

SHOOK
HARRY & SACON

Food & Beverage Litigation and Consumer Marketing Trends

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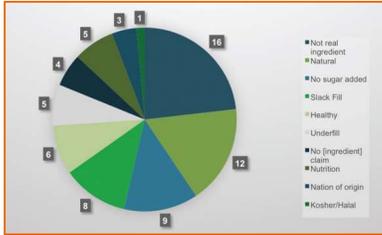


<p>1</p> <hr/> <p>Food & Beverage Litigation</p>	<p>2</p> <hr/> <p>Consumer Marketing Trends</p>
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THE LANDSCAPE



Approximately 70 Food Class Actions Filed Jan. 1 to Oct. 9, 2017



Source: <https://www.fdpi.org/2017/12/food-litigation-trends-new-undefined-label-claims-2017/>

CONTINUED GROWTH & CREATIVITY IN CLAIMS



GEOGRAPHIC HOTSPOTS





FDA'S CURRENT GUIDANCE

- Natural = "Nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food."
- Comments closed May 2016; yet to see final definition



Scott Gottlieb, FDA Commissioner
Confirmed May 2017





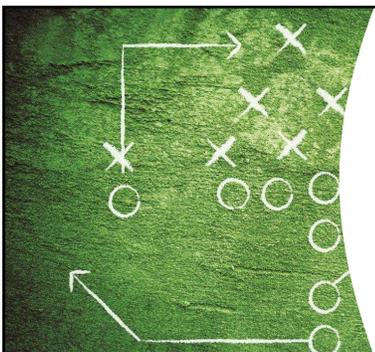
- “Natural” product claims continue to be litigated
 - Includes similar terms such as “Pure,” “No Artificial Ingredients,” “Real”
 - More problematic if the label uses the terms “100%” or “All”
 - Expanding to attack growing methods and supply chain issues

WHAT’S THE OUTCOME?

Motions to dismiss often denied, leading to significant defense costs

- Inconsistent case law around the country
- Settlements in CPG cases worth \$5M-\$10M, include packaging changes
- Disclosure of commercially sensitive information and processes
- Low Likelihood of Success





Arguments to Consider

- Primary Jurisdiction
- Preemption
- Standing
- Who’s in the class?
- Damages

“NATURAL” SETTLEMENTS FROM 2015 – 2017

 <p>\$9M (CA) Juices labeled as “All Natural” despite GMO ingredients</p>	 <p>\$1.5M (NY) Stevia in the Raw products labeled as “All Natural”</p>
 <p>\$4.5M (NY) Cleaning supplies labeled as “All Natural”</p>	 <p>\$1.5M (CA) Soup & noodle bowls labeled as “100 Percent All Natural Ingredients” & “No MSG Added”</p>
 <p>\$4M (FL) Numerous products labeled as “All Natural” and “Nothing Artificial”</p>	 <p>\$825k (FL) Corn starch labeled as “All Natural”</p>
 <p>\$3.2M (MO) Chips labeled as “All Natural”</p>	 <p>\$410k in fees (CA) Smoothie kits labeled as “All Natural”</p>

a	b	c	d	e
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Natural	Made in the USA	Place of Origin	Environmental Claims	Supply Chain

<p>FTC</p> <ul style="list-style-type: none"> Requires that “all or virtually all” of the product be made in the US “All or virtually all” means all significant parts and processing of the product are of U.S. origin, with no—or negligible—foreign content. No clear numerical guidelines or % limits on foreign content 	<p>CALIFORNIA</p> <ul style="list-style-type: none"> Requires that 90-95% of the product be made in the US, depending on whether ingredients are available in the US The old statute, prior to January 1, 2016 amendments, forbade the use of such labels if <i>any</i> part, component, or ingredient was “entirely or substantially” made outside the US
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EXPRESS V. IMPLIED

Express:

“Our products are American made” or “USA”

Implied:

FTC focuses on the overall impression of the label, advertising, or promotional material.

Context is everything.

WHAT ABOUT A QUALIFIED CLAIM?

FTC cautions manufacturers to avoid qualified claims **unless the product has a significant amount of US content or US processing.** Like an unqualified Made in USA claim, a **qualified claim must be truthful and substantiated.**

Examples:

- “Made in USA of U.S. and imported ingredients”
- “Made in USA with finest globally sourced ingredients”



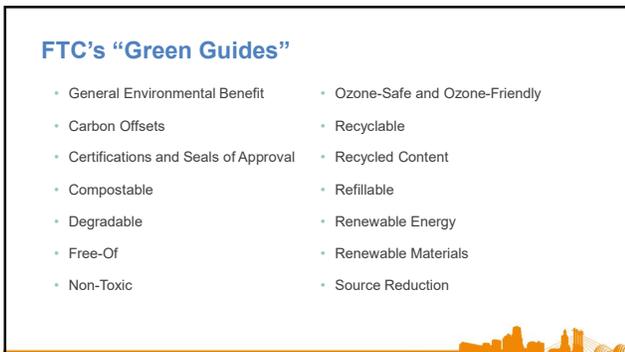












FTC's Guiding Principles

1. **Qualifications and Disclosures:** should be clear, prominent, and understandable, and use plain language and sufficiently large type.
2. **Distinction between benefits of product, package, and service:** an environmental claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service.
3. **Overstatement of environmental attribute:** should not overstate, directly or by implication, an environmental attribute or benefit.
4. **Comparative claims:** should be clear to avoid consumer confusion about the comparison and marketers should have substantiation for the comparison.

