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Trends In 'All Natural' Class Actions

Law360, New York (November 10, 2011, 1:20 PM ET) -- Everyone wants to go “green” these days, and that includes companies that make and sell food, beverages or cosmetic products. Unfortunately for these companies, one of the hottest trends in class action litigation are suits against them based on allegations that they are improperly advertising their products as “natural” or “all natural.” Suits have been filed (or threatened) relating to a host of packaged food products, meat and poultry, hair care and cosmetic products, and even pet supplies.

In most of these cases, the theory is that the product was marketed as “natural” or “all natural” but, it is alleged, the product contains some synthetic product or genetically modified crops, or was processed in some way that does not “occur in nature.” The theories for relief vary, including claims based on state unfair and deceptive trade practices laws, fraud, breach of warranty, and unjust enrichment, just to name a few.

These cases obviously raise a number of important legal issues on the merits about what it means to be natural. They also raise significant issues relating to the ability to certify a class under these theories and what damages, if any, are available. The discussion below highlights some of the key issues facing manufacturers and sellers in the food industry, though much of it applies in context of “natural” advertising for other products.

Allegations of Misrepresentation

The theory of the plaintiffs in these cases obviously varies based on the product, but plaintiffs typically point to some combination of the following as grounds for why the product in question is not “natural.”

Sometimes plaintiffs simply rely on common understanding of what the term "natural" means. At other times, they point to informal statements from the U.S. Food and Drug Administration. For example, while the FDA has not fully defined what "natural" means (see the discussion below), plaintiffs in some of these cases point to FDA guidance language that describes "natural" as meaning that "nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food." See 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).

Much of this litigation initially focused on products containing high-fructose corn syrup ("HFCS") but has more recently included products containing citric acid, inulin, products produced using genetically modified organisms, and alkalized cocoa, glycerin and soy lecithin. For example, a recent suit filed against Trader Joe's Co. accuses the retailer of falsely marketing some of its juice, rolls, cookies and other products as all-natural even though they allegedly contain synthetic ingredients.

In other cases, such as a recent case against Kashi Company, the plaintiffs have pointed to Kashi's very own marketing to define "natural" foods and ingredients. Plaintiffs have alleged that Kashi's own "natural" products do not meet these definitions. Bates v. Kashi Co., No. 3:11-cv-01967-H-BGS (S.D. Cal., filed Aug. 24, 2011).

Why Is This Area So Hot Now?

This type of litigation has been around for a while, but the number of cases filed has picked up noticeably since around the time that the United States Court of Appeals for the Third Circuit held that certain claims based on "natural" marketing are not preempted by FDA regulations. See Holk v. Snapple Beverage Corp., 575 F.3d 329 (3d Cir. 2009).

In Holk, a consumer brought a putative class action against the makers and distributors of Snapple beverages, based on various state statutory and common law theories. Plaintiff claimed Snapple was falsely labeled as "all natural" when it in fact contained HFCS, which plaintiffs alleged is not a natural ingredient.

In 2008 the district court dismissed the plaintiff's complaint as impliedly preempted by FDA regulations governing "natural flavors" and the labeling of juices. Holk v. Snapple Bev. Corp., 574 F. Supp. 2d 447, 454 (D. N.J. 2008). This decision, however, was overturned on appeal by the Third Circuit Court of Appeals, which held that Congress and the FDA had not indicated a "clear and manifest" intention to preempt state warranty and consumer protection laws governing beverage labeling. Holk v. Snapple Bev. Corp., 575 F.3d 329, 339-41 (3d Cir. 2009).

Since the Third Circuit's decision in Holk, several other courts have rejected preemption arguments in this area. See Lockwood v. Conagra Foods Inc., 597 F. Supp. 2d 1028, 1030-35; Wright v. Gen. Mills Inc., No. CIV. 08CV1532L (NLS) 2009, at *2-*3 (S.D. Cal. Sept. 30, 2009).[1]

Looking to the FDA for Answers

The argument for FDA preemption has been based, in part, on informal guidance on the issue from the FDA. To date, the FDA has not utilized typical notice and comment rulemaking to establish a definition for the term "natural." As noted above, however, in the 1993 preamble to a rulemaking for nutrient content claims, the FDA offered an informal policy regarding use of the term.

