U.S. Food and Beverage Law: Trends and Takeaways From 2023

OVERVIEW

With a wrap on 2023, below we provide a summary of issues that impacted the U.S. food and beverage industry in 2023 to highlight lessons learned and upcoming trends in food and beverage law as we look to 2024 and beyond. The key food and beverage law issues identified in this summary are the following:

- PFAS: State Regulation and Class Action Litigation
- Scrutiny of Heavy Metals in Foods
- Class Action Food and Beverage Litigation Trends
    - Express and Implied "Healthy", "Real", and "Naturally Flavored" Claims Remain but Courts Grow Increasingly Skeptical
    - Throwing Out Cases Based on a More "Reasonable Consumer Standard"
- FTC Health Claims Guide
- FDA: Food Division Reorganization

ANALYSIS & INSIGHTS

PFAS: State Regulation and Class Action Litigation

Throughout 2023, it became increasingly evident that per- and polyfluoroalkyl substances (PFAS) (so-called "forever chemicals") in food and similar consumer products are a key priority for regulatory oversight and a target area for class action litigation. PFAS refers to a group of synthetic chemicals used in a large number of consumer and industrial products. In recent years, regulators and scientists have been further evaluating the potential health risks associated with these chemicals.

In the food context, PFAS are prominently found in food contact polymers used to reduce build-up on manufacturing equipment, as well as in paper/paperboard food packaging, such as grease-proofing agents in fast-food wrappers, microwave popcorn bags, take-out paperboard containers and pet food bags to prevent oil and grease in foods from leaking through the packaging.

At the federal level, the EPA, in March 2023, announced a proposed National Primary Drinking Water Regulation (NPDWR) for six PFAS known to occur widely in drinking water throughout the United States. The EPA anticipates finalizing the regulation by the end of 2023. Further, in April 2023, the EPA issued a proposed rule asking for public input regarding the designation of PFOA and PFOS (two of the most studied subsets of PFAS) as hazardous substances. From an FDA perspective, the agency has conducted scientific testing of PFAS in food packaging and certain seafood products over the past few years and noted that it will continue to test foods from the general food supply with the goal of assessing potential human exposure to PFAS from food. To date, the FDA has not issued any regulation directly targeting PFAS but notes that it will remove from the market any products that contain PFAS at levels that render the product adulterated. For example, in 2022, two seafood products were voluntarily recalled after health concerns were raised regarding their high PFAS levels.

The states, however, have been much more aggressive in issuing new laws aimed at restricting PFAS in food and consumer products. Twelve states have recently enacted PFAS laws implicating PFAS in foods and/or consumer products that generally go into effect between 2023 and 2030. At this stage, most state laws target restricting only intentionally added PFAS. For example, in 2021, Maine issued a law banning PFAS with a phased approach where, beginning in 2023, manufacturers of products containing intentionally added PFAS are required to notify the Maine DEP of such products and by 2030 most intentionally added PFAS will be banned. California's PFAS law, however, goes further as it also captures products unintentionally containing PFAS by prohibiting all PFAS contained in certain juvenile products and plant-based food packaging at 100ppm or more. In addition, California will require labeling disclosures of PFAS used in certain cookware by 2024.

Litigants are also taking advantage of state tort laws to raise contamination claims against companies that manufacture or use PFAS. Over the past year, there have been enormous settlements reported relating to PFAS contamination, including a $10.3 billion settlement against a single manufacturer. Class action plaintiffs have also argued that PFAS-containing products violate state consumer production laws. Consumer class actions involving PFAS typically allege that the presence of PFAS renders affirmative representations that the products is safe as false or misleading or that the presence of PFAS must be disclosed on the label.

Key Takeaways:

- Federal scrutiny regarding the presence of PFAS in foods, water and other consumer products continues to increase. At this stage, the EPA is largely focused on PFAS levels in the general water supply (and options for limiting such levels), while the FDA continues to monitor the health effects of PFAS to evaluate whether additional regulatory oversight is necessary.
- States are attempting to fill in the federal regulatory gap by enacting broad, sweeping regulations regarding PFAS in foods and other consumer products, many of which go into effect between 2023 and 2025. Most state

laws focus on limiting intentionally added PFAS in food packaging or requiring disclosures of the presence of PFAS in product labels. However, certain states are looking to limit the levels of unintentionally added PFAS in food and food packaging, which may place additional testing burdens on food manufacturers and distributors.
- Class action plaintiffs have already been active in filing complaints alleging that products violate state consumer protection laws where the products' labels fail to disclose the presence of PFAS or advertising otherwise suggests that the products are safe.

Scrutiny of Heavy Metals in Foods

Legal battles and regulatory scrutiny concerning the presence of heavy metals in foods was a hot issue in 2023 and will likely continue to be in 2024. At the end of 2023, Consumer Reports published a study finding high levels of lead and cadmium in various chocolate products, including cocoa powder, chocolate chips, milk chocolate bars and baking mixes. This study was a follow-up to Consumer Report's 2022 study that found high levels of lead and cadmium in certain dark chocolate bars.

