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High Bar For 'Natural' Class, Despite FDA Ambiguity


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Law360, New York (January 21, 2014, 6:54 PM ET) -- A recent wave of class actions allege labeling food products as "natural," "all natural" or "100% natural" violates state consumer protection laws if they contain ingredients that are artificial, synthetic, bioengineered, highly processed or "unnatural" for other reasons.

While other words appearing on food labels have been defined in the Code of Federal Regulations, the U.S. Food and Drug Administration has not provided a formal, regulatory definition of natural for foods. Such a definition may establish a bright line for compliance, allowing courts to easily decide the truth or falsity of these labels and providing compliant manufacturers much more secure defenses to liability. All the FDA had done was to state — and sometimes enforce — its informal policy that it does not object to the term "natural" on food when "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."

A cottage litigation industry has been built in the shadow of the FDA's regulatory inaction, with attorneys nationwide supplying their own varying interpretations of natural and bringing class actions claiming that the natural labeling on countless products does not live up to those interpretations. The newest trend is to challenge the "natural" labeling of foods containing genetically modified organisms, which are increasingly prevalent in our food supply but need not be labeled under current FDA rules.

Faced with these class actions, several federal judges referred to the FDA the question of whether food products containing bioengineered ingredients may be labeled "natural" or "all natural" or "100% natural" for an administrative determination under 21 C.F.R. § 10.25(c). These and other cases had been stayed or dismissed while waiting for the FDA's decision. Many hoped that the FDA would respond with a formal definition to provide greater clarity to the industry and consumers, and to contain the litigation flood. However, on Jan. 6, 2014, the FDA issued its response and refused to decide the question.

While those hoping for clarity were disappointed by the refusal, the FDA's response implicitly set a very high bar for class certification in natural class actions. For a court to grant class certification under Rule 23 in a suit for damages, common questions of fact and law must predominate over individual ones. But as the Supreme Court instructed in Wal-Mart v. Dukes, it is not merely the existence of common questions, but the availability of common proof to reach common answers that is required to certify a class.

The FDA's refusal to define "natural" raises numerous issues that will make class certification substantially more difficult to obtain in these actions. First, the FDA recognized the need to, and desirability of, engaging the public and competing stakeholders in a dialogue to fulfill its commitment to transparency and openness. In doing so, the FDA implicitly confirmed that no definition of "natural" can be drawn from other proposed synonyms (such as "organic") as some had suggested.

Second, the FDA noted that "defining the term 'natural' on food labeling necessarily involves interests of [f]ederal agencies other than FDA, including the United States Department of Agriculture, as well as competing views on the part of stakeholders." If there is not existing consensus among agencies and stakeholders who are intensely focused on the issue, it stands to reason that no consensus could exist among the consuming public who has indubitably thought about the issue substantially less.

Third, the FDA identified numerous "complexities of such a definition" that would affect the reasonable consumer, including those "well beyond the narrow scope of genetically engineered food ingredients." As the FDA put it, "if the agencies were to define the term, they would likely need to consider among other things: relevant science; consumer preferences, perceptions, and beliefs; the vast array of modern food production technologies in addition to genetic engineering (e.g., use of different types of fertilizer, growth promotion drugs, animal husbandry methods); the myriad food processing methods (e.g., nanotechnology, thermal technologies, pasteurization, irradiation); and any strictures flowing from the First Amendment."

Given people's close connection to and obvious interest in what they put in their mouths, it would be difficult indeed to construct a model that identified statistically significant commonality among all of these issues, and among consumers. Thus, it will be exceedingly difficult to quantify the materiality of the natural label in individual consumers' purchases or show that it was common to all class members, and even more difficult to show that each purchaser was damaged. And, under the Supreme Court's 2013 Comcast Corp. v. Behrend decision, damages must be determinable based upon a common, classwide damage theory for class certification to pass muster. Indeed, for these very reasons, federal courts have expressed increasing skepticism about the appropriateness of certifying "natural" class actions.

Showing commonality and predominance among class members is made more difficult by the greater rigor being applied in determining whether the class is ascertainable, another rule 23 requirement. An emerging line of cases from the Third Circuit suggests that courts will be increasingly suspicious of classes that are defined to include people based upon no more than their own say-so. These cases emphasize that class claims are not proven "if the only proof of class membership is the say-so of putative class members or if ascertaining the class required extensive and individualized fact-finding."

Finally, the FDA concluded that "even if we were to embark on a public process to define 'natural' in the context of food labeling, there is no assurance that we would revoke, amend, or add to the current policy, or develop any definition at all."

Put differently, the meaning of "natural" is so individualized and context-specific, it is not even clear whether the detailed administrative process required to create a regulation could amass a sufficient consensus to get out of the definitional morass. As applied to the class action context, if the FDA cannot develop a consensus definition through its required administrative process, no common definition could possibly exist in the minds of the consuming public. Without a common understanding of the label on the box, there cannot be common answers to common questions, individualized issues would predominate, and class certification in the natural cases cannot be granted.

—By Michael A. Geibelson and Stephen P. Safranski, Robins Kaplan Miller & Ciresi LLP.

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[1] See 58 Fed. Reg. 2302, 2407 (1993).

[2] See FDA, Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984 (May 29, 1992).

[3] Cox v. Gruma Corp., No. 4:12-cv-6502-YGR (N.D. Cal.), Barnes v. Campbell Soup Co., No. 3:12-cv-05185-JSW (N.D. Cal.), and In Re General Mills, Inc. Kix Cereal Litigation, No. 2:12-cv-00249-KM-MCA (D.N.J.).

[4] 564 U.S. 277 (2011).

[5] 133 S. Ct. 1426 (2013).

[6] See, e.g., Astiana v. Ben & Jerry's Homemade, Inc., 2014 U.S. Dist. LEXIS 1640, at *37-38 (C.D. Cal. Jan. 7, 2014) (denying certification of "all natural" class because class was not ascertainable, plaintiff's claims were not typical, and individualized damage issues predominated); Astiana v. Kashi Co., 291 F.R.D. 493, 508 (S.D. Cal. 2013) (denying, in part, certification of "All Natural" class because "Plaintiffs fail to sufficiently show that 'All Natural' has any kind of uniform definition among class members").

[7] See Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593-94 (3d Cir. N.J. 2012); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349 (3d Cir. Jan. 8, 2013); Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013).

[8] Hayes at 356; see also Stone v. Advance Am., Cash Advance Ctrs. Inc., 278 F.R.D. 562, 569 (S.D. Cal. 2011) (citing Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 672-73 (N.D. Cal. 2011); Clavell v. Midland Funding LLC, No. 10–3593, 2011 U.S. Dist. LEXIS 65721, *7 (E.D. Pa. June 21, 2011); Xavier v. Philip Morris, 787 F. Supp. 2d 1075 (N.D. Cal. 2011).