The policy states that "natural" means that "nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food." See 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993). Except as to "flavors" and "colors," however, FDA has not defined or issued guidance regarding the terms "synthetic" or "artificial."[2] Thus, products with added color, synthetic or artificial substances, or artificial flavors cannot be called natural.[3]

In a July 2008 letter to the Corn Refiners Association ("CRA"), Geraldine June, supervisor of the FDA's product evaluation and labeling team on the food labeling and standards staff, in response to a CRA letter requesting clarification on the issue, explained that, depending on the process used to manufacture the HFCS, it is possible that the ingredient can be considered "natural."[4]

As noted above, however, the FDA's position on natural claims as evidenced by its informal policy and the June letter were both called into question by the Holk v. Snapple decision in the Third Circuit. Specifically, the court found that neither FDA's policy statement regarding use of the term "natural" nor its letter indicating that some forms of HFCS may be labeled as "natural" have the force of law required to preempt conflicting state law because they were not issued as part of any formal rulemaking or adjudication and were not subject to the notice and comment process.

After the Third Circuit's preemptive ruling in Holk, the district court in Holk and in Lauren Coyle v. Hornell Brewing Co. et al., No 08-cv-2797 (D. N.J. filed April 17, 2008) stayed their cases and formally requested that FDA address whether the ingredients at issue were "natural." Both cases were reopened when the FDA declined to make any determination citing lack of resources to do so. See Holk, Order, Docket No. 141, filed Oct. 15, 2010; Coyle, Order, Docket No. 118, filed June 25, 2010. Both cases were reopened when the FDA declined to make any determination. See Holk, Order, Docket No. 141, filed Oct. 15, 2010; Coyle, Order, Docket No. 118, filed June 25, 2010.[5]

The combination of a rejection of preemptive arguments and a lack of guidance from the FDA has opened the door to even more litigation about this type of advertising.

Litigating the Claims

Absent dispositive guidance from any regulatory authority, the "natural" class actions have typically been litigated on these fronts.

First, defendants have aggressively sought to challenge the adequacy of the named plaintiff's pleading or challenged the named plaintiff's claims on summary judgment grounds. These challenges have included the failure to plead fraud, or state law claims grounded in fraud, with the requisite particularity required under Federal Rule of Civil Procedure 9(b) (or its state law equivalent).

At times, plaintiffs have not adequately identified the advertising on which their claim is based, or when they made their purchases, for example. In other cases, the named plaintiff has not adequately alleged that they relied on the particular advertising or disclosure in question or did not adequately pledge a concrete loss.

For example, in Weiner v. Snapple Beverage Corp., No. 07 CIV. 8742 DLC, 2011 (S.D.N.Y. Jan. 21, 2011), plaintiffs' deceptive trade practices claim was dismissed because injury could not be proven. Id. at *3. The named plaintiffs had no record of their Snapple purchases and offered no other evidence from which to calculate the premium they paid for Snapple as a result of the labeling. Id. at *3. Plaintiffs' unjust enrichment and express warranty claims failed because there was no showing that they placed any reliance on the "All Natural" label. Id.

Plaintiffs did not appeal. Similarly, in Wright v. General Mills Inc., 2009, at *5 (S.D. Cal. Sept. 30, 2009), the court held that the plaintiff failed to allege injury-in-fact in anything more than "conclusory and speculative" fashion; in other words, the court essentially held that plaintiff had not alleged a plausible injury. In addition, the court held that plaintiff failed to allege fraud, a required element of a California Consumer Legal Remedies Act claim, with the particularity required under Federal Rule of Civil Procedure 9(b). Id. at *6.

Second, the cases typically have a number of challenges to class certification. For example, in Weiner v. Snapple Beverage Corp., 2010 *5 (S.D.N.Y. Aug. 5, 2010), the court refused to certify the class because individualized issues predominated under Fed. R. Civ. P. 23(b)(3). The plaintiffs could not demonstrate that issues of causation and injury could be demonstrated on a classwide basis. Plaintiffs had offered expert testimony from an economist to show that causation and injury were "susceptible to generalized proof on a class-wide basis." Id. at *6.

