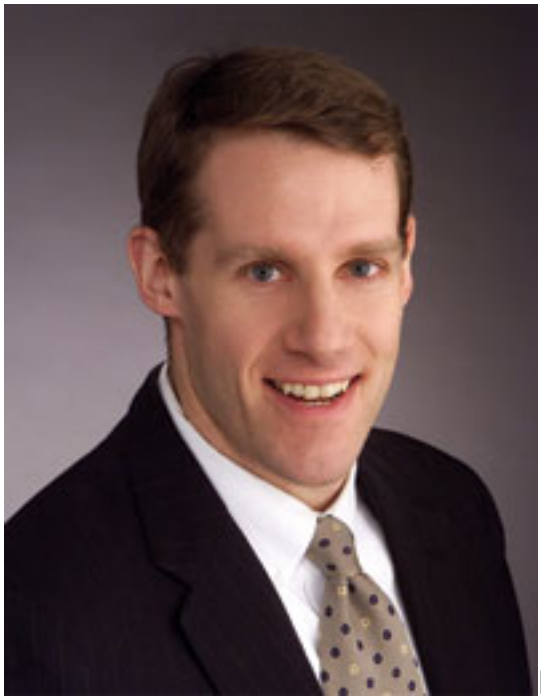
Q&A: Judging By The Label

 Ferrero USA recently settled a class action lawsuit over the marketing of its Nutella chocolate-hazelnut spread. *Food Manufacturing* spoke with David L. TerMolen of Freeborn & Peters LLP about the lawsuit and why food processors should think carefully before placing health claims on their product labels.

Q: What made Nutella vulnerable to a lawsuit over its marketing and labeling practices?

A: The maker of Nutella — Ferraro USA Inc. — was vulnerable to a lawsuit because a plausible argument existed that its labeling and marketing practices misled consumers into believing Nutella was a relatively healthy product like peanut butter. Specifically, the front label of Nutella identifies it as “Hazelnut Spread with Skim Milk & Cocoa,” the side panel states it is “Made with over 100 Hazelnuts per Jar,” and the back label states that it is ”An example of a tasty yet balanced breakfast.” According to its nutrition facts label, however, Nutella contains 10.9 grams of sugar per serving (close to 55 percent of the overall product) and 2 grams of saturated fat. The contrast between the marketing message and actual product resulted in the lawsuit, in which a mother claimed that she “was shocked to learn” that Nutella “was the next best thing to a candy bar.” In other words, she claimed she was “duped” by Nutella’s “deceptive and misleading” marketing practices into buying a product she would otherwise not have purchased.

Significantly, California law rejected the idea that a reasonable consumer cannot be

deceived by such practices because the nutrition facts panel specifically identifies the product's ingredients. As the Ninth Circuit Court of Appeals stated: "We do not think that the FDA requires an ingredient list so that manufactures can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield of liability for the deception." This meant that the case was likely heading to trial because there was not a solid basis for the court ruling that Ferraro's advertising of Nutella could not, as a matter of law, mislead a reasonable consumer. Compounding this problem was the fact that Nutella is marketed as a breakfast food for kids, which increases potential risks and long-term embarrassment for Ferraro given the present concerns about childhood obesity.

Q: What can food manufacturers learn from the Nutella case?

A: If there's a key lesson from this case, it's that food manufacturers should carefully scrutinize marketing efforts that imply a product high in calories, added sugars, saturated fats or sodium is healthy, even if the individual statements are all literally true. It also demonstrates the potential advantages of complying with the industry-led Facts Up Front [1] labeling system, the use of which should dampen the power of such claims. In fact, Ferraro has agreed to use this labeling system in the future for Nutella.

Q: What are FDA requirements for food package claims?

A: One could write several lengthy articles on this topic. Generally, however, FDA regulation of front-of-package (FOP) claims is limited to restricting FOP claims that are false or misleading and compelling the disclosure of certain factual information on FOP labels. Significantly, truthful FOP claims are protected as "commercial speech" under the First Amendment. Thus, even if policymakers believed it was in the public interest to preclude certain FOP claims altogether, that can only happen if scientific evidence supports the position that such claims are false and misleading, and thus deceptive.

The FDA's balancing act between free speech concerns and preventing deceptive labeling is readily apparent in its regulation of the following FOP nutrient and health claims:

Nutrient Content Claims: Claims that, directly or by implication, characterize the level of a nutrient in the food, such as "low fat," "good source of oat bran" or "contains 100 calories."

Among other FDA requirements, a disclosure statement is needed if a Nutrient Content Claim is made and another nutrient in that food exceeds certain prescribed levels. An example is a "No Trans Fat" claim made for a product high in saturated fat or sodium, which would require a disclosure statement identifying the high levels of these other "nutrients."

Health Claims: Any claim — including "third party" references, written statements (e.g., a brand name including a term such as "heart"), symbols (e.g., a heart symbol) or vignettes — that, expressly or by implication, characterizes the

relationship of any substance to a disease or health-related condition.

The FDA requires that health claims meet the "Significant Scientific Agreement" standard, and if a health claim is provided for in an FDA regulation, then it can be used in accordance with that regulation. A list of approved health claims can be found here [2].

Qualified Health Claims: Health claims that don't quite meet the Significant Scientific Agreement standard and which must therefore include "qualifying" language so that consumers are not misled.

Structure/Function Claims: Claims that describe the effect a substance has on the structure or function of the body without reference to a disease, such as "Calcium builds strong bones." No FDA pre-review is required, but, as with any FOP claim, it cannot be misleading.

The FDA's overview of all these claims can be found here [3].

Q: Are there particular product claims food companies should avoid?

A: Companies should obviously avoid any claim that runs afoul of FDA regulations. Significantly, FDA warning letters are often cited by class action attorneys as "evidence" that a particular claim is deceptive. The larger question is the potential risk that, despite compliance with FDA regulations, an FOP claim will lead to a consumer lawsuit or attacks by consumer interest groups. This analysis will vary based on the particular product and the type of claim being made.

For example, there has been a recent flood of litigation over "all natural" [4] claims. Such claims have strong consumer appeal and can be applied to a wide array of products. For many of those products, "all natural" or "100% natural" can be used without much, if any, risk. But for other products, such as those more than minimally processed or that use ingredients targeted by class action attorneys, there will always be some risk. It is therefore critical to understand the legal and marketing dynamics for particular claims before deciding on whether such a claim is appropriate for your product.

Q: What should manufacturers consider before making claims about their products?

A: The bottom line is that food manufacturers must consider all applicable FDA and USDA regulations and guidelines and whether proposed claims are otherwise appropriate for enhancing the value of a brand and selling more product. In the example of Nutella, Ferraro was shortsighted in its marketing of the product and failed to understand (or fully appreciate) the potential adverse impact its advertising practices might have in the long term.

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Interview by Lindsey Coblentz, Associate Editor

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[1] http://www.factsupfront.org/
[2] http://www.fda.gov/food/labelingnutrition/labelclaims/healthclaimsmeetingsignificantscientificagreementssa/
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