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STRATEGIC PERSPECTIVES—California “food court” dominates 2013 food litigation on misleading and deceptive labeling claims

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During 2013, a group of plaintiffs’ lawyers have regularly challenged healthy-sounding food labels as deceptive and misleading. The majority of the litigation has been in the Northern District of California, where the consumer-protection laws are more expansive and the jury pool tends to skew towards the nutrition-conscious. Among practitioners and the judiciary this jurisdiction is referred to colloquially as the “Food Court.”

Wolters Kluwer reported on over 55 decisions in in 2013 that sought either changes or damages based on the use of healthy-sounding food labels. Targets of the litigants include Ben & Jerry’s ice cream, Chobani yogurt, Kraft’s Trident gum, Ocean Spray beverages, and Hershey’s chocolates.

In contrast to lawsuits over cigarettes, the food label cases do not allege physical injuries or addictions; nor are suggestions made that the products in question are dangerous or defective. Instead, litigants argue that the sale of products such as granola bars, fruit juice, and tea as being good for you, including label claims of “all natural,” “low-calorie,” and “no sugar added,” are deceiving consumers to make unwarranted purchases.

The onset of healthy-sounding food label challenges can be traced in part back to 2009, when Dannon Co. [agreed](#) to pay \$35 million to settle claims that the food giant spent millions on a misleading advertising campaign designed to induce consumers to buy yogurts containing probiotic bacteria. Dannon claimed at the time that the bacteria containing yogurts improved digestive health. The settlement cleared the path for lawsuits against other manufacturers for claims made on healthy-sounding food labels. A review of some of the more notable food litigation decisions in 2013 follows.

Bioengineered foods. A number of decisions concerned whether bioengineered or genetically modified organisms (GMOs) changed a food product to the extent that claims such as “all natural” or “natural” were misleading and deceptive. GMOs are organisms whose genetic material has been altered using genetic engineering and include micro-organisms such as bacteria and yeast, insects, plants, fish, and mammals. The use of GMOs in feed for cows whose milk is eventually used in yogurt was one factor for Whole Foods’ [recent announcement](#) that it would drop Greek yogurt Chobani from its shelves. Whole Foods had already [announced](#) earlier in 2013, based on consumer sentiment that it would require products sold in its stores to disclose whether they contain GMOs, intensifying the debate ahead of any potential regulations or statements by the FDA. The GMO announcement has the potential impact of Wal-Mart’s decision several years ago to stop selling milk from cows treated with growth hormone. As a result, currently, only a small number of milk cows are injected with the hormone.

Trade groups representing the biotech industry have stated it is too early to determine what impact, if any, that the Whole Foods move would have. Additionally, the trade groups have noted that without scientific evidence showing that GMOs used in foods caused safety or health issues, labeling was unnecessary.

Notably, the FDA’s most current thinking is a nonbinding industry [guidance](#) issued in 2000 that indicated the agency was “not aware of any data or other information that would form a basis for concluding that the fact that a food or its ingredients was produced using bioengineering is a material fact that must be disclosed.” Although the FDA had

[announced plans](#) earlier this year to finalize the guidance after 13 years, the agency still has not done so. According to Bryan J. Anderson, Member, Dykema Gossett PLLC, it is difficult to predict what, if any, action the FDA will take in the coming year regarding its draft guidance on genetically engineered foods, given its focus on finalizing regulations for the Food Safety Modernization Act. However, Anderson said “the last thing food manufacturers want is to navigate fifty different state laws regarding genetically engineered ingredients.”

Additionally, the FDA has not officially defined “natural” for use in connection with food. The closest the agency has come to defining “natural” was in a [warning letter](#) to a food manufacturer asserting that the use of “All Natural” was false and misleading because the product contained a synthetic chemical preservative, and such use of the term was inconsistent with FDA’s understanding of “natural” to mean “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” as established by [21 U.S.C. 343\(a\)\(1\)](#). Anderson said that it was a certainty that the “trend of litigation against food manufacturers arguing that a product cannot be labeled ‘natural’ if it contains genetically engineered ingredients” continues.

Food manufacturers have argued that litigation in courts should generally be stayed or dismissed under the primary jurisdiction doctrine pending the FDA’s intervention because the decision of whether a product is “natural” is best left to the FDA’s expertise. However, in a number of decisions involving General Mills food products, namely granola bars and trail mix, courts sided with consumers in rejecting the applicability of primary jurisdiction.

