Extracted from *Law360*:

Law360, New York (December 05, 2013, 4:16 PM ET)
By Josh L. Becker, Alston & Bird LLP

One of the most prominent theories for class action claims in 2013 involved allegations of deceptive advertisement, based on a company's labeling of its product as "all natural," "100 percent natural" or simply "natural." Many of these cases allege that such labeling is deceptive because the products contain ingredients made from genetically modified organisms ("GMO") or from synthetics. Such cases, which are most commonly filed in the federal courts of California owing to California's consumer protection statutes — including California's Legal Remedies Act, False Advertising Law, and Unfair Competition Law — have reached varying results.

For example, some cases were resolved through fairly significant settlement agreements. See, e.g., Natalie Pappas v. Naked Juice Co of Glendora Inc., 11-cv-08276 (C.D. Cal. Aug. 7, 2013) (given preliminary approval for a $9 million settlement); Trammell v. Barbara's Bakery, 12-cv-02664 (N.D. Cal. June 21, 2013) ($4 million settlement).

Others were voluntarily dismissed. See, e.g., Rapcinsky v. Skinnygirl Cocktails LLC, No. 11-cv-6546 (S.D.N.Y. Jan. 1, 2013) (class certification denied and later voluntarily dismissed); Tobin v. Conopco Inc., 12-cv-5812 (D.N.J. August 20, 2013).

Most courts struggled with whether the claims were preempted or fall under the primary jurisdiction doctrine. These two struggles exist, in part, because the U.S. Food and Drug Administration, pursuant to the Federal Food, Drug & Cosmetic Act ("FDCA"), is responsible for ensuring that food labels are neither false nor misleading. Despite this responsibility, however, the FDA has neither indicated whether products with GMOs can be labeled as "all natural", nor has it indicated when such an "all natural" label would be false or misleading. This lack of FDA action has led some courts to stay proceedings in anticipation of a clear determination. Thus, as the year comes to an end, it appears that the main question for courts in 2014 will be whether to stay future cases in hope of obtaining guidance from the FDA.

Preemption and the Primary Jurisdiction Doctrine

While preemption is often argued as a defense against "all natural" claims, such claims usually have been preempted when the claim involves USDA-regulated meat products. See e.g. Barnes v. Campbell Soup Co., No. 12-cv-05185, (N.D. Cal. July 25, 2013). In Barnes, defendants argued that the plaintiffs' allegations regarding its "100 percent natural" chicken soup were preempted by the Federal Meat Inspection Act ("FMIA") and the Poultry Products Inspection Act ("PPIA") because, pursuant to the FMIA and PPIA, the U.S. Department of Agriculture preapproved the labels and determined that the labels were not "false [or] misleading." Id. Thus, the defendants argued that because the USDA previously had found that the "100 percent natural" label was not false or misleading, the label could not be construed as false or misleading under state law. Id. The Barnes court agreed, comparing this situation to medical device cases that are preempted because the devices have gone through pre-market approval. Id.

Most defendants also argue that the FDA has primary jurisdiction over "all natural" litigation, but this argument has been met with differing results. Compare Cox v. Gruma Corp., (N.D. Cal. July 11, 2013) (case stayed for six months based on the primary jurisdiction doctrine) with Bohac v. General Mills Inc. (N.D. Cal. Oct. 10, 2013) (finding the primary jurisdiction doctrine inapplicable).

The primary jurisdiction doctrine allows courts to stay proceedings so that an administrative agency which has expertise in the area can resolve the dispute. Cox (N.D. Cal. July 11, 2013). To determine whether the primary jurisdiction doctrine applies, courts weigh four factors: (i) the need to resolve an issue that (ii) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (iii) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (iv) requires expertise or uniformity in administration. Id. (citations omitted). As discussed below, this doctrine may be the best hope for defendants in 2014.

The Varying Results in "All Natural" Lawsuits

This type of "all natural" litigation is still in its infancy — most complaints were filed within the past two years — and, therefore, most orders have been given at pleadings or class certification stages. Of the 21 cases reviewed that had "all natural" labeling claims and substantive orders issued in 2013, 11 were allowed to proceed, five were dismissed, three were stayed and two had classes certified.

These orders have obviously given varying results, with an apparent discrepancy being made between cases with synthetic ingredients and cases with GMOs. As discussed below, defendants in cases involving synthetic ingredients may

have a strong argument for having the claims dismissed at the pleadings stage, while those in cases involving GMOs may be better off seeking a stay.

