Litigation Risks and Exposures: “All Natural” Claims

By: Michael Cromwell and Kurt Weaver
Womble Carlyle Sandridge & Rice, LLP

Overview

“All natural” claims are relatively new, only making their way to the forefront of the legal system within the past decade. Originally, these claims struggled to find legal footing in the face of common defenses such as lack of standing, insufficient pleadings, preemption, and primary jurisdiction. Yet, as the federal agencies charged with regulating food—namely, the FDA and the USDA—have continued to refrain from providing sufficient guidance to food manufacturers as to what constitutes “natural” or “all natural,” more and more suits are being filed, alleging violations of state statutes on false advertising, unfair trade practices, consumer protection, fraud, and breach of warranty. Though these cases were originally unsuccessful (or settled out of court), they seem to be gaining some new traction in light of an uncertain regulatory scheme. The following summary provides a look at the current state of the news reports, regulatory scheme, and case law that surrounds these “all natural” claims.

Current Landscape of “All Natural” Claims

NEWS & MEDIA REPORTS: A number of recent news reports have brought “all natural” food claims to the regulatory and legal forefront.

- Various news outlets, including the New York Times, have reported that the same attorneys who once took on tobacco manufacturers are now involved with “all natural” claims against large food manufacturers, generally based on the same types of claims brought against the tobacco manufacturers—false advertising, fraud, and breach of warranty claims.

- A number of reports and new studies show that consumers commonly misperceive what “all natural” labels actually mean, particularly when the term is compared to “organic.” “Organic” foods have far more precise and stringent standards than “natural” foods. For instance, to qualify as “organic,” crops must be grown without synthetic pesticides or bioengineered genes and may not be irradiated, organic livestock must have access to the outdoors and be raised without antibiotics or growth hormones, and organic operations must be certified by third parties accredited by the USDA. Despite the more stringent standards for “organic” food, surveys routinely suggest that consumers express a preference for products labeled “natural” over those labeled “organic.” These surveys demonstrate that “all natural” products are increasingly more in demand than “organic” products. Additionally, they are more in supply given the fact that the product does not have to meet a discernible standard.

- Some media outlets have made the argument that “non-natural” foods, such as processed foods and GMOs, could actually be healthier than “all natural” foods in some instances. Such support may lend credence to some of plaintiffs’ false advertising claims.

REGULATORY: No statutes have been established to define the term “natural” in the context of food. Moreover, although the FDA and USDA are charged with enforcing the labeling laws on food manufacturers, neither agency has specifically defined the term “natural” or “all natural.”
Rather, the FDA and USDA have separate *informal* guidance on the use of the term “natural.”

- **FDA:** The most recent guidance from the FDA is from 1991, which states that “natural” means a food item contains nothing artificial or synthetic. Since then, the FDA has generally only agreed to define whether something is “natural” or “all natural” on a case-by-case basis. For instance, in April 2008, the FDA stated that it would object to the use of the term “natural” on a product containing high-fructose corn syrup. Yet, in July 2008, the FDA stated that whether high-fructose corn syrup could be considered “natural” would depend on the manner in which the corn syrup was manufactured. The FDA has also sporadically issued warning letters to companies declaring their use of the term “all natural” as inappropriate.

- **USDA:** The most recent guidance from the USDA is from 1982, which states that “natural” means: (1) the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative, or any other artificial or synthetic ingredient; and (2) the product and its ingredients are not more than minimally processed. In September 2009, the Food Safety Inspection Service of the USDA issued an Advance Notice of Proposed Rulemaking concerning the use of the term “natural” in labeling meat and poultry products; however, it has taken no further action since then.

- **RESULT:** The regulatory ambiguity results in (1) no enforceable regulations defining the term “natural,” and (2) different agency definitions for the term “natural,” which has created much confusion in the food industry. These ambiguities have helped to trigger a number of lawsuits targeting “all natural” food claims.

**CASE LAW:** The wave of “all natural” litigation is still in its early stages, and it is difficult to predict the chances of a party’s success. We note, however, that the regulatory ambiguity may motivate settlements when and if cases are filed.

- **Common “All Natural” Claims:** Many suits have been brought to federal courts as putative class actions under state law, alleging violations of state statutes on false advertising, unfair trade practices, or consumer protection, or alleging common law fraud or breach of warranty. With that said, no court has yet reached a judgment in favor of plaintiffs. They are either still pending or have been dismissed.

- **Common “All Natural” Claim Defenses:** The current case law demonstrates some defense strategies that have been successfully used in “all natural” cases. Common reasons for dismissal include lack of standing, failure to allege fraud or mistake with particularity, failure to state a claim, preemption, and the doctrine of primary jurisdiction. However, there seems to be a growing ability to circumvent some of these traditional defenses.

  - **Standing:** Lack of standing is often highlighted by a plaintiff’s lack of injury, or, when plaintiffs are seeking injunctive relief, a plaintiff’s lack of future injury. Another way defendants challenge standing is by arguing the named plaintiff lacks standing to bring the claims on behalf of class members who purchased a different variety of products than was purchased by the named plaintiff. That said, a number of courts have ruled that a named plaintiff has standing if there is enough similarity between the purchased products and the non-purchased products, and between the purchased and non-purchased products’ labeling.

  - **Preemption:** Preemption arguments have historically been successful in cases where the manufacturer’s representations are governed by specific FDA regulations that control the content of food labeling rather than in cases that focus solely on claims that a product is wrongfully labeled “all natural.” Some courts have held that state law claims based on “all natural” labeling are not preempted by anything because the FDA’s informal policy on the term “natural” does not have the force of law or because the state law parallels the labeling requirements under federal law.

  - **Primary Jurisdiction:** Under the doctrine of primary jurisdiction, defendants urge courts not to intervene when doing so would undermine
the FDA’s comprehensive regulatory scheme with respect to labeling. Some courts have applied the doctrine to high-fructose corn syrup or GMO cases and the courts have stayed the cases, but the FDA has declined to give guidance. Other courts have not applied the doctrine because the FDA has been asked on numerous occasions to formally define “natural” in the food labeling context but it has declined to do so.

- **Magnuson-Moss Warranty Act**: Plaintiffs often bring their breach of warranty claims under this act; however, they have been largely unsuccessful. The act is expressly “inapplicable to any written warranty the making or content of which is otherwise governed by Federal law.” Because the federal law already governs the labeling of food, the act is inapplicable to food.

- **Failure to Plead Fraud with Specificity**: Plaintiffs have found it increasingly difficult to meet the heightened pleading levels given the lack of accessibility to food manufacturer’s internal workings.

### Conclusion

According to the FDA, “[f]rom a food science perspective, it is difficult to define a food product that is ‘natural’ because the food has probably been processed and is no longer the product of the earth. That said, FDA has not developed a definition for use of the term natural or its derivatives.” While it remains an uphill path for those pursuing “all natural” food labeling claims, it appears that these claims may be finding some footing, either in the pleading stages of individual or class action lawsuits, or at the settlement table. For instance, in July 2013, PepsiCo brand Naked Juice settled a class action lawsuit for $9 million and agreed to stop using “all natural” to describe its products due to the lack of detailed regulatory guidance around the word “natural.” Given the lack of guidance as to what constitutes “natural” and the courts’ inconsistent treatment of these claims, these lawsuits could continue for the foreseeable future.

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