Consumer Report's 2022 study was cited in several claims brought against chocolate manufacturers, including a class action brought against The Hershey Co. (Hershey) alleging that certain of its dark chocolate bars contained hazardous levels of lead and cadmium. Although Hershey was successful in dismissing the claims that the levels created a safety hazard, the plaintiffs were allowed to pursue an injunction that, if successful, would require Hershey to disclose the presence of the heavy metals. Mars Inc. (Mars) also found itself in a similar case where it was accused of failing to disclose toxic lead and cadmium levels in its Dove-branded dark chocolate. These cases will continue to be litigated in 2024 and their holdings may impact how heavy metals are disclosed on labeling of chocolate and other food products containing heavy metals.

Chocolate is not the only food associated with concerns regarding the presence of heavy metals. In October 2023, the brand WanaBana recalled millions of its pouches of cinnamon apple sauce packages targeted at kids after several cases of lead poisoning were linked to the pouches. The FDA initiated an investigation and announced on January 5, 2024, that it found not only lead but also chromium in the recalled pouches.

Although the FDA currently does not have a rule setting a limit for chromium in foods, it is working on a rule setting limits for lead that is expected to be issued this year. The rule will likely impact several cases brought against various baby food manufacturers relating to high levels of lead in their baby food. These cases have been ongoing for several years and were sparked by a report issued in February 2021 by the U.S. House of Representatives Committee on Oversight and Reform that found "significant" levels of lead (and other metals) in baby food.

Key Takeaways:

- If the plaintiffs in the Hershey's or Mars litigation succeed in their claims that the defendants should have disclosed the presence of heavy metals in their chocolate products, food companies may need to reevaluate whether they should disclose the presence of heavy metals in their foods in light of the rulings.
- The FDA is likely to continue to be active in investigating WanaBana and other food manufacturers for the presence of heavy metals in their food products.
- In addition to impacting the ongoing baby food litigation, the FDA's expected rule setting limits for lead in food will require food companies to evaluate the levels of lead in their products to determine if they are within the limit.

Class Action Food and Beverage Litigation Trend: Express and Implied "*Healthy*", "Real", and "Naturally Flavored" Claims Remain but Courts Grow Increasingly Skeptical

What's old is new again. During 2023, class action plaintiffs once again revived complaints targeting a variety of advertising claims in food and beverage labeling, primarily those related to health and wellness. Over the past year, courts saw a return of "***naturally flavored***" claims in food and beverage litigation. Most recently, the complaints are focused on allegations that food or beverage additives in the products (particularly malic acid) are synthetic and have a dual effect: as a flavor and as a pH balancer. Where the additive may have a flavoring effect, the plaintiffs argue that any "naturally flavored" claims or "no artificial flavor" claims are false and misleading. At this stage, courts are divided on whether speculation that an additive could be used as a flavor, without more, are sufficient to evade a motion to dismiss. For example, in two 2023 cases argued in Illinois, Kraft Heinz beat one malic acid suit on a motion to dismiss, but lost on another, on the same day. A product labeled with "Natural flavor with other natural flavors" was held not to imply that it contained no artificial flavors, and the complaint was dismissed (see *Boss v. Kraft Heinz*, No. 21-cv-6380), while a similar case against a product labeled "no artificial flavors" was allowed to proceed (see *Tatum v. Kraft Heinz*, No. 23-cv-0073).

Plaintiffs have also continued to bring challenges against express and implied "***healthy***" claims on foods and beverages. For example, a March 2023 lawsuit, *Reynolds v. The Coca-Cola Company* (23-cv-1446), alleged that the "Good for you!" claim on Minute Maid juice boxes were purportedly "false or at least highly misleading because they convey that the juice boxes are healthy (beneficial to health) when in reality regularly consuming them is unhealthy since it increases risk of disease" in violation of California's consumer protection laws. While steering clear of the debate over the juice's healthfulness, the court found that Minute Maid's "Good for You!" claim complied with FDA regulations governing implied nutrient content claims, and therefore, the plaintiff's state law challenges were preempted by federal law. Finally, "made with" claims have remained a mainstay for plaintiff litigation; however, they have met with mixed success. For example, various Illinois courts dismissed claims that "made with real butter" meant that the product contained no other source of fats or oils, and that "made with real olive oil" meant that olive oil was the most predominant fat/oil. See *Barnett v. Schwan's*, 22-cv-2178 (S.D. Ill. Sept. 25, 2023); *Guzman v. Walmart*, 22-cv-3465 (N.D. Ill. May 15, 2023).

