

What's Cooking in Food and Beverage Litigation?

And some tips for staying out of the stew!

Presented by
Anthony Anscombe, Partner

Sedgwick_{LLP}

Why Do Plaintiff Lawyers Love Food And Beverage Companies?

- Everyone has to eat and drink.
- Millions of people get SICK annually from food-borne illness.
- Every consumer makes CHOICES when deciding what to eat and drink.
- F&B COMPANIES MAKE MONEY!

KNOW THE THREAT ENVIRONMENT!

Two major sources of worry

Food-Borne Illness Litigation

- A sure as the sun rises every morning, next year, 1 in 6 Americans will get a food-borne illness.
- Tens of thousands will be hospitalized.
- Several thousand will die.
- The CDC and State health departments do most of the investigating.
- For Plaintiff lawyers, this means EASY MONEY.
- The question isn't whether, it's HOW MUCH?
- Brand damage can destroy your company.

Class Action Litigation

- Hundreds have been filed over the last five years.
- Hot spots: Northern District of California (dubbed the “food court”); New Jersey; New York; Florida.
- A few of the defendants: Blue Diamond, Bumble Bee, Chobani, Coca-Cola, ConAgra, Del Monte, Dole, Frito Lay, General Mills, Gerber, Hain, Hershey, Kellogg, Kraft, Naked Juice, Nestle, Ocean Spray, Odwalla, Pepsi, Pom Wonderful, P&G, Quaker Oats, R.C. Bigelow, Red Bull, Trader Joe’s, Tetley, Twinings, Unilever, Whole Foods.

Class Actions 101

- A “class representative” sues on behalf of all “similarly situated” consumers.
- Key: “Do common questions predominate?”
- Courts decide whether to “certify” the class.
- If certified, the class representative tries to establish recovery for all other class members through representative proof.
- Cases usually settle before trial, leading to the “notices” you get in the mail or see in USA Today.

Class Actions 102

- Most cases involve small per person damages.
- Big multipliers – lots of people, many sales.
- Allege false, misleading, illegal, “unfair” conduct.
- No personal injury - too many individual issues.
- Settlements driven by corporate risk – where potential damages are huge, even bogus claims can win hefty payments.

Class Actions 103

- Most class members don't care about the issue.
- Most money goes unclaimed.
- Many class members do not even know they are class members.
- The only sure payday is for the lawyers.

THE F&B CLASS ACTION PHENOMENON

Why the fuss? Neither the law nor the
products are new...

Partly Lawyer Driven

- “Lawyers from Suits Against Big Tobacco Target Food Makers” – NYT, 8/19/2012

http://www.nytimes.com/2012/08/19/business/lawyers-of-big-tobacco-lawsuits-take-aim-at-food-industry.html?pagewanted=all&_r=0

Partly Consumer & Lawyer Driven

- For laughs, take a look at:
- http://www.lawyersandsettlements.com/food_drink.html
- <http://topclassactions.com/>
- <http://www.consumer-action.org/lawsuits/>
- <http://www.classactionsnews.com/>
- <https://www.bigclassaction.com/lawsuits/>
- <http://www.hustlermoneyblog.com/class-action-lawsuit-settlements/>

Partly Driven By Public Interest Groups, Advocates

- CSPI - <http://www.cspinet.org/>
- Environmental Working Group - <http://www.ewg.org/>
- Marion Nestle - <http://www.foodpolitics.com/>
- “The Food Babe” - <http://foodbabe.com/>

Lawyers With Nothing To Do = The Playground For This Guy



A Few Recent Results

- Red Bull - \$13mm
- Naked Juice - \$9 mm
- Cargill (Truvia) - \$6.1mm
- Ghirardelli - \$5.25mm
- Kellogg - \$5mm
- Trader Joe's - \$3.375mm
- Merisant (Pure Via) - \$1.65mm
- Pepsi/Quaker - \$1.5mm
- Jimmy John's - \$750k
- Flax Milk - \$260K

COST: Millions of dollars in defense costs!

FIELD GUIDE TO THE CLASS ACTION LAWSUITS

And why most of them are stupid



I Only Eat “Natural” Products



But Your Food Contains Nasty Stuff

LAWSUIT FILED

Gold Fish Contain GMOs

INGREDIENTS:
MADE WITH SMILES AND WHOLE GRAIN WHEAT FLOUR, UNBLEACHED ENRICHED WHEAT FLOUR (FLOUR, NIACIN, REDUCED IRON, THIAMIN MONONITRATE (VITAMIN B1), RIBOFLAVIN (VITAMIN B2), FOLIC ACID), CHEDDAR CHEESE [(PASTEURIZED CULTURED MILK, SALT ENZYMES), ANNATTO], VEGETABLE OILS (CANOLA, SUNFLOWER AND/OR SOYBEAN), CONTAINS 2 PERCENT OR LESS OF: SALT, YEAST, AUTOLYZED YEAST, SPICES, LEAVENING (BAKING SODA, MONOCALCIUM PHOSPHATE) AND ONION POWDER.

