

## Science Is Not Static For The Food And Beverage Industry

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The food and beverage industry has, in recent years, been subjected to increasing regulatory scrutiny and a surge of lawsuits based on allegedly misleading nutrient content and other health claims. Makers of yogurt products, for example, have faced actions brought by the Federal Trade Commission over claims related to purported benefits to immune systems and digestive health.[1] Other companies have received agency warning letters over claims as seemingly innocuous as their products being “healthy and tasty, convenient and wholesome.”[2] Not surprisingly, these regulatory actions have spurred a number of class actions against food companies, even those not subjected to regulatory attention.[3] Some plaintiffs have also begun to allege negative health effects from food and beverage products, or their ingredients.[4] This litigation trend is all but certain to continue, particularly in light of the epidemics of obesity, Type 2 diabetes, and, more broadly, metabolic syndrome given the blame that some place on certain food ingredients and the food industry for these serious health problems.

In light of these developments and this forecast, food and beverage companies that desire to make health-related claims — directly or implicitly — should prepare far in advance of being on the receiving end of a lawsuit. It is more important than ever to regularly, meaningfully and freely engage with the scientific and medical communities, just as prudent manufacturing companies engage with safety engineers. Doing so will enable targeted companies to respond with more informed and vigorous defenses in the court of law and, just as importantly, in the court of public opinion.

### **A Proposed New Approach: Embrace the Science Early**

The science associated with health claims about foods, beverages and their ingredients is often considered static — it isn’t. The dairy industry provides one illustration. Not long ago, the frenzy surrounding consumption of cholesterol and fat had placed dairy products high on the health

community's list of public enemies.[5] Those outside the dairy industry seized on concerns about the cholesterol and fat inherent to dairy products to champion their alternatives as "healthier" options, driving down dairy's market share and leading dairy producers to introduce lower and no-fat alternatives.[6] Fast forward to today, when we see front-page coverage observing that "research published in recent years indicates that ... [m]illions might have been better off had they stuck with whole milk" instead of low-fat or no-fat options.[7] Indeed, some researchers and observers now seriously question whether carbohydrates — as opposed to fats and cholesterol — are the real cause of heart disease, weight gain and obesity.[8]

The point here is not to take sides in the debate about the healthiest dietary proportions of macronutrients, the significance of micronutrients, genetically modified organisms, artificial sweeteners or any of the innumerable other aspects of the modern diet. We are, after all, attorneys, not public health experts. Rather, we seek to underscore the importance of food and beverage companies monitoring and appreciating the advances (and nuances) of the scientific and medical communities' understanding of the nutritional and metabolic effects of food and beverage products, including their specific ingredients. Companies should be particularly wary of embracing a static understanding of nutritional science, for it may lead to continued advertising of a product's attributes as a matter of established scientific fact when the purported "fact" is a matter of a new or perhaps even an ongoing debate in the scientific community.[9]

Another example that underscores this advice came earlier this year, when makers of "diet" sodas were the subject of FTC and U.S. Food and Drug Administration petitions seeking to preclude use of the word "diet" in their labeling and advertising.[10] These petitions were based on the emerging body of peer-reviewed scientific literature suggesting that consumption of artificial sweeteners does not facilitate weight loss and may instead promote weight gain.[11] While the FTC declined to take action on the petition after considering the scientific literature, the FDA has not addressed the merits of the petition due to a lack of agency resources.[12] As we have seen in the context of the FDA's refusal to define what foods and ingredients are "natural," agency inaction can, and increasingly will, result in civil litigation.

Our recommendation to embrace the science comes with a caution: Resist any temptation to rely heavily, much less exclusively, on industry-captive scientists. One industry received embarrassing press attention when it was reported that it had spent, in a relatively brief period, over \$10 million on research under the direction of a single scientist who was also reportedly receiving \$500,000 per year in separate consulting fees.[13] There may be instances in which industry needs hired guns. But the perception alone of industry-captive scientists serving as those hired guns is damaging — in the courtroom, and in the broader forum of public opinion.

