



Responding to Heightened Enforcement Risks from Consumer Class Actions Challenging Food Labeling

By Bruce A. Silverglade, JD

Food marketers are increasingly suffering from a legal pandemic of consumer class action lawsuits challenging labeling claims as misleading under state laws intended to prohibit deceptive trade practices.

The popularity of such cases among the plaintiffs' class action bar stems in part from a void left by the absence of Food and Drug Administration (FDA) regulation and enforcement in key areas of food labeling. The net result is a hole in the federal regulatory scheme and a lack of a level competitive playing field. Plaintiff consumer class action attorneys are all too happy

to "fill-in" for FDA by bringing actions alleging that various food labels violate state consumer protection laws (there is no private right of action under the Federal Food, Drug, and Cosmetic Act).

FDA's Diminished Regulatory Role

The trend is fueled in part by FDA enforcement policies. Despite a spate of warning letters and an open letter issued to industry in March 2010,¹ the agency has avoided a number of key labeling controversies. For example, FDA Deputy Commissioner for Foods Mike Taylor announced in an op-ed in *The Atlantic* entitled "How the FDA Is Picking its Food Label Battles," that the agency lacks adequate statutory authority and resources to effectively police the marketplace. Referring to allegedly misleading "structure/function" claims for foods, Mr. Taylor stated: "Going after them one-by-one with the legal and resource constraints we work under is a little like playing Whac-a-Mole, with one hand tied beyond your back."²



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Deputy Commissioner Taylor is correct that FDA currently lacks the ability to adequately address such matters. A Government Accountability Office report released in January 2011 called on FDA and Congress for changes.³ Further, the agency's resources are strained; FDA must meet statutory deadlines for a plethora of regulations needed to implement the Food Safety Modernization Act and other legislative mandates, including nutrition labeling of restaurant foods, leaving little room to address other issues.

"All Natural" Becomes A Lighting Rod

FDA's minimalist enforcement policy regarding structure/function claims for foods applies equally to certain other types of label claims. Many class action cases, to date, have involved challenges to claims such as "All Natural" or "100% Natural." As with structure/function claims, the agency has made it clear that "natural" claims are a low priority. A FDA spokesperson stated in the *Wall Street Journal*, "With the few precious dollars the FDA has, we largely choose to focus on topics that affect public safety ... the "natural" issue doesn't. That's not to say it's not important, but frankly we have more pressing things to deal with."⁴

FDA's handling of the term "natural" has created uncertainty for marketers. FDA has not formally defined the term. The agency has simply said that foods labeled as "natural" must not contain any synthetic substance, artificial flavors, or colors from any source.⁵ The FDA's policy stands in contrast to that followed by USDA's Food Safety Inspection Service that regulates the labels of meat and poultry products.⁶

The absence of a formal definition of the term "natural" for FDA regulated foods has led to a variety of practices

within the industry. Foods with ingredients such as high fructose corn syrup, (HFCS), alkalized cocoa, and factory made ascorbic acid have been labeled as "all natural" or "100% natural." Such claims have been challenged in consumer class actions filed in federal district court. Cases against "natural" claims for foods with HFCS have been particularly prevalent. The following cases illustrate how "natural" claims have been challenged in other contexts as well:

- ConAgra was sued on the grounds that Wesson Oil labeled as "100% Natural" violates California's false advertising and unfair competition laws because the product is made with genetically engineered ingredients.⁷ Five similar cases have been filed against ConAgra and are being consolidated.⁸ Bloggers have noted that Monsanto defines genetically engineered organisms on its website as food with "genetic makeup altered to exhibit traits that are not naturally theirs."⁹
- Trader Joe's Co. was sued over claims for store brand cookies, cheese, and fruit jellies labeled "All Natural." The products contain ingredients the plaintiffs allege are synthetic including potassium carbonate, xanthan gum, sodium citrate, and ascorbic acid.¹⁰
- Kashi, which is owned by Kellogg Company, was sued for using allegedly "synthetic" ingredients including alkalized cocoa, in products labeled as "natural."¹¹ In another case, Kashi was sued for "All Natural" claims on its Go Lean Shakes containing sodium molybdate.¹²

Litigation Defense Strategies

While the results have not been uniform, preemption and primary

jurisdiction defenses have often been unsuccessful in such cases. *See, e.g., Holk v. Snapple*, 575 F.3d 329 (3rd Cir. 2009) (FDA's informal policy and enforcement letters on "natural" claims for foods with high fructose corn syrup do not constitute federal law and therefore are not binding under state consumer protection act); *Western Sugar Cooperative v. ADM*,¹³ (rejecting a motion to dismiss holding, *inter alia*, that a Citizens Petition pending at FDA requesting that the name of high fructose corn syrup be changed to "corn sugar" was not sufficient to find that FDA had primary jurisdiction); *Lockwood v. ConAgra Foods*, 597 F.Supp. 2d 1028 (N.D. Cal 2009) (in a suit challenging "natural" claims for foods made with high fructose corn syrup, the court rejected a motion to dismiss on both primary jurisdiction and federal preemption grounds).¹⁴

