

Food & Beverage Cases To Watch In 2015

By **Andrew Westney**

Law360, New York (January 02, 2015, 5:24 PM ET) -- As 2015 gets underway, food labeling class actions will show no signs of slowing down and may face a tough test at the Ninth Circuit, while genetically modified foods will continue to be the subject of public controversy and litigation, with special attention paid to a challenge to Vermont's groundbreaking GMO labeling law.

Here's a look at the food and beverage cases attorneys will have their eyes on in the new year.

Kane et al. v. Chobani Inc.

The Northern District of California's "food court" has seen an abundance of food-labeling consumer class actions in recent years, particularly over the alleged mislabeling or misbranding of products as "natural" or "all natural."

However, not many of those suits have been tested, and very few have gone to trial or seen an appeal, according to Womble Carlyle Sandridge & Rice LLP partner Kurt D. Weaver.

"We're starting to see in that area a lot of settlements, and there have only been a handful of cases that have gone the distance, if you will, to get to the point where there's an assignment of error for an appellate court to review," Weaver said.

That could all change in 2015 in a case appealed to the Ninth Circuit. In *Kane v. Chobani Inc.*, plaintiffs Katie Kane, Arianna Rosales and Darla Booth alleged that Chobani deceptively labeled its yogurt as "all natural," because the yogurt was artificially colored with fruit and vegetable juice concentrates. They brought claims under California's unfair competition law, false advertising law and Consumers Legal Remedies Act.

In February, U.S. District Judge Lucy H. Koh granted Chobani's motion to dismiss the suit, saying the plaintiffs failed to allege how they thought the processing of the juices rendered them "unnatural."

But the plaintiffs appealed to the Ninth Circuit, giving the appeals court an opportunity to weigh in on whether the alleged mislabelings can be appropriately characterized as a state consumer protection violation, which could spur more litigation in California and around the country, Weaver said.

The plaintiffs are represented by Darren L. Brown of Provost Umphrey Law Firm LLP; Pierce Gore of Pratt

& Associates; Colin H. Dunn, Michael S. Krzak and Robert A. Clifford of Clifford Law Offices PC; Keith M. Fleischman of The Fleischman Law Firm; and Don Barrett of Barrett Law Group PA.

Chobani is represented by Dale J. Giali, Michael L. Resch, Barrett L. Schreiner, Steven E. Rich and Andrew Z. Edelstein of Mayer Brown LLP.

The case is Kane et al. v. Chobani Inc., case number 14-15670, in the U.S. Court of Appeals for the Ninth Circuit.

Grocery Manufacturers Association et al. v. Sorrell et al.

In September, the Grocery Manufacturers Association and other food industry groups urged a federal judge to halt Vermont's GMO food labeling law, describing it as a costly and unnecessary measure that would impinge on food groups' constitutional rights.

The GMA filed a motion for a preliminary injunction that would prevent Vermont from going forward with its plans to implement the new food labeling requirements.

The case could have a major impact on federal legislation to regulate GMO labeling, according to Crowell & Moring partner John Fuson.

"That is a really big thing to watch," Fuson said. "To some extent because that's going on, and because other states have certainly considered so-called GMO labeling, two different bills have been introduced nationally to deal with GMO labeling."

A hearing on the food groups' motion for preliminary injunction and Vermont's motion to dismiss is scheduled for Jan. 7.

The food groups are represented by Matthew B. Byrne of Gravel & Shea PC and Catherine E. Stetson, E. Desmond Hogan and Judith E. Coleman of Hogan Lovells.

The state is represented by Vermont's attorney general's office and Lawrence S. Robbins and Daniel N. Lerman of Robbins Russell Englert Orseck Untereiner & Sauber LLP.

The case is Grocery Manufacturers Association et al. v. William H. Sorrell et al., case number 5:14-cv-00117, in the U.S. District Court for the District of Vermont.

Segovia et al. v. Vitamin Shoppe Inc.

In a putative class action filed in New York federal court in September, Vitamin Shoppe Inc. was accused of misleading consumers about the effectiveness of its BodyTech protein supplements through its labeling, by underdosing a digestive enzyme and making false claims about the function of lactase in the body.

The suit claims the company falsely labels and markets its BodyTech Whey Tech Pro 24, BodyTech 100% Casein and BodyTech Primal Pro products by boasting about the amount of digestive enzyme Aminogen in the supplements, only to actually underdose the enzyme to the point where its inclusion is "useless."

The case, which addresses so-called "protein spiking" — the alleged overrepresentation of protein in

supplements — shows plaintiffs using scientific methods to verify the claims food retailers make on labels, according to Faegre Baker Daniels partner Sarah Brew.

“We’re seeing more of that, where plaintiffs develop relationships with laboratories and test things,” Brew said.

Plaintiffs will likely continue to look for opportunities to test claims for foods with an eye toward potential litigation, “especially if you draw a target on your product by saying it’s high-protein or low-sodium,” Brew said.

