A Rose by Any Other Name Is a Lawsuit, Part 2

This is part two of a two-part piece. Part one can be found here *[1].*

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Actual and Threatened Lawsuits by Governmental Agencies against Food Manufacturers

The third category of recent labeling lawsuits is perhaps the most fear-inducing for those in the food industry. It involves actual and threatened lawsuits by governmental agencies against food manufacturers. This is perhaps due to state and local governments "becoming alarmed at the escalating costs of caring for people with diseases [caused by eating unhealthy foods] and are putting pressure on food companies," as noted by the aforementioned New York Times article.

An example of a threatened lawsuit is the recent investigation by New York's attorney general against the makers of energy drinks. The investigation centers on whether these companies are deceiving consumers in a number of ways, including the amount of caffeine in their drinks, the health risks generated by consumption of large amounts of caffeine, whether all of the ingredients in the drinks are properly disclosed, and whether the drinks are dietary supplements or foods. To date, the New York attorney general has issued subpoenas to the energy drink makers as part of the probe. The FDA is reportedly investigating the industry as well.

State and local governments are not the only ones pursuing this strategy. The Federal Trade Commission has won settlements from companies for claims related to a product's health benefits. In addition, public interest groups are also getting into the act, suing over labeling of various food products.

Overview of Proposition 37

On another front, various state legislatures appear to be moving to expand laws requiring accurate labeling of food products. For instance, legislatures in at least 20 states have introduced legislation that would require the labeling of genetically engineered food. Though only one state has passed such legislation thus far (Alaska), it appears to only be a matter of time before more are passed. In fact, in California, a new law requiring labeling of genetically engineered food was narrowly defeated as a ballot initiative in November 2012.

This proposed law, known as Proposition 37, or The California Right to Know Genetically Engineered Food Act, would have required labeling on raw or processed food offered for sale to consumers if it is made from plants or animals with genetic material changed. In addition, Proposition 37 would have prohibited the labeling or advertisement of any such food as “natural” or “all natural.” Enforcement of any violations would have been through existing regulations and the Consumer Legal Remedies Act, which includes actual damages, injunctive relief, restitution, punitive damages, and attorneys’ fees. Many observers believed that if Proposition 37 had passed, it would have had a huge impact on the food industry — increasing compliance costs and opening the door to a whole new target of litigation. Passage looked likely just a month or two before Election Day with polls showing that the measure was leading by more than 40 points, but a late focus on the proposed law’s problems turned the tide and led to a six-point defeat of the Proposition.

However, the battle appears to be far from over. The Proposition 37 campaign spokeswoman, Stacy Melkin, said after its defeat that they plan to win the labeling debate over the long-term and that “[w]e showed that there is a food movement in the United States, and it is strong, vibrant and too powerful to stop.” It appears that there may be a similar ballot initiative in Washington State in November 2013, and there are current legislative efforts to pass similar measures in Connecticut, Vermont, and New Mexico. Moreover, U.S. senators have proposed legislation to permit states to pass laws like Proposition 37 (though the latest effort picked up a mere 26 votes in the Senate).

The stakes in this new wave of lawsuits are high. The addition or omission of literally one word in a label can potentially lead to millions of dollars in liability for a company, millions more in legal fees, and even lead to investigations into such practices by federal and state authorities. Those in the food industry should follow this trend closely and take steps to prepare for possible litigation.

This is part two of a two-part piece. Part one can be found here [1]. For more information, please visit www.mcguirewoods.com [2].

1 Lam v. General Mills, Inc., no. 3:11-cv-05056 (N.D. Calif.)
2 Janney v. General Mills, no. 4:12-cv-03919 (N.D. Calif.)
3 Colucci v. Zoneperfect Nutrition Co., no. 12-2907 (N.D. Calif.)
4 Nutella Marketing and Sales Practices Litigation, no. 3:11-cv-01086 (D. N.J.)
5 Shenkman v. One World Enterprises, LLC, no. BC467165 (Los Angeles County)
6 Western Sugar Cooperative et al. v. Archer-Daniels-Midland Co. et al., case number 2:11-cv-03473 (C.D. Calif.)

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