While plaintiffs have not been deterred from filing food or beverage litigation claims related to false advertising allegations, the recent outcomes of such cases suggest that **courts are growing tired and increasingly skeptical of such claims**, particularly where they view the complaints as frivolous lawsuits. For example, 2023 alone brought at least six cases in which the court dismissed the claim and required additional measures to be taken by plaintiffs' counsel to justify the filing of the case. Actions ranged from ordering the plaintiff's counsel to submit a table of similar cases for the Court to consider whether to impose sanctions ordering the plaintiff's counsel to show cause why it should not have to pay the defendant's attorney fees for repeatedly filing "frivolous lawsuits". See, e.g., *Guzman v. Walmart Inc.*, No. 22-cv-03465 (N.D. Ill. May 15, 2023). Even where courts have expressed willingness to hear cases on their merits, they are increasingly returning to the "reasonable consumer" standard when evaluating food or bevrage advertising, as discussed more fully below.

Key Takeaways:

- Plaintiffs continue to file false advertising claims under state consumer protection laws.
- Commonly challenged claims include not only express but also implied claims that products are "healthy," "naturally flavored" or "made with" a certain amount of a particular ingredient.

- Courts have expressed increased skepticism, particularly against certain food and beverage plaintiff class action attorneys, regarding such false advertising challenges as potentially frivolous lawsuits.

Class Action Food and Beverage Litigation Trend: Throwing Out Cases Based on a More "Reasonable Consumer Standard"

The holdings in several cases in 2023 involving food or beverage labels strengthened the "reasonable consumer" standard. It remains to be seen if this trend will continue in 2024 and if the strengthened standard will dampen the flurry of lawsuits involving allegedly deceptive food or beverage labels that have been a strain on the industry over the past few years.

In *McGinity v. The Procter & Gamble Company*, the Ninth Circuit found that a reasonable consumer could clarify ambiguous information on the front of a product's label with information on the back of the label. The plaintiff in the case claimed that the defendant's shampoo and conditioner, which contained the words "Nature Fusion" on the label, superimposed over the image of an avocado, misrepresented the products as natural even though they contained artificial ingredients. The Ninth Circuit affirmed the lower court's dismissal of the plaintiff's claim because the back label of the product clarified that it contains avocado oil and artificial ingredients, and the label would make it clear to a reasonable consumer that the product contains a mix of natural and artificial ingredients. In its analysis, the Ninth Circuit distinguished its holding in *McGinity* where the front label was ambiguous but clarified on the back label from other cases where the front label was found to be deceptive when it expressly contradicted information on the back label. In addition, the Ninth Circuit repeatedly focused on the importance of context when the reasonable consumer is evaluating food or beverage advertising and labeling.

The *McGinity* holding had an immediate impact on the Ninth Circuit, as the Appellate Court, citing *McGinity*, affirmed the dismissal of class action plaintiffs' deceptive labeling claims in two other cases, *Steinberg v. Icelandic Provisions, Inc.* and *Robles v. GOJO Indus., Inc*. The district courts in the Ninth Circuit have applied the *McGinity* standard to dismiss several other plaintiffs' claims involving allegedly deceptive labeling.

The Second Circuit ruled similarly to *McGinity* in *Hardy v. Ole Mexican Foods, Inc.* where the plaintiffs claimed that the defendant's flour tortilla product labeled as "A Taste of Mexico" misrepresented that the product was made in Mexico despite it being made in the United States. The court rejected the plaintiffs' claim, noting that the front labeling of the product was ambiguous and did not expressly state where the product was made and that the back of the label resolved the ambiguity by clearly stating the product was made in the United States. In addition, the court distinguished its ruling in *Hardy* where the front label was ambiguous and clarified by the back label from *Mantikas v. Kellogg Co.,* in which statements on the front label were contradicted by statements on the back label.

Key Takeaways:

- Plaintiffs in the Ninth and Second Circuits bringing food or beverage labeling cases relating to ambiguous labels may have more difficulty surviving defendants' summary judgment motions. As a result, plaintiffs may be less inclined to bring these claims, which may result in less food and beverage labeling litigation.
- Courts have increasingly emphasized the importance of context when viewing food and beverage advertising and labeling, with a recognition that the front and back panels of food and beverage labeling can be read together to give the overarching takeaway of a product claim.
- The Courts of Appeal in the other districts may adopt similar standards, which could also result in less allegedly deceptive food or beverage labeling claims in those districts.

FTC Health Claims Guide

On December 20, 2022, the FTC issued its *Health Products Compliance Guidance* (Health Claims Guide), which replaces the FTC's *Dietary Supplements: An Advertising Guide for Industry* published in 1998. The Health Claims Guide expands the scope of its 1998 guidance on health care claims for dietary supplements to include health care claims for all health products, including medical devices and over-the-counter drugs.

