

## *Pet Products*

### **Blue Buffalo, Purina, Other 'Premium' Pet Food Makers Face Suits**

Blue Buffalo Pet Products, Nestle Purina PetCare, and Tyson Foods are among pet food makers facing suits over allegedly deceptive assertions about their so-called premium products.

Multimillion-dollar settlements, a plaintiffs' attorney playbook taken straight from human food false advertising and labeling cases, and strong growth in the pet food industry, mean this litigation is likely to thrive, attorneys tell Bloomberg Law.

"Now that Americans are viewing their pets like human family, we can expect that paradigm shift to manifest not just in the grocery store aisles, but in the courtroom as well," said defense attorney Jonah Knobler of Patterson Belknap Webb & Tyler LLP in New York.

A plaintiffs' consumer protection attorney involved in one suit over "natural" pet food labeling and is investigating others, also predicts an increase in pet food suits.

"People spend a lot of money on these products and care greatly about the quality," Michael Reese of Reese LLP in New York told Bloomberg Law. "When the representations they relied upon in choosing one product over another turn out to be misleading, consumers will be upset and turn to the courts."

U.S. consumers spent \$28.23 billion to feed their pets in 2016 and were expected to spend \$29.69 billion in 2017, according to the American Pet Products Association, an industry trade group.

Together with that market growth, cases targeting the pet food industry are on an upswing, "similar to the explosion of food false advertising cases that we have seen over the last seven years," defense attorney Keri Borders of Mayer Brown in Los Angeles said.

Litigation includes suits by pet owners who say they overpaid for promises of a superior product, as well as Lanham Act suits by businesses alleging their competitors' deception took customers away.

"We are seeing the same legal theories, same causes of action, and the same arguments of consumer deception as in human food," Borders told Bloomberg Law.

The predominant theories center on the terms "natural" and "Made in the USA," attorneys say.

But misleading claims over lack of by-products, or quality of ingredients, will also trigger lawsuits, said Reese, who teaches food law and class actions at Brooklyn Law School in New York.

**Blue Buffalo Shows Trend** Recent high-profile litigation against Blue Buffalo Pet Products, Inc. is a good example of the marketing patterns and resulting litigation, Knobler, one of Blue Buffalo's attorneys, told Bloomberg Law.

In those suits, which settled, consumers alleged Blue Buffalo misrepresented its food as containing no poultry byproducts. The U.S. Court of Appeals for the Eighth Circuit gave its final approval in 2017 to a \$32 million agreement affecting about 3.5 million households.

The trend toward high-end, natural pet food is intensifying, Knobler said. Some companies are even starting to make specific claims about what their products can do, like mitigating cognitive decline in older dogs, he said.

"As these claims proliferate and get more specific, there's every reason to think that consumer class actions will follow," Knobler said.

The Blue Buffalo consumer suits led to litigation by Blue Buffalo against supplier Wilbur-Ellis Co. and broker Diversified Ingredients, Inc. Blue Buffalo alleged one or both of those companies supplied mislabeled ingredients that contained poultry by-product meal.

Wilbur-Ellis wouldn't comment on the ongoing litigation. But the company did tell Bloomberg Law that "Wilbur-Ellis is committed to providing our customers and theirs with quality, reliable pet-food products and we are confident our operational processes will ensure this pledge is upheld."

Diversified didn't respond to a request for comment.

**Natural Litigation** Challenges to "natural" labeling statements on packaging are also part of the new wave of suits over pet food. Similar phrasing on human food and household products has triggered hundreds of consumer suits and a number of settlements in recent years.

These include an agreement by actress Jessica Alba's Honest Co. to pay \$7.35 million and stop labeling certain cleaners "all natural," and a \$2.76 million settlement that resolved a suit over Snyder's-Lance snacks that allegedly contained genetically modified ingredients.

Now, owners are parsing pet food labels and suing.

In one suit, celebrity cook Rachael Ray's company, Ainsworth Pet Nutrition, LLC faces litigation challenging "natural" statements on Nutrish-brand pet food products allegedly containing synthetic vitamins.

Guidelines from the Association of American Feed Control Officials say pet food containing vitamins may be called "natural."

AAFCO is a nationwide voluntary association of local, state, federal, and international agencies that regulate the sale and distribution of animal feeds. It has a memorandum of understanding with the Food and Drug Administration regarding the regulation of animal products.

Proposed class plaintiff Christina Grimm acknowledges that the Ainsworth label complies with the AAFCO guidelines, which a majority of states have formally adopted. She argues, though, that a court should determine whether the label could still deceive consumers.

Grimm's suit was recently put on hold while the California Department of Health mulls whether to take steps to formally adopt the AAFCO guidelines on "natural." An announcement from the California agency is expected by March 2018.

### Lanham Act Cases

Other false advertising pet food cases have already reached the appeals court level.

One is a Lanham Act case that alleges use of ingredient images on packaging by some of the U.S.'s biggest producers tricks consumers into buying those products.

The Lanham Act prohibits trademark infringement and false advertising.

Wysong Corp., a small specialty company, sued Nestle Purina PetCare Co., Mars PetCare US, Inc., and Big Heart Pet Brands, Inc., a unit of J.M. Smucker Co.

Wysong alleges the companies use pictures of premium ingredients such as vegetables and chicken breasts, when the food is made with less costly ingredients, such as chicken trimmings. That steers buyers away from Wysong's wares, the specialty company alleges.

A district court found that Wysong failed to show how the images conveyed a deceptive message and dismissed the case. But the case is currently on appeal at the Sixth Circuit.

The argument that images were misleading because they didn't exactly match what was in the food is "similar to theories that have been presented and rejected with respect to human food," said Borders, who represents Nestle Purina.

**'Made in U.S.A.' Claims** Recently argued in another federal appeals court, the Ninth Circuit, is a suit over "Made in U.S.A." claims against Tyson Foods, Inc. and Big Heart Brands.

Both companies claim certain dog treats are made in the U.S. but have ingredients sourced from foreign countries, plaintiff Susan Fitzpatrick says.

At the time of purchase, California consumer protection law made it illegal to label a product "Made in USA" if it contained any foreign ingredients.

But Tyson and Big Heart contend the matter is covered by a later-added provision that allows the U.S.-made designation for products with a small percentage of foreign components.

Demand for U.S.-made and grain-free products spiked after 2007. That was the year that thousands of dogs and cats died of kidney failure linked to melamine, which was labeled as wheat gluten or rice protein in Chinese-made food.

The incident led to many lawsuits and a \$24 million settlement with pet owners.

BY JULIE A. STEINBERG

To contact the reporter on this story: Julie A. Steinberg in Washington at [jsteinberg@bloomberglaw.com](mailto:jsteinberg@bloomberglaw.com)

To contact the editor responsible for this story: Steven Patrick at [spatrick@bloomberglaw.com](mailto:spatrick@bloomberglaw.com)

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