

'Natural' suits persist absent FDA definition

By Sascha Henry and Paul Seeley

It is no secret that some advertisers believe that using the term "natural" is an effective way to advertise a product. Some consumers seem to prefer these "natural" products for a variety of reasons, even while no one (particularly the Food and Drug Administration) has set forth an accepted definition of what "natural" actually means. Not surprisingly, the lack of defined standards for "natural" offers significant litigation opportunities for plaintiffs to file suits (usually class actions) claiming they were misled by the "natural" advertising into purchasing products that are not, in fact, "natural." The year 2013 saw many of these cases, and defendants tested the lawsuits through motion practice. Defendants often argued: (1) that the FDA has "primary jurisdiction" over the advertising, and (2) no reasonable consumer would be misled by the term "natural." The mixed success of these arguments suggests that courts are changing their attitudes toward "natural" allegations. In fact, by the end of 2013, the very lack of a "natural" definition that opened the door to this kind of litigation was turned into a defense that successfully dismissed several cases.

Defendants facing claims of false advertising using the term "natural" often assert the defense of primary jurisdiction. This discretionary doctrine allows courts to dismiss or stay a case because an administrative agency has primary jurisdiction over that issue, and the agency should decide the issues so that the rulings are consistent across the country. The underlying premise of this defense is that the administrative agency should make a uniform determination applicable to all manufacturers, rather than piecemeal litigation in the courts. As applied to "natural" litigation, since the FDA has primary jurisdiction over food and beverage labeling, the argument goes, the FDA should decide when a product is allowed to be advertised as "natural" rather than the courts. See, e.g., *Astiana v. The Hain Celestial Group Inc.*, No. 11-6342, (N.D. Cal. Nov. 19, 2012) (applying primary jurisdiction to dismiss claims based on the phrase "all natural" because the FDA has the expertise and authority to regulate labels).

The primary jurisdiction defense to "natural" claims had mixed success in 2013. For example, in *Janney et al. v. General Mills*, No. 12-3919 (N.D. Cal. May 10, 2013), the plaintiffs alleged

that the defendant's Nature Valley products were falsely advertised as "natural" because they contained high fructose corn syrup and similar sweeteners. The defendant argued that the court should dismiss and let the FDA make the determination of whether products containing these ingredients can be advertised as "natural." The court was not convinced. After reviewing the long history of inaction by the FDA with respect to "natural" food labels (including times when the FDA was asked to rule on the "natural" issue by other courts and refused to do so), the court concluded that "a dismissal or stay under the primary jurisdiction doctrine would have no effect on the FDA's position" and refused to stay the case.

Courts are recognizing that the very indefiniteness of the term "natural" precludes reasonable consumers from relying upon it in making purchasing decisions.

Just months after the *Janney* court rejected the primary jurisdiction defense, another Northern District court applied primary jurisdiction to dismiss a "natural" case. In *Cox v. Gruma Corp.*, No. 12-6502 (N.D. Cal. July 11, 2013), the plaintiff claimed that the defendant's tortillas were falsely advertised as "natural" because they contained genetically modified organisms. Both parties acknowledged that the FDA had not issued any guidance on whether products containing GMOs could be considered "natural." Applying the primary jurisdiction doctrine, the court stayed the case for six months and referred the dispute to the FDA. Here, the lack of guidance from the FDA persuaded the court that it should wait for the FDA to address the issue. But see, e.g., *Bohac v. General Mills Inc.*, No. 12-05280 (N.D. Cal. Oct. 10, 2013) (refusing to stay case where plaintiff alleged "natural" advertisement was false because the product used GMOs, reasoning that the court could determine falsity and the FDA had issued "informal" guidance through administrative actions).

While some courts were unwilling to defer to the FDA, others granted motions to dismiss "natural" claims because no reasonable consumer would be misled. In *Kane et al. v. Chobani*, No. 12-02425 (N.D. Cal. Sept. 19, 2013),

the plaintiff claimed that the defendant's yogurt was falsely advertised as "all natural" because it included fruit or vegetable juice concentrate for coloring. The court dismissed the complaint because the labels "clearly disclosed the presence of fruit or vegetable concentrate," thus, it was "not plausible" that the plaintiff was misled into thinking the "all natural" advertising meant the yogurt did not contain added juice. Because of this full disclosure, the "natural" language would not mislead a reasonable consumer.

A similar result was reached in the case *Pelayo v. Nestle USA Inc. et al.*, No. 13-5213 (C.D. Cal. Oct. 25, 2013). The plaintiff argued that the defendant's pasta was falsely advertised as "All Natural" when the products contained xanthan gum and soy lecithin, allegedly "unnatural" ingredients. The court dismissed the case, with prejudice, on the ground that no reasonable consumer would be misled. Specifically, the court noted that the plaintiff failed to offer "an objective or plausible definition of the phrase 'All Natural,' and the use of the term 'All Natural' is not deceptive in this context." In reaching this conclusion, the court rejected the plaintiff's attempt to use the dictionary definition of "natural" ("produced or existing in nature") because every consumer is "aware that Buitoni Pastas are not springing fully-formed from Ravioli trees and Tortellini bushes." The court also rejected the plaintiff's reliance on the FDA's "informal" guidance, noting that it did not establish a legal requirement binding on the manufacturers. Finally, the court noted that, even if "natural" was ambiguous, the ingredient list printed on every package disclosed that the products contained the challenged ingredients, thereby preventing any reasonable consumer from being misled. Thus, in the absence of a plausible, objective definition of "natural," and the plaintiff's failure to show that her subjective definition was shared by reasonable consumers, the court dismissed her claims.

So far, at least one other court has followed the Pelayo court's lead in dismissing "natural" claims. In *Balser et al. v. The Hain Celestial Group Inc.*, No. 13-05604 (C.D. Cal., Dec. 18, 2013), the court dismissed a complaint, without leave to amend, that alleged that the defendant's cosmetics line was falsely advertised as "natural." The court noted that it was "undisputed that 'natural' is a vague and ambiguous term." The plaintiff attempted to define "natural"

as "existing in or produced by nature; not artificial." The court rejected this definition by echoing *Pelayo*: "shampoos and lotions do not exist in nature, there are no shampoo trees, cosmetics are manufactured." The court noted that the defendant provided its own definition of "natural" on its website, as well as a full list of ingredients used. Based on these disclosures, the court concluded that "no reasonable consumer would be misled by the label 'natural.'"

The *Kane*, *Pelayo* and *Balser* cases may represent a change in judicial attitudes toward "natural" false advertising claims, as judges become more willing to decide, at the pleading stage, whether "natural" advertisements are misleading. Instead of waiting for the FDA to issue "natural" standards, courts are recognizing that the very indefiniteness of the term "natural" precludes reasonable consumers from relying upon it in making purchasing decisions. By making a full disclosure of the ingredients on their labels, defendants are able to argue that their products fit within their own definitions of "natural," and, therefore, are not misleading. Thus, the very ambiguity that allowed the "natural" litigation to spring forward is now being used by defendants to show why no consumer would be misled by this undefined and vague term. As parties and courts await further guidance from the FDA regarding the term "natural," it will be interesting to see whether this possible trend of courts deciding that "natural" advertisements are not misleading as a matter of law continues in 2014.

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