The central theme from the 1998 publication remains the same in the Health Claims Guide: the evidence a company uses as substantiation must be relevant to the specific product referenced and to the advertising claims. However, the Health Claims Guide builds on this theme, drawing from the FTC's actions brought since 1998 and the FTC's other guidance documents, including the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* and the FTC's Enforcement Policy Statement on Marketing Claims for Over-the-Counter Homeopathic Drugs.

The Health Claims Guide clarifies that the FTC expects companies to substantiate health claims with high-quality, randomized, controlled human clinical trials (RCTs). However, the FTC will make exceptions in limited situations where testing may not be feasible, such as in the field of nutrition where it may take decades to determine if a food or nutrient is linked to the risk of a developing a disease. In such a situation, the FTC will accept high-quality epidemiologic evidence as substantiation.

Although there is no requirement for the number of RCTs that must be conducted to support a claim, the FTC notes that the more RCTs that replicate the support of a claim, the better. However, the FTC further clarifies that RCT quality is more important than the quantity. The Health Claims Guide details the key elements for determining the quality of RCTs and cautions against the practice of "data mining" or "p-hacking", where the advertisers selectively rely on a small subset of data to support their claim when the results for the general population are not conclusively supportive.

The Health Claims Guide also applies the FTC's other guidance regarding disclosures and endorsement and testimonials to health claims. Disclosures must be "clear and conspicuous" and difficult to miss (e.g., if a health claim is made visibly and audibly, the disclosure must be made visibly and audibly at the same volume, speed and cadence, and social media ads must include the disclosure in the post itself, not behind a hyperlink). Endorsements and testimonials for health claims should be substantiated with appropriate evidence, as if the advertiser made the health claims itself. The honest opinion or experience of an endorser is not sufficient to support a testimonial. Expert endorsers should have appropriate qualifications and should have conducted appropriate examination or testing of the product endorsed. In addition, the advertiser must clearly and conspicuously disclose any material connection between the endorser and the advertiser.

Key Takeaways:

- The Health Claims Guide may assist advertisers of health-related products with making and substantiating health claims consistent with the FTC's requirements.
- Advertisers of health-related products should focus on using RCTs that are consistent with the quality standards detailed in the Health Claims Guide to substantiate their products.

FDA: Food Division Reorganization

In January 2023, the FDA announced it would develop a proposal for a unified Human Foods Program (HFP) and new Office of Regulatory Affairs (ORA). Under the proposal, the FDA would combine the Center for Food Safety and Applied Nutrition (CFSAN), Office of Food Policy and Response and certain functions of the ORA under a single leader. This person would report directly to FDA Commissioner Robert Califf, according to the proposal. The planned reorganization intends to address recommendations from an external report organized by the nonprofit Reagan-Udall Foundation. The report, published in December 2022, criticized the FDA's food program for having "duplicative" and "competing roles and responsibilities."

In addition, the FDA stated that it will form a Human Foods Advisory Committee composed of external experts who will help advise the agency on challenging or emerging issues in food safety, nutrition and innovative food technologies. The agency also plans to create a Center for Excellence in Nutrition aimed at reducing diet-related chronic diseases and improving health equity. This center will include an Office of Critical Foods to regulate infant formula and medical foods.

In December 2023, the FDA announced progress by outlining the proposed changes to implement the reorganization, which must undergo review by Health and Human Services (HHS) before being implemented. Planned changes include the following, among others:

- Making the FDA's HFP and product centers solely responsible for receipt, triage and closing consumer and whistleblower complaints, rather than this role being split between centers and field offices. This will refine the processing of complaints, ultimately improving the FDA's ability to detect problems faster.
- Renaming ORA as the Office of Inspections and Investigations (OII) and solidifying its role as the front line of the FDA's field-based inspection, investigation and import operations.
- Merging the Office of Counterterrorism and Emerging Threats (OCET) and the Office of Regulatory Science and Innovation (ORSI) to form a new office; both offices are currently housed within the FDA's Office of the Chief Scientist (OCS). This new merged office in the OCS, proposed as the Office of Regulatory and Emerging Science, will strengthen support for regulatory science and preparedness research efforts.
- Creating an Office of Enterprise Transformation. This proposed new office in the Office of the Commissioner will work across the FDA to drive high-priority cross-cutting business process improvement efforts. The proposed shift will result in more strategic and efficient use of agency resources.
- Undertaking additional efforts to enhance the oversight and safety of infant formulas.

Key Takeaways:

- In 2023, the FDA announced that it would develop the unified Human Foods Program as a reorganization of the current food oversight body, the CFSAN.
- In the wake of several public investigations highlighting food safety issues (e.g., infant formula and heavy metals in baby foods), the goal is to help the FDA focus on and adequately respond to challenging and emerging issues in food safety, nutrition and innovative food technologies.
- In December 2023, the FDA announced details of the reorganization, which is now under review by HHS.