

US CLASS ACTION LANDSCAPE: SPOTLIGHT ON CONSUMER GOODS

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Legal Briefings - By **David Wallace** and **Benjamin Rubinstein**

THE BUSINESS RISK

Five years or so on now, the wave of class-action litigation engulfing consumer-goods companies in the US court system continues without sign of abatement. The food and beverage industry has been bearing the brunt of these actions, which typically challenge some aspect of a product's labeling (e.g. "natural" and "health" claims) or packaging (e.g. nonfunctional "slack fill") under state consumer-protection statutes, based on alleged violations of state and federal regulatory requirements.

These lawyer-driven actions face a number of legal hurdles -- not least of which is proving damages, typically restitution of a claimed "price premium" attributable to an allegedly false labeling claim or other product attribute. But their transactional costs, coupled with the associated business disruption and reputational risk, have led to a number of "nuisance" settlements in the low-to-mid seven-figure range (not counting the cost of labeling changes that are also often agreed for settlement purposes).

This litigation environment puts a premium on careful legal vetting of product-labeling statements, related promotional claims (e.g. website), and packaging decisions, which are often based on what competitors are doing. Leaving this decision-making process entirely to the business side, or waiting too long before seeking legal input, can be costly -- in terms of reputational, regulatory and litigation risks. In the current legal environment, companies that leave the legal department out of the product development and promotion loops, or lean too much on what competitors are doing in that regard, are likely to find themselves following the competition into litigation, at significant cost.

The "herd" mentality is probably a good part of the explanation for the crush of "natural" and "healthy" litigation that many food and beverage companies find themselves fighting across the American legal landscape. But what's good for the competition is not always good for business and the bottom line.

A WAY AROUND IT... AND FORWARD

To chart a safe course through the American stream of commerce in consumer goods, companies sailing these waters are best advised to take a strategic approach to the avoidance, mitigation and management of litigation risk. One way to reduce these costly risks, and for the legal function to position itself as a source of added value to corporate clients rather than a cost center, is to involve internal lawyers in each critical stage of a product's life-cycle. This can be done by integrating them with the business teams responsible for introducing new products and managing their growth in the marketplace. Internal partnerships of this sort, and the different perspectives and dialogue they foster, enable companies to spot, avoid, and manage liability risks on a proactive and ultimately more cost-effective basis. Done right, they can also put a company in a stronger position to defend itself -- with a better story to tell -- when litigation does arise.

These partnerships can be equally valuable at the back-end of a product's life-cycle or in the wake of disputes its marketing or use generates in the course of business. Led by the legal function, and not unlike an autopsy, these teams are convened to deconstruct and mine a dispute's origins and outcome, or different aspects of a product's life-cycle, for information that can be fed back into the business to reduce the risk of similar issues or disputes arising in the future. Three questions should ideally frame this exercise:

- what was the cause;
- what did it cost; and
- what can be learned?

TAKEAWAY

A proactive, interdisciplinary approach to risk management won't prevent litigation, but can reduce its likelihood, strengthen defenses when it does arise, reduce legal (and opportunity) costs generally, optimise business performance as well as shareholder value, and enable the legal function to bring value to the corporate client's bottom line.

For more information about the firm's U.S. experience and offering in regard to this litigation trend, contact [David Wallace](#) or [Benjamin Rubinstein](#) in New York

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**BENJAMIN
RUBINSTEIN**
PARTNER, NEW YORK

+1 917 542 7818
Benjamin.Rubinstein@hsf.com

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