



LEGISLATION, REGULATIONS & STANDARDS

Beauty-Product Chemical Exposure Has Disparate Effect on Women of Color, Researchers Argue

The use of beauty products is “an understudied source of environmental chemical exposures” with a disparate effect on women of color, George Washington University and Occidental College researchers argue. Ami R. Zota, et al., “[The environmental injustice of beauty: framing chemical exposures from beauty products as a health disparities concern](#),” *American Journal of Obstetrics & Gynecology*, July 2017. The article focuses on three categories of products in particular: (i) skin-lightening creams; (ii) hair relaxers and straighteners; and (iii) feminine hygiene products. The researchers assert that materials used in some personal care products, such as formaldehyde, phthalates, parabens, lead, mercury, triclosan and benzophenone, have been linked to “endocrine disruption, cancer, reproductive harm, and impaired neurodevelopment in children.” The article argues that women of color tend to spend much more than the national average on skin care products, resulting in higher possibilities of toxic exposure.

ERSP Recommends Modifications to Some Plexaderm Ads, Approves Others

The Electronic Retailing Self-Regulation Program (ERSP) has [ruled](#) that True Earth Health Products should discontinue some claims but can continue to assert that its product Plexaderm can

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[Laurie Henry](#)
816.559.2421
lhenry@shb.com

reduce eye puffiness, fine lines and wrinkles and minimize pores around the eyes. True Earth Health told ERSP that the challenged claims—that Plexaderm “smooths fine lines and firms skin, redefines facial contours, improves skin density, refines skin texture for face and neck lines and minimizes pores”—had already been discontinued. In addition, ERSP recommended the marketer discontinue “limited time offer” advertising for Plexaderm because one half-price offer was available for ten consecutive months.



Jennise Stubbs

713.227.8008

jstubbs@shb.com

NAD Refers Super Flora Probiotic Claims to FTC

The National Advertising Division (NAD) has referred advertising claims made by FemaLife Nutrition to the Federal Trade Commission (FTC) after the company failed to respond to requests for substantiation. Advocacy group Council for Responsible Nutrition challenged claims that FemaLife’s Super Flora Probiotic dietary supplement boosted immune systems, ended sugar cravings, regulated appetite, helped grow “longer, stronger nails, healthier, fuller, shinier hair,” and restored a “glowing, youthful blemish-free radiance” to skin.

FDA Warns Skincare Companies of Alleged Misbranding Violations

The U.S. Food and Drug Administration (FDA) has warned Moon Valley Natural Products that its website claims for Muscle Rub, Rejuvenating Rub, PsoriaSoothe, Herbal Heal and Peppermint Foot Rub establish the products as new drugs under the Federal Food, Drug and Cosmetic Act (FDCA) and are misbranded. FDA sent a similar notification to Skin 2 Spirit, warning the company that its website advertises its skincare products as new drugs in violation of the FDCA.

GLOBAL

ASA Rules Body Lotion Ads Made Medical Treatment Claims

The U.K. Advertising Standards Authority (ASA) has ruled that two Colgate-Palmolive body-lotion advertisements breached codes prohibiting medical claims for unlicensed products. The ads featured claims that Sanex Advanced AtopiCare Body Lotion was

ABOUT SHOOK

Shook, Hardy & Bacon attorneys counsel consumer product manufacturers on FDA, USDA and FTC regulatory compliance and risk management issues, ranging from recalls and antitrust matters to facility inspections, labeling, marketing, advertising, and consumer safety. We help these industries develop early legal risk assessments to evaluate potential liability and develop appropriate policies and responses to threats of litigation or product disparagement.