MISLEADING LABELING & FALSE ADVERTISING

Natural
NO ARTIFICIAL PRESERVATIVES
Big Trains Eat

Foodbabe.com

Fresh, Raw And Natural? (HPP)



I Love Evaporated Cane Juice But I Hate Sugar!



I Wanted Organic!



You Gave Me All These Things With Funny Names (Required By Law, And Without Which My Baby Might Die)

Nutrients

Per 100 Calories
(Normal Dilution) (5 fl oz)

Protein	g	2.2
Fat	g	5.3
Carbohydrate	g	10.6
Water	g	134
Linoleic acid	mg	750
Vitamins:		
Vitamin A	IU	300
Vitamin D	IU	60
Vitamin E	IU	2
Vitamin K	µg	8
Thiamine (Vitamin B ₁)	µg	100
Riboflavin (Vitamin B ₂)	µg	150
Vitamin B ₆	µg	63
Vitamin B ₁₂	µg	0.2
Niacin	µg	750
Folic Acid (Folacin)	µg	7.5
Pantothenic Acid	µg	315
Biotin	µg	2.3
Vitamin C (Ascorbic Acid)	mg	9
Choline	mg	15
Inositol	mg	4.1
Minerals:		
Calcium	mg	63
Phosphorus	mg	42
Magnesium	mg	7
Iron	mg	1.8
Zinc	mg	0.75
Manganese	µg	15
Copper	µg	71
Iodine	µg	9
Selenium	µg	2.1
Sodium	mg	23
Potassium	mg	84
Chloride	mg	56

INGREDIENTS: ORGANIC REDUCED MINERALS WHEY, ORGANIC NONFAT MILK, ORGANIC LACTOSE, ORGANIC GLUCOSE SYRUP SOLIDS, ORGANIC PALM OIL OR PALM OLEIN, ORGANIC COCONUT OIL, ORGANIC HIGH OLEIC (SAFFLOWER OR SUNFLOWER) OIL, ORGANIC SOY OIL, ORGANIC WHEY PROTEIN CONCENTRATE, AND LESS THAN 1%: MORTIERELLA ALPINA OIL*, CRYPTOCODINIUM COHNII OIL*, VITAMIN A PALMITATE, BETA-CAROTENE, VITAMIN D (CHOLECALCIFEROL), VITAMIN E (d/-ALPHA TOCOPHERYL ACETATE), MIXED TOCOPHEROL CONCENTRATE, VITAMIN K (PHYTONADIONE), ASCORBYL PALMITATE, THIAMINE HYDROCHLORIDE, RIBOFLAVIN, PYRIDOXINE HYDROCHLORIDE, CYANOCOBALAMIN, NIACINAMIDE, FOLIC ACID, CALCIUM PANTOTHENATE, BIOTIN, ASCORBIC ACID, CHOLINE CHLORIDE, INOSITOL, CALCIUM CHLORIDE, CALCIUM HYDROXIDE, FERROUS SULFATE, ZINC SULFATE, MANGANESE SULFATE, CUPRIC SULFATE, MAGNESIUM PHOSPHATE, POTASSIUM BICARBONATE, POTASSIUM CHLORIDE, POTASSIUM IODIDE, POTASSIUM HYDROXIDE, SODIUM SELENITE, SODIUM CITRATE, TAURINE, SOY LECITHIN, NUCLEOTIDES (ADENOSINE-5'-MONOPHOSPHATE, CYTIDINE-5'-MONOPHOSPHATE, DISODIUM GUANOSINE-5'-MONOPHOSPHATE, DISODIUM INOSINE-5'-MONOPHOSPHATE, DISODIUM URIDINE-5'-MONOPHOSPHATE).

CONTAINS: SOY and MILK. Good Manufacturing Practices are used to prevent introduction of undeclared allergens.

Manufactured for Distribution by
The Hain Celestial Group, Inc.
Melville, NY 11747 USA

CERTIFIED ORGANIC BY
QUALITY ASSURANCE INTERNATIONAL (QAI) 02FTP

Comments? Call 800-434-4246 or
www.earthsbest.com

©2011 The Hain Celestial Group, Inc.

Filled by weight, not by volume; some settling may occur.

