims on the merits will yield investment returns later if the storm hits close to home. Here are some proactive best practices to keep in mind:
- **The right hand should know what the left is doing:** Intra-company education and communication go hand-in-hand with a defensible record retention policy. Marketing departments should have regular dialogue with in-house legal departments that are up-to-date with the latest developments in this area of class action litigation so that, for example, a company's upcoming ad campaign does not contain certain words or phrases that have been trending in the recent consumer fraud filings over labels' and ads' language. Counsel's involvement in product label development now must go beyond issues such as regulatory compliance and into areas such as close examination of labels' "capacity to mislead" consumers—especially since literal truth is not always an absolute defense in this arena. Counsel should work with marketing personnel to perform internal review of label language from a con-

sumer fraud law vantage point and to ensure there is a good faith, sound, and substantiated basis for the labels that is documented and retained in the company's records. Risk management here means that selection of product labels' language should not be the sole election of marketing departments that might not be sensitive to these issues and to the latest case law and complaints. Marketing departments may understandably perceive other departments' commentary about product label development as invasion of their territory, especially if a company decides to reconsider and redo their most recent labels that use language identical or similar to others that were targets in recent lawsuits. However, without consistent dialogues (preferably oral, not written, for obvious discovery reasons) among advertising departments, in-house counsel and outside counsel experienced in this trend, a company's product label could make the organization a target for the next class action.

- **Keep track of the changing landscape:** Internal company task forces should: (i) inventory the organization's current advertising, (ii) compare it to existing case law, FDA and FTC regulations and warning letters, and FTC Green Guides, and (iii) collaborate among legal, marketing and upper management to evaluate risks posed by the company's current advertising and identify steps to lessen or eliminate those risks. Critical to the task force's work would be either (i) preparation of a 50-state survey (assuming a national customer base) of court decisions (wherever the company sells or markets its product) dealing with product labeling claims against advertising language similar to the company's labels, or (ii) adoption of a stringent jurisdiction's consumer fraud labeling claim standards for similar products. This inventory of benchmark analogous examples of labeling claims can assist the executive and advertising teams in collaboratively understanding the applicable law and weighing the risks of the company's existing or contemplated product label language. With new product labeling suits filed every week, the parameters of what constitutes non-actionable "promotional puffery" (e.g., "unique features") versus potential litigation targets (e.g., "clinically proven") can change. So the intra-company task force should constantly strive to remain up-to-date and cognizant of specific jurisdictions, while simultaneously making their knowledge part of the marketing and sales evolution of a product. For subsequent discoverability reasons, the task force should involve counsel in its communications.
- **Gather your cache of nuts for the long, tough winter:** Build into the company's litigation budget now the foreseeable continuation of labeling class actions in the coming five or more years. For example: (i) purchase insurance that provides coverage if the company is sued for misrepresenting its own (versus competitors') products; (ii) retain outside counsel knowledgeable about litigation hold triggers in these labeling class action contexts; (iii) invest in e-data capabilities to make immediately accessible information to remove a case to federal court, fight class certification, defend the suit on the merits, or put a realistic dollar value on it to meaningfully negotiate settlement; and (iv) consult with outside counsel in the relevant jurisdictions to advise, with a fresh perspective, on your current labels—and revamp them, if necessary. Yes, these steps could require considerable investment of financial resources. Yet the reputational harm to a company's brand and its product's reputation from even frivolous suits could push organizations over their own fiscal cliff. Here, a penny spent could be many pennies saved.

In the second part of this series, we will review three of the other "Top Five" preparatory areas for in-house counsel to contemplate and execute on now in order to fortify their company's defenses against a potential barrage of product labeling class actions. Those storm clouds are on a two-to-three-year horizon for consumer product manufacturers and sellers.

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