

Managing Mounting Litigation Risk in the Food and Beverage Industry

by Deborah Glendinning, Sonia Bjorkquist & Craig Lockwood



Consumer awareness of issues relating to food and beverages has been heightened by public debates over health regulations, by documentaries, and by actual – and sometimes tragic – health scares.

Not surprisingly, consumer litigation against the food and beverage industry has similarly increased in recent years in North America. Such litigation has been directed at a number of different aspects of the manufacturing and marketing process. Accordingly, food and beverage companies should not only consider the extent to which each of these areas of potential liability arise in the context of their own products, but also how they can minimize the risk of litigation through sound management practices and well-considered marketing, business and legal strategies.



Osler comments

A recall is not just a recall

The very fact of a product recall is often a triggering event for subsequent consumer litigation, even when the recall may not be attributable to the conduct of the product manufacturer or distributor. Indeed, class proceedings are often commenced in the immediate wake of an announced product recall, well before issues of “fault” or even the existence of injury have been established.

Public health authorities require only reasonable grounds for a belief that a product is a threat to health or safety, and err on the side of safety when confronted with a health risk. A company facing a recall of one of its products will therefore typically have to deal with the direct costs of the recall itself, with the costs of follow-on litigation, and with a loss of brand confidence that is all but inevitable. Further, a company whose products have been recalled and have later been found to be uncontaminated has no recourse against the inspecting agency – a principle confirmed in the B.C. Court of Appeal’s 2013 decision in *Los Angeles Salad Co. v. Canadian Food Inspection Agency*.

Regulators are growing increasingly stringent in response to food safety failures that have put the public at risk, and the federal government’s Safe Food for Canadians Action Plan, being implemented over the next few years, will give greater powers to inspectors and will increase testing capacity. Food products companies would be wise to assume that the risk of recalls is only going to increase.

Selected Best Practices

- 1 Develop a distribution list**
Ensure your company’s products are able to be traced in the manufacturing process and identified in distribution channels.
- 2 Communicate effectively**
Consider utilizing a 1-800 number, a website, newspaper/magazines, and other media (including social media) to effectively communicate with customers and others to whom the recall must be directed.
- 3 Implement a recall response team**
Have a product recall “team” and response protocols in place in the event of a recall. The best defence is a good offence.

Minimize the risk of litigation through sound management practices and well-considered marketing, business and legal strategies.

Avoid health claims that may mislead

Claims about a product's positive effects on health are another common trigger for litigation. In May 2013, for example, the Canadian division of an international food manufacturer settled a class action in Québec for approximately C\$1.7 million, the case having been founded on an allegation that some of the company's products improperly advertised certain positive health effects of probiotics in the absence of a scientific consensus. The case was also an example of "copycat" litigation which parallels similar and more common actions in the U.S., a phenomenon that has become an increasing source of concern for food products companies despite Canada's distinct legal and regulatory landscape.

Though products sold in Canada must have their health claims pre-approved by the regulator, this does not prevent future litigation over the adequacy of information provided about a product, but increases the onus on companies to consider how they market their products and make accurate disclosure. This onus may become all the more burdensome as the Supreme Court's recent articulation of the consumer standard in *Richard v. Time* – namely that of a "credulous and inexperienced" consumer – plays out in the food products arena.

Selected Best Practices

- 1 Know your product**
Understand how it is made, and where its ingredients are sourced. Substantiate all health claims on labels or websites with research and reports before it hits the shelves.
- 2 Know your customer**
Consider how the average consumer might interpret your label, and confirm this through focus groups and other marketing research.
- 3 Integrate your teams**
Ensure your marketing department and your product development team are working with legal counsel at an early juncture to ensure that potentially false or misleading claims are headed off at the pass.

Failure to warn

The inverse of a misleading claim about health benefits is a failure to warn about a product's harmful effects. In the U.S., recent class actions of this type have targeted products such as energy drinks and fast food. In Canada, by contrast, energy drinks are regulated as "natural health products," and while this may explain why litigation in respect of such products has not been as prolific in this country, no amount of regulation offers immunity from litigation. Companies should anticipate that as consumer awareness of health risks grows, as U.S. cases establish additional points of comparison, and as the legal and regulatory framework becomes increasingly stringent, the risk of such litigation will only grow.

Selected Best Practices

- 1 Back up your warnings**
Document potential adverse health effects with research, which may be leveraged to establish a due diligence defence.
- 2 Consider your target market**
Where appropriate, avoid any perception of marketing to sensitive or vulnerable segments of the population (e.g. children).

Supply chains are no place to hide

The era of the family farm down the road is – for most people – long gone. Extended agricultural supply chains now link local retailers with distributors, growers, and feed producers, only some of which may be located in the same country as the consumer. Yet despite their complexity, the various members of these supply chains are increasingly exposed to a variety of consumer claims. Where suppliers are located outside of the jurisdiction of sale, the distributor of the product will often be the target of litigation. The fact that liability is “joint and several” means that entities at the end of the supply chain will be responsible for any consumer loss even where the source of the harm is attributable to one of its suppliers down the chain. Accordingly, it will be important to ensure that adequate contractual protections are in place so as to protect all rights of recovery and indemnity along the supply chain.

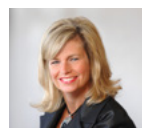
At the same time, suppliers who are not at the end of the supply chain should not assume that they are insulated from direct consumer actions. To the contrary, the Supreme Court recently affirmed that claims of anti-competitive behaviour (including price-fixing) can be lodged not just by direct purchasers one step along the chain, but also by end-users. (*See further commentary on this topic in this report’s Securities and Consumer Class Actions section.*) While this jurisprudence arose outside of the food products arena, at least one recent action has been launched in response to alleged price-fixing against manufacturers of high-fructose corn syrup (the Court ultimately denied class certification in this case for lack of evidence). Going forward, food and beverage companies will be well advised to design and manage their supply chains to minimize this risk.

It will be important to ensure that adequate contractual protections are in place so as to protect all rights of recovery and indemnity along the supply chain.

Selected Best Practices

- 1 **“KYS” (know your supplier)**
Develop a thorough understanding of the players along your supply chain – their jurisdiction, their assets, their processes, etc.
- 2 **Review and upgrade legal protections**
Consider the scope of supplier warranties and indemnities, and consider exclusion of liability clauses for consequential or indirect damages (e.g. lost profits).

For more information on the issues above and risk management strategies, please contact:



Deborah Glendinning
Chair, National Litigation Department
dglendinning@osler.com
416.862.4714



Sonia Bjorkquist
Partner, Litigation
sbjorkquist@osler.com
416.862.5876



Craig Lockwood
Partner, Litigation
clockwood@osler.com
416.862.5988