In [Janney v General Mills](#) (N.D. Cal., 12-cv-03919-WHO, October 10, 2013, Orrick, W), [Bohac v General Mills](#) (N.D. Cal., 12-cv-05280-WHO, October 10, 2013, Orrick, W) , and [Rojas v General Mills](#) (N.D. Cal., 12-cv-05099-WHO, October 9, 2013, Orrick, W), federal district courts held that the determination of “natural” was not an “issue of first impression” nor would any judicial determinations subsequently made undercut the FDA’s judgment and authority. The courts noted that the FDA had adopted a policy for the use of “natural” on food labels and issued repeat and consistent guidance on the proper use of the term. There was no reason to invoke primary jurisdiction, as determining whether a term was false or misleading was within the province of the judiciary.

Conversely, within the same California jurisdiction, use of bioengineered corn downstream in a food product was determined as the province of the FDA’s expertise. The district court in [Cox v Gruma Corp.](#) (N.D. Cal., 12-CV-6502 YGR, June 7, 2013, Rogers, Y) issued a “tentative ruling” allowing the litigants the opportunity to either wait for FDA guidance or proceed to trial. The court noted that there was “a gaping hole in the current regulatory landscape for ‘natural’ claims and GMOs” and deferred to the FDA for determination on whether products containing GMOs could be properly labeled as “natural” or “all natural.” A month later the same court dismissed the consumer’s complaint, holding that the issues alleged in the complaint were not currently addressed by any FDA rules that required GMO or bioengineered foods to be labeled as such. The court noted the language in the FDA’s nonbinding guidance on GMOs that voluntary labeling was not necessary in reaching its decision to defer to the FDA’s authority under the doctrine of primary jurisdiction.

In New York, the district court [In re Frito Lay](#) (E.D.N.Y., 12-MD-2413 (RRM)(RLM), August 29, 2013, Mausekopf, R) declined to dismiss a complaint in which consumers had alleged the deceptive use of GMOs in a variety of products, noting that the substantive question was whether the label was misleading and not about the science underlying the term “all natural.” Moreover, the nonbinding industry guidance the California court in *Cox* cited in its decision did not have the same effect on the New York court. Instead of finding primary jurisdiction, the court further held that even if the nonbinding guidance could preempt state law, the policy detailed in the guidance did not contain actual federal requirements regarding the term “natural” that the court could use for preemptive effect.

“All natural.” Usage of “all natural” or “natural” on food labels comprised the majority of allegations asserted against food producers and manufacturers for misleading or deceptive labeling.

Surviving a motion to dismiss, a consumer's allegations that infant and toddler food and beverage products misrepresented statements describing content and health claims and induced consumers to make purchases were not preempted by federal law because the consumer brought the action under a parallel state law. In [*Bruton v Gerber Products Co.*](#) (N.D. Cal., 12-CV-02412-LHK, September 6, 2013, Koh, L), the district court found that it was significant that Congress had not set forth a "clear and manifest" statement that it intended state food labeling claims to be impliedly preempted.

Currently, the Nutritional Labeling and Education Act (NLEA) explicitly states that the NLEA cannot be construed to preempt a state law provision, unless the provision was expressly preempted. Without recourse through express preemption under the NLEA or congressionally-intended implied preemption, Anderson also said food manufacturers face "an uphill battle" invoking preemption "if there is no FDA regulation directly on point with a plaintiff's labeling claims." The *Bruton* court also declined to invoke primary jurisdiction, noting that the Ninth Circuit had made it clear that only cases of first impression or particular complexity could be dismissed or stayed based on the doctrine. Although the court permitted the nutrient and sugar content claims to continue, it dismissed the "100% Natural fruit" claims because the consumer failed to explain why a reasonable consumer would find Gerber's labels misleadingly imply that the entire product, which contained other ingredients besides fruit, as free of synthetic ingredients or ingredients not normally expected to be in food.

The same court ruled similarly in [*Werdebaugh v Blue Diamond Growers*](#) (N.D. Cal., 12-CV-02724-LHK, October 2, 2013, Koh, L) that "all natural" claims predicated on "evaporated cane juice" did not fall under the doctrine of primary jurisdiction. The court noted that the FDA's position was clear on synthetic ingredients and that the agency's expertise was not necessary for non-technical issues.

