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Food & Beverage Cases To Watch In 2018

By **Joyce Hanson**

Law360, New York (January 1, 2018, 3:04 PM EST) -- Food manufacturers that tout their products' healthfulness will remain a subject of scrutiny in 2018, with the U.S. Food and Drug Administration finally expected to offer up regulatory guidance on the use of words like "healthy" and "natural" on packaging. Also in 2018, more foodborne-illness suits may reach a jury, diet soda makers will get dragged into proposed class actions and slack-fill suits may see some closure.

'Natural' & 'Healthy' Labeling Claims Wait on Trump FDA

A case challenging the use of "natural" and "healthy" on packaging for Kind LLC's snack bars has become a litmus test for other food manufacturers making similar claims. But the case itself hinges on long-awaited policy decisions the FDA is expected to make in 2018.

A New York federal judge put the case on hold in September 2016, "pending the FDA's promulgation of rules addressing use of the word 'natural' on food labels."

Speaking to Law360 in December, Mayer Brown LLP partner Keri Borders, whose firm is representing Kind in the suit, said that "maybe we'll see something from the FDA in 12 months."

"We're watching and waiting in 2018 for the FDA to give a definition of 'natural,'" she said.

According to Borders, manufacturers' "natural" claims have been a prominent focus for food litigation in the last five to six years, and "what the FDA has to say about natural and health claims on labels is certainly going to impact consumer class actions."

She sees reason to expect FDA action in the near future, citing comments made by FDA Commissioner Scott Gottlieb at a Wall Street Journal forum in October in which he said he wants to see the agency take steps to adjudicate health claims. According to the Journal, the President Donald Trump appointee also said he remains committed to making food packaging more informative, but wants to give manufacturers time to comply.

The agency is also weighing its policy on the word "healthy," though it has already issued a ruling on that term in the Kind case. In May 2016, it said Kind could use the word so long as it's clearly part of the company philosophy and not a nutritional statement, in what Kind described as a reversal of a 2015 FDA warning letter that threatened the company with regulatory action if it continued to label its products as

healthy.

But the agency added that it would be re-evaluating how it defines healthy food. In April, it wrapped up a public comment period on “healthy” after receiving more than a thousand comments from industry stakeholders and consumers. And during a comment period that closed in 2016, the FDA also asked if consumers think “natural” and “healthy” are synonymous.

The case is In re: Kind, case number 1:15-md-02645, in the U.S. District Court for the Southern District of New York.

Food-Related Illness Outbreaks to Keep Rolling In

Following a California jury’s Oct. 26 finding that Costco, a frozen-berry supplier and others weren’t responsible for an 89-year-old woman's death from hepatitis A, the lead trial lawyer for the defense predicted that more food-related product liability cases would be filed and tried in 2018.

The attorney, Eric A. Kuwana of Katten Muchin Rosenman LLP, gave Law360 a simple reason for his prediction: “The science is so much better.”

“Investigations can track food-related illnesses and genotype them,” he said. “As a result of that, plaintiffs' counsel can identify quicker the universe of likely responsible parties and get cases filed quicker and in a greater volume."

“But science also can benefit the defense. It enables a defendant to say, ‘It wasn’t us.’ These cases often aren’t tried because fighting causation is tough, but in appropriate cases defendants need to be willing to defend and try these cases,” he said.

In Costco, Kuwana said, Katten Muchin and his clients tried the case because they did not believe the death was linked to a contaminated batch of pomegranate seeds, and the jury agreed with them. It rejected the woman’s children’s request for $18 million because there wasn't enough evidence that she actually ate the berry blend.

Counsel for the plaintiffs, John H. Gomez of Gomez Trial Attorneys and Ron Simon of Ron Simon & Associates, did not respond to a request for comment.

Looking ahead, Kuwana believes that more defendants may be willing to fight things out in court and refuse to settle because, in his view, plaintiffs counsel often line up cases based simply on outbreaks of foodborne illnesses.

“More defendants will test these cases,” Kuwana said. “Currently, the vast majority of these cases settle and the vast majority of the settlements aren’t public because the food companies settle to make the cases go away. But that may change as the science continues to improve.”

Kuwana also anticipates seeing more lawsuits claiming foodborne illnesses related to organic foods, especially imported food sold through large retailers.

“Many outbreaks are coming from foreign countries, and that continues to be an area of risk,” Kuwana said. “As large retailers move more into food, more cases will be brought against them. They want to meet consumer demand quickly, but it’s a new area for them.”

The case is Darla Schelitzche et al. v. Townsend Farms Inc. et al., case number BC576437, consolidated in Townsend Farms Organic Anti-Oxidant Blend Cases, case number JCCP4812, in the Superior Court of the State of California, County of Los Angeles.

Diet Soda Now Facing False Ad Suits

The "diet" in diet soda is now on the growing list of false advertising claims being brought against food and beverage manufacturers.

Three class actions, filed Oct. 16 in New York federal court, allege that The Coca-Cola Co., Pepsi-Cola Co. and Dr Pepper Snapple Group Inc. mislead customers with "diet" drinks containing aspartame. They claim consumers are duped into believing that the zero-calorie beverages will assist in weight loss or management, when in fact the artificial sweetener can lead to weight gain.

"Scientific evidence demonstrates this is wrong because non-nutritive sweeteners like aspartame interfere with the body's ability to properly metabolize calories, leading to weight gain and increased risk of metabolic disease, diabetes and cardiovascular disease," each complaint says.

Mayer Brown's Borders called these three suits "very interesting" because one of the law firms representing the plaintiffs, The Law Office of Jack Fitzgerald PC, has been closely involved in bringing class action claims against General Mills Inc., Kellogg Sales Co. and Post Foods LLC over sugary breakfast cereals.

"This is the second tranche of what we call Jack Fitzgerald's 'war on sugar.' His theory is that breakfast cereals are marketed to indicate they're healthy and good for you when in fact they have high sugar content, which is bad for you," Borders said.

Fitzgerald's cases against cereal makers have survived motions to dismiss in the Northern District of California, so the food and beverage industry is likely to see more consumer class actions in 2018 where sugar is the targeted ingredient, according to Borders.

The diet soda cases are Excevarria et al. v. Dr Pepper Snapple Group Inc. et al., case number 1:17-cv-07957, Geffner et al. v. The Coca-Cola Co., case number 1:17-cv-07952, and Manuel et al. v. Pepsi-Cola Co., case number 1:17-cv-07955, in the U.S. District Court for the Southern District of New York.

Fate of Slack-Fill Suits Questioned

Perkins Coie LLP partner David T. Biderman, who has made a name for himself as a founder and chair of the firm's food litigation group, expects to see more court decisions involving "slack-fill" suits in 2018 — and not all of them good news for the plaintiffs bar.

The number of slack-fill lawsuits claiming food companies trick consumers into thinking they are getting more product than they actually paid for has jumped more than six times since 2013, and that growth shows no signs of diminishing.

But as of spring 2017, successes for the plaintiffs side have been few, and federal courts have denied most bids for class certification.

“I would continue to monitor the slack-fill cases to see how that litigation comes out in 2018, because there will be important decisions about whether those cases can even make it past the pleadings,” Biderman said.

--Additional reporting by Pete Brush, Bonnie Eslinger, Emily Field, Dani Kass, Brandon Lowrey, Daniel Siegal and Steven Trader. Editing by Mark Lebetkin and Jack Karp.