* A SOURCE OF ARACHIDONIC ACID (ARA)

** A SOURCE OF DOCOSAHEXAENOIC ACID (DHA)



X2941 003

1.297 005W 0621

**You Sold Me Something That Didn't
Have Enough Of The Good Stuff To
Bring Me Relief!**



You Sold Me Stuff Whose Benefits Have Not Been Proven (just look at Jr.'s report card)



You Sold Me Stuff That Contains Things That Scare Me



Walgreen's Apple Juice

- (It may not have been the specific brand packaging shown on the preceding slide)
- Alleged to contain arsenic above levels approved by FDA for water.

AMUSING THOUGHTS:

- 1.The Arsenic was probably NATURAL.
- 2.Probably ORGANIC (as opposed to inorganic).

Size Matters - Don't Brag About Your Footlong Unless It's 12 Inches!



Food Contact Materials Are Poison! (Despite decades of safe use...)

PFOA



BPA



I Thought This Was From Santa Fe

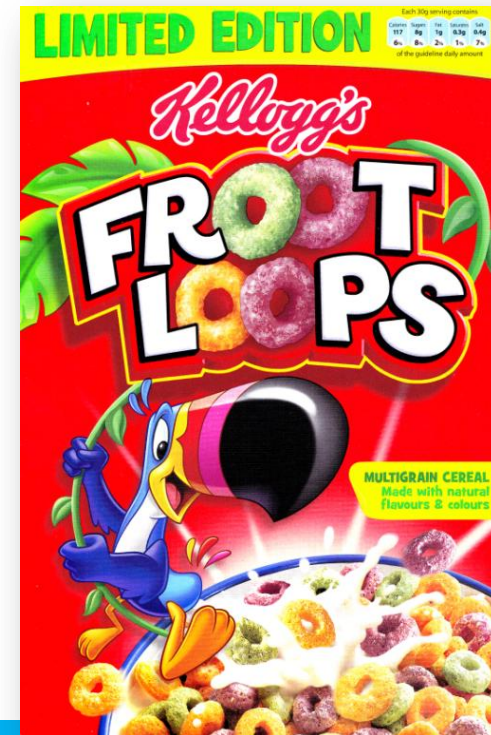
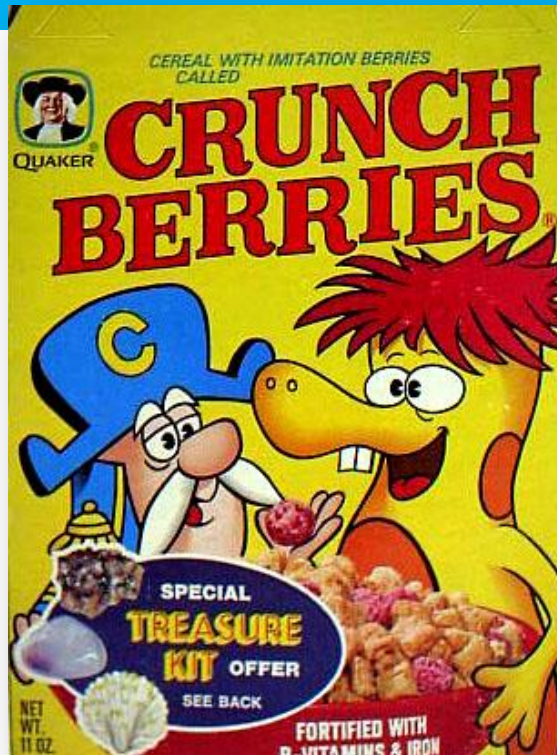


How dare you call this “honey”!



Another Illusion Shattered...

A fruit that is always in season.



OK, so maybe "Froot" was a tip-off.

Common Plaintiff Arguments

- Your advertising was false.
- You violated government regulations.
- You failed to disclose important information.
- If I had only known the truth, I:
 - a) Would not have bought the product;
 - b) Would not have paid as much;
 - c) Would have bought a less expensive alternative.

**You owe me:
all or part of my purchase price, or the difference
between this product and a less expensive one.**

Common Defenses To Class Certification

- Human purchasing behavior is complex: taste, price, convenience, brand loyalty, perceived benefits, advice of third parties such as doctors, may all play a role.
- Many/most people did not see the alleged deception.
- Most people do not care about this kind of thing.
- Class members cannot be identified.
- There is no class-wide proof of loss.

Defenses To Liability

- Our statements were truthful.
- Plaintiffs did not rely on our statements.
- We did not have a duty to disclose information.
- You have no monetary damage – you enjoyed a good product and got what you paid for.

