

News & Developments

January 9, 2014

To Be Natural, or Not to Be . . .

Throughout the last year a number of proposed class actions have been filed against various food manufacturers of well-known brands, including Horizon Milk, Frito-Lay, Häagen-Dazs, General Mills, Campbell Soup, Pepperidge Farm, Mission Tortilla Chips, ConAgra Foods, J.M. Smucker, and Kashi. Although the specific allegations vary from case to case, essentially the plaintiffs claim that the manufacturers misled consumers by labeling their products as “all natural” or “100% natural” when the products were allegedly made with ingredients grown from genetically modified organisms (GMOs).

In the past, the FDA has not formally provided guidance regarding the meaning of “natural,” but its policy has been to apply the term to products where “nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.” [“Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food,”](#) 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993). The FDA also had not provided any specific guidance to manufacturers to answer the question of whether food products containing ingredients produced using bioengineered seed may be labeled “natural,” “all natural,” or “100% natural.” Thus, based on the definition and lack of other formal guidance, many manufacturers regularly use the term “natural” to label their products. This labeling is increasingly coming under attack, with varying results.

For example, courts in California and Colorado referred the issue to the FDA asking for guidance. *See Cox v. Gruma Corp.*, No. 12-cv-6502 YGR, 2013 WL 3828800 (N.D. Cal. July 11, 2013); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017 (N.D. Cal. July 25, 2013); *Van Atta v. Gen. Mills, Inc.*, Civil Action No. 12-cv-02815-MSK-MJW (D. Colo. July 18, 2013). But earlier this month, the FDA declined to address the issue, citing its limited resources and higher-priority projects. [“FDA ‘respectfully declines’ judges’ plea for it to determine if GMOs belong in all-natural products.”](#) E. Watson, (Jan. 8, 2014). Other courts have dismissed claims of the proposed class actions or transferred and consolidated them instead of referring the issue to the FDA – *see, e.g., Rojas v. Gen. Mills, Inc.*, No. 12-cv-05099, 2013 WL 5568389 (N.D. Cal. Oct. 9, 2013); *Shake v. Frito-Lay N. Am., Inc.*, No. 12-cv-00408 (E.D.N.Y. Aug. 29, 2013), while others have allowed the cases to proceed – *see, e.g., Krzykwa v. Campbell*

Soup Co., Case No. 12-62058, 2013 WL 2319330 (S.D. Fla. May 28, 2013); *In re Horizon Organic Milk Plus DHA Omega-3 Marketing and Sales Practice Litig.*, No. 12-md-02324-JAL, 2013 WL 3830124, at *28 (S.D. Fla. July 24, 2013).

One of the most recent cases is a case filed against Snyder's Lance, Inc. (Snyder) in a Florida federal court. *Barron et al. v. Snyder's-Lance Inc.*, No. 0:13-cv-62496 (S.D. Fla. filed Nov. 13, 2013). The proposed class action claims that Snyder deceptively and misleadingly labeled a considerable number of its pretzel and chip snacks as "all natural" even though they allegedly contain GMOs. Plaintiffs, who consist of residents from several states, argue that Snyder consistently and systematically marketed several snacks as "all natural" merely to distinguish certain products to appeal to its health conscious consumers while charging a premium price.

According to the complaint, many of Snyder's pretzel and chip snacks—including those from the Snyder's of Hanover, Cape Cod, EatSmart and Padrinos line of products—contain unnatural ingredients, including genetically modified canola oil and corn, as well as synthetic ingredients that mislead and deceive reasonable consumers by portraying products containing non-natural ingredients as 'All Natural,' 'natural' and/or 'naturals.' *Id.* at pg. 3-4, 6. The consumers allege claims under Florida's deceptive and unfair trade practices act, as well as breach of express warranty and intentional misrepresentation, among other claims, and seek declaratory and injunctive relief and unspecified damages. *Id.* at pgs. 43-46.

Cases involving the inclusion of GMOs in food products are on the rise. The Snyder litigation is just another in a long line "all natural" lawsuits that have been filed in the last year. Now that the FDA has officially declined to address the issue, manufacturers can continue to expect "all natural" litigation to gain steam, and they should take care to ensure the accuracy of their labeling and their compliance with the FDA regulations.

Keywords: litigation, products liability, FDA, class actions, natural, GMOs, genetically modified organisms, Snyder's-Lance

—[Janelle L. Davis](#), Thompson & Knight LLP, Dallas, TX, and [Ira J. Gonzalez](#), Adams and Reese LLP, New Orleans, LA