

## 7 Ways To Shield Food Product Websites From Legal Troubles

By **Natalie Rodriguez**

*Law360, New York (August 14, 2014, 7:13 PM ET)* -- Food and beverage companies are facing an increasing slate of regulatory actions and putative class actions over claims made on their products' websites and social media platforms. While regulatory and case law on this matter is just starting to take shape, here are seven best practices that expert attorneys say could help fend off legal trouble.

### **Beware the Words 'All Natural'**

The trouble with the popular and marketing-friendly term "all natural" is that there is no exact definition with regulators as to what constitutes "natural." Where the U.S. Department of Agriculture has a voluntary program for organic produce, neither the U.S. Food and Drug Administration nor the Federal Trade Commission — the two main agencies that share enforcement powers over food and beverage websites — have taken on defining "natural."

While this means the regulators generally won't come after companies over this particular phrase, use of the term often triggers consumer class actions that allege misleading labeling. "That phrase continues to be a lightning rod for litigation," said Kristen E. Polovoy, an attorney with Montgomery McCracken Walker & Rhoads LLP.

If a product has artificial ingredients, preservatives or genetically modified organisms, some state consumer laws make it easy to drag a website making a "natural" claim into litigation, according to attorneys.

"My main concern when I'm counseling clients is avoiding these consumer class actions that are so prevalent," said Chip English of Davis Wright Tremaine LLP, who advises clients to steer clear of the term on Internet materials in light of the increasing prevalence of class actions.

Indeed, many companies, wary of tripping litigation that would be a major hit to their bottom lines, are already starting to shift away from the use of the term, according to Polovoy.

### **Monitor Customer Testimonials**

Most companies are already aware that an easy way to get on the wrong side of the FDA is to make a claim that a food or beverage product has certain health benefits, such as fighting off colds. But some might not be aware that the agency is also increasingly on the watch for customer testimonials on company websites that make similar claims.

"It's not sufficient to quote what someone says," said Raqiyyah Pippins of Kelley Drye & Warren LLP. "They have to be representative of the typical consumer experience."

While its unlikely regulators will come after a company the same day that an offending customer testimonial is put up, it's important to regularly monitor comments, according to attorneys.

And any comments that are highlighted as customer testimonials should meet the same standards as any of the company's other advertising materials.

"Look to make sure they're truthful and not misleading," said Justin Prochnow of Greenberg Traurig LLP.

Also, keep in mind that individuals could also use testimonials or customer comments as a hook for their own litigation. "If you leave it on your website, [plaintiffs] can make the argument that you're doing so on purpose," English said.

### **Avoid Social Media Traps**

A company must be careful of interacting with customers on social media platforms, according to attorneys.

"The FDA is trying to be proactive and recently issued guidance on user-generated content," Pippins said.

Per that guidance, if a company likes or retweets someone's statement, it's akin to the company taking ownership of that comment, she noted. If that customer comment makes any boasts like "I swear it got rid of my cold," or "It helped me lose 30 pounds in a month," the company could find itself in hot water for promoting that statement as representative of customer experiences.

Right now, given the recent guidance, such slip-ups are high on the regulator's radar. In July, for example, the FDA issued a warning letter after a company liked and responded to consumer comments that included disease claims, according to Prochnow.

"It's a good example of some of the pitfalls the companies have," he said.

It also highlights the need for legal training with companies' social media directors, according to attorneys.

"As new forms of social media come out, companies certainly need to realize and keep those same principles in mind," Prochnow said.

### **Stand Behind Product Claims**

If a company is going to say a product is made with natural ingredients, has antioxidants or any other similar claims, make sure those claims can be backed up with scientific data that is accessible on the product's website.

"If you're going to make a claim, explain why you're going to make a claim and have scientific evidence to back it up," English said.

This will help defend against potential litigation, attorneys said. But taking on the responsibility also means making sure that the materials are as up-to-date as possible, particularly if the product is depending on ingredients supplied by another company.

"You need to be at least concerned about ... your paper trail and what happens if your supplier or vendor changes ingredients without telling you ahead of time," English said.

It can also be helpful to stick to the FDA's definitions on Internet materials, as that can sometimes bolster the chances of getting a proposed class action tossed in the early stages. For example, if a consumer sues, arguing that the listing of evaporated cane juice as an ingredient is deceptive because he or she didn't know that essentially means sugar, a company can come back and argue that federal statute requires that listing, and federal law preempts the state consumer protection statute.

"It's not a slam-dunk argument ... but we're seeing more and more defendants go to the motion stage [on this]," Polovoy said, noting that defendant companies have so far had mixed results with the federal preemption defense.

### **Keep URLs and Nutrition Labels Divided**

Frito-Lay North America Inc. recently dodged claims in California federal court that its website content constituted misleading labeling under the Food, Drug and Cosmetic Act. A federal judge ruled against the claims, finding that the phrase "Visit our website @ fritolay.com" is printed underneath the company's physical address, not near the ingredients list or any nutritional facts, and nowhere on any product's packaging does the company direct consumers to its website for more facts about the labeled product.

It can be helpful for companies to follow a similar practice with its on-label website directives, according to Pippins.

"You need to be actively referring to the website for more information on a nutritional claim," she said.

### **Don't Trip Up on Metatags**

Another pitfall can be the metatags that a company puts on its websites to trigger the sites' appearance on Internet word searches. If those tags at all look like they are putting the website in the same category as a drug, such as "cold remedy" or "flu," it will increase the likelihood that the FDA or FTC will come knocking on the company's door with legal action, according to Prochnow.

"The FDA has cited that in a number of warning letters as additional evidence that a company is trying to sell a product for drug purposes," Prochnow said.

### **Get on the Defensive**

Given the litigiously hot environment surrounding food and beverage companies, it's important to be playing defense now.

"I think the message really is to think ahead in terms of getting your arsenal ready to defend these cases. When a company has a reasonable suspicion they might become the target of a food class action,

they have an obligation to preserve electronic data ... one of the things they have to think about is preserving all versions of their websites that existed," Polovoy said.

If there are multiple versions of a website and multiple languages, that can help a defendant oppose certification of a class because it's going to be harder for the plaintiff to demonstrate that the members were exposed to the same statements during a particular time period, she noted.

It's also important for companies to have someone that is dedicated to watching the regulators, attorneys say.

"I think it's important for companies to specifically designate personnel to monitor these agency's websites," Polovoy said. "If these company representatives tracking these agency actions start to notice the FTC or FDA taking an interest in a particular sector of the industry ... you can start taking proactive actions in advance of becoming an agency target."

--Editing by Katherine Rautenberg and Philip Shea.

---

All Content © 2003-2014, Portfolio Media, Inc.