

Food & Beverage Group Of The Year: Patterson Belknap

By **Steven Trader**

Law360, New York (January 19, 2016, 9:08 PM ET) -- Last year was a sweet one for Patterson Belknap Webb & Tyler LLP, whose food and beverage litigation team landed a win for Hershey Co., first in a proposed antioxidant benefit mislabeling class action then again in an alleged chocolate price-fixing scheme, solidifying the group's place among Law360's Food and Beverage Groups of the Year.



At least three times in 2015, the firm went to bat for Hershey and came away with a favorable result, beginning in March when a Northern California federal judge ruled that consumers alleging the company misled them about antioxidants in its chocolate and cocoa products hadn't shown that the label was likely to deceive a reasonable shopper, tossing the suit.

Patterson Belknap partner Steve Zalesin credits a great deposition taken by Travis Tu that got many of the claims dismissed early in the April 2012 suit, when lead consumer Leon Khasin admitted he never actually relied upon many aspects of the label.

"You learn from these cases to come in the door very skeptical as it just doesn't seem logical that a normal person would've been deceived in the way that the plaintiffs in these highly technical [U.S. Food and Drug Administration] regulation cases allege," Tu said. "And if you hold by your guns and push them, sooner or later most people will try and save their own credibility by throwing their allegations overboard, and that was certainly true in this case."

The March dismissal has since been widely cited, and created something of a template for other companies to follow in trying to whittle down false labeling class actions, according to the partners.

A month earlier, Patterson Belknap had helmed a trademark infringement settlement between Hershey and Mars Inc., which accused its rival in Virginia federal court of using a deceptive ad campaign to mimic and edge out the Mars' Maltesers candy line with Hershey's similar product. Though the terms of the deal were undisclosed, both parties agreed to dismiss all claims and counterclaims.

Meanwhile, in September, the Third Circuit upheld a Pennsylvania federal judge's dismissal of class actions accusing Hershey, Nestle USA Inc. and Mars of conspiring to raise the price of chocolate, finding the consumers' evidence was too weak to prove any price-fixing conspiracy and instead pointed to the fact that Hershey acted alone.

Though Zalesin said he was involved in the case at only the very beginning before handing it off to partner William Cavanaugh Jr., Zalesin called it one of Hershey's most important legal challenges and a significant victory with important precedential repercussions.

"I'm basically the lawyer at Patterson most directly responsible for the relationship with Hershey, but my job in the antitrust instance was to make sure they had the very best lawyering they could have on the case and that was not me, it was Bill Cavanaugh," Zalesin said. "We collaborate and try and get the best outcome for the client on the most cost-effective terms possible. It's a very collegial and supportive kind of place."

More and more, those successful outcomes start with behind-the-scenes advising to clients on labeling risks, Zalesin said, noting that a conversation about how attractive a potential label might be for a consumer class action is almost inevitable now.

Currently, Patterson Belknap has its hand in several ongoing suits over false labels, most notably one brought by Pom Wonderful LLC against firm client Coca-Cola Co. back in 2008, claiming Coca-Cola was lying to consumers about the amount of pomegranate juice actually contained in a now-discontinued blend of Minute Maid drink.

After Pom challenged a Ninth Circuit dismissal, the U.S. Supreme Court in 2014 stepped in and said that a label expressly authorized by the FDA can be challenged by a competitor as false and in violation of the Lanham Act. Trial in the suit is set to begin this March.

Though the dynamics of the case have changed in the almost five years it has been dormant, Zalesin said that at its core, Coca-Cola's defense hasn't changed: Its label isn't misleading and Pom has not been injured by it.

What's more, the firm was able to end at least one proposed Florida consumer class action against Coca-Cola over its Minute Maid juice, which mirrored Pom's allegations and often happens when competitors sue each other, but in this instance involved allegations Coca-Cola violated state consumer protection laws that were preempted by the Food Drug and Cosmetics Act, Zalesin said.

"There were some attempts early on to kind of stretch the Supreme Court's decision beyond its true meaning," Zalesin said. "But we've been successful in the aftermath of that decision in reminding federal judges that preemption of state-law claims is alive and well."

--Additional reporting by Y. Peter Kang and Brandon Lowrey. Editing by Edrienne Su.
