



“All Natural” and “Natural” Cases

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Why “Natural”?

- FDA historically refused to define “natural”
 - Nonbinding policy
 - Warning letters
- Plaintiffs fill the gap where:
 - Product includes a “synthetic” or “artificial” ingredient
 - Product contains genetically modified ingredients (e.g., corn or soy)
- FDA recently sought comment on defining “natural”
 - Comment period closed May 10, 2016
 - No promise of action from FDA



Still a Trend?

- Dip in filed cases in 2016
- Courts stayed “natural” cases
 - Ninth Circuit
 - District courts in CA, NY, NJ, and MO
- BUT potential uptick in filings in 2017
- Courts are lifting or declining to issue stays

Evolution of “Natural” Cases

- “Synthetic” or “artificial” ingredients
 - How are they made?
 - National Organic Program “Synthetics allowed” list
 - Pesticides
 - Examples
 - Xanthan Gum
 - Glyphosate

Recent Filings - Ingredients

- Annie's "Naturals" salad dressing
 - Two complaints filed in N.D. and S.D. Cal.
 - Xantham gum
 - Stabilizer, thickener; improves pourability
 - A USDA "synthetic allowed" and thus not "natural"



Recent Decisions - Ingredients

- General Mills defeats claims over “100% Natural Whole Grain Oats”
 - Represents one ingredient – oats – as “100% Natural”
 - No claims about glyphosate
 - Alleged glyphosate content falls well below amount for organic products



Evolution of “Natural” Cases

- Supply chains
 - Ingredients themselves aren’t GM
 - But GMOs appear somewhere in the supply chain
 - Cows fed GMO feed
 - Animals treated with hormones (rBST)
- Do certifications affect expectations?

Recent Filings – Supply Chain

- Sargento “natural cheese” (N.D. Cal.)
 - Milk from cows likely fed GE feed
 - Cows also likely treated with rBST
 - Sargento: there’s “nothing unnatural about the cheese or any of its ingredients”
- Dannon (S.D.N.Y.)

Supply Chain – Federal Labeling Law

- GM feed → doesn't trigger "bioengineered" label requirement
- BUT can't necessarily claim
 - "non-GMO"
 - "Natural"



Slack Fill Cases

Slack Fill Cases

- Plaintiffs allegedly misled about the amount of product in a package
- 10 suits filed in 2013 and 2014
- 65+ filed in 2015 and 2016
- Filings continue in 2017



FDA Regulations

- “Non-functional” slack fill prohibited
- BUT may be legitimate reasons for extra space:
 - To protect the contents
 - To operate the manufacturing process
 - Product settling
 - For preparation or consumption
 - Dictated by labeling requirements
 - For reuse of packaging



Recent Decisions – *Ebner v. Fresh*

- Plaintiff challenged lip balm packaging
 - Portion of the product used as an anchor
 - Ninth Circuit finds the design “commonplace”
- Similar rulings re Oreos, Advil



Recent Decisions – MTD Denials

- *Bratton v. Hershey* (W.D. Mo.): Reese's Pieces and Whoppers boxes up to 41% empty
- *White v. Just Born* (W.D. Mo.): Mike & Ike and Hot Tamales boxes up to 35% empty
- *Iglesias v. Ferrara* (N.D. Cal.): Jujufruit boxes up to 41% empty



Recent Decisions – MTD Granted

- Mondelez Sour Patch Watermelon candy
 - Alleged up to 44% slack fill
 - Judge not persuaded that quantity and weight info discloses contents
 - But case dismissed: plaintiffs failed to show injury



Recent Decisions and Filings

- Pret A Manger sued for air content in sandwich package
 - Plaintiff points to 1-2.5 inches of space between wrap halves



Slack Fill Strategies

- State the number of items in your package (not just net weight)
- Include clear sections of packaging
- Add clear fill lines
- Include statements about settling in transit



Defenses and Risk Mitigation Strategies

Available Defenses?

- Merits:
 - No reasonable consumer shares plaintiff's view
 - The packaging discloses information plaintiffs need
 - No actual injury
- Preemption
 - Federal regulations require the label as-is
 - Safe harbor under state law
- Primary jurisdiction – should FDA decide?
- Class certification issues
 - Ascertainability
 - No common injury
 - Damages calculations
 - Adequacy of class representative

Risk Mitigation Strategies

- Communication
 - Research & Development
 - Regulatory
 - Legal
 - Marketing
- Give existing labels a fresh look
 - Even long-standing claims aren't immune
- Monitor cases and recently challenged claims
- Monitor regulatory activity
 - Warning letters
 - Guidance documents

