Food Fights Make A Mess In California District Courts

Law360, New York (May 21, 2014, 7:01 PM ET) -- In recent months, a series of California district court cases have addressed motions to dismiss claims that defendants misled consumers with the words “all natural” on packaged foods. A divergence of opinion in those cases, and in cases challenging use of the term “evaporated cane juice,” has left potential litigants hoping the Ninth Circuit will serve up some certainty in these messy areas of food labeling.

All-Natural Food Claims

Earlier this year, in Kane v. Chobani Inc., Judge Lucy H. Koh in the U.S. District Court for the Northern District of California dismissed plaintiff's claims that labeling yogurt as “all natural” was deceptive because the defendant’s products were artificially colored with fruit and vegetable juice concentrate. The plaintiff took the position that natural ingredients are only those that occur in nature and are neither synthetic nor highly processed. In the plaintiff’s view, the coloring at issue did not fit within that definition because it was a “highly unnatural substance far-removed from the fruits or that they were supposedly derived from.” Judge Koh rejected such allegations as insufficient in part because the plaintiffs failed to allege how Chobani had “highly processed” the juices to render them unnatural.

The decision in Chobani followed another decision in favor of defendants late last year. In Pelayo v. Nestle USA Inc., Judge John F. Walter of the U.S. District Court for the Central District of California dismissed a plaintiff’s challenge to “all natural” claims on Butoni pasta, which allegedly contained “unnatural” ingredients, including synthetic xantham gum and soy lecithin. The district court found the plaintiff failed to allege either a plausible objective definition of the term “all natural,” or a subjective definition shared by reasonable consumers. The court’s ruling depended in part on a conclusion that the ingredient list clarified any ambiguity in the labeling, such that no reasonable consumer could have been deceived by the words “all natural” on the package.

Any enthusiasm potential defendants may have enjoyed after Pelayo and Chobani was promptly tempered by three natural-food decisions that expressly rejected the reasoning in Pelayo. All three decisions were issued by Judge William H. Orrick III of the U.S. District Court for the Northern District of California.

One case, Janney v. General Mills Inc., involved “natural” claims for a product that included, among other things, high fructose corn syrup. The other two cases — Bohac v. General Mills and Rojas v. General Mills — challenged “natural” claims for products that contained genetically modified organisms.

In all three cases, the district court found that claims on the front of the products could lead a consumer to conclude that the products contained only natural ingredients when they included ingredients the plaintiff had plausibly alleged were unnatural. Judge Orrick did not require plaintiffs to explain their understanding of the “natural” claims or the ingredients at issue beyond the allegation that natural means not artificial, synthetic or highly processed.

Judge Susan B. Armstrong of the U.S. District Court for the Northern District of California may be next to enter the food fray. Pending before her in Surzyn v. Diamond Foods Co. is a challenge to use of the phrase "all natural" in connection with products that contain maltodextrin and/or dextrose. Briefing on Diamond Foods' motion to dismiss wrapped up earlier this month. Litigants and spectators alike are waiting to see whether a decision in the case may add to the mix of case law on "natural" food claims.

Evaporated Cane Juice Claims

Like several other natural food cases decided this year, Chobani addressed both "natural" claims and also claims challenging use of the phrase "evaporated cane juice" in an ingredient list. The Chobani plaintiff alleged she would not have bought Chobani products listing evaporated cane juice ("ECJ") as an ingredient if she had known the phrase meant that the products included added sugar. Judge Koh dismissed the plaintiff's ECJ claim as implausible because she alleged she knew that dried cane syrup was sugar and could not explain why she did not have a similar understanding as to evaporated cane juice. Judge Koh also dismissed ECJ claims on similar grounds in Avoy v. Turtle Mountain LLC.

So far this year, Judge Edward J. Davila of the U.S. District Court for the Northern District of California has dismissed ECJ claims in two cases — Thomas v. Costco Wholesale Corp. and Pratt v. Whole Foods Market Inc. — that expressly followed Chobani and Turtle Mountain as well as a third case — Leonhart v. Nature's Path Foods Inc. — in which he held that the plaintiff failed to allege what a reasonable consumer would believe ECJ to be if not sugar.

Meanwhile, Judge Orrick expressly rejected Chobani in the decision he issued in Morgan v. Wallaby Yogurt Co. Judge Orrick held it was not implausible that a reasonable consumer would perceive a difference between evaporated cane juice and dried cane syrup. In any event, he found that "it does not matter what plaintiffs thought ECJ was if not sugar," because the allegation that the plaintiff did not realize ECJ was sugar sufficed for pleading purposes.

Wallaby is among several recent decisions from California's northern district allowing ECJ claims to survive the motion to dismiss stage. Examples include: Ross v. Clover Stornetta Farms, Gitson v. Trader Joe's Co. and Ogden v. Yucatan Foods.

But not all judges facing ECJ claims this year have reached the merits. Judges Susan Y. Ilston, Thelton E. Henderson and Yvonne G. Rogers, all in California's northern district, have granted motions to dismiss ECJ claims on primary jurisdiction grounds in Figy v. Santa Cruz Natural Inc., Figy v. Amy's Kitchen, Reese v. Odwalla Inc. and Figy v. Lifeway Foods Inc.

The primary jurisdiction doctrine permits courts to stay proceedings or dismiss a complaint pending the resolution of an issue within the special competence of an administrative agency. In each of these ECJ cases, courts have cited a notice issued by the U.S. Food and Drug Administration in March stating that ECJ is being taken under consideration. Although the defendant in Wallaby raised that notice as grounds for dismissal, the court determined that the primary jurisdiction doctrine did not apply because the notice did not make clear when or if the

FDA would rule conclusively on the issue.

Less than halfway into 2014, district courts have reached a variety of potentially inconsistent positions on both "all natural" and ECJ claims. Until the Ninth Circuit or FDA steps in to referee California's food fight, litigants would do well to develop a variety of strategies based on the various arguments the Ninth Circuit has yet to review and keep an eye on the appellate docket in Chobani, where briefing will begin this summer on some of the stickiest issues in California's natural foods and ECJ cases.

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