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Prepare for Product Labeling Class Action Now, Part II

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

In part one of this article, we discussed a recent explosion in the number of consumer product class action filings under state consumer protection statutes. The defense costs associated with these lawsuits, along with the financial pressure to settle if plaintiffs achieve class certification, are confronting consumer goods manufacturers nationwide. Part one detailed a few of the top areas that in-house counsel should think about now to better position the organization, should it become a defendant in one of these class actions. Don't overlook the following preparatory measures, either.

The risks to consumer goods companies of being a target make the consumer fraud product labeling class action trend reminiscent of *Titanic* Captain Edward J. Smith's chilling words: "I cannot imagine any condition which would cause a ship to founder. I cannot conceive of any vital disaster happening to this vessel." Product labeling litigation can be the unexpected iceberg to any company.

The defense costs associated with these lawsuits, along with the financial pressure to settle if plaintiffs achieve class certification (in order to avoid the risk of juries' damages awards), are forcefully hitting the wallets of consumer goods manufacturers nationwide. In-house counsel should prepare

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the lifeboats now to better position the organization should it become a defendant in one of these class actions by considering the following issues.

Obtaining Insurance Coverage For Defense Costs And/Or Liability Judgments In Labeling Litigation

In most consumer product companies' coverage action cases against their insurers, courts have denied coverage because:

- **"Advertising injury" coverage does not encompass the claims:** "Advertising injury" insurance in general liability policies covers publication of material that disparages another's products or wrongful use of *another*'s advertising ideas in one's *own* marketing. However, product labeling consumer fraud class actions allege: (i) that companies misrepresented their own product, not another's goods; or (ii) that defendants made false claims or misused terms in their *own* advertising to promote their *own* products, not that they misappropriated another's advertising or business ideas.

  There is generally no advertising injury coverage in these scenarios. *Giovanni Cosmetics Inc. v. Arch Ins. Co.*, CV 09-5548 GAF (C.D. Cal. Feb. 5, 2010). But cases' specific facts are what ultimately control the issue. *E.piphany Inc. v. St. Paul Fire & Marine Insurance Co.*, 590 F. Supp. 2d 1244 (N.D. Cal. 2008) (claims of "superiority" over competitors was within advertising injury coverage); *Vector Products, Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316 (11th Cir. 2005) (claims of superiority over the "leading brand" was within advertising injury coverage).

- **Media policies do not cover the claims:** Media or professional services wrongful act coverage in media policies covers disparagement or misappropriation of competitors' ideas. However, product labeling class actions challenge the allegedly fraudulent, false, or misleading content of companies' own labels. Thus, these class action complaints do not fall within the scope of media policies. Courts have also found that professional services coverage is not intended to cover claims by competitors. *Welch Foods Inc. v.*

National Union Fire Ins. Co., Civ. A. No. 09-12087-RWZ, 2010 WL 3928704 (D. Mass. Oct. 1, 2010).

- **D&O insurance does not cover the claims:** Exclusions in D&O policies often preclude coverage for claims arising out of "unfair competition or deceptive trade practices." Consumer fraud class actions alleging fraudulent, misleading, or deceptive product labels fall squarely within the plain language of this exclusion. Again, there is usually no coverage under D&O policies.

Of course, coverage in each case turns upon its specific facts as well as the language in the particular policy and the complaint.

Company counsel should review the language of its existing policies and if there are gaps that would exclude coverage of defense and liability costs in the typical product labeling class action, reach out to insurers to explore availability of ways to bridge those gaps. In-house counsel must assume responsibility for educating corporate decision-makers on the potential exposure in these cases, regardless of existing insurance policies.

Personal Liability For Individual Officers

Institutional exposure from consumer fraud product labeling class actions is not the only problem. *Individual* officer and employee liability is also a risk.

For example, regulatory violations of the New Jersey Consumer Fraud Act may result in individual liability for corporate employees, officers, and owners when the violation at issue implicates the personal behavior of individual actors. *Allen v. V and A Brothers, Inc.*, 208 N.J. 114, 26 A.3d 430 (2011); *Kort v. Van Aswegen*, 2011 WL 5137833, at *3 (N.J. App. Div. Nov. 1, 2011) (a company president signed a contract omitting provisions required by statutory regulations).

Other jurisdictions also permit individual liability in certain circumstances under those states' consumer protection statutes. *See, e.g., Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 55, 760 N.E.2d 1274, 1278-79 (2011) (corporate president liability under New York's Consumer Protection Law); *Jackson v. Harkey*, 41 Wash. App. 471, 480, 704 P.2d 687, 692 (1985) (individual officer liability under Washington's Consumer Protection Act); *State ex. Rel. McLeod v. VIP Enterprises, Inc.*, 286 S.C. 501, 506, 335 S.E.2d 243, 245 (S.C. Ct. App. 1985) ("controlling person" liability under South Carolina's Unfair Trade Practices Act).

The risks of personal liability from consumer fraud product labeling class actions underscore the need for:

1. Intra-company training about product labeling lawsuits and the pertinent states' consumer fraud statutes.
2. Periodic review of policies, procedures, and form contracts to minimize potential individual (and corporate) liability.
3. Investigation of insurance products that could offer defense and indemnification coverage to individual officers and employees.

Watch FTC/FDA Actions As A Signal For Civil Litigation

Consumer fraud class action practitioners frequently file private product labeling class actions after the Food and Drug Administration or Federal Trade Commission issues public posts, such as agency warnings letters about a company's or industry's food or beverage marketing. In-house corporate compliance teams should regularly review these postings, such as those at fda.gov in order to forecast possible activity against their industry or their label's language, to educate corporate decision-makers, and to recommend adjustments to language in labels and ads, if necessary as a proactive, defensive measure.

Even with utmost diligence, there is no guarantee of a satisfactory or fiscally friendly outcome. Even if you feel your company's product label is truthful, accurate, and not misleading, the possibility of a class action remains. That said, while your company or its competitors may not presently be under attack, upper management and company counsel should consider the issues detailed in both parts of this article. In the words of Boy Scouts founder Robert Baden-Powell, "A Scout is never taken by surprise; he knows exactly what to do when anything unexpected happens."

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