Example: An advertiser claims that its packaging creates "less waste than the leading national brand." The advertiser implemented the source reduction several years ago and supported the claim by calculating the relative solid waste contributions of the two packages. The advertiser should have substantiation that the comparison remains accurate.



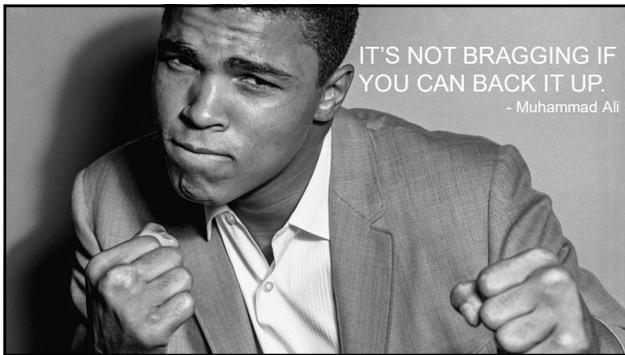


SOURCING & MISLABELING CLAIMS



Source: <http://www.philly.com/philly/blogs/inq-phillydeals/Ad-watchdog-scolds-Progresso-.html>

Source: <http://www.wj.com/articles/for-restaurant-trends-what-comes-after-farm-to-table-51295091>



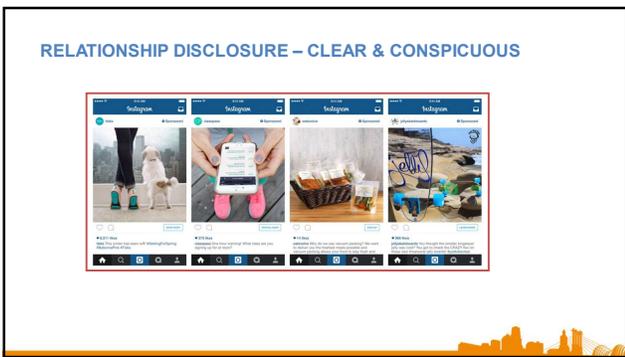
IT'S NOT BRAGGING IF YOU CAN BACK IT UP.
- Muhammad Ali



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Food & Beverage Litigation

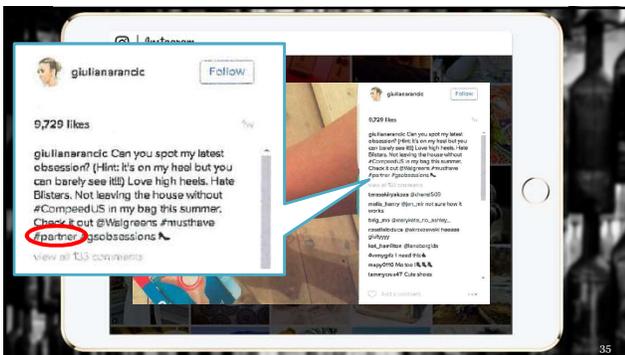
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Consumer Marketing Trends

