

Food & Beverage Cases To Watch In 2019

By **Sophia Morris**

Law360 (January 1, 2019, 12:03 PM EST) -- In 2019, food and beverage attorneys will be looking to see if new takes on the age-old "natural" labeling debate are successful and how cases brought over trace amounts of the pesticide glyphosate are handled, while also following the ongoing antitrust litigation against poultry and pork producers.

Law360 has rounded up the cases worth paying attention to in 2019.

The Expansion of "All Natural" Claims

The past year saw a jump in the number of lawsuits filed by consumers alleging they were duped into believing a product was "all natural" or contained no artificial flavors or preservatives, then found out it contained ingredients that are synthetic or can be used as preservatives and artificial flavors.

Dale Giali, a partner at Mayer Brown, told Law360 that lawsuits based on this theory "really ballooned in 2018," and he expects this trend to continue and grow in 2019. Giali is paying particular attention to the spate of cases brought over the presence of malic acid in food products that advertise themselves as free from artificial flavors. Consumers claim the acid can be used as a flavor and therefore the labeling is deceptive.

Ocean Spray Cranberries Inc. is facing a suit from consumers over the presence of malic acid in its juice products. Giali said the suit is worth paying attention to given the November ruling that granted partial certification to a class of consumers, finding their claims alleging violations of California consumer protection laws could proceed.

Manufacturers such as Ocean Spray make the argument that malic acid can have other functions, and is not serving as an artificial flavor in their products, but so far this defense has not had much success, Giali said.

A similar proposed class action was launched in October against National Beverage Corp., the maker of LaCroix, alleging that the hipster beverage of choice is not "100 percent natural" as its label claims. The sparkling water contains ethyl butanoate, limonene, linalool and linalool propionate, synthetic compounds that are also used in insecticides and cancer treatments, the suit says.

The LaCroix case is "an example of how 'natural' continues to be a target for class action plaintiffs

lawyers and that any company who has natural on their label has to think long and hard about that claim and make sure it is substantiated in a very solid way," Sarah Brew, a partner at Faegre Baker Daniels LLP, told Law360.

The cases are Hilsley et al. v. Ocean Spray Cranberries Inc. et al., case number 3:17-cv-02335, in the U.S. District Court for the Southern District of California, and Lenora Rice et al. v. National Beverage Corp., case number 2018-CH-12302, in the Circuit Court of Cook County.

When GMO meets "Natural"

Lawsuits launched by consumers accusing companies of falsely advertising dairy and egg products as "natural" when they derive from animals that eat genetically modified feed also fit into that trend of suits over "natural" labeling. One ongoing case is a proposed class action against Boar's Head Provisions over its cheese products, which are alleged to be deceptively labeled as "natural" because the cheese is derived from cows that were raised on GMO feed.

Giali said attorneys will be watching to see how receptive courts are to this theory of liability. He highlighted the September order certifying a class of Chipotle customers who accuse the chain of falsely advertising that its food was made with only non-GMO ingredients when it contained meat and dairy ingredients derived from animals that had eaten genetically modified feed.

"We are going to see more lawsuits where the plaintiffs are looking closely at what an ingredient is, what function it serves, how it is produced for use in consumer packaged goods food products, including looking back on the animal side to how animals are raised and what they eat," Brew said.

The cases are Forsher v. Boar's Head Provisions Co. Inc., case number 4:17-cv-04974, in the U.S. District Court for the Northern District of California, and Schneider et al. v. Chipotle Mexican Grill Inc., case number 4:16-cv-02200 in the U.S. District Court for the Northern District of California.

Glyphosate in Your Cereal

In recent months, consumers have hit General Mills and Kellogg's with suits alleging their cereal products contain trace amounts of the pesticide glyphosate. The chemical has been categorized as a "probable human carcinogen" by the World Health Organization and is found in Monsanto's Roundup weedkiller. The U.S. Environmental Protection Agency separately concluded in 2017 that glyphosate is not carcinogenic to humans.

These lawsuits originate from plaintiffs' lawyers testing products in order to discover trace amount of the pesticide, which is commonly used in the U.S. In the Kellogg Co. case, filed Dec. 7, the strawberry Nutri-Grain Soft Baked Breakfast Bars and Cracklin' Oat Bran cereal products were tested by activist group The Environmental Working Group and trace amounts of the pesticide were found, according to the complaint.

Shawn Gebhardt of Ulmer & Berne LLP told Law360 that the case against General Mills was filed just days after a California jury awarded a groundskeeper \$289 million in compensatory and punitive damages after linking his lymphoma to Monsanto's Roundup and Ranger Pro.

The August complaint alleges consumers were defrauded as the company failed to warn them that Cheerios cereal contained trace amounts of the pesticide. Gebhardt said these cases will only grow in

number, and if consumers are successful they could have a burdensome impact on manufacturers as the end result could be additional product labeling requirements.

"I think that those cases are relevant because they affect a large number of consumer food products — all grain-based or soy-based products — those are all crops that glyphosate is commonly applied to and you could possibly find residues of glyphosate at these very low levels in any number of products," Gebhardt said.

The cases are *Kein v. Kellogg Co.*, case number 3:18-cv-02759, in the U.S. District Court for the Southern District of California, and *Doss v. General Mills*, case number 0:18-cv-61924, in the U.S. District Court for Southern District of Florida.

Antitrust Cases Continue

Ryan Phair of Hunton Andrews Kurth LLP told Law360 that class actions alleging antitrust violations by chicken producers will continue to be something to watch for into 2019, and pork has become the latest product to be targeted. The chicken suits, the first of which was filed in 2016, allege that more than a dozen big-name poultry producers, including Tyson Foods Inc., Perdue Farms Inc., Koch Foods Inc. and various affiliates, manipulated the price of broiler chickens by restricting supply, and that data compiler Agri Stats Inc., a unit of Eli Lilly and Co., facilitated the sharing of pricing and sales information.

In an indication that the issue is not going away, grocers such as Kroger, Hy-Vee Inc. and Albertsons Cos., along with BJ's Wholesale Club, have filed suits in recent months. Phair said these antitrust cases are important given that grocers such as Kroger are buying such large quantities of chicken products.

"The potential scale of liability there is massive, so it has real implications on both sides of the issue and also in terms of the price that consumers will pay on a daily basis," he said.

Pork producers have been more recent targets, with a consolidated class action currently ongoing in Minnesota federal court. The initial complaint was launched by consumers in June, and as in the chicken suits, producers are accused of colluding to raise prices and of sharing sensitive pricing information through Agri Stats.

The cases are *In re: Broiler Chicken Antitrust Litigation*, case number. 1:16-cv-08637, case number 1:18-cv-04534, in the U.S. District Court for the Northern District of Illinois, and *In re: Pork Antitrust Litigation*, case number 0:18-cv-01776, in the U.S. District Court for the District of Minnesota.

--Editing by Jay Jackson Jr.

--Additional reporting by Lauren Berg, Diana Novak Jones, Mike Curley, Nathan Hale and Eric Kroh.