The firm’s lawyers also counsel manufacturers on labeling audits and a full range of legal matters such as U.S. and foreign patent procurement; licensing and technology transfer; venture capital and private financing arrangements; joint venture agreements; patent portfolio management; research and development; risk assessment and management; records and information management issues and regulations; and employment matters, including confidentiality and non-compete agreements.



developed to treat “atopic skin,” described as “red, very dry or itchy” or “reactive or irritated.” ASA referred to the European Commission’s cosmetic regulation manual, noting that references to treatment of itching can define products as medicinal. Although Colgate claimed the Sanex product was only a moisturizer, ASA found, “the emphasis of the ad was not on the moisturising action of the products” but rather the relief of symptoms. The ads also claimed that “atopic skin is a common skin condition” and the products had been “Developed with Dermatologists” with clinically proven results. Accordingly, ASA said consumers were likely to conclude the advertising made medicinal claims for the lotion.

Wales to Ban Microbeads in Cosmetics and Personal Care Products

The Welsh government has reportedly announced it will ban the use of plastic microbeads in cosmetics and personal care products following a decision by the United Kingdom to ban them in England beginning in 2018. A twelve-week consultation on the ban began October 15, 2017, and proposes a commencement date of June 30, 2018.

Wales met with England, Scotland and Northern Ireland in a joint consultation about how to implement the ban. Although Scotland and Northern Ireland also reportedly say they are committed to banning the material, neither has introduced legislation on the issue.

LITIGATION

FTC, Maine Settle Charges Against Supplement Marketers

The Federal Trade Commission (FTC) and Maine announced they will settle charges against three defendants that allegedly used deceptively formatted infomercials and print ads with fictitious endorsers to market dietary supplements. *FTC v. XXL Impressions LLC*, No. 17-0067 (D. Me., stipulated final judgment entered August 23, 2017). The orders bar advertising agency Synergixx, LLC, its principal Charlie Fusco and naturopathic physician Ronald Jahner from engaging in numerous marketing practices, including making false or unsubstantiated health claims, misrepresenting the existence or results of product studies, and failing to disclose material connections between sellers and endorsers. The order against Synergixx and Fusco

included a \$6.5 million monetary judgment that the court suspended because of the defendants' inability to pay.

Court Dismisses RICO Action Against Supplement Maker

A California federal court has dismissed Racketeer Influenced and Corrupt Organizations Act (RICO) allegations against a supplement maker but allowed a false advertising claim to proceed. *Nutrition Distrib. LLC v. PEP Research LLC*, No. 16-2328 (S.D. Cal., entered September 7, 2017). The complaint alleged that PEP Research, maker of selective androgen receptors that provide effects similar to steroids, sildenafil and tadalafil, engaged in racketeering by introducing misbranded drugs into interstate commerce. The court found the plaintiff failed to allege sufficient facts to identify "two or more instances" that would show the "pattern of racketeering activity" required to establish the elements of a civil RICO claim. The court allowed a Lanham Act false advertising claim to proceed, finding the complaint alleged enough facts to support a material deception of consumers that would give rise to a competitive injury.

St. John's Wort Suit Denied Nationwide Class

A federal court has denied certification and dismissed a breach of warranty claim in a lawsuit alleging that Nature's Bounty, Inc.'s St. John's Wort supplement contained less of the active ingredient than the packaging indicated. *Muir v. Nature's Bounty, Inc.*, No. 15-9835 (N.D. Ill., entered September 28, 2017). The plaintiff alleged that the bottle contained 0.578 milligrams of hypericin per serving rather than the label's advertised 0.9 milligrams, which is apparently the "lowest amount shown in studies to confer the benefits of St. John's Wort."

The court rejected the plaintiff's bid for a nationwide class because Nature's Bounty was able to identify "significant differences in the unjust enrichment law" in Ohio and New Jersey. Because "unjust enrichment doctrine is particularly complex," the court refused to certify the class. The court also denied multistate class certification, noting that standing "must be addressed before certification where the standing of the named plaintiff to assert the claims of the class is in question." Because the plaintiff never lived in other states and never purchased the product outside of Illinois, he lacked standing for certification.

