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Clean Beauty, The New ‘Natural,’ Carries Same Litigation Risk – Attorneys

by Eileen Francis

Beauty and personal-care companies using ‘clean’ labeling and advertising should clearly define the term and ensure consistency across marketing messages, attorneys said at the BBB National Program Inc.’s 18 July webinar, ‘Getting Clean Beauty Advertising Right.’

“Clean” claims, considered the “new natural” in cosmetic product labeling and advertising, should be avoided unless a company can provide a clear definition and keep it consistent across marketing, says Ronie Schmelz, partner in the Los Angeles office of K&L Gates, LLP.

“Avoid general ‘clean’ claims. If you’re making them, just define what you mean. If it’s fewer ingredients, say that. If it’s that you’re not going to include ingredients from the Environmental Working Group’s unacceptable list, you can say that. So just be sure to explain what you mean,” said Schmelz in the BBB National Program Inc.’s 18 July webinar, “Getting Clean Beauty Advertising Right.”

The attorney said nebulous claims are an invitation for the plaintiffs’ bar to impose an alleged consumer interpretation.

“There’s nothing like a vacuum like this that the consumer lawyers love to drive into and say, ‘Well, there’s no regulatory definition, so let us consumer lawyers tell you what consumers think it means,’” Schmelz said. “It can be very expensive if we use marketing terms in a way that leaves it open to the consumer lawyers.”

Sephora "had all of the language out there about how they were going to define clean, and what they were going to say to their consumers about 'this is what clean means to us.' Even they face litigation." – Emilia McKee

“Clean” has largely replaced “natural” in beauty advertising as an appeal to supposedly more discriminating, health-conscious consumers. Natural representations were used extensively on cosmetic product packaging before they became fodder for lawsuits over the past two decades, resulting in numerous settlements. (Also see ["I&J Agrees To \\$6.75M Aveeno Active Naturals Class Settlement"](#) - HBW Insight, 30 May, 2017.) “I’ve been saying for years now that clean is the new natural,” Schmelz said.

“Natural is an undefined term, there’s no regulatory definition, try as industry has to get the FDA to focus on this,” she said. “If you use the term in itself, [it] is basically communicating that the product is all-natural, or 100% natural, contains no synthetic ingredients.” (Also see ["Are 'Natural' Claims Equivalent To 'All Natural'? Tarte's \\$1.7m Settlement Offers Little Instruction"](#) - HBW Insight, 5 Nov, 2019.)

While plaintiffs overwhelmingly have come to support that interpretation, federal courts have differed on that point, as has the Federal Trade Commission. In 2016, the FTC took action against four companies for falsely and misleadingly representing products as “all natural” or “100% natural,” but declined to embrace the notion that consumers read unqualified “natural” claims as equivalent to absolute natural claims. (Also see ["FTC Finalizes 'All-Natural' Personal-Care Settlements, Offers A Word On 'Natural'"](#) - HBW Insight, 13 Jul, 2016.)

BBB National Programs’ National Advertising Division has taken the position that, at minimum, active ingredients in products carrying natural claims must be natural and not synthetic. (Also see ["Tom's 'Naturally Dry' Claims Survived Class Action, Only To Perish At NAD"](#) - HBW Insight, 30 Mar, 2017.)

Procter & Gamble Co. recently succeeded in dismissing a class action complaint in California’s Northern District over a “Nature Fusion” claim on Pantene Pro-V products. The consumer plaintiff alleged the Nature Fusion labeling misrepresents the products as completely natural or predominantly made of natural ingredients, which they are not, he said.

The California federal court sided with P&G, and on appeal the Ninth Circuit affirmed, determining the Pantene Pro-V “Nature Fusion” claim to be ambiguous, rather than deceptive,

and sufficiently clarified by information on the products' back label. (Also see "[US Ninth Circuit Affirms: P&G's Pantene 'Nature Fusion' Claim Passes Reasonable Consumer Test](#)" - HBW Insight, 20 Jun, 2023.)