The FDA's lack of clarity on the term "all natural" was also a determinative factor in favor of a class action suit against the makers of Crisco cooking oil in [*Parker v J.M. Smucker Co.*](#), (N.D. Cal., C 13-0690 SC, August 23, 2013, Conti, S). The district court held that "all natural" is an affirmative representation on products and because the FDA still had not defined "natural" or required disclosure of bioengineered ingredients primary jurisdiction doctrine was not available to the food producer. Sharply worded, the district court noted that allowing the FDA to have primary jurisdiction, hinging on a special competence of an administrative agency, would do little for the matter before the court as the FDA could not have special competence due to its repeated refusal to rule on "natural" labeling.

In [*Pelayo v Nestle*](#) (C.D. Cal., 2:13-cv-05213-JFW-AJW, October 25, 2013, Walter, J) consumers claimed that they would not have made purchases of Buitoni Pastas if they had known that the pastas contained at least two ingredients that were unnatural, artificial or synthetic. The court analyzed the pasta's packaging to determine whether the use of "all natural" was deceptive. Noting that the phrase "all natural" was also listed on the back of the package, above the detailed ingredient listing, the court failed to recognize any ambiguity, because the nutritional information was clarified by the ingredient list. Consumers acting reasonably could not have been deceived with the term "all natural."

A Washington district court, likewise, held that a consumer failed to prove that purchasing a beverage product containing caffeine marketed as "VitaRain" gave a misleading impression that the beverage was "nutritional" and "natural" tonic. The court in [*Maple v Costco Wholesale Corp.*](#) (E.D. Wash., CV-12-5166-RMP, November 1, 2013, Peterson, R) noted that it was implausible that the name "VitaRain" had the capacity to deceive a substantial portion of the public into believing that it contained only vitamins. The name included "Rain" which is not a vitamin.

Likewise, a class action suit brought against 7-Eleven alleging that its food products contained statements amounting to misbranding and deception was dismissed in [*Bishop v 7-Eleven, Inc.*](#) (N.D. Cal., 5:12-cv-02621 EJD, August 5, 2013, Davila, E). The district court held that the suit did allege the term "misbranded food products" with specificity. The suit asserted

ambiguously that a non-definite group of items was purchased alongside an enumerated list of products; the enumerated products failed to link any violations of state or federal law with language on the packaging.

Yogurts and milk. FDA [regulations](#) characterize words like "milk" and "cheese" as "traditional dairy terms" and bars food producers of non-dairy foods from using such terms. However, that does not necessarily prevent producers from the use of additional ingredients and/or processes and that define such products as essentially dairy in nature. As a result, consumers have brought forth allegations that products containing the additional ingredients, such as evaporated cane juice or sugar, are mislabeled. Courts have tended to dismiss these claims.

In [Hood v Wholesoy & Co.](#) (N.D. Cal., 12-cv-5550-YGR, July 12, 2013, Rogers, Y) consumers sued the food producer alleging that soy yogurt labels did not comply with the Food, Drug, and Cosmetic Act (FDC Act) when listing "organic evaporated cane juice" instead of "sugar" and identifying the product as yogurt when no milk was present. In dismissing the claims, the district court deferred to the FDA under the doctrine of primary jurisdiction. However, in deferring to the FDA, the court raised questions as to whether "soy yogurt" would be subject to the same standards as "dairy yogurt." It declined to make a determination, noting that to do so would overstep its role.

Likewise, in [Kane v Chobani](#) (N.D. Cal., 12-CV-02425-LHK, September 19, 2013, Koh, L), consumers alleged that Chobani's yogurt labels referred to "evaporated cane juice" rather than using the term "sugar" or "dried cane syrup." The consumers argued that they were misled to purchase these products and would not have done so if they knew the yogurt contained sugar. In dismissing the claims, the court found that because the allegations suggested that the consumers understood that dried cane syrup was a form of sugar, that the consumers did not allege facts sufficient to show that they believe the yogurts only contained natural sugars from milk and fruit.

The addition of whey protein and milk protein concentrate in yogurt does not adulterate or misbrand the product. The district court in [Smith v Cabot Creamery Cooperative](#) (N.D. Cal., 12-4591 SC, February 25, 2013, Consti, S) noted that the FDA had on numerous occasions stated that the additions were optional ingredients that could be added to yogurt under current regulations. As such the FDA was entitled to deference in interpreting its own regulation and the case was dismissed.

Butter substitutes. Food manufacturers of butter substitutes were not immune to allegations of misleading or deceptive labeling.