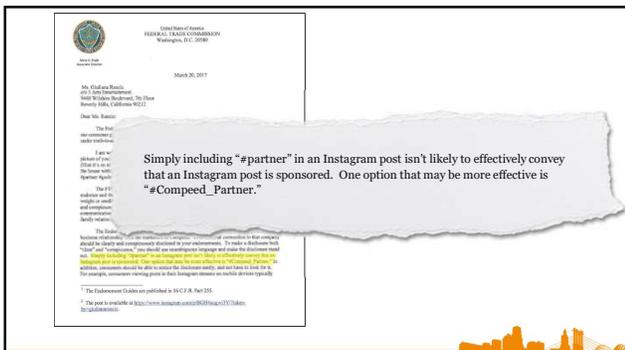




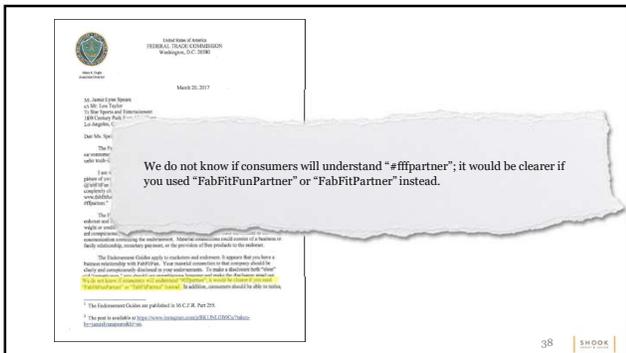


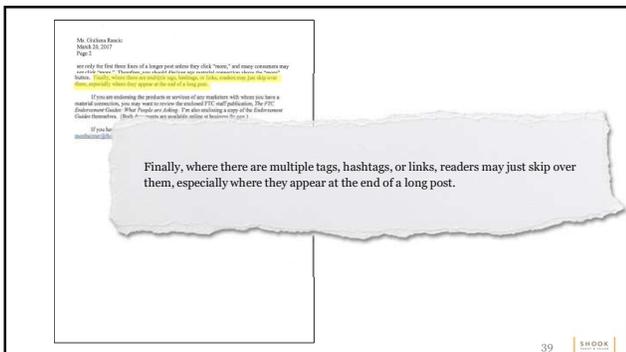


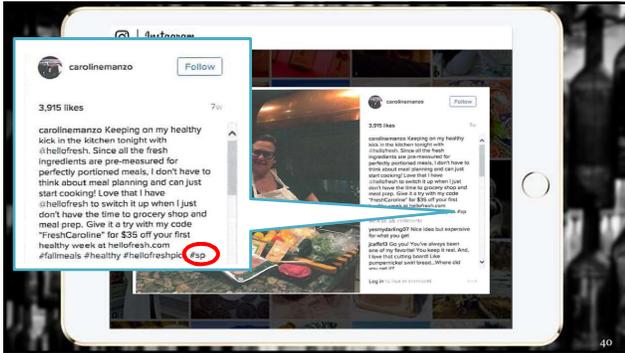


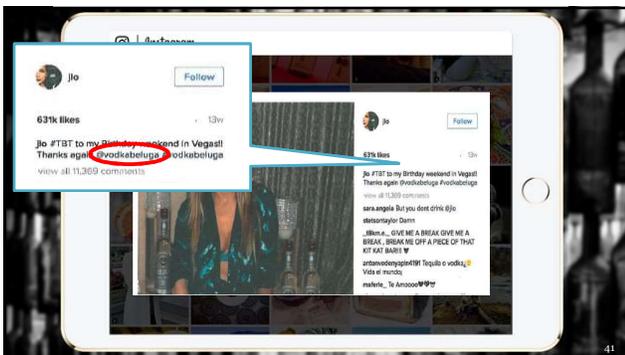


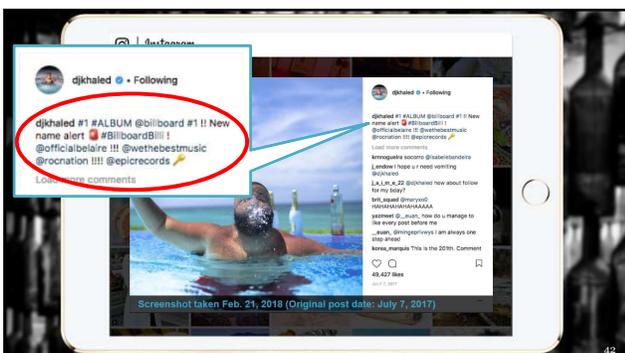




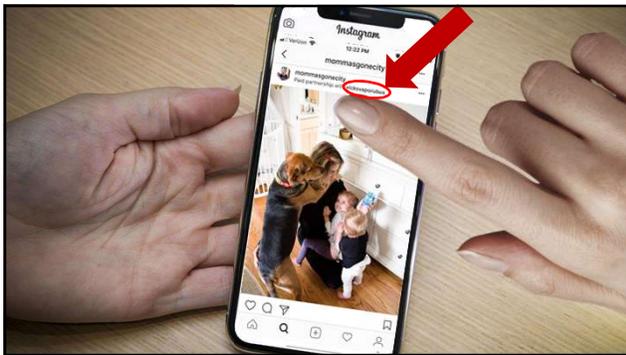


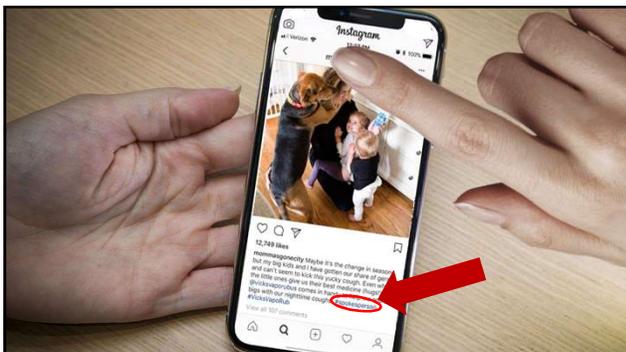




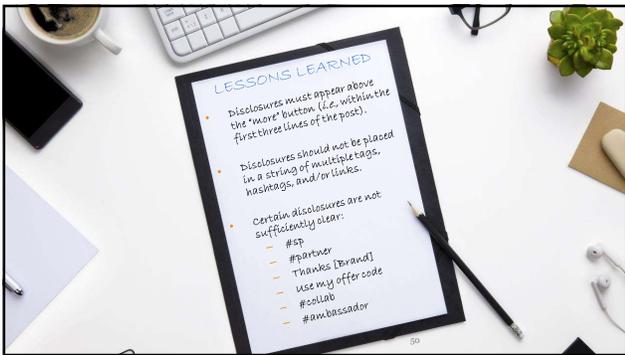
















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