



Litigation Trends: The Latest on New and Undefined Label Claims

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HEALTHY CLAIMS

Relevant FDA Regulations

- “Healthy” is an implied nutrient content claim when
 - Used to suggest that a food may help maintain healthy dietary practices and
 - Made in connection with an explicit claim (e.g., healthy, contains 3 grams of fat)
- “Healthy” is defined as low in fat, cholesterol and sodium, and containing at least 10% of one or more qualifying nutrients
- Definition is outdated based on current dietary guideline
 - Type of fat more important than total fat
 - Nutrients of public concern have changed
 - FDA focus on added sugars

Current Regulatory Landscape

- FDA agreed to revisit the definition of “healthy”
- Public comment period closed April 2017
- FDA held a public hearing in March 2017
- FDA has not stated if or when it will redefine “healthy”



Current Regulatory Landscape

- Non-binding guidance issued by FDA in September 2016, pending new regulations on “healthy”
 - Enforcement discretion towards products with disqualifying amounts of total fat, if the majority of total fat is unsaturated
 - Enforcement discretion towards products with at least 10% of the daily value of non-qualifying nutrients vitamin D or potassium



Healthy Litigation Landscape

- Consumer class actions in federal and state court
- Brought under state consumer protection laws and common law claims
- Plaintiffs claim products contain too much saturated fat and/or added sugars

Healthy Litigation: KIND BAR

- MDL comprising several putative national and statewide class actions
- Triggered by Warning Letter concerning the use of the phrase “healthy and tasty” in product labeling
- Plaintiff alleged the bars are not “healthy” under FDA regulations because they are high in fat
- Plaintiffs voluntarily dismissed “healthy” claims after FDA permitted KIND to use “healthy” as a statement of corporate philosophy
- Pending defense motion to dismiss non-GMO claims; plaintiff motion to lift stay on “natural” claims



Healthy Litigation: Coconut Oil

- Putative class actions filed in CA state and federal courts
- Triggered by Warning Letter
- Plaintiff alleged coconut oil is marketed as “healthy” despite having high levels of total fat and saturated fat
- Varying outcomes
 - *Boswell v. Costco Wholesale Corp.*, No. 8:16-cv-00278-DOC-DFM (C.D. Cal.)
 - Class settlement receives preliminary approval (July 2017)
 - *Boulton v. Carrington Tea Co.*, No. 2:16-cv-1740-R-AS (C.D. Cal.)
 - Voluntary dismissal (June 2016)
 - *Hunter v. Nature’s Way Prods., LLC*, No. 3:16-cv-00532-WQH-BLM (S.D. Cal.)
 - Motion for class certification pending (July 2017)
 - *Jones v. Nutiva, Inc.*, No. 4:16-cv-00711-HSG (N.D. Cal.)
 - Motion to dismiss granted with leave to amend (Aug. 23, 2017)



Healthy Litigation: Cereals

- Putative class actions filed against manufacturers of cereal and cereal bars
 - *Hadley v. Kellogg Sales Co.*, No. 5:16-cv-04955-LHK (N.D. Cal.)
 - *Truxel v. General Mills Sales, Inc.*, No. 4:16-4957-JSW (N.D. Cal.)
 - *Krommenhock v. Post Foods, LLC*, No. 3:16-cv-04958-WHO (N.D. Cal.)
- Plaintiff alleged defendants products are marketed as “healthy” but contain excess amounts of added sugar
- Cases brought by Jack Fitzgerald



Healthy Litigation: Cereals

- Mixed results
 - *Hadley*: Motion to dismiss granted (Aug. 10, 2017)
 - *Truxel*: Motion to dismiss pending (Feb. 2017)
 - *Krommenhock*: Motion to dismiss added sugar claims denied (June 2017)



MORE SUGAR CLAIMS

Other Theories Supporting Added Sugar Claims

- Plaintiffs rely on 21 C.F.R. 101.60(c)(2)(iv), which prohibits the use of phrases like "no added sugar" unless "the food that it resembles and for which it substitutes normally contains added sugars"
- Plaintiffs also rely on 21 C.F.R. 101.60(c)(2)(v), which provides that a "no added sugar" claim can only be made "if the product bears a statement that the food is not 'low calorie' . . . and that directs consumers' attention to the nutrition panel for further information on sugar and calorie content"



