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The 'Natural' Cases: An Update after FDA's Request for Comments

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In November 2015, FDA announced it was seeking comments regarding the use of the term "natural" in food labeling. The announcement was significant because FDA had previously declined to engage in rulemaking to establish a formal definition of the term "natural," even after federal courts requested clarification. FDA is accepting comments through May 10, 2016.

FDA reiterated it has a longstanding informal policy that the term "natural" on a food label means the food contains nothing artificial or synthetic (including all color additives regardless of source) that would not normally be expected to be in that food (58 Fed. Reg. 2302, 2407 [Jan. 6, 1993]). However, FDA acknowledged its informal policy: (a) was not intended to address food production methods (e.g., the use of pesticides); (b) does not explicitly address food processing or manufacturing methods (e.g., thermal technologies, pasteurization or irradiation); and (c) does not incorporate considerations as to whether the term "natural" should describe any nutritional or health benefit.

Potential Impact on Future Consumer Fraud 'Natural' Litigation

FDA's announcement may impact future consumer fraud litigation, particularly with respect to the primary jurisdiction doctrine. The primary jurisdiction doctrine is a prudential doctrine under which courts may stay or dismiss litigation if the initial decision-making responsibility should be performed by an administrative agency, such as FDA.

Before FDA's announcement, many courts refused to apply the primary jurisdiction doctrine to "natural" cases, reasoning that FDA had already declined to define the term. (See, e.g., Randolph v. J.M. Smucker Co., No. 13-80581-CIV, 2014 WL 1018007, at *6 [S.D. Fla. Mar. 14, 2014].)

After FDA's announcement, however, defendants may be more successful with primary jurisdiction arguments. Indeed, a similar situation occurred with cases challenging "evaporated cane juice" labeling. In March 2014, FDA announced it was re-opening the comment period for its draft guidance relating to the use of "evaporated cane juice" to describe sweeteners. Within months, several cases challenging such claims were stayed or dismissed on primary jurisdiction grounds. (See Morgan v. Wallaby Yogurt Co. Inc., No. 13-cv-00296, [D.E. 72] [N.D. Cal. Nov. 5, 2014]; Saubers v. Kashi Co., 13-cv-00899, [D.E. 52] [S.D. Cal. Aug. 11, 2014] [collecting cases].)

Moreover, the Ninth Circuit indicated district courts have considerable discretion when applying the primary jurisdiction doctrine in "natural" cases. (See Astiana v. Hain Celestial Group Inc., 783 F. 3d. 753, 761 [9th Cir. 2015] [district court did not err in applying primary jurisdiction doctrine because "[w]hile the FDA had shown some reticence to define 'natural,' [the district judge] was not alone in thinking that new guidance would be forthcoming"].)

Perhaps in an attempt to test the waters, at least three new "natural" cases have been filed since FDA's announcement. (See Tsvettsikh v. Goya Foods Inc., No. 15-cv-06556 [E.D.N.Y. Nov. 16, 2015]; Minker v. Ricola USA Inc., No. 15-cv-09014 [S.D.N.Y. Nov. 17, 2015]; and Tjokronolo v. Monster Beverages Corp., No. 15-cv-6482 [E.D.N.Y. Nov. 12, 2015].) These cases may be the first test cases regarding the effect of FDA's "natural" rulemaking activity on consumer class action litigation, including the applicability of the primary jurisdiction doctrine.

Status of Pending "Natural" Cases

FDA's announcement did not, however, spur a flurry of primary jurisdiction motions in pending litigation, perhaps due to the timing of the announcement. Many of the "natural" cases have already been resolved, and at least six cases have already been stayed pending the Ninth Circuit's resolution of Rule 23 class certification issues in the Brazil v. Dole Food Company Inc., Jones v. Conagra Foods Inc., and Kosta v. Del Monte Foods Inc. cases. (See, e.g., Park v. Welch Foods, No. 12-cv-06449 [D.E. 77] [N.D. Cal. Oct. 22, 2015]; Koller v. Med Foods Inc., No. 14-cv-02400 [D.E. 79] [N.D. Cal. Dec. 14, 2015]; Samet v. Kellogg Co., No. 12-cv-01891 [D.E. 167] [N.D. Cal. Nov. 10, 2015] [granting motion to stay, except with respect to standing]; Ivie v. Kraft Foods Global Inc., No. 12-cv-02554 [D.E. 86] [N.D. Cal. Nov. 16, 2015]; Wilson v. Frito-Lay North America Inc., No. 12-cv-1586 [D.E. 150] [N.D. Cal. July 20, 2015]; and Rahman v. Mott's L.L.P., No. 13-cv-03482 [D.E. 102] [N.D. Cal. April 21, 2015]; see also Pratt v. Whole Foods Market Inc., No. 12-cv-05652 [D.E. 67] [N.D. Cal. Nov. 16, 2015] [motion to stay pending]; Anderson v. Hain Celestial Group Inc., No. 14-cv-03895 [D.E. 57] [N.D. Cal. Sept. 21, 2015] [same]; and Smedt v. The Hain Celestial Group Inc., No. 12-cv-03029 [D.E. 91] [N.D. Cal. Sept. 21, 2015] [same].)

Since FDA's announcement, at least three "natural" cases were settled or voluntarily dismissed. (See Musgrave v. ICC/Marie Callender's Gourmet Products

Division, No. 14-cv-02006 [D.E. 75] [N.D. Cal. Dec. 28, 2015] [granting joint request for dismissal]; Bryant v. Whole Foods Market Group Inc., No. 15-cv-01001 [D.E. 21] [E.D. Mo. Dec. 30, 2015] [notice of voluntary dismissal filed]; see also Frito-Lay North America Inc. All Natural Litig., No. 12-md-02413, [D.E. 100] [E.D.N.Y. Nov. 10, 2015] [unopposed motion for preliminary approval of settlement filed].)

With respect to pleading requirements, one defendant has argued that FDA's announcement confirms plaintiffs must affirmatively "plead facts that speak to how a reasonable consumer would understand [the term 'natural']." (Reply in support of Motion to Dismiss, Demmler v. ACH Food Cos., No. 15-cv-13556 [D.E. 25] [D. Mass. Dec. 29, 2015.] This defendant argued that FDA's request for comments indicates "the term 'natural' has no accepted meaning," and therefore, "pleading a plausible claim requires an allegation as to what meaning—if any—a reasonable consumer would give to the term 'natural.'"

While FDA's announcement has not yet spurred a flurry of briefing in pending litigation, that may change in the coming months. The announcement has certainly changed the calculus for companies evaluating the risks of future litigation.

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