Admittedly, working cooperatively with independent researchers, clinicians and public health experts may occasionally inhibit a company's ability to make health claims likely to boost sales. But if long-term brand protection, public trust and, indeed, public responsibility are core business principles, then fostering truly professional relationships with independent scientists, and even scientists with a contrarian tilt, is a more responsible way to advance a company's business principles while also insulating it from costly legal attacks and damaging hits on social media. Companies not willing or able to place resources into understanding and appropriately communicating the current state of the science as it relates to their products should steer clear of making health claims. Unless, of course, they have an appetite to defend their claims against actions by federal agencies, plaintiffs class action attorneys or even their competitors.

With increasing frequency, defendants are finding the need to address the merits of health-related

claims at the outset of litigation. Plaintiffs are increasingly citing scientific support for their claims in their initial pleadings, even using them as tools to prompt pre-filing settlement discussions. Peer-reviewed science calling into question a company's health-related advertising claims should not come as a surprise in the form of a lawsuit. In a positive development for industry, some courts have demonstrated a willingness and capability to assess whether referenced scientific articles actually support the allegations at issue on scientifically based motions to dismiss.[14] This provides well-informed companies with early opportunities to quickly respond to the substance of allegations and expose flaws in the plaintiffs' claims or at least cabin them.

Additionally, by staying current on the science surrounding its products, a defendant can quickly identify the key scientists on the pertinent issues, and may even be able to retain researchers with opposing views as consulting experts. This technique not only enables the defense to better anticipate contrary positions, but also simultaneously deprives its adversaries of that expert's services.

## **Conclusion**

By embracing the objective science of nutrition early, and before litigation commences, food and beverage companies will not only protect their brand equity, but also help insulate them from litigation and regulatory intervention down the road. We recognize that this approach may require more upfront research costs and perhaps greater lead time to the grocery store shelf. However, by following objective science in making health-related claims, food and beverage companies will be acting more responsibly, which may enhance their reputations with consumers, as well as limit their legal liability and their exposure to regulatory intervention. In short, food and beverage companies doing business in the U.S. should appreciate the important role of science-based research and scientific experts in today's burgeoning food and beverage litigation landscape before U.S. courts.

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[1] See FTC's Dec. 15, 2010, press release: Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink; See also *Gemelas v. The Dannon Co. Inc.*, No. 1:08-cv-00236 (N.D. Ohio Sept. 18, 2009) (in which the parties stipulated to a reported \$35 million settlement of class action accusing Dannon of falsely marketing and advertising the purported health benefits of its Activia and DanActive yogurt products).

[2] See FDA's March 17, 2015, warning letter to Kind LLC, the maker of Kind bars (alleging that the bars are misbranded, *inter alia*, as "healthy" because they contain too much saturated fat).

[3] See, e.g., *In Re: Whole Foods Market Inc. Greek Yogurt Marketing and Sales Practices Litigation*, MDL No. 2588 (W.D. Tex.) (putative class action claiming that Whole Foods misrepresented the sugar content

of yogurt); *In re: Kind LLC “All Natural” Litigation*, MDL number 2645 (S.D.N.Y.) (putative class action alleging Kind misrepresented its products as healthy and natural); *Moran v. Good Health Natural Products Inc.*, No. BC588986 (Cal. Super. Ct.) (putative class action alleging that products were misrepresented as “healthy” and “natural”); *Workman v. Plum Inc. et al.*, No. 3:15-cv-02568-JCS (N.D. Cal.) (putative class action alleging the baby food products were misrepresented as being “healthy” when, in fact, they largely contain sugary apple juice and apple puree).

[4] See, e.g., *Bengco v. Quorn Foods Inc.*, No. BC576522, Superior Court of California, Los Angeles County (filed March 24, 2015) (attributing a minor’s fatal allergic reaction to defendant’s “deliberate misbranding by means of misidentifying its food product” as “mycoprotein” instead of “mold.”); *Marsh v. Monster Beverage Corp.*, No. 5:15-cv-02205 (C.D. Cal. Oct. 27, 2015) (attributing plaintiff’s heart damage to Monster’s failure to disclose caffeine level in its energy drinks and attendant health risks).

