Responding to Class Action Threats: The A to Z on Minimizing Litigation and Liability Risk

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This panel will discuss on how to manage, at the front-end, the most common class action facing consumer food and beverage companies today—the inevitable mislabeling lawsuit. The discussion focuses on cutting through empty threats, responding to (or ignoring) demand letters, seeking indemnity or insurance coverage if appropriate, addressing product changes, and fighting the claims. Class action demands more often play on fear of liability than actual reality; this discussion will help counsel—in-house and outside—navigate how (and whether) to respond to consumer class action demands.

1. The Problem: Increased Mislabeling Class Action Threats

    a. Mislabeling class actions are easy to file, and food companies are easy targets. For the last five years, food mislabeling class actions have been among the most common class actions filed by the plaintiffs' bar. Everyone buys food, all food has labels, and any plaintiff's lawyer can come up with a way to misconstrue a label into something that is "misleading." The vast majority of claims are substantively weak—some might say completely frivolous—but they are easy to file, and a risk-averse company may be tempted to seek early settlement regardless of the merits.

    b. Mislabeling class actions rise or fall with the initial demand letter (or draft complaint lawsuit). Most food and beverage companies first encounter class action threats through demand letters or draft complaints sent to companies demanding action. (Less often, companies don't discover the claims until service of filed complaints with no warning.)

    c. Mislabeling class actions follow generic formulas. Threats typically complaining about statements or disclaimers made on packaging. Such complaints frequently involve alleged failures to satisfy **FDA definitions** (e.g., "organic," "all natural"); **general puffery and similar descriptions** (e.g., "handmade," "artisan"); and other **statutory or regulatory violations** (e.g., "slack fill," FTC findings)

    d. Mislabeling class actions are based on the threat of apparently draconian punishments. The punch-line for demand letters is the threat of liability for failure to comply with the demand letter: the explicit demands (Injunction, damages, attorney fee demand, punitive damages) and implicit threat (bad PR).

    e. Mislabeling class actions are easy to defeat, if companies understand the plaintiffs' lawyers motivations.

2. The Solution: Mitigate the Risks and Cut Down the Garbage.

    a. Preliminary Considerations. For in-house counsel, most of the leg-work in responding to a class action occurs within the first <u>30 days</u> of service of the demand, because most

consumer class action statutes require a response within 30 days of the demand. The key decisions affecting litigation and liability risk will occur within this period.

i. First, **tender**! Before doing anything else, first consider whether the company can tender the claim. **Insurance** usually does not cover, but sometimes it will under general liability so read the policy. **Indemnification** often *does* apply, especially upstream (suppliers, manufacturers, farms). Either way, insurance and indemnification must happen early in the process, usually immediately upon notice of a potential claim, so take this step within the first few days of receiving notice of a potential class action.

ii. Second, get a **litigation hold** in place. Even if the threat is ultimately frivolous, best practices require ensuring documents are not destroyed in the event of litigation. Preservation helps companies document their defenses if necessary. Failure to preserve documents and evidence can result in harsh consequences (even if the claims are weak), including spoliation rulings, sanctions, or worse.

iii. Third, do a **risk assessment**. Next, assess the real risks. Demand letters often rely on scare tactics. They implicitly equate risk of a lawsuit with risk of liability. **Do not conflate *litigation risk* and *liability risk***. Consumer class actions are easy to file, even with minimal or non-existent liability, with little deterrence for baseless claims. Analyze the risk by breaking into two pieces:

1. *Litigation Risk*: Chances of getting *sued*—generally high for any consumer food manufacturer, supplier, or retailer.

2. *Liability Risk*: Changes of getting *held liable*—generally low for mislabeling claims.

NOTE: High litigation risk IS NOT high liability risk. If these concepts stay separate, it becomes easier to assess real risk to the company.

iv. Fourth, **assess costs**. Break down the costs associated with the claims and the lawsuit. Set aside the liability, and think about what a decision would cost. These include **extortion cost** (if you settle early, what are the chances of becoming an easy target); **correction costs** (how much would it cost to take the "corrective" measures requested); **litigation costs** (how much to fight); and **reputation costs** (does the company's reputation suffer for changing the label? Or inaction?)

v. Fifth, **assess options** after taking these into consideration. Common options include **ignoring** the demand, **negotiating/modifying**, or **fighting**.

b. Fighting—Responding to Claims. In most cases, companies are well-advised to fight the allegations. That fight comes in two steps: (i) dealing with the demand letter, and (ii) if the plaintiff persists, litigating. In most cases, the response to the demand letter will

eliminate the claims without litigation—and, done skillfully, without any payment or settlement!

i. Responding to Demand Letters. When fighting claims, it often makes sense to prepare a response; where (as in most cases) the claims seem weak or suspect, a well-reasoned and aggressive response often deters the plaintiff from taking further action. Here are some suggestions on how to analyze the demand letter.

1. Identify experience and motivation deficiencies. Do the plaintiffs' lawyers have experience? Does it name a plaintiff? Does the plaintiff look like a serial plaintiff? Is it a form letter? Have you or your attorneys seen the label? A lazy or inexperienced plaintiff's attorney will invite a different approach from an aggressive and experienced one.

2. Identify procedural deficiencies. Demand letter statutes have stringent procedural and timing requirements. Failure to comply is frequent, and implies a lazy or inexperienced attorney or plaintiff. Does it name a plaintiff? Does it name the correct company or corporation? Does it specify a product? Was it served by Certified Mail?

3. Identify notice deficiencies. Does the letter give notice that complies with statutory requirements? (*See, e.g.*, Cal. Civ. Code § 1782(a) (requiring demand letters to provide sufficient detail to allow company to correct, repair, replace, or otherwise rectify the goods or services" that are allegedly misleading)). This requirement has been interpreted to mean plaintiffs must give details about the plaintiff, product, purchase, and background.

4. Identify "standing" issues—did the plaintiff even buy the product or rely on the label? Many (if not most) mislabeling lawsuits are attorney driven, with actual consumers brought in simply to stand in as a plaintiff. Demand letters with weak plaintiff details suggest no real plaintiff. Some letters do not even name a plaintiff, suggesting one doesn't exist. Challenge the facts: Did the plaintiffs purchase the product? Where? When did they buy it? Does anything suggest they did not read the label?

5. Identify substantive problems. Pull the label and pull the statute that the label allegedly violates. In 90% of the cases, the plaintiff misreads the label, the statute, the case law. In the remaining cases, other defenses usually apply, such as preemption (i.e., the FDA or USDA has jurisdiction over the claim, not the court).

6. Identify evidence of lack of factual investigation—and threaten sanctions. Federal courts and most state courts allow defendants to seek sanctions where substantial evidence suggests that plaintiff did not conduct a real factual investigation before making the claims. Lack of a plaintiff and weak plaintiff-side details serve as good evidence of lack of factual investigation.

ii. Fighting the Claims. Despite strong defenses supported by a strong demand letter, lawsuits do sometimes get filed. Litigation begins, and in-house counsel and companies should know what tools remain at their disposal—while keeping in mind the risk/cost considerations detailed above.

1. Attacking the complaint.

2. Filing a sanctions motion.

3. Deposing the plaintiff.

4. Attacking class certification.

5. Obtaining summary judgment.

6. Going to trial (very rare).