Supplement Maker Sentenced for Illegal Imports

The U.S. Department of Justice (DOJ) has announced that dietary-supplement maker Young Living Essential Oils (YLEO) has pleaded guilty to federal misdemeanor charges that the company illegally trafficked in rosewood and spikenard oils in violation of the Lacey Act and the Endangered Species Act. The company's plea agreement includes a \$500,000 fine, \$135,000 in restitution and \$125,000 for conservation efforts related to protected plant species used in essential oils. The company must also complete five years of probation, which will include implementation of a corporate compliance plan and audits.

YLEO voluntarily notified DOJ and other agencies of the violations after hiring outside counsel to conduct an internal investigation into harvesting and shipping plants from South America. The investigation reportedly found that YLEO employees and contractors harvested, transported and distilled rosewood in Peru and imported the oil into the United States through Ecuador in violation of Peruvian law. It also found that YLEO bought more than 500 pounds of rosewood oil from another importer without conducting due diligence as to its source. In addition, YLEO discovered that spikenard oil produced in Nepal was exported to the United Kingdom without the required permits.

Plaintiff Challenges Peter Thomas Roth, Clean Reserve Packaging Sizes

A consumer has filed two similar putative class actions alleging Peter Thomas Roth Labs and Fusion Brands deceptively package their products in boxes that make the product's containers appear larger than their actual sizes. *Gonzales v. Peter Thomas Roth Labs, LLC*, No. 17-1393 (C.D. Cal., filed August 14, 2017); *Gonzales v. Fusion Brands America, Inc.*, No. 17-1598 (C.D. Cal., filed September 14, 2017).

The plaintiff alleges that Peter Thomas Roth Labs' Rose Stem Cell Bio-Repair Precious Cream is sold in a package with a false top and bottom, hiding that the actual product container was a "small fraction" of the box size. Similarly, he argues in his complaint against Fusion Brands Inc. that its Clean Reserve fragrance products are packaged with a false top and bottom.

Alleging violations of California’s Fair Packaging and Labeling Act, which prohibits containers with “false bottom, false sidewalls, false lid or covering,” as well as other state consumer-protection laws, the plaintiff seeks class certification, damages, injunctive relief and attorney’s fees in both lawsuits.

Plaintiffs Challenge “Pure” or “Natural” Deodorant Claims

Hain Celestial Group faces a putative class action alleging that “natural” labeling on its Jason deodorant sticks is false, misleading and deceptive because the products contain synthetic ingredients, including tocopheryl acetate, glycerin and ethylhexylglycerin. *Pecanha v. Hain Celestial Grp.*, No. 17-4517 (N.D. Cal., filed August 8, 2017). The plaintiffs assert that they paid a premium for the products because of their “natural” and “pure natural” labeling and that they would not have purchased the product if they had known about the synthetic ingredients. Further, they argue, another cosmetic manufacturer agreed to stop marketing products containing ethylhexylglycerin as “natural” after receiving a warning letter from the Federal Trade Commission. Claiming violations of state consumer-protection laws, breach of warranty, unjust enrichment and fraud, the plaintiffs seek class certification, damages, restitution, injunctive relief and attorney’s fees.

Plaintiff Alleges Deception by “Repairing” Hair Care Claims

A plaintiff has filed a putative class action alleging that the advertising and labeling for Juice Organics' Repairing Shampoo, Conditioner and other hair care products deceive consumers because hair is made of “inorganic, dead” keratin, which cannot be repaired once damaged. *Rodriguez v. Juice Beauty, Inc.*, No. 17-5187 (E.D.N.Y., filed September 1, 2017). The plaintiff asserts that she would not have purchased Juice Beauty products had she known hair could not be repaired and that a “reasonable consumer” would rely on the company’s claims. Claiming violations of New York consumer-protection law, deceptive and unfair trade practices, false advertising and common law fraud, the plaintiff seeks class certification, restitution, disgorgement, declaratory relief and attorney’s fees.

