

# Food Advertising Litigation

## Claims Under Attack

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# Natural

- ▶ Natural remains a targeted claim for consumer class action litigation.
- ▶ No formalized FDA guidance or definition of “natural” has contributed to significant litigation.
- ▶ Many cases are stayed under the doctrine of primary jurisdiction, although recently, some courts recently have lifted stays.
- ▶ Cases have targeted products advertised as “natural” that contain artificial flavors, synthetic additives, or GMOs.
- ▶ Recent litigation has challenged “natural” claims on products containing trace amounts of glyphosate (Nature’s Valley) or propylene glycol (Hint Inc.), or products derived from animals given rbSTs or GMO feed (Sargento, Dannon).



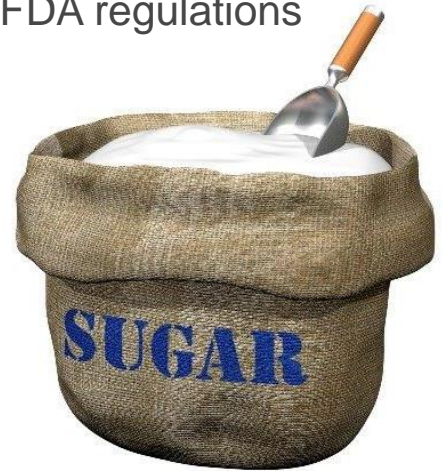
# Healthy

- ▶ “Healthy” is an implied nutrient content claim. Foods must be low in fat, cholesterol and sodium, and contain at least 10% of one or more qualifying nutrients.
- ▶ FDA is revisiting its definition of “healthy” and issued non-binding guidance, but has not announced a revised definition.
- ▶ Some “healthy” cases are premised on alleged violations of the FDA regulations (KIND).
- ▶ Recent cases attack added sugars in foods advertised as healthy and nutritious (Post, General Mills, Mondelez).



# No Added Sugar

- ▶ FDA regulations address circumstance where “no added sugar” or similar claims can be made on product labeling. 21 C.F.R. 101.60(c).
- ▶ Most cases attacking “no added sugar” claims have been filed against juice and snack product manufacturers, including Odwalla, Mott’s and Ocean Spray.
- ▶ These cases are usually premised on an alleged violation of the FDA regulations including:
  - 21 C.F.R. 101.60(c)(2)(iv): Prohibits the use of phrases like “no added sugar” unless “the food that it resembles and for which it substitutes normally contains added sugars”
  - 21 C.F.R. 101.60(c)(2)(v): A “no added sugar” claim can 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”



# Mischaracterizing Ingredients

- ▶ Many suits attack claims characterizing the inclusion or omission of ingredients, flavorings and colors.
- ▶ Examples include:
  - *Brumfield v. Trader Joe's Co.*, 17-cv-3239 (S.D.N.Y.) (black truffle flavored oil)
  - *Lejbman v. Transnational