Added Sugar Cases

- *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-cv-03067-EJD (N.D. Cal.)
 - Ninth Circuit affirmed summary judgment (May 2017)
- *Wilson v. Odwalla, Inc.*, No. 2:17-cv-02763-DSF-FFM (C.D. Cal.)
 - District Court denied MTD (June 2017)
- *Rahman v. Mott's LLP*, No. 3:13-cv-03482-SI (N.D. Cal.)
 - Ninth Circuit upheld denial of cert for liability-only class (July 2017)
- *Lipkind v. PepsiCo*, No. 1:16-cv-05506-SJ-VMS (E.D.N.Y.)
 - Brought by the Center for Science in the Public Interest (CSPI)
 - Settled (Feb. 2017)



Evaporated Cane Juice

- Suits stayed under primary jurisdiction are reactivated and new suits are on the rise as a result of 2016 FDA Final Guidance
- Some courts have issued decisions on MTD:
 - *Swearingen v. Santa Cruz Natural, Inc.*, 2016 U.S. Dist. LEXIS 109432 (N.D. Cal. Aug. 17, 2016) (MTD granted in part) (since settled)
 - *Swearingen v. Healthy Bev., LLC*, 2017 U.S. Dist. LEXIS 66938 (N.D. Cal. May 2, 2017) (MTD granted)
 - *Swearingen v. Late July Snacks LLC*, 2017 U.S. Dist. LEXIS 69280 (N.D. Cal. May 5, 2017) (MTD granted in part)
 - MTD Pl.'s third amended complaint pending (Aug. 18, 2017)



COUNTRY OF ORIGIN CLAIMS

Made in the U.S.A.

- FTC maintains exclusive enforcement authority over “Made in the U.S.A.” claims under the FTC Act
- But private plaintiffs have used state consumer protection laws or CA “Made in the U.S.A.” statute to advance litigation
- Lawsuits against food, supplement and consumer product companies
- Plaintiffs argue that they paid a premium for a “Made in the U.S.A.” product and foreign ingredients in the product were inferior



Made in the U.S.A. Recent Cases

- *Dowlatshahi v. McIlhenny Company*, No. 2017-00911222 (Cal. Sup. Ct.)
 - Putative class action under CA consumer protection laws concerning Tabasco sauce
- *Giffin v. Universal Protein Supplement Corp.*, No. BC613414 (Cal. Sup. Ct.)
 - Putative class action under CA consumer protection laws concerning protein supplement products
 - Class settlement granted preliminary approval



Made in the U.S.A. Recent Cases

- *Alaei v. Heinz Co.*, No. 15-CV-2961 (S.D. Cal.)
 - Putative class action involving Heinz products alleged to contain foreign ingredients (turmeric, tamarind extract, jalapenos)
 - MTD granted for lack of specificity on which components of the products were made outside the U.S.A.
 - Ultimately settled
- *Alaei v. Rockstar, Inc.*, No. 15-CV-2959 (S.D. Cal.)
 - Putative class action involving Rockstar energy drinks alleged to have foreign ingredients (taurine, guarana seed extract, milk thistle extract)
 - MTD granted for lack of specificity regarding where the foreign sourced ingredients were made and what percentage were comprised of foreign-sources ingredients. Court also barred claims under CA safe harbor



Alcohol Litigation

- Several putative class actions filed against beer and spirits manufacturers
- Plaintiffs claim that manufacturers misled them about the geographic origin of products to justify a price premium
- Disclaimers helpful, but not always dispositive
- Mixed results
 - *Broomfield v. Craft Brew Alliance*, No. 5:17-cv-01027-BLF (N.D. Cal.) (Kona beer)
 - MTD denied (Sept. 2017)
 - *Bowring v. Sapporo U.S.A., Inc.*, No. 16:cv-1858 (E.D.N.Y) (Sapporo beer)
 - MTD granted (Feb. 2017)
 - *Dumas v. Diageo PLC*, No. 3:15-cv-01681-BTM-BLM (S.D. Cal.) (Red Stripe beer)
 - MTD granted (April 2016)
 - *Marty v. Anheuser-Busch Cos.*, No. 1:13-cv-23656-JJO (S.D. Fl.) (Beck's beer)
 - MTD denied (Sept. 2014); settled (Oct. 2015)



Olive Oil Litigation

- Several cases filed against olive oil manufacturers
 - *Kumar v. Salov N. Am. Corp.*, No. 4:14-cv-02411-YGR (N.D. Cal.)
 - Settled (July 2017)
 - *Koller v. Med Foods, Inc.*, No. 3:14-cv-02400-RS (N.D. Cal.)
- Plaintiffs claim olive oil products labeled as “imported from Italy” are deceptively marketed because the olives come from other countries
- Class certification granted in both cases