Vitamin Shoppe has been granted leave to file a motion to dismiss the case, along with an opposition from the plaintiffs and the company’s reply, by March 3.

The plaintiffs are represented by Peter J. Cambs and Jordan L. Chaikin of Parker Waichman LLP; Nick Suci III of Barbat Mansour & Suci PLLC; and Sharon S. Almonrode of The Miller Law Firm PC.

Vitamin Shoppe is represented by Jennifer Marino Thibodaux and Michael R. McDonald of Gibbons PC.

The suit is Segovia et al. v. Vitamin Shoppe Inc., case number 7:14-cv-07061, in the U.S. District Court for the Southern District of New York.

U.S. v. Parnell et al.

The conviction of three former Peanut Corporation of America executives in September, stemming from the sale of salmonella-contaminated peanuts that killed at least nine people, could spur further criminal prosecutions in the food industry, experts say.

Former PCA CEO Stewart Parnell, Vice President of Sales Michael Parnell and Quality Assurance Manager Mary Wilkerson were found guilty on one count of obstructing justice and enabling the sale of contaminated peanut products. Brothers Stewart and Michael Parnell were also found guilty on dozens of fraud and conspiracy charges.

Pursuing criminal charges against food industry executives for alleged criminal conduct could rise this year, according to Shook Hardy & Bacon LLP partner Madeleine M. McDonough.

“People are really watching all of the fallout from the Parnell situation and trying to keep that in mind in making sure they have appropriate procedures internally,” McDonough said.

The U.S. Department of Justice and the U.S. Food and Drug Administration have made it clear that they intend to use misdemeanor prosecutions under the Park Doctrine of the Federal Food, Drug and Cosmetic Act against corporate officers for regulatory violations, according to McGuireWoods LLP partner Angela M. Spivey.

Under the Park Doctrine, a food company executive can be prosecuted for a misdemeanor for failing to correct or prevent food safety violations involving the distribution of adulterated or misbranded food, drugs, and medical devices, even in cases where the executive had no knowledge of the wrongdoing.

“We saw aggressive criminal prosecution in the food industry in 2014, and we expect that to increase in the coming year,” Spivey said.

In addition, the industry should be keeping an eye on the possibility that the government will pursue strict liability felony charges for repeat offenders, which might motivate food companies to set up their facilities as separate legal entities as protection against such prosecutions, Spivey said.

The Parnells and Wilkerson have all sought to have their convictions thrown out by a Georgia federal court.

Stewart Parnell is represented by Thomas J. Bondurant, E. Scott Austin and Justin M. Lugar of Gentry Locke Rakes & Moore LLP. Michael Parnell is represented by Edward D. Tolley and Devin Hartness Smith of Cook Noell Tolley & Bates LLP. Wilkerson is represented by Thomas G. Ledford of the Ledford Law Firm LLC.

The government is represented by Kenneth A. Dasher, Mary M. Englehart and Patrick H. Hearn of the U.S. Department of Justice.

The case is U.S. v. Parnell et al., case number 1:13-cr-00012, in the U.S. District Court for the Middle District of Georgia.

In re: 5-Hour Energy Marketing and Sales Practices Litigation

A consolidated class action in multidistrict litigation accusing the makers of 5-Hour Energy drinks of false advertising reflects a trend of states forming alliances with private plaintiffs attorneys that will likely continue into 2015, McDonough said.

“Not only will it be government-sponsored litigation, but it will spin off into individual litigation, either basic tort cases or consumer fraud class action cases,” McDonough said.

The 5-Hour Energy claims took a hit when a California federal judge trimmed the suit in September, shrinking the consumers' allegations to those based specifically on the claim that the products provide five hours' worth of energy, while throwing out allegations that Innovation Ventures LLC and Living Essentials LLC made fraudulent claims about the drinks and their benefits.

However, states' health concerns around food could continue to expand from energy drinks to attorneys general suing major food manufacturers over Medicare and Medicaid expenses allegedly tied to poor food choices, Weaver said.

“My big concern is the extent to which state governments might follow the path of the tobacco manufacturers and say they're going to start bringing large health care recoupment class actions that relate to obesity and other issues,” Weaver said.

On Dec. 8, the plaintiffs in the 5-Hour Energy litigation filed a memorandum in opposition to the defendants' motion to dismiss the amended complaint.

The plaintiffs are represented by L. Timothy Fisher, Annick M. Persinger, Yeremey O. Krivoshey and Scott A. Bursor of Bursor & Fisher PA; David E. Bower and Antonio Vozzolo of Faruqi & Faruqi LLP; and Mark J. Geragos and Benjamin J. Meiselas of Geragos & Geragos APC.

The defendants are represented by Gerald E. Hawxhurst and Daryl M. Crone of Crone Hawxhurst LLP.

The case is In re: 5-Hour Energy Marketing and Sales Practices Litigation, case number 2:13-ml-02438, in the U.S. District Court for the Central District of California.

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