

Food & Beverage MVP: Greenberg's Rick L. Shackelford

By **Abraham Moussako**

Law360, New York (December 21, 2016, 2:56 PM EST) -- Greenberg Traurig LLP class action litigation co-chair Rick Shackelford's efforts this year in beating back suits accusing Tito's Handmade Vodka and Welch Foods of deceptive labeling were among efforts that helped him earn a spot as one of Law360's Food & Beverage MVPs for 2016.

Los Angeles-based Shackelford, who has been at Greenberg Traurig since 2009, said work for food and beverage companies made up two-thirds of his defense practice. His work in the area contributed to landing Greenberg Traurig's food and beverage team among Law360's 2015 Practice Groups of the Year.

Shackelford traces the growth of litigation in his practice to a 2008 California Supreme Court decision on farm-raised salmon that found that consumer claims could be made under the state consumer law without falling under the federal law. The consumers had claimed that they were deceived because a salmon label didn't disclose the use of artificial colorings.

"It opened the door to these claims ... [by giving] the instruction manual, if you will, for how to plead around preemption issues," Shackelford told Law360.

As more and more of those cases began to be filed, he developed a body of work in the litigation area of food and beverage labeling, which just a few years ago had primarily been about regulatory law.

One of the cases he worked on in the past year was with Fifth Generation Inc. The maker of Tito's Handmade Vodka was facing a number of class actions accusing the company of falsely portraying the distilling process of the vodka as "handmade," even though the process by which the drinks are actually distilled is mechanized. They were part of a trend of such suits facing other alcohol makers challenging similar claims about the beverages' production process.

Shackelford's team at Greenberg Traurig defended these cases by taking advantage of the main respect in which alcoholic beverage class actions are distinct from other consumer labeling actions.



“Unlike food cases, [with alcohol] you have overlapping state and federal regulations on the labels and advertising by virtue of the constitutional amendment repealing Prohibition,” Shackelford said. “They’re different in some ways compared with food cases where you’re dealing with a uniform federal statute.”

The firm argued against some of these class actions by using the overlap of federal jurisdiction, specifically the process by which the Alcohol and Tobacco Tax and Trade Bureau approves labels for sale, to appeal to the “safe harbor” provisions of the state consumer laws.

“In our view, once we had obtained federal approval for what was said on the label ... [that] gave us a safe harbor against claims under state law,” Shackelford said.

This strategy led to a dismissals of part or all of the lawsuits against Fifth Generation in Illinois, Ohio and Florida, among others. A California judge interpreted the provision differently and did not initially dismiss a suit there on those grounds.

Shackelford said he was drawn to litigation through his work at a law firm on a Massachusetts Superfund dispute between college and law school.

“[I] enjoyed the process of developing the discovery record, so that you knew what your facts were that you were dealing with, the various legal theories, the thrust and parry, if you will, that litigation involves,” Shackelford said.

Shackelford’s work on more conventional food and beverage cases included his representation of Welch Foods, which was sued in two actions by consumers alleging labels calling its jam and juices “all natural” were misleading, and his work with Ocean Spray, which faced similar labeling claims.

In each of those cases, Shackelford’s team used a strategy of asking the judge to move decisions on potentially dispositive issues earlier in the court calendar. In one of the Welch Foods actions, the firm used this strategy to argue that the claims as to heart health underlying the class action were actually best decided on the regulatory end.

The judge agreed that this was within the FDA’s primary jurisdiction, and the case was dismissed. The other of the Welch’s cases was stayed pending the resolution of an appeals court ruling, and more recently was denied class certification.

In the Ocean Spray case, the juice maker was sued by a consumer who claimed that a “100% juice” and a “no sugar added” label required disclaimers that noted the lack of added sugar did not necessarily mean a low calorie count. The action, which consisted of what Shackelford characterized as a “grab bag” of legal theories, was denied class certification.

Shackelford’s advice to attorneys in this area is to remember the individuality of each case.

“Take the long view. Each case is it’s own unique factual and legal environment, and so don’t assume what worked before is going to work again,” he said. “Each client, each product, each case, each judge, they all deserve that kind of individualized treatment and assessment.”

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