Cases suggest that deceptive labeling claims based merely on products being labeled as "all natural", but containing synthetic or processed ingredients, have a reasonable chance at dismissal at the pleadings stage. See Rapcinsky, No. 11-cv-6546 (S.D.N.Y. Jan. 1, 2013) (class certification denied and later voluntarily dismissed); Kane v. Chobani Inc., 12-cv-02425 (N.D. Cal. Sept. 19, 2013) (case dismissed); Maple v. Costco Wholesale Corp., 12-cv-5166 (E.D. Wash. Nov. 1, 2013) (case dismissed); Pelayo v. Nestle USA Inc., 13-cv-5213 (C.D. Cal. Oct. 25, 2013) (case dismissed); Ries v. Arizona Beverages USA LLC, No. 10-cv-01139 (N.D. Cal. March 28, 2013) (summary judgment granted, class decertified); but see Howerton v. Cargill Inc., 13-cv-00336 (D. Haw. Oct. 15, 2013) (motion to dismiss denied); Wilson v. Frito-Lay North America Inc., 12-cv-01586 (N.D. Cal. April 1, 2013) (motion to dismiss denied); Werdebaugh v. Blue Diamond Growers, 12-cv-2724 (N.D. Cal. Oct. 2, 2013) (motion to dismiss denied).

For example, the court in Pelayo opined that a plaintiff's inability to provide a plausible definition of "all natural" will prove fatal to his or her deceptive labeling claims. 13-cv-5213 (C.D. Cal. Oct. 25, 2013). As the court explained, without a clear definition of what "all natural" is, a plaintiff cannot allege to have been deceived by the phrase. Id. Moreover, when "all natural" ingredients are "clarified by the detailed information contained in the ingredient list," a plaintiff's claims for deceptive advertisement will fail. Id. (granting motion to dismiss without leave to amend); see also Kane, 12-cv-02425 (N.D. Cal. Sept. 19, 2013) (granting the motion to dismiss because the labels clearly disclosed the presence of the allegedly unnatural ingredients).

Conversely, cases involving products labeled as "all natural" and containing GMOs generally have survived motions to dismiss, suggesting that these claims will proceed past the pleadings stage unless the primary jurisdiction doctrine applies and the case is stayed. Bohac, 12-cv-05280 (N.D. Cal. Oct. 10, 2013) (motion to stay denied); In Re: ConAgra Foods, 11-05379 (C.D. Cal. Aug. 12, 2013) (ex parte application for an order staying action denied); In Re: Frito-Lay North America Inc. All Natural Litigation, 12-md-2413 (Aug. 29, 2013) (motion to dismiss denied); Kryzwka v. Campbell Soup Co. Federal Court, 12-62058 (S.D. Fl. May 28, 2013) (motion to dismiss denied); Parker v. J.M. Smucker Co., 13-cv-00690 (N.D. Cal. Aug. 23, 2013) (motion to dismiss denied); Rojas v. General Mills Inc., 12-cv-05099 (N.D. Cal. Oct. 9, 2013) (motion to dismiss denied).

In Parker, the defendant's motion to dismiss was denied because the plaintiff provided a "simple[] argument," namely that consumers would assume products labeled as "all natural" would not contain bioengineered (i.e, GMO) ingredients. 13-cv-00690 (N.D. Cal. Aug. 23, 2013). Additionally, the court determined that the claims were not preempted and that the primary jurisdiction doctrine did not apply because the FDA does not require any special labeling for products with bioengineered ingredients and has not indicated a willingness to provide a definition of "all natural." Id. Holdings such as this suggest that simple deceptive labeling claims based on products being labeled as "all natural" but containing GMOs will be difficult for defendants to defeat at the pleadings stage.

There is hope for defendants, however. Despite plaintiffs' success in the aforementioned GMO cases, defendants have had some success when they pursued stays. In those cases, the judge applied the primary jurisdiction doctrine and stayed the proceedings to give the FDA time to determine whether products with GMOs can be labeled as "all natural." See Cox (N.D. Cal. July 11, 2013) (case stayed for six months for the FDA to provide a definition of "all natural"); Barnes (N.D. Cal. July 25, 2013) (case stayed, in part, for 6 months for a FDA administrative decision); Van Atta v. General Mills Inc., (D. Colo. July 18, 2013) (case stayed until Cox referral is decided); but see Bohac (N.D. Cal. Oct. 10, 2013) (finding the primary jurisdiction doctrine inapplicable); Rojas v. General Mills Inc. (N.D. Cal. Oct. 9, 2013) (same).

In Cox, the court stayed the proceeding for six months, referring to the FDA to determine "whether and under what circumstances food products containing ingredients produced using bioengineered [(GMO)] seed may or may not be labeled 'natural' or 'all natural' or '100 percent natural.'" (N.D. Cal. July 11, 2013).

Not only does this action illustrate at least some acknowledgment by the courts that these deceptive labeling cases may be preempted by the FDA, but they also may encourage the FDA to take action that could resolve the issue of whether products containing GMOs can be labeled as "all natural."

Conclusion

With these orders, courts have provided some guidance for attorneys faced with litigation that revolves around deceptive advertisement claims, based on food products containing GMOs or synthetic ingredients. Specifically, courts have shown a willingness to allow cases involving GMOs to proceed past the pleadings stage, but have been more likely to dismiss claims involving synthetic ingredients, especially when the ingredients are disclosed in an ingredient list. Thus, while defense attorneys may now feel that claims involving synthetic ingredients should be strongly attacked at the pleadings stage, defense attorneys faced with such GMO cases may be better off seeking a stay to allow the FDA to determine with

products containing GMOs can be labeled as “all natural.”

Josh Becker is a partner at Alston & Bird's Atlanta office.