The expert proposed comparing classwide economic data to compare prices of products labeled "All Natural" to similar products without such labeling, and using other "inherent value" methods to analyze the increased value of the products. Id. The court excluded the expert testimony as unreliable. Id. at 7. Absent this expert testimony, the plaintiffs were forced to deal with variances in damages (based on when people purchased the product, how much they paid and what an appropriate alternative was), as well as causation issues because people bought the "Snapple beverages for many reasons other than the "All Natural" label, including their taste, glass bottles, quirky advertising, or even the "Snapple Facts." Id. at 11.

Therefore, "[i]individualized inquiries would therefore be required to determine whether putative class members purchased Snapple beverages in reliance upon the "All Natural" label, as opposed to other considerations. Id. The court also noted that manageability and ascertainability issues precluded class certification. Id. at 12.

Third, separate from its impact on class certification questions, the issue of damages is an obstacle for many plaintiffs in "natural" class actions. Often, the named plaintiff struggles to show an actual damage. For example, sometimes there is no difference in price between the "natural" product and substitutes that are not marketed as natural. Proof of purchase price is also an issue.

More creative plaintiffs are now seeking damages, either under statute or common law, based on a theory that they wanted an all-natural product, but they got something else. For example, the plaintiffs in the Kashi case allege that the proposed nationwide class of consumers suffered economic injury based on the purchase price, but also alleges that they were injured by ingesting "a substance that is generally harmful to their health, their children's health, or their unborn fetus's health," and because they were "unwittingly support[ing] an industry that contributes to environmental, ecological, or health damage." Notably, this case even includes allegations of "assault and battery."

With these cases rapidly growing in number, expect even more creative theories for plaintiffs. They will undoubtedly try to avoid the pleading problems, primarily lack of specifics about purchases and reliance, that have plagued early filers. They will also no doubt try to find more creative theories for why classes can be certified. Manufacturers and sellers of such products should take note.

That may include a review of their marketing and labeling materials, including, where appropriate, adding more detailed disclosures about the ingredients for the product. It may also include switching the ingredients used in the manufacturing process, particularly when equally priced substitutes will result in avoiding litigation.

In short, until there is further guidance from the FDA, expect issues relating to the merits of these "natural" class actions, as well as the often intertwined issues relating to class certification and damages to slowly make their way through the courts.

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[1] In a different context, the Seventh Circuit held that plaintiff's claims relating to dietary fiber for product containing inulin were preempted by the Federal Food, Drug and Cosmetic Act where the plaintiff wanted a disclaimer relating to the presence of inulin. Carolyn Turek v. General Mills Inc., et al., Case No. 10-3267 (7th Cir. 2011).

[2] With regard to colors, it is FDA's position that any added color is an artificial color, even if the added color is from a source considered to be natural. See Compliance Policy Guide No. 7127.01. FDA defines "natural flavor" by regulation as "the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis ... of a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material ... or fermentation products thereof." 21 C.F.R. § 101.22(a)(3).

[3] The USDA's Food Safety and Inspection Service currently has a policy governing the use of "natural" claims that is set forth in the Standards and Labeling Policy Book. The current standard, which was first established in 1982, provides that a "natural" claim may be used in the labeling of meat and poultry products provided (1) the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative (as defined in 21 CFR 101.22), or any other artificial or synthetic ingredient; and (2) the product and its ingredients are not more than minimally processed.

[4] Letter dated July 3, 2008, to Audrae Erickson, president of CRA, from Geraldine A. June. The letter stated that FDA would not object to the use of the term "natural" when describing HFCS derived from a manufacturing process whereby the enzymes for making HFCS are fixed to a column by the use of a synthetic fixing agent called glutaraldehyde, so long as the agent does not come into contact with the high dextrose equivalent corn starch hydrolysate and is not considered to be included or added to the HFCS. However, June indicated that FDA would object to use of the term "natural" on a product containing HFCS that has a synthetic substance such as a synthetic fixing agent included in or added to it.

[5] Holk was ultimately dismissed based on a joint stipulation. See Order, Docket No. 145, filed Nov. 9, 2010. The ourt in Coyle denied class certification earlier this year for lack of adequacy of representation under Rule 23(a)(4) because of inconsistent factual allegations by the plaintiff. Coyle v. Hornell Brewing Co., No. CIV 08-2797 JBS JS, 2011 WL 2147218, at *5 (D. N.J. May 26, 2011) (stating that plaintiff claimed multiple times that she bought Snapple in March without knowing about HFCS, despite signing a retainer agreement for this suit seven months earlier).