The Court of Appeals for the Third Circuit dismissed claims against a butter substitute manufacturer in [Young v Johnson & Johnson](#) finding that the consumer's allegations were preempted by federal law. The appellate court held that New Jersey's standards were not identical to federal regulations authorized by the FDA. As in other matters involving food, the outcomes varied once again in California.

In [Allen v ConAgra Foods, Inc.](#) (N.D. Cal., 13-cv-01279-JST, September 2, 2013, Tigar, J) the district court denied ConAgra's motion to dismiss a consumer fraud action on grounds that federal law did not preempt the consumer's claims. The consumer alleged that Parkay butter-flavored spray manufactured and sold by ConAgra was misleading, because the product was labeled and marketed as "fat free" and "calorie free" even though a bottle of the butter-flavored spray contained 93 grams of fat and 832 calories.

In this instance, ConAgra argued that Parkay was a cooking spray and under federal regulations, food manufacturers were permitted to round down the fat and calorie content of their products if below a certain threshold. In denying the motion to dismiss, the court agreed with the consumer that ConAgra used an artificially small serving size, specifically that 8-ounce bottles of the butter-flavored spray contained 1,130 single spray servings and allowed the claims under California consumer protection laws to proceed. ConAgra subsequently requested that the court certify an immediate

appeal of the ruling, which was [denied](#) on November 12, 2013, because the preemption question required the court to decide whether there was a genuine issue of fact to be litigated.

However, a few months prior, a consumer's class action complaint in [Pardini v Unilever United States Inc.](#) (N.D. Cal., 13-675 SC, July 9, 2013, Conti, S) against Unilever alleging fraudulent labeling of Unilever's "I Can't Believe It's Not Butter" spray was preempted. The facts of the case were similar to *Allen v ConAgra*, above, in that the consumer alleged that the "I Can't Believe It's Not Butter" spray contained 771 calories and 82 grams of fat per bottle, even though the label stated that the product contained 0 fat and 0 calories per serving. Additionally, the consumer argued that the spray belonged in the FDA's "butter, margarine, oil, and shortening" category, not as a cooking spray. Unilever made the same defense that ConAgra would eventually employ, namely that federal regulations permitted it to round down the fat and calorie content below a certain threshold and that its product was a cooking spray.

In *Pardini*, the district court found that the composition of the "I Can't Believe It's Not Butter" packaging (front label of "great for cooking" and back label of "cooking spray") and its location in the grocery store (alongside margarines and butters) were not determinative. The consumer's arguments that the product was not a cooking spray were rejected; the use of the product as a topping did not mean it was not a cooking spray. However, in *Allen v ConAgra*, the court found substantial support that Parkay Spray should be categorized with other imitation butter products. ConAgra had indicated on both the product label and its website that Parkay Spray was a substitute for butter, sharing butter's taste without the negative consequences. Additionally, Parkay Spray listed serving sizes on the bottle for both cooking and topping and invited consumers to visit the Parkay Spray website for recipes. This listing of serving sizes and the language used on the labels comparing Parkay Spray to butter served to bolster the allegations that the serving size listing was wrong.

Likewise, litigation was allowed to proceed against Boulder Brands, Inc., the manufacturer of Smart Balance butter products, for false or misleading claims about their products in [Aguilar v Boulder Brands, Inc.](#) (S.D. Cal., 12cv01862 BTM (BGS), June 10, 2013, Moskowitz, B). The consumer filed claims against Boulder Brands after purchasing Smart Balance Light Butter & Canola Oil Blend for \$3.00 from California store, relying on the product label which stated that Boulder Brands' Smart Balance "Helps Block Cholesterol in the Butter." The consumer also alleged misrepresentation claims for two other Boulder Brands products that she did not purchase.

FDA regulation. Beyond litigation involving food label claims and ingredient listings, the FDA was ordered to publish final regulations concerning food safety as mandated with the passage of the FDA Food Safety Modernization Act of 2010 (FSMA) (P.L. 111-353). The district court in [Center for Food Safety v Hamburg](#), (N.D. Cal., C 12-4529 PJH, June 21, 2013, Hamilton, P) set a deadline of June 30, 2015, because the process of rule promulgation under the FSMA was intended by Congress to be closed-ended. The court found fault with the FDA's "goal" of issuing a proposed rule in the second quarter of 2014, with a submission of a final rule to occur 15 to 21 months after the close of comment periods.

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