Tatcha Alleges Too Faced Infringed Lipstick Trade Dress

Tatcha has alleged that Estee Lauder Co.'s Too Faced Cosmetics' lipstick packaging has "extensive similarities" to Tatcha's lipsticks. *Tatcha v. Too Faced Cosmetics*, No. 17-4472 (N.D. Cal., filed August 7, 2017). Tatcha's trade-dress complaint points to "extensive similarities" in the vertical display of the brand name on the lipstick tube, molded medallions at the base and on the cap, and a semi-circular cutout at the bottom of the cap that aligns the brand name with the medallion. Tatcha cites Instagram posts expressing confusion between the two, including one post concluding that Too Faced's lipstick "has the exact same packaging" as Tatcha's lipsticks. Alleging trade-dress infringement, false designation of origin and unfair competition, Tatcha seeks injunctive relief, including destruction of infringing product and advertising materials, disgorgement of profits, damages, restitution, corrective advertising, royalties and attorney's fees.

Younique Fiber Lashes Not "Natural," Plaintiff Claims

A consumer has filed a putative class action alleging Coty, Inc. and Younique advertise a fiber-based mascara product as containing "100% Natural Green Tea Fibers" despite containing nylon. *Schmitt v. Younique, LLC*, No. 17-1397 (C.D. Cal., filed August 14, 2017). The complaint asserts that Younique Moodstruck 3D includes a gel product and a fiber product, which the label describes as green tea fibers. The plaintiff asserts that she would not have purchased the product had she known it contained nylon. Claiming violations of the Magnuson-Moss Warranty Act and California's Consumer Legal Remedies Act as well as unfair competition and breach of warranties, the plaintiff seeks class certification, damages and attorney's fees.

Social Media Personality Breached Skin Care Campaign Contract, Lawsuit Alleges

Studio 71, a digital network that pairs content creators with brands, has filed a lawsuit against YouTube vlogger Bethany Mota and her father for breach of contract and fraud, alleging that Mota failed to deliver social media materials to a group that hired her to promote a line of skin care products. *Studio 71 v. Mota*, No. BC672871 (Cal. Super. Ct., Los Angeles Cty., filed August 18,

2017). Studio 71 asserts that it hired Mota for \$325,000 to provide videos for YouTube and Facebook along with posts for Twitter, Instagram and Snapchat that were to be used in an advertising campaign for a skin care company. The company allegedly paid for Mota and her father to fly to Kauai to film the content, but they “did not provide the video and stubbornly refused to commit to a timetable for its production.” Studio 71 asserts that it received a single video from Mota that “did not contain any of the agreed upon creative components” and that the defendants have since “refused to make any of the changes required by the advertiser, and failed to produce [the materials].” Claiming breach of contract, breach of covenant for good faith and fair dealing, fraud, negligent misrepresentation, intentional interference with contract and negligent interference with prospective economic relations, the plaintiff seeks declaratory relief, damages and attorney’s fees.

Putative Class Action Challenges “Natural” Labeling on

A consumer has filed a putative class action alleging that Credo Beauty’s skin care products contain hazardous synthetic ingredients despite being advertised as “100% natural,” “eco-friendly, cruelty free and organic.” *Cohen v. Eco-Chic LLC*, No. 17-5146 (N.D. Cal., filed September 5, 2017). The plaintiff asserts that she purchased shampoo and lipstick from Credo, relying on its representations that the products were “natural,” but found that the shampoo contained coco betaine and the lipstick contained octyldodecyl stearyl stearate, castor isostearate succinate, glyceryl di-hydroxystearate and glyceryl diisostearate. She also argues that after she notified Credo of her allegations, the company changed its website to say that all products were either natural or “made with a combination of safe/non-toxic synthetic ingredients *combined* with plants.” Claiming violations of California’s Consumer Legal Remedies Act, breach of express warranty, false advertising, unfair competition and the New Jersey Fraud Act, the plaintiff seeks class certification, damages, injunctive relief and attorney’s fees.

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