TIPS FOR STAYING OUT OF THE STEW

DISCLAIMER: THIS IS SENSITIVITY TRAINING ONLY

This is NOT legal advice or a substitute for legal advice.
Talk to your company's lawyer regarding the
circumstances of situations you may be confronting.

Tip #1: Product Safety Is Job 1

- Duh! You already knew that.
- Never forget it.

Tip # 2: Tell The Truth

- Duh! You knew that too.
- Avoid statements that are literally true but create false impressions.
- Would a substantial number of people be likely to be misled?
- Danish Pastry?
- Bob the Enzyte Guy?

Tip #3: Everything In And About Your Product Will Be Scrutinized

- Does it meet the description on the label? (Weight, nutritive value, etc.)
- Does it meet advertising claims?
- Consider ingredients/processing in relation to descriptors like “Natural,” “Fresh,” “Organic,” “GMO Free”
- Regulatory compliance, esp. standards of identity
- Health claims vs. structure & function claims
- Does it contain trace elements or chemicals that will cause concern?
- Does it raise political/environmental issues?

Tip #4: Keep An Eye On What Is Said About Similar Products

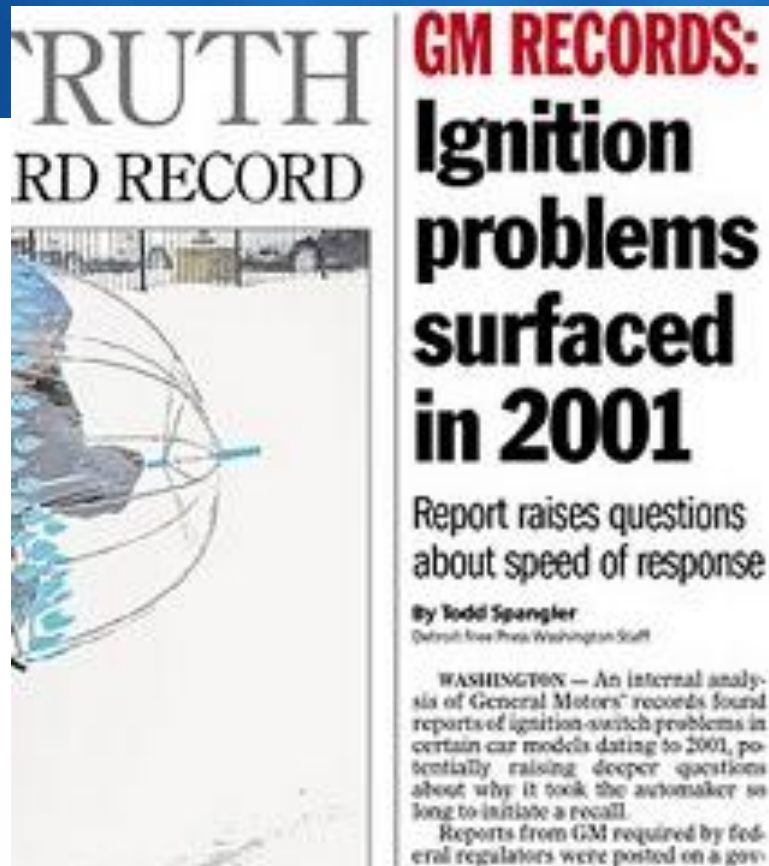
- Watch the media for the latest “scandal.”
- Watch foreign regulatory actions.
- The Plaintiffs’ bar looks for new products and new theories, and will target similar products.

Tip #5: Watch What You Say And How You Say It

- The litigation risk for F&B companies is very high.
- Everything you write will reflect on you later.
- A single bad document can become the face of your company
- Make sure the record tells a good story about you and your company.

IT IS GOOD TO LEARN FROM YOUR OWN MISTAKES

And even better to learn from the mistakes of others.



The ignition recall is full of important messages for food companies

Auto Industry vs. F&B Industry

Auto

- Epidemiologic fact: many people die in car crashes
- Legal climate: hot
- Recall climate: hot
- Scandal index: high
- Product safety is an iterative process, with constant effort to improve

F&B

- Epidemiologic fact: many people die of F-B illness
- Legal climate: hot
- Recall climate: hot
- Scandal index: high
- Product safety is an iterative process, with constant effort to improve

Risk Perceptions Differ According To The Viewer

Food/Automotive Engineer

- Views issues in real time
- Understands iterative process
- What I do today is good, and what I do tomorrow will be even better

Newspaper Reporter/Consumer Lawyer

- Views events in hindsight
- Looks for a story to sell papers/jury
- What you did wasn't good enough because you can always do it better

Case Study: GM Technical Learning Symposium

2008 Q1 Interior

Technical Learning Symposium

Soft Trim Breakout Session

Meet-Me Line Participants:

Please mute your phones when you are not speaking.

