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Bylined Article

The Perils of Navigating Legal Issues in Bringing a New Food Product to Market

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The legal environment today does little to simplify the process of bringing a new food product to market, particularly when it comes to how that product will be labeled and marketed to consumers. Putting aside for this discussion issues relating to intellectual property concerns regarding the use of trade names and trade dress, and false advertising claims by competitors, the combination of evolving FDA regulations concerning food marketing and labeling and plaintiffs' attorneys looking for every opportunity to commence a class action suit over a company's marketing efforts makes it important for food and beverage companies to carefully consider how they describe their products.

One of the most notable areas in dispute is the question of when a manufacturer can use the term "natural" or "100 percent natural" in describing its product, given the likelihood that nearly every food product will contain ingredients that have been "processed" to some degree. To the purists—or more accurately, plaintiffs' attorneys looking for a basis to bring a lawsuit—the presence of any ingredients that are subject to any form of processing leads to the unreasonable conclusion that the use of a variation of the term "natural" is a false advertising claim subject to legal redress.

While many food company defendants have in the first instance argued that the FDA has "primary jurisdiction" over the appropriate use of the term "natural" and that as a result, such claims must be dismissed or stayed until the FDA takes a position on this issue, many courts have concluded that it is unlikely that the FDA will provide a definitive definition of "natural" any time in the near future. As a result, there have been some courts that have deferred to the FDA while others have permitted the plaintiffs to pursue their claims. Indeed, the FDA has so far declined to define what will and will not pass as an accurate statement that a food product is "all natural." In commenting on this issue, the FDA has stated that: "From 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." The FDA has not objected to the use of "natural" if the food does not contain added color, artificial flavors, or synthetic substances, but it goes no further than that.

By declining to address all of the questions relevant to the "natural" issue, the FDA has left food companies with little guidance beyond the obvious "synthetic" and "artificial" criteria, and perhaps more important, with no clear defense to the claims of class action plaintiffs. For example, producers are facing claims that use of the term "natural" is deceptive if any of the natural ingredients of its products are extracted or refined, because, it is claimed, those ingredients are too highly "processed" to justify use of the term "natural." Similarly, there is heated debate in the courts and various state legislatures over whether ingredients harvested from naturally grown crops planted with genetically engineered seeds may still be referred to as "natural."

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A related issue arises with the manner in which manufacturers refer to the sugar content of their products, when even statements that would be considered truthful and accurate to the reasonable consumer have become subject to claims of false and misleading product labeling and marketing. For example, in a case entitled *Rahman v. Mott's LLP*, a federal court in California recently ruled that claims may proceed against a popular brand of 100 percent apple juice for putting the statement "No Sugar Added" on its label. While most of us realize that fruit juice will naturally contain a relatively high amount of sugar, and this particular company accurately stated the sugar content of its juice on the product's Nutrition Facts panel, the plaintiff argued that the "No Sugar Added" statement created the false impression that this brand of apple juice contained less sugar than competing juice products.

Besides contending that the statement was true because it had not added any sugar to its 100 percent apple juice product and that the accurate amount of sugar naturally present in the juice was accurately stated on the Nutrition Facts panel of the product, the defendant juice company argued that the court should stay the plaintiff's claims because the FDA is currently reviewing its standards and requirements for the content of Nutrition and Supplemental Facts labeling. In particular, the FDA has proposed that the Nutrition Facts Label require manufacturers to disclosed the presence or absence of added sugar in addition to the disclosure of total sugar content. Nevertheless, the court determined that the issue of whether a manufacturer is providing false and misleading information when it includes a true statement that no sugar has been added to the product is unrelated to the FDA's current consideration of that very issue. The court based this decision on the premise that the FDA rulemaking proceeding deals only with

the content of the Nutrition Facts label while the statement at issue appears in an area on the product other than in that Fact panel. So now the plaintiff will be entitled to pursue the class action claim that the true statement regarding the absence of added sugar is false and misleading.

While nearly all of this litigation has been pursued in California because it has what are likely the most stringently enforced consumer protection statutes in the country, the practical effect for most food companies will be that the outcome of the California litigation will drive the national marketing of most products, as evidenced by the number of companies that have revised their labeling in response to the litigation claims in California. Moreover, the examples discussed here are just a few instances of how our current legal environment makes it difficult for reputable food producers to honestly market and label their products without fear of legal repercussions.

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