In other cases, defense attorneys have been successful in persuading a court that plaintiffs failed to plead sufficient facts to state a claim for relief that is "plausible on its face."¹⁵ Plaintiffs need to plead facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misleading practices. For example, in a case alleging that the label of Cap'n Crunch's Crunch Berries was misleading because the cereal did not contain actual berries, the court dismissed the case finding that "no reasonable consumer would believe" that Cap'n Crunch contained fruit based on pictures of the cereal depicted on the principal display panel. The court stated that "These cereal balls do not even remotely resemble any naturally occurring fruit of any kind. There are no representations that the Crunch Berries are derived from real fruit nor are there any depictions of any fruit on the cereal box."¹⁶

Counsel for defendants have also met with some success gaining dismissal of cases by persuading courts to deny class certification.¹⁷ In some states, consumer protection statutes require a showing that each individual plaintiff relied on the food label statements alleged to be misleading in the complaint.¹⁸

Defense attorneys are compiling a growing list of strategies to obtain dismissal of such cases. However, like the very labeling claims that FDA Deputy Commissioner Mike Taylor compares to a game of Whac-a-Mole, class actions continue to pop up in different states (California and New Jersey remain favorites) with different plaintiffs, under different theories. Further, even when dismissals can be obtained, such cases are costly, not only in fees paid to the defense team, but in terms of adverse publicity that often surrounds the initial filing of the litigation.

Future Lightning Rods

Future class action cases may increasingly challenge claims about the presence of value-added ingredients. Notwithstanding the dismissal of the Crunch Berries litigation, the Center for Science in the Public Interest (CSPI) which maintains a litigation project sued General Mills over claims for the company's Fruit Roll-Ups, Fruit by the Foot, and Fruit Gushers. CSPI alleged that the names of the products, vignettes on the labels, and related label statements misleadingly implied that the products contain more fruit than is the case.¹⁹ The CSPI action (and others that may follow) can be analyzed from both a public health policy and legal standpoint.

First, the 2010 *Dietary Guidelines for Americans* emphasizes that consumers should eat more fruits and vegetables. That recommendation has led consumer advocacy organizations

to monitor food labels that allegedly imply fruit content when little to none is actually provided.

More importantly, plaintiff attorneys have had success in fighting off a motion to dismiss in a related case brought against the Gerber Products Company.²⁰ In that case, the U.S. Court of Appeals found that the plaintiffs alleged sufficient facts to state a claim for relief that could plausibly prove that a reasonable consumer would be deceived by the manufacturer's packaging for fruit juice snacks. The Gerber package pictured fruits not contained in the product and stated that the snacks were "just one of a variety of nutritious" foods and juices designed by manufacturer "to help toddlers grow up strong and healthy."²¹ Another growing area of future class action activity may involve challenges to structure/function claims. As with "natural" claims, the FDA has publicly stated it intends to take limited enforcement action in the area. That type of public pronouncement triggers competitive pressures within the food industry, causes some companies to push the envelope, and in turn, provides new fertile ground for class action attorneys. The plaintiff's bar has had some success in surviving motions to dismiss in litigation brought against structure/function claims for "vitaminwater" owned by Coca Cola.²² A third area raising consumer group concerns involves claims that canned tomato sauces made from concentrate misleadingly imply that they are packed from fresh tomatoes.²³ The labels of such products contain claims like "made from California vine-ripened tomatoes" when in fact they are made from industrial tomato concentrate. The National Consumers League has repeatedly urged FDA to act on such claims.²⁴ Some companies have

changed their label claims while others have not. The mix of FDA inaction and a changing marketplace may lead class action attorneys to conclude that remaining claims are "ripe" for challenges under state law.

