

## Limiting Food Liability Starts At Product's Birth, Attys Say

By Greg Ryan

*Law360, New York (June 12, 2013, 9:19 PM ET)* -- Attorneys told attendees of a food litigation conference on Wednesday that companies can limit their potential liability in labeling lawsuits by considering possible claims during product development and carefully monitoring their flavor content.

Target Corp. in-house counsel Nancy Husnik said that companies should look to limit their liability from the first stages of a product's development. Before any labels are placed on the product, companies should consider its target consumer; the category it belongs to, such as health or wellness; and the ingredients and level of nutrients in the product, according to Husnik.

Retailers like Target should consider establishing a plant audit process for current good manufacturing practices, mandating product testing, and designating a person to monitor manufacturers' claims, so they can predict the trends that will be happening in two or three years, she said.

Companies should be particularly careful about claims related to flavor content, which have received more scrutiny in recent years, according to Husnik.

"I tell my clients, 'If you would have come to me three or four years ago, I would have told you it was fine,'" she said.

For instance, General Mills Inc. recently faced a lawsuit that claimed it falsely marketed Fruit Roll-Ups as strawberry-flavored when it was composed of pear concentrate and other ingredients, Husnik said. Kraft Foods Inc. **agreed to stop using** certain wholesomeness claims on snack packages in September in order to avoid the prospect of facing certified subclasses of consumers who purchased cookie and cracker products in a suit in California federal court over allegedly misleading labels.

Jan Simonsen of Carr Maloney PC told the attendees that companies should attack food labeling class actions by pushing plaintiffs to prove they actually suffered an injury.

"It's a very good challenge to the pleadings, because it's difficult to show an actual injury," she said.

Defendants have also found success securing the dismissal of suits by arguing that the Nutrition Labeling and Education Act of 1990 preempts the plaintiffs' allegations, according to Simonsen. In May, the Third Circuit looked to the NLEA in **dismissing a proposed class action** alleging Johnson & Johnson misrepresented the health benefits of its Benecol brand of butter and margarine substitutes on the products' labeling.

Simonsen also focused on ways that food companies can reduce the risk of a recall and litigation related to foodborne illnesses. Companies should maintain a reliable recordkeeping system, which will help them in the event of litigation, and have a team of employees — one from each department — who will

focus on a recall if necessary, she said. They should also consider running a mock recall to expose any flaws in their process, she said.

Faegre Baker Daniels LLP partner Sarah Brew, who moderated the panel, highlighted the importance of ensuring that a company's suppliers are not operating in unsanitary conditions through various contractual assurances. A company can hold a supplier to a product warranty, create a supplier expectations manual, and audit the supplier either itself or through a third party.

Companies should consider categorizing suppliers based on risk, so they scrutinize most heavily those suppliers most likely to cause a contamination issue.

--Additional reporting by Sean McLernon. Editing by Jeremy Barker.

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