

CLIENT ALERT

"Natural" Food Labeling Decision Delivers Defense-friendly Clarity

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Christmas came early for Dole Packaged Foods LLC (Dole) in the form of a summary judgment victory in its "all natural fruit" labeling case. As the first merits ruling among a slew of "natural" food labeling cases, the influence of this defendant-friendly decision will spread well into 2015.

In early December, U.S. District Judge Lucy Koh of the Northern District of California granted summary judgment for Dole in *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK (N.D. Cal. Dec. 8, 2014). The court found that the plaintiff failed to prove that Dole's "All Natural Fruit" label on fruit products was unlawfully deceptive, noting a lack of evidence that other consumers would be similarly misled.

"Natural" Labeling Ripe For Confusion

Natural food mislabeling cases generally seek to capitalize on legal ambiguities created by the FDA's decision not to formally define the word "natural" as it relates to packaged foods. Under federal law, food is "misbranded" if it contains labeling that is "false or misleading in any particular." 21 U.S.C. § 343(a)(1). The FDA maintains only an informal policy that "natural" means that nothing artificial or synthetic (including color additives) has been included in, or added to, a food that would not normally be expected to be in that food. *See Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food*, 58 Fed. Reg. 2303, 2407 (Jan. 6, 1993). Predictably, plaintiffs have turned to the courts to enforce an even more restrictive definition of "natural."

The *Dole* plaintiff filed a putative class action in early April 2012, alleging violations of various California statutes that adopt the federal labeling requirements. He claimed that ten Dole food products bearing the label statement "All Natural Fruit" were misleading because each contained the allegedly synthetic ingredients ascorbic acid (Vitamin C) and citric acid.

The court initially certified a nationwide class of consumers under Fed. R. Civ. P. 23(b)(2) (the "Injunction Class") and a California class of consumers under Fed. R. Civ. P. 23(b)(3) (the "Damages Class"). However, Dole was handed an initial victory in November when the court decertified the Damages Class because plaintiff's hedonic regression model was incapable of measuring damages caused solely by Dole's conduct. Dole then moved for summary judgment, asserting that the record contained insufficient evidence that reasonable consumers would be likely to be misled by its "All Natural Fruit" label.

The Summary Judgment Decision

To survive summary judgment in the Ninth Circuit, the court explained, the plaintiff's evidence had to show that a significant portion of the general consuming public could reasonably be misled by Dole's "All Natural Fruit" label. However, the plaintiff had based his case on his own interpretation of the label. He asserted that he was deceived by the label—which he interpreted to mean that all contents of the package, not just the fruit, were "all natural."

The court found that this "non-literal" interpretation, while not necessarily unreasonable, was an isolated instance of actual deception that was insufficient to survive summary judgment. Brazil further suggested that Dole's label ran afoul of the FDA's informal definition of "natural" because consumers would not normally expect "all natural" fruit products to contain synthetic, artificial or excessively processed ingredients such as ascorbic acid and citric acid. The court found the record held no evidence that reasonable consumers would not expect ascorbic and/or citric acid to be found in the challenged products (notwithstanding missed opportunities in interrogatory answers or expert reports). Nor could Brazil rely on FDA letters to other companies regarding use of the word "natural" where no FDA warning letter to Dole regarding its "All Natural Fruit" labels had been issued. Because isolated examples of deception are insufficient to create a genuine dispute of material fact, the court granted summary judgment for Dole.

Likely Impacts On Other "Natural" Cases

Similar natural food mislabeling cases have settled before the courts have reached the merits. And many of these recent settlements have involved hefty payments by food manufacturers, coupled with labeling changes and restrictions. For instance, in the highly publicized settlement between CSPI and General Mills, General Mills agreed to drop "100% Natural" claims from the labeling and advertising for a variety of its Nature Valley products, including Nature Valley Crunchy Granola Bars, Nature Valley Sweet & Salty Nut Granola Bars, Nature Valley Granola Thins Crispy Squares, Nature Valley Trail Mix Bars, and Nature Valley Protein Chewy Bars. General Mills also agreed to be bound by much stricter criteria for use of the word "natural" going forward.

Brazil v. Dole reflects a change in the tides. As the first "natural" labeling case to reach a merits-ruling, it bodes well for food manufacturers by erecting a higher barrier to success for future natural food mislabeling claims. Judge Koh did not accept the invitation to clarify the meaning of "natural." But the decision is clear that one plaintiff's reasonable, non-literal interpretation of a label statement – without evidence establishing that such interpretation is shared, or likely to be shared, by a substantial portion of consumers – is insufficient to survive summary judgment. The court did not elucidate what evidence would be sufficient to satisfy the plaintiff's evidentiary burden, though it implied that a consumer survey about consumer deception might help.

While plaintiffs will likely learn from this decision and ensure that multiple "misled" plaintiffs are included in future filings, these factual additions may harm their chance of class certification. So this decision may have additional defense value yet to be seen. Nonetheless, by beginning to chart the outer boundaries of a legal standard, the decision is likely to serve as a guide for future merits decisions in both "natural" labeling cases as well as other food mislabeling suits. And such clarity is welcome in this ambiguous space.

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