Avoid Becoming A Target

Given the multi-faceted costs of defending litigation, marketers may want to focus their energies on avoiding becoming a target in the first instance. A number of strategies are available, including the following:

- Word claims carefully – don't become an obvious target. By reviewing the cases that have been brought to date, companies can assess their risk of liability. For example, companies considering making an "All Natural" claim can review the ingredients that plaintiff attorneys have alleged, in cases filed to date, are not "natural" and compare that list against the ingredients used in their product.
- Consider challenging competitors who are pushing the envelope. There are a number of specific tactics available to companies who are willing to take a "beat 'em, don't join 'em" attitude.
- Base claims on authoritative statements in the 2010 *Dietary Guidelines for Americans*. The Dietary Guidelines, including the advisory committee report that served as the foundation for the actual Guidelines,²⁵ contain numerous "authoritative statements" that can be used to support nutrition and health claims that are beyond reproach. FDA has established an expedited procedure for the authorization of such claims.²⁶
- Keep up with consumer group priorities by meeting with consumer groups and monitoring their

publications. Class action lawsuits are sometimes inspired by examples highlighted in consumer group publications. For example, in August 2010, CSPI wrote Unilever's Ben & Jerry's Homemade and demanded that the company drop "All Natural" claims for ice creams made with corn syrup, partially hydrogenated vegetable oil, brown rice syrup and other ingredients alleged not to be "natural." CSPI had been complaining about the company's "All Natural" claims for many years.²⁷ The company agreed to drop the "All Natural" claim from its entire product line of ice creams and instead focus on new marketing strategies and label statements related to local sourcing, fair trade, and animal welfare.²⁸

- Review regulatory trends in the European Union. The Transatlantic Consumer Dialogue²⁹ has provided a forum for American and European consumer groups to share information. If a European regulatory authority cracks down on a particular claim, chances are an American consumer group will notice and may pursue a similar action in this country by contacting members of the plaintiffs' class action bar.
- Get to know your opposition. The National Consumer Law Center publishes a reference manual entitled "Unfair and Deceptive Trade Practices" that keeps track of consumer fraud cases brought under state law. Monitor the subject matter of new cases challenging food labeling to assess your company's risk of exposure.
- Monitor the priorities of the National Association of Consumer Advocates, an association to which many class action attorneys belong.³⁰

- If and when FDA does act (e.g., by issuing a Warning Letter), settle the matter quickly. The more formal a FDA enforcement action is, the more likely that action can be relied upon by plaintiff attorneys to argue that a label statement is misleading under state law.
- Follow the same strategy with investigations by the FTC. Formal settlements with the FTC may be cited as evidence that the challenged practice violates state consumer protection laws. If contacted by the FTC, consider the potential benefits of ending the investigation early by terminating the challenged trade practices before they become fodder for new class actions cases filed with or without the government's acquiescence or approval.

Conclusion

Given current fiscal constraints and FDA institutional priorities, there is little likelihood that FDA will find the resources to establish a level competitive playing field. Thus, the pandemic of class action cases involving food labeling is likely to continue. Defenses to such cases certainly exist, but by following a set of preventive measures, marketers can reduce their risk of falling victim in the first instance. ▲

1. FDA Calls on Food Companies to Correct Labeling Violations; FDA Commissioner Issues an Open Letter to the Industry, <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2010/ucm202814.htm>, accessed November 25, 2011.
2. *The Atlantic*, <http://www.theatlantic.com/life/archive/2010/07/how-the-fda-is-picking-its-food-label-battles/59927/> accessed November 23, 2011.
3. *Food Labeling: FDA Needs to Reassess Its Approach to Protecting Consumers from False or Misleading Claims*, GAO-11-102, Jan 14, 2011, <http://www.gao.gov/products/GAO-11-102>, accessed November 23, 2011.
4. Ashby Jones, "Is Your Dinner 'All Natural,'" *Wall Street Journal*, Sept. 20, 2011.
5. While the FDA does not require labeling of genetically engineered ingredients (except when the genetically engineered variety is materially different from its traditional counterpart) the agency has not addressed whether such foods may be labeled as "natural."
6. The USDA has a formal enforcement policy for natural claims on meat and poultry labels, requiring that such products have no artificial ingredients and be "minimally processed." USDA, Food Safety Inspection Service, Food Standards and Labeling Policy Book, (2005) http://www.fsis.usda.gov/OP-PDE/larc/Policies/Labeling_Policy_Book_082005.pdf
7. *Briseno v. ConAgra Foods, Inc.*, C.A. No. 2:11-05379 (C.D. Cal.), 2011 WL 4889254. The court granted, without prejudice, Defendant's motion to dismiss under FRCP 9(b) finding that the original plaintiff failed to state with particularity when, where, and how the alleged misrepresentations were communicated, Order Granting Defendant's Motion to Dismiss, November 23, 2011, The plaintiffs intend to file an amended complaint, *infra*, note 8.
8. *In Re: Wesson Oil Marketing and Sales Practices Litigation*, MDL No. 2291 Oct. 13, 2011. 2011 WL 4889254. The court has not ruled on the sufficiency of the complaints in the consolidated cases pending filing of an amended complaint by the original plaintiff, *In re ConAgra Foods, Inc.* CV 11-05379, Stipulation re: Amended Consolidated Complaint, December 12, 2011.
9. 2011 WL 4889254. The court has not ruled on the sufficiency of the complaints in the consolidated cases pending filing of an amended complaint by the original plaintiff, *In re ConAgra Foods, Inc.* CV 11-05379, Stipulation re: Amended Consolidated Complaint, December 12, 2011.
10. *Larsen v. Trader Joe's Co.*, No. 11-5188 (N.D. Cal., October 24, 2011).
11. *Sethavanish v. Kashi Co.*, No. 11-cv-4453-JCS (N.D. Cal. Filed Sept. 7, 2011).
12. *Bates v. Kashi Co.*, No. 11-cv-01967-HBGS (S.D. Cal. Aug. 24, 2011).
13. *Western Sugar Cooperative v. ADM, et al.* No. 11-CV-3473 CBM (MAN) Order Denying In Part and Granting In Part, Defendant's Motion to Dismiss, (C.D. Cal. Oct. 21, 2011).

