In the Hot Seat
Here’s how you can protect your company in today’s onslaught of advertising litigation.

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by Christopher A. Cole

The once sleepy world of food advertising has emerged in recent years as a hotbed of litigation, as food marketers have been forced to fend off dozens of lawsuits by competitors, consumers and government agencies.

In a recent high-profile example, Taco Bell was hit with a putative class action for allegedly failing to disclose that its beef was more filler than beef.

Taco Bell hit back hard against the allegations, waging a public media campaign to refute the plaintiff's charges, a strategy that caused the plaintiff to drop the suit. Despite the quick victory, however, as of this writing, Taco Bell had informed the press it was considering countersuing the plaintiff's law firm because the mere filing of the apparently frivolous case and accompanying adverse press had hurt its sales.

Why have the floodgates opened on cases like this, and what can food marketers do about it?

First, due to tort reform in some states and securities class action reform nationally, consumer class action lawyers have redirected their energies to what they see as more lucrative potential targets - deep-pocketed food manufacturers and quick-service restaurants.

Class action law firms have been aided in this effort by a wide array of public interest groups, such as the Center for Science in the Public Interest, which are focused on using litigation as a means to advance public nutrition causes. For example, food policy groups have been advocating nationwide for state and local laws banning the sale of children's fast-food meals that include toys. Hand in hand with the legislative push, putative class actions also have been filed on the theory that such marketing is deceptive because it causes children to pester their parents until they purchase nutritionally inferior meals.

Second, food marketers have targets on their backs. They are often high-profile advertisers with big advertising budgets that sell products to consumers in grocery stores nationwide. Although individual claims for refund would be quite small, millions of claims can be aggregated to achieve very significant damage demands. A single container of yogurt might cost $1.50, but a national class action on behalf of millions of consumers can - as in the case of Dannon's Activia and DanActive - net the plaintiffs' lawyers millions in recoveries.

Third, recent rulings on preemption have opened the door for plaintiffs to claim that product labels, even if they comply fully with FDA regulations, are nevertheless misleading to consumers. The Obama FDA has failed to intervene to protect its primary authority over labeling for food products, quite unlike the position FDA took with respect to prescription drug claims during the Bush administration. Thus, one sees putative class actions on the theory that foods are deceptively labeled as "all-natural," when they have ingredient labels fully disclosing high-fructose corn syrup, even though this practice arguably tells consumers everything they need to know and is perfectly acceptable under FDA's well-considered policies and regulations.

Fourth, the pressure to increase sales and profit margins in historically stable product categories has sparked a flurry of innovation as food marketers add novel ingredients or features that are claimed to provide special health benefits. Even in categories lacking innovation, marketers are
calling out existing attributes, such as low fat or added fiber, to make aggressive health benefit claims.

Fifth, food marketers themselves have become more vigilant at self-policing. The number of competitive challenges to food marketing claims as risen dramatically at the National advertising Division of the Council of Better Business Bu and in federal court. The most dramatic example is the national campaign by the makers of POM Wonderful® pomegranate juice - an allegedly "pure" juice product – to sue numerous makers of juice products that allegedly had misled consumers about their pomegranate juice content.

Food for Thought

Given this swirling vortex of risk, how can a food advertiser best protect itself? Here are a few recommendations.

Engage good advertising lawyers to review labeling and advertising for both express and implied claims. Although it should go without saying that FDA counsel is needed to focus on ensuring compliance with FDA regulations and policy, advertisers can not rely on FDA compliance as a defense to consumer class action liability or competitor challenge. You need lawyers who are trained at evaluating the unstated messages that are conveyed by the packaging and advertising - in the lexicon of the ad lawyers, the "net impression." Sometimes, high-risk advertising copy should be pretested under protection of attorney work-product privilege to evaluate the real world understanding of consumers. That kind of evidence can help down the road in any litigation.

If the advertiser seeks to make health claims, it should adhere to FDA approved language and be prepared to provide rigorous clinical data on the entire product, not just on the ingredients. The Federal Trade Commission has articulated a highly rigorous substantiation standard (two independent clinical studies) in recent cases against food companies, which appears to be on its way to becoming a de facto standard of compliance for any novel health claim.

Food advertisers should offer a flexible refund policy and adhere to it. In litigation, it is always helpful to be able to point to such a policy as evidence that a class action is unnecessary. Customer service representatives should be trained to follow this policy and to handle complaints from disgruntled consumers in a responsive and courteous manner while documenting the interactions. You never know whether that seemingly ordinary person who has called the complaint line has been carefully scripted by plaintiff's counsel. Likewise, records of happy consumers should also be documented.

From a litigation defense perspective, the first reaction of almost every class action defendant is to consider a motion to dismiss, but many such motions merely teach the plaintiffs' lawyers about the shortcomings of their claims. They may lose the motion, but if dismissal is without prejudice, they will respond by filing an amended complaint or by filing a new, stronger complaint with a new plaintiff. Consider as a strategy whether aggressive and swift discovery of the plaintiff can kill the class completely before the plaintiff's lawyer learns enough to be really dangerous.

Consider taking a page from the Taco Bell playbook and adopting an aggressive media strategy to respond to particularly frivolous allegations. The natural impulse is to keep the matter quiet for fear of attracting more plaintiffs, but this may not always be correct, depending on the outrageousness of the allegations.

Despite all the careful planning and thought that goes into providing superior food offerings, advertising litigation is likely to find your company someday. Unless your marketing is completely innocuous, it will be difficult to completely prevent such cases from being filed against you. Companies in the food business must therefore be more vigilant than ever to minimize the risk of loss.