If your phone does not have a mute function, you can do this by hitting:

- * 6 on your phone to mute,
- * 7 to un-mute.

Thank you!

Sound advice...

Documentation Guidelines

In a corporation the size of GM, writing is in many cases the only way to communicate globally because of time changes, number of people involved, etc.

- Write “smart.”
 - Be factual, not fantastic, in your writing.
- When identifying product risks, make sure they are addressed and closed out.
- Our writing must always be based only on fact, without judgmental adjectives and speculation.



GM Confidential

Also good advice

Documentation Guidelines

- Understand that there really aren't any secrets in this company.
 - For anything you say or do, ask yourself how you would react if it was reported in a major newspaper or on television.
- Don't be cute or clever.
 - The words you choose could be taken out of context to suggest you meant something much worse than what was intended.
 - This may be especially easy to do in an e-mail, when there might be a temptation to use a casual tone to describe a potentially serious safety risk.



GM Confidential

Word choice guidance...

<u>Instead of</u>	<u>Use</u>
Problem	= Issue, Condition, Matter
Safety	= Has Potential Safety Implications
Failed	= Broke & separated 10mm. Visible crack 25mm long. Ignited, flame grew to 100mm in 15 sec., then self extinguished.
Good Bad	= Above/Below/Exceeds Specification.
Defect	= Does not perform to design
Defective	



GM Confidential

The media love a scandal



The Brutal Facts. The topic today is very much a current event. This year, a week has not passed without headlines involving subjects like: Recalls and NHTSA investigations.

What every company vehicle driver must know...

Examples of comments that do not help identify and solve problems:

- “This is a lawsuit waiting to happen...”
- “Unbelievable Engineering screw up...”
- “This is a safety and security issue...”
- “This is a very dangerous thing to happen. My family refuses to ride in the vehicle now...”
- “Scary for the customer...”
- “Kids and wife panicking over the situation...”
- I believe the wheels are too soft and weak and could cause a serious problem...
- “Dangerous...almost caused accident”

Examples of comments that can help identify and solve problems:

- “Windshield wipers did not work properly. Would run for 3-4 seconds and then quit for the next 7-8 minutes...repeatedly”
- “Upon opening the passenger side rear door after a day of rain followed by freezing temperatures, the passenger side rear door would not close. The door had to be slammed shut several times before it would latch closed.”
- Vehicle traction control activates under normal acceleration from a stop...activation occurs without warning and in conditions not generally associated with the need for traction control.



GM Confidential

Judgment Words

Documents used for reports and presentations should contain only engineering results, facts, and judgments. These documents should not contain speculations, opinions, vague non descriptive words, or words with emotional connotations. Some examples of words or phrases that are to be avoided are:

always	deathtrap	gruesome	rolling sarcophagus (tomb or coffin)
annihilate	debilitating	Hindenburg	safety
apocalyptic	decapitating	Hobbling	safety related
asphyxiating	defect	Horrific	serious
bad	defective	impaling	spontaneous combustion
Band-Aid	detonate	inferno	startling
big time	disemboweling	Kevorkianesque	suffocating
brakes like an "X" car	enfeebling	lacerating	suicidal
cataclysmic	evil	life-threatening	terrifying
catastrophic	eviscerated	maiming	Titanic
Challenger	explode	malicious	tomblake
chaotic	failed	mangling	unstable
Cobain	failure	maniacal	widow-maker
condemns	flawed	mutilating	words or phrases with biblical connotation
Corvair-like	genocide	never	you're toast
crippling	ghastly	potentially-disfiguring	
critical	grenadelike	powder keg	
dangerous	grisly	problem	

Late night television

- Last Week With John Oliver

<https://www.youtube.com/watch?v=j6lZ2TroruU>

See also: What Food Professionals Can Learn From GM About Internal Safety Communications, Food Safety Magazine, June, 2014 –

<http://www.foodsafetymagazine.com/enewsletter/what-food-professionals-can-learn-from-gm-about-internal-safety-communications/>

BE CAREFUL ABOUT WHAT YOU SAY

Including what you say about being careful about what
you say!



Anthony Anscombe

Partner

anthony.anscombe@sedgwicklaw.com

312.641.9050

AUSTIN BERMUDA CHICAGO DALLAS FT. LAUDERDALE HOUSTON KANSAS CITY LONDON LOS ANGELES
MIAMI NEW YORK NEWARK ORANGE COUNTY SAN FRANCISCO SEATTLE WASHINGTON D.C.