



Insights: Perspectives

5 Key Takeaways | Defending Against ‘Do-Gooder’ Litigation: Developing Legal and PR Strategies Against Putative False-Advertising Class Actions

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5 KEY TAKEAWAYS

Defending Against 'Do-Gooder' Litigation: Developing Legal and PR Strategies Against Putative False-Advertising Class Actions

Kilpatrick's [Evan Nadel](#), [Jonathan W. Thomas](#), and [Bryan Wolin](#) were honored to host a roundtable discussion at the ANA's 2023 Masters of Advertising Law Conference, titled "Defending Against 'Do-Gooder' Litigation." As the title suggests, whether under the guise of environmental protection, animal rights, or consumer protection, more claims are getting filed ostensibly for the common good. While some are filed as class-actions, many are not. Our roundtable provided an overview on coming up with the right legal and PR strategies for handling these cases, which is key to a successful legal resolution.

Takeaways from the roundtable include:

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Identify the Plaintiff's Goals Early. Some plaintiffs (or plaintiffs' counsel) are "true believers" who will not settle without some form of injunctive relief. Others are stick-up artists that file cookie-cutter lawsuits to make a quick buck with an early settlement. Investigate your plaintiff(s) and their counsel early to determine which box they fall into, as this will necessarily inform your legal strategy. A "nuisance value" settlement offer could satisfy the stick-up artist, but would anger the "true believer" and undermine later good-faith resolution efforts.

Align Legal and PR Strategies. The natural tendency of any defendant is to fight back, including in the "court of public opinion." Before a company sued in a putative false-advertising class action—or any lawsuit—issues a press release, they should consult with their outside counsel about the pros and cons of commenting on an ongoing lawsuit. Often, "no comment" is the best approach, as opposing counsel can attempt to manipulate statements that are neutral and benign on their face. If a company decides to issue a press release, then it should ensure the statement's content aligns with the company's legal strategy. And remember – your court filings are public and may be picked up by news outlets. If you plan to rely on technical defenses, frame them in a PR-friendly way. For example, do not just argue that the plaintiff's claim is barred by "the doctrine of federal preemption." Lay news consumers may think you're using a "loophole" to avoid responsibility! Explain the defense in clear terms – you "played by the rules" set by the federal government, so you did not do anything wrong in the first place.

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"Organic" Product Labeling. While the federal organic program applies to agricultural products, California's organic law (COFFA) arguably applies to all products making "organic" or "made with organic" claims, including textiles and clothing. The restrictions are demanding. Given how difficult, time-consuming and expensive it can be to correct physical product label and packaging claims compared to online product descriptions, companies should think carefully about not only what they claim but where they claim it.

"Natural"-Formative Claims. Whether driven by ESG and/or other factors, companies across all industries are increasingly making "natural"-formative marketing claims (e.g., "Natural" pet food and shampoo; "100% Natural" sunscreen; etc.). The FTC and consumers regularly challenge these claims—especially when coupled with images of fruit, vegetables, and other depictions of nature on the front of product packaging—on the ground that they are false and misleading because the advertised product contains or was manufactured with artificial and/or synthetic ingredients. To help minimize this risk, companies should avoid making unqualified natural-formative claims in the consumer-facing aspects of their advertising (unless, of course, the product and its manufacturing process is/was free of artificial and synthetic ingredients). For example, if a product contains natural and unnatural ingredients, then the company could consider using "Made With Natural Ingredients" instead of "Natural." And, as always, companies should be able to substantiate their natural-formative claims.

Can Back of Label Disclosures Save Front of Label Claims? The trend among circuit court decisions is that false or misleading front of label claims are actionable despite correct information on the back of the label, such as in the ingredient list. But an ambiguous front of label claim is not actionable where the back-label disclosures eliminate any ambiguity or uncertainty. This applies not only to express, but also implied claims on the label. Use caution with label language and images.

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