14. Motions to dismiss based on federal preemption grounds have met with greater success where the FDA has specific regulations on the point, e.g. disclosure of fiber content or trans fatty acids on the Nutrition Facts Panel.
15. See, "Food Labeling Remains Ripe for Consumer Fraud Class Actions," Brew, Sarah, Eads, Kristen, and Toeniskoetter, Steven, American Bar Association, Section on Litigation, Products Liability, <http://apps.americanbar.org/litigation/committees/products/articles.html>. Note: The authors attribute much of the increase in class action activity to cases filed in the wake of increased FDA and FTC (Federal Trade Commission) enforcement actions (e.g., lawsuits filed in the wake of an FDA Warning Letter alleging a labeling violation or the announcement of a cease and desist order by the FTC). In contrast, this article argues that the increase in such cases is due to a void, or perceived void, in FDA (and FTC) regulatory and enforcement activity.
16. *Werbel v. Pepsico, Inc.* No. C 09-04456 (N.D. Cal. July 1, 2010) 2010 WL 2673860, *Rosen v. Unilever*, No. C 09-02563, (N.D. Cal. May 3, 2010), 2010 WL 4807100.
17. *Weiner v. Snapple Beverage Corp.*, No. 1:07-cv-08742 (S.D.N.Y.) 2010 WL 3119452.
18. See, *Benedict v. Altira Group, Inc.* 241 F.R.D. 668, 679 (D. Kan. 2007).
19. http://cspinet.org/new/pdf/fruit_roll-ups_complaint.pdf.
20. *Williams v. Gerber Products Company*, 552 F.3d 934 (9th Cir. 2008).
21. *Id.*, at 939.
22. *Ackerman v. Coca Cola Company*, No. CV-09-0395 (E.D.N.Y.) (July 21, 2010), 2010 WL 2925955.
23. FDA has defined the term "fresh," 21 CFR § 101.95 and explained it's policy regarding the labeling of tomato products from concentrate at 58 Fed. Reg. 2302,2406 (Jan. 6, 1993), see letter from Janice Oliver, Director, Division of Regulatory Guidance, Center for Food Safety and Applied Nutrition, FDA, to Melvin E. Lazar, Barnes, Richardson & Colburn finding "packed from fresh tomatoes" misleading for a product made from tomato concentrate (June 17, 1991).
24. See, <http://www.nclnet.org/newsroom/press-releases/496-ncl-calls-on-fda-to-crack-down-on-misleading-claims-for-tomato-sauces-made-from-concentrate>.
25. *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010* <http://www.cnpp.usda.gov/DGAs2010-DGACReport.htm>, accessed November 25, 2011.
26. A FDA guidance document explaining the procedures for obtaining authorization for use of an authoritative statement, together with reference to FDA rules in the Code of Federal Regulations, can be found at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm056975.htm>, accessed November 25, 2011.
27. See CSPI news, <http://www.cspinet.org/new/201008121.html>, accessed November 23, 2011. CSPI complained to the FDA originally in 2002.
28. Notwithstanding, given the new trend towards consumer class actions, at least one case has been brought against the company alleging that the company's past labeling violated state law, *Astiana v. Ben & Jerry's Homemade, Inc.*, Nos. C10-4387 PJH, C10-4937 PJH (N.D. Cal. May 26, 2011). Had the company ceased the challenged practices years earlier, the matter might have been settled before the current trend of class action cases gained steam.
29. See, www.TACD.org
30. See <http://www.naca.net/> for a description of NACA.

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