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Time to expand the food industry's menu of defense strategies

By Benjamin P. Broderick

It was only last fall that the New York Times identified the food industry as the new target of choice for class action plaintiffs ("Lawyers of Big Tobacco Target Food Makers," Aug. 18, 2012). But the torrent of new food industry class actions ("FICAs") in 2012 was merely the continuation of a storm that has been gathering for at least five years. From 2008 through 2010, the number of FICA filings roughly doubled each year. And while the trend line flattened a bit in 2011, 2012 restored the prior pace of growth, once again doubling the number of FICAs filed the year before.

The FICA frenzy is a nationwide phenomenon. However, a single state, California, has hosted roughly a quarter of all such suits over the past five years. No surprise: California's broadly-framed consumer protection laws, abetted by consumer-friendly courts loathe to recognize key defenses recognized in most other jurisdictions (notably preemption), make California the ideal venue to bring a FICA claim. Other favored FICA venues include New Jersey, Illinois, Florida, New York and Missouri.

Thus far, the storm has centered on large manufacturers, particularly those specializing in breakfast foods, beverages, snacks, candy, ice cream, baby food and health foods. Over the past five years, General Mills; PepsiCo, Inc. and its subsidiary Tropicana Products; Kellogg Company; Coca Cola Company and its subsidiary Simply Orange Juice; Nestle USA; ConAgra Foods, Inc.; Unilever; and Gerber Products Company have each been pelted by at least a dozen separate FICAs. Other frequent FICA defendants include Hershey Company (candy); Dean Foods (dairy), Arctic Zero (dessert), Chobani (yogurt), Hain Celestial Group (natural and organic food) and Ferrero USA (candy).

Just about any marketing theme or product claim may become the basis for a FICA suit. In January, Subway was sued because its "footlong" sandwiches are allegedly only 11 inches long. Dannon was sued because its product allegedly isn't real "yogurt." Kraft was sued because it marketed its Ritz crackers and Teddy Grahams as healthy or sensible snacks when they contain trans fat and other allegedly undesirable ingredients. Arctic Zero was sued for allegedly understating the calories in its desserts. Frito-Lay was sued for labeling certain snacks "all natural" because they allegedly contained genetically modified soy. And the list goes on.

Whatever the particulars, a FICA complaint begins with the allegation that a defendant has made one or more uniform misrepresentations, or material omissions, relating to the content or quality of its products. Most commonly, plaintiffs challenge food labels identifying a product's sugar, fat and/or caloric content, or ads or labels promoting food or beverages as "healthy" or "all natural," alleging that the product doesn't match up to its billing.

Plaintiffs typically seek to certify a class comprised of all consumers who purchased the product at issue during the period of the alleged misrepresentation (or the applicable statute of limitations, if shorter) and demand full refunds to the class for all purchases made during the relevant timeframe. Most FICAs are brought in venues where state consumer protection laws provide for relaxed standards of proof regarding reliance and causation, with correspondingly lenient standards for class certification. Consequently, by applying this aggressive formula, in many cases, FICA plaintiffs can credibly assert millions or even tens of millions of dollars in damages. FICA complaints may also seek injunctive and declaratory relief regarding defendants' advertising or business practices.

Thus far, few major jury verdicts have been handed down in FICA cases. But in class action litigation, plaintiffs understand from the outset that they are going for settlements, not verdicts. One can be sure that if these suits weren't turning up profitable settlements, the number of such suits would not have multiplied 10 times over in the past four years.

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While not specific to FICAs, a published study of class actions from 2000 to 2005 found that less than 1 percent of class actions in the courts studied went to verdict. Findings of the Study of California Class Action Litigation, 2000-2006, California Judicial Council (March 2009). The study showed that where a class action survived summary judgment, defendants nearly always chose settlement over trial. In the absence of contrary data, it may be presumed that these general trends would also hold true for FICA litigation.

This nearly universal preference for settlement is understandable, as entering into settlement may limit bad publicity while avoiding both the onerous legal fees incident to mounting a strong legal defense at trial and

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the risk of facing a potentially catastrophic damage verdict and/or restrictive injunction. On the other hand, routinely settling class actions without testing their merits may have the unintended effect of encouraging more lawsuits because plaintiffs' attorneys will soon discover that if they can only get a class certified and survive summary judgment, they are nearly assured of winning a lucrative settlement.

Accordingly, when evaluating the merits of a proposed FICA settlement, a food industry defendant should not simply compare the costs of settlement with the avoided costs and risks of trial. It should also consider the potential long-term impact of its settlement strategy, including its tendency to encourage follow-on suits. Where a company has strong legal defenses, this may mean taking a matter to trial even if the cost of doing so, and its potential worst-case liability, far exceed the cost of settlement.

Food companies should also consider proactive measures to minimize the number and impact of FICAs:

First: Industry players should stay abreast of relevant regulations and legal precedents and conduct periodic legal reviews of their product claims.

Second: Food companies should stay informed of FICAs challenging practices akin to their own and communicate with other similarly-situated companies about the nonconfidential details of their marketing themes and litigation experience.

Third: Food companies may consider increasing their budget for research concerning how consumers understand their ads and labels, and the range of reasons that consumers are purchasing their products, so that their corporate executives can better coordinate with their marketing departments and legal counsel to avoid FICAs when possible and more easily defeat class certification when necessary.

Fourth: Companies who rely on third-party food suppliers should require them to certify the accuracy of their stated product ingredients and specifications.

Fifth: Increasing the amount of product information available to the public, and/or making key information more conspicuous, may reduce the chances that consumers will be misled about the true contents or quality of one's products and the corresponding risk of litigation.

Sixth: If possible, avoid advertising campaigns or product labeling featuring pseudo-scientific, hard-to-define terms such as "all natural," "organic" or "healthy" - which make prime targets for FICA litigation.

Seventh: Avoid long-term, nationwide, single-message marketing campaigns, which make perfect targets for class certification in a false advertising suit.

Eighth: Implementing a well-advertised refund policy can also help to avoid consumer class actions and improve one's defenses.

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Food industry participants should also consider longer-term solutions to mitigate the bet-the-company risks of FICA litigation that often drive defendants to settle rather than present their valid defenses. This may take the form of establishing a program for industry-specific self insurance through which companies contribute premiums to create a fund from which members may draw, under defined circumstances, when they need financial assistance with litigation defense and/or protection against liability in excess of stated limits. At a minimum, industry participants should establish regular forums in which they share nonconfidential details of their litigation experiences and identify ways of eliminating questionable practices while cooperating in the defense of appropriate practices the industry wishes to maintain. In some cases, such cooperation may be limited to providing relevant research or advice to the named defendants. In others, it may mean sharing publicly available market research or legal research. In appropriate cases, industry participants may also agree to share legal costs when a suit challenges practices in which they have a common interest.

Of course, the risk presented by FICA litigation and the best strategy for defending against such suits will vary from company to company and from case to case. But if the food industry wishes to abate the FICA frenzy sooner rather than later, it may be time to consider expanding their menu of litigation strategies to include more proactive, long-term, and even cooperative defense options.

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