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A COLLECTION OF COMMENTARIES ON THE CRITICAL LEGAL ISSUES IN THE YEAR AHEAD

Food and Beverage Labeling and Marketing Litigation Continues to Play Out in the Courts and Legislatures

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The food and beverage industry has experienced a recent spate of consumer class actions attacking various aspects of the labeling and marketing of products. Advertising and marketing claims by manufacturers that a product is "All Natural" have been an especially frequent target, with plaintiffs pointing to the inclusion of synthetic ingredients or genetically modified organisms (GMOs) or the processing of the product as grounds for suit. Many of these cases have been filed in California, where state laws are viewed as favorable to plaintiffs, although cases are pending throughout the country.

Consumers have contended that "All Natural" claims are false, misleading or deceptive under states' applicable consumer fraud statutes, but several such claims have been stymied by plaintiffs' inability to explain what, exactly, "All Natural" means. In the absence of an established, uniform legal definition, courts are sending mixed signals through conflicting rulings that will require careful consideration by industry participants seeking to avoid or minimize litigation risk.

Court Interpretations

Although the term "All Natural" is not defined by the U.S. Food and Drug Administration, the U.S. Department of Agriculture has issued draft guidance on the subject. In the absence of an FDA definition, courts often have reached conflicting conclusions regarding what constitutes an "All Natural" product and whether a legal challenge should proceed. For example:

- In *Pelayo v. Nestle USA*, the U.S. District Court for the Central District of California dismissed a proposed consumer class action on the grounds that the plaintiff failed to offer an objective or plausible definition of "All Natural."
- However, in *Astiana v. Kashi Company*, the U.S. District Court for the Southern District of California refused to grant the defendant's motion to dismiss and certified two classes of consumers who purchased Kashi products labeled "All Natural" or "Nothing Artificial" on the basis that certain of the challenged ingredients either were synthetic or were not permitted in organic foods.

As the *Kashi* decision suggests, in the absence of a uniform definition courts may look to USDA standards for organic foods to determine whether an ingredient is natural. The court in *Kashi* noted that consumers often equate natural with "organic" — or hold organic to a higher standard. For example, in *Thurston v. Bear Naked*, another decision from the Southern District of California, the court refused to certify a class of consumers who sought to challenge certain ingredients in granola products labeled "All Natural," explaining that those ingredients are permitted in organic foods.

Genetically Modified Organisms. The inclusion of GMO ingredients in foods also has been litigation fodder for consumer plaintiffs. The lack of a definition of "All Natural" sometimes provides plaintiffs free rein to attack the processing of a food or beverage product without specifying how the processing converts natural ingredients into an unnatural product.

For example, the U.S. District Court for the Northern District of California recently rejected a motion to dismiss in *Parker v. J.M. Smucker Co*. The plaintiff alleged that the defendant's labeling of various Crisco cooking oils as "All Natural" misled consumers because of the chemical processing the oils had undergone. The court deemed the plaintiff's allegation that this processing results in the oils no longer "retain[ing] the chemical composition occurring in nature" sufficient to withstand the motion to dismiss, despite defendant's argument that merely describing the processing didn't explain how the oils had been "chemically altered." On the other hand, the court in *Pelayo* dismissed a challenge to an "All Natural" labeling claim involving the defendant's processed pastas, commenting that consumers of the pasta certainly must have understood that it was not "springing fully-formed from Ravioli trees and Tortellini bushes."

Looking to the FDA to weigh in on GMOs as a defense strategy has not proven successful. In early January, the FDA informed courts overseeing the class actions against three major food manufacturers that the agency was declining "to make a determination … regarding whether and under what circumstances food products containing ingredients produced using genetically engineered ingredients may or may not be labeled "'natural.'" Indeed, the U.S. District Court for the Eastern District of New York recently rejected a motion to dismiss in *In re Frito-Lay North America, Inc. All Natural Litigation*. The case is a purported class action in which the plaintiffs alleged violation of state and federal laws based on the manufacturer labeling SunChips and Tostitos "All Natural," despite the fact that GMO corn is an ingredient. The plaintiffs argued that "unnaturalness" is a defining characteristic of GMOs, and the court allowed the case to proceed, refusing the defendant's request for a stay to obtain guidance on the question from the FDA.

Raw Foods. Another emerging labeling controversy involves one of the latest trends in nutrition: raw foods. A group of plaintiffs championing the "raw foodist" movement recently brought suit against a juice manufacturer in the U.S. District Court for the Southern District of New York, alleging that the high-pressure processing (HPP) with which the defendant's BluePrint Juice and BluePrint Cleanse products are treated destroys "vital" enzymes and nutrients. The plaintiffs claim that the defendant's "100% raw" and "never-heated" labels mislead consumers, who pay nearly $10 for a single bottle of juice. Little guiding precedent or regulation exists concerning how a product subject to HPP may be labeled or characterized; it is unclear whether the court in that case will allow the suit to proceed. The increasing popularity of HPP among food manufacturers marketing to health-conscious consumers indicates that this issue could present a new wave of litigation.

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Regulatory Developments

The absence of FDA guidance arguably gives courts wide latitude to decide cases involving "All Natural" claims. Some courts have stayed class actions pending FDA comment, but others have refused to do so based on the FDA's 2010 statement that natural labeling is low on the agency's list of priorities. The recent FDA letter makes it clear that the agency has no intention of issuing such guidance in the near future. With no imminent solution at the federal level, legislation has been proposed in various states, like Proposition 37 in California and Initiative 522 in Washington, that would disallow labeling genetically modified food as natural and/or require that genetically modified food be labeled as such. While the California and Washington proposals recently failed to pass, similar labeling legislation in Vermont and Connecticut has the potential to change the landscape for food and beverage labeling in coming years; the Vermont proposal is awaiting state senate approval in January 2014, and the Connecticut proposal passed but requires a three-part "trigger" (including that four other states must enact similar legislation).

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The use of "All Natural" labels already is fraught with difficulty, and as manufacturers develop new methods of processing foods and ingredients, this issue will become even more complex. In the coming year, attention likely will be focused on the FDA and state legislatures to see whether and how they weigh in on labeling; but in the meantime, manufacturers must make important decisions about how to market their products. Some companies are opting to remove, or refrain from the use of, the "All Natural" label, while others are stepping up their health-conscious labeling to appeal to certain consumers' increasing interest in what are perceived to be healthier ingredients. In addition, the impact and effect of FDA guidance — or lack thereof — will garner more attention given the Supreme Court's recent grant of *certiorari* in *POM Wonderful, LLC v. The Coca-Cola Co.*, a case that involves the interplay between false advertising claims, the FDA, and the Food, Drug, and Cosmetic Act.