[5] Gary Taubes, “What if It’s All Been a Big Fat Lie?” *The New York Times*, July 7, 2002. (Magazine); Bryan Walsh, “Ending the War on Fat,” *Time magazine*, June 23, 2014, at p. 28.

[6] See, e.g., Jill Carroll, “The Government’s Food Pyramid Correlates to Obesity, Critics Say,” *The Wall Street Journal*, June 13, 2002, (noting that a criticism of the government’s dietary guidelines was that “the government’s focus on reducing calories from fat has helped propel sales of low-fat foods that still pack a lot of calories”).

[7] Peter Whorisky, “For decades, the government steered millions away from whole milk. Was that wrong?” *The Washington Post*, Oct. 6, 2015.

[8] See Nina Teicholz, “The scientific report guiding the US dietary guidelines: is it scientific?,” vol. 351 *BMJ* p. h: 4962 (Sep. 23, 2015); David Ludwig et al., “Effects of Dietary Composition on Energy Expenditure During Weight-Loss Maintenance,” vol. 307 *J. AM. MED. ASSN.* p. 2627 (June 27, 2012); Dariush Mozafarian, “Diverging global trends in heart disease and type 2 diabetes: the role of carbohydrates and saturated fats,” vol. 3 *The Lancet Diabetes & Endocrinology* p. 586 (August 2015); see also, Gary Taubes, “What Really Makes Us Fat,” *The New York Times* June 30, 2012; Marni Jameson, “A reversal on carbs,” *The Los Angeles Times*, Dec. 20, 2010.

[9] *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 159-61 (7th Cir. 1977) (explaining that “impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease,” because experts had formed this as a hypothesis — disputed by other experts — a trade association’s “advertising and public relations campaign” to convey the message that eggs are harmless was properly deemed false advertising).

[10] Letter from Gary Ruskin, executive director, U.S. Right to Know, to Jessica Rich, director, Bureau of Consumer Protection, Federal Trade Commission (April 9, 2015) (<http://usrtk.org/wp-content/uploads/2015/04/FTC-artificial-sweetener-letter.pdf>) (“U.S. Right to Know FTC Petition”); Citizen Petition from U.S. Right To Know to Food and Drug Administration, U.S. Department of Health and Human Services (April 9, 2015) (<http://usrtk.org/wp-content/uploads/2015/04/FDA-artificial-sweetener-petition.pdf>) (“U.S. Right to Know FDA Petition”).

[11] See U.S. Right to Know FTC Petition at 3-7 and U.S. Right to Know FDA Petition at 4-7 (summarizing reviews of the scientific literature, epidemiological evidence and other studies on artificial sweeteners suggesting “that they do not contribute to weight loss, and instead link them to weight gain.”).

[12] Letter from Mary K. Engle, associate director for advertising practices, Federal Trade Commission, to Gary Ruskin, executive director, U.S. Right to Know (Sept. 18, 2015) (<http://usrtk.org/wp-content/uploads/2015/10/FTC-response-diet-soda.pdf>); Letter from Patricia A. Hansen, acting director, Office of Nutrition, Labeling and Dietary Supplements, Food and Drug Administration, to Gary Ruskin, executive director, U.S. Right to Know (Sept. 22, 2015) (<http://usrtk.org/wp-content/uploads/2015/10/FDA-response-diet-soda.pdf>).

[13] Eric Lipton, “Rival Industries Sweet-Talk the Public,” *The New York Times*, Feb. 11, 2014, at B1; Tom Hamburger, “‘Soft Lobbying’ war between sugar, corn syrup shows new tactics in Washington influence,” *The Washington Post*, Feb. 12, 2014.

[14] See, e.g., *McCrary v. Elations Co. LLC*, No. 13-0242, 2013 U.S. Dist. LEXIS 173592, at \*22-24 (C.D. Cal. July 12, 2013) (in which the defendant convinced the court to dismiss a complaint without leave to amend in part because the numerous studies cited in plaintiff’s complaint “did not demonstrate the falsity” of defendant’s claims promoting its product as improving “joint comfort” and “joint flexibility.”).