

Food & Beverage Group Of The Year: Gibson Dunn

By Allison Grande

Law360, New York (January 14, 2016, 12:42 PM ET) -- Gibson Dunn attorneys wrapped up a range of matters for some of the industry's top players in 2015, including the disposal of personal injury claims against Pepsi, the defeat of a controversial ban on polystyrene foam containers in New York City and the sale of Heineken's Mexican packaging business, earning them a place among Law360's Food & Beverage Groups of the Year.



The dozens of Gibson Dunn attorneys who step to the plate for clients in the food and beverage industry have for years been drawing from their expertise in class action, antitrust, employment, capital markets and other substantive areas of the law in order to handle the diverse and complex issues that face their clients.

"While our group pulls from different capabilities, the lawyers in the group typically have a pretty meaningful and deep relationship with clients in this particular industry sector," class actions practice group co-chair Andrew Tulumello told Law360.

The depth and experience have served the firm well as the food and beverage industry has grown in prominence and visibility during the past two decades, a transformation that is in large part due to the rise of social media and other technological advancements that have increased companies' public exposure and the spread of bad press, according to Tulumello.

"Part of our strength is recognizing that for companies in this space, their business and their problems move very fast, and that we can best serve them by being responsive, being on top of their business and bringing in our unique substantive law experience," he said.

The group showcased their skills in a range of matters in 2015, including the defense of PepsiCo Inc. in a wave of false labeling class actions filed in California federal court.

Plaintiffs began suing Pepsi after Consumer Reports published an article in early 2014 that claimed that the caramel color added to many soft drinks, including some Pepsi products, contained a potentially carcinogenic chemical called 4-methylimidazole, or 4-Mel, in excess of levels permitted by California's Proposition 65.

By January 2015, nine putative class actions had been filed contending Pepsi had failed to warn consumers about the inclusion of the chemical. While eight were consolidated, one was severed to allow the plaintiffs a chance to plead personal injury medical monitoring claims.

In March, the Gibson team scored a dismissal with prejudice of the proposed medical monitoring class action, with U.S. District Judge Edward M. Chen finding that the plaintiffs lacked standing and that their allegations, which relied heavily on studies conducted on lab mice and rats, weren't backed by facts sufficient to show that 4-Mel causes cancer in humans.

"The ruling put the scientific evidence on the outlandish claims front and center, and we were really pleased with the result," class actions practice co-chair Christopher Chorba said. "We've had a lot of success knocking claims out at the pleading stage, which separates us in this space and eliminates a lot of uncertainties for clients."

Across the country, a Gibson Dunn team led by partner Randy Mastro secured another significant victory for the industry in September, when it prevailed in a Rule 78 action challenging New York City's ban on polystyrene foam food service articles.

Representing a broad coalition of petitioners — including the Restaurant Action Alliance NYC, Dart Corp., Reynolds Consumer Products LLC and 11 individual, NYC-based restaurant owners — Mastro and his team argued that the determination by the Department of Sanitation commissioner that plastic foam cannot be recycled in an environmentally efficient and economically feasible manner was arbitrary and capricious.

"Typically, when parties go into court and try to challenge a New York City regulation as arbitrary and capricious, they file a three-sentence submission," Tulumello said. "We filed a 100-page complaint with dozens of declarations and affidavits."

The strategy paid off, with the New York State Supreme Court ruling that the commissioner had ignored multiple key pieces of evidence on the recyclability of the foam and the emergence of a growing and hungry market for both dirty and clean food containers.

"The case was significant because once one city gets a ban like this in place, the risk of copycat regulation rises, so it's really important to win these kinds of cases to prevent follow-on regulation from all over the country," Tulumello said.

Gibson Dunn's antitrust experience also proved valuable in 2015 to clients such as Cal-Maine Foods Inc., which turned to the firm when it was hit with a series of putative class actions brought by direct and indirect purchasers alleging that egg producers nationwide had participated in a decade-long conspiracy to raise the prices of eggs.

In September, the Gibson Dunn team helped to significantly reduce Cal-Maine's liability with respect to claims levied by the indirect purchasers by securing a ruling that denied certification to the proposed class of all consumers from 21 states who were seeking damages dating back to October 2006.

U.S. District Court Judge Gene E.K. Pratter of the Eastern District of Pennsylvania ruled that the plaintiffs hadn't sufficiently shown they were all overcharged for eggs or bought eggs that came from the alleged conspirators and not other producers. The ruling struck down the proposed state law damages classes, although the judge did allow the plaintiffs to revise and renew their motion to certify a class seeking only injunctive relief, a request that is currently pending.

"A lot of the reasons used by the judge to deny certification to the state damages classes, including the problems with ascertaining who exactly might be in a class and if the retailer had passed on the alleged price increase to consumers, should serve to benefit litigants in other food and beverage class actions," antitrust litigation partner Brian Robison said.

Outside of the litigation context, the Gibson Dunn team has also sunk their teeth into several high-profile transactional matters during the past year, including Heineken NV's sale of its Mexican packaging business Empaque to Crown Holdings Inc. for \$1.23 billion, a deal which closed in February.

The firm also assisted Jack in the Box Inc., which operates both the popular burger chain as well as Qdoba Mexican Grill, with its amended and upsized \$1.2 billion senior-secured term and revolving credit facility in July and represented Piper Jaffray as underwriter in both the \$90 million initial public offering of Habit Restaurants Inc. in November 2014 and a \$155 million follow-on offering of common stock in April.

"The food and beverage industry, especially with respect to restaurants, was very hot in 2015," corporate partner Michael Flynn said. "Our role is to know what's going on in the industry and be able to understand the risks and be involved in the flow."

--Editing by Katherine Rautenberg.