But other companies have not fared as well in the courts, and even success can come at a significant cost. Schmelz says if clean claims follow the path of natural, even disclosures on ingredients present and carefully articulated definitions may not be enough to shield against expensive settlements.

"There's been an evolution as to whether or not [it's] okay if we just take off 'naturals' alone" – eg, from brand or product line names – "or if we just explain more on our website ... Well, it hasn't worked in the natural spaces, those cases continue to get filed. And we unfortunately [may] see that these are not working in the clean space either."

Industry Awaits 'Clean At Sephora' Outcome

For now, all eyes are watching a putative class action against Sephora USA Inc. in the US District Court for the Northern District of New York, which targets the retailer's "Clean at Sephora" designation for products sold in its stores.

Sephora, which moved to dismiss the case in February, defines Clean at Sephora on its site as "the beauty you want, minus the ingredients you might not" and lists ingredients that featured clean offerings avoid, such as parabens, sulfates, mineral oils, SLS, formaldehyde and phthalates. (Also see "[Sephora Asks NY Federal Court To Toss Out 'Clean at Sephora' False Advertising Suit](#)" - HBW Insight, 9 Feb, 2023.)

According to plaintiff Lindsey Finster, however, consumers understand clean to mean "made without synthetic chemicals and ingredients that could harm the body, skin, or environment."

Sephora maintains it is "a model of transparency" that informs consumers "in plain terms exactly what they are and are not buying." (Also see "[Sephora Well-Positioned To Defend 'Clean Beauty' Case, Attorney Says](#)" - HBW Insight, 12 Feb, 2023.)

Emilia McKee, partner in the Philadelphia office of law firm Ballard Spahr, sees the case as a red flag. "Even Sephora, [they] had all of the language out there about how they were going to define clean, and what they were going to say to their consumers about 'this is what clean means to us.' Even they face litigation," she said.

Companies that want to claim 'clean' first should "figure out how you're going to decide what 'clean' means to you as a new market participant and how you're going to articulate that to consumers," said McKee. "But part of that is also making sure that everybody in the brand is on the same page, so that all of your materials are on the same page." Further, "if you're using

influencers, are they all making the same message? So that it's coherent and cohesive and that you're not making a misleading message out there?"

Schmelz reminded companies to be mindful of other copy and images used in advertising as well. "You look at the context. Courts are looking at the context, consumers are looking at the context," she said.

She agreed that companies need to be vigilant about ensuring all parts of the company are coordinated and speaking the same language when it comes to clean communications. "The biggest pressure points that I see are between – [not] that this is news to anybody – the marketing group and the regulatory group. And the marketing group going off on their own and coming up with their wish list of everything they want to say and starting to develop all this wonderful packaging and branding and everything behind it, only to then go up to the regulatory group which puts a stamp on it and sends it back to day one."

Schmelz advised companies to keep records supporting their claims, including clean assertions. They already will be required to have producible safety substantiation data under the new requirements of the Modernization of Cosmetics Act, she noted. (Also see "[FDA Will Be Motivated To Bring Enforcement Action Under MoCRA; 'Get Your Ducks In a Row'](#)" - HBW Insight, 6 Jun, 2023.)

"When my clients have substantiation, whether it's a consumer service that they've done, or the ingredient support, or whatever the case may be, when I have the data, that substantiation, that's when I'm able to push back against the consumer lawyer. Because if we know one thing about the consumer lawyer, they're not in this to lose money, so if they think they're going to get resistance, and if they think it's going to cost them a lot of money to litigate, they're going to back off," she said.

McKee acknowledged that temptation to slap a "clean" statement on a beauty product label or ad is growing. The global clean beauty market, valued at \$7.2Bn in 2022, is anticipated to grow to \$14.3bn by 2028, she said, quoting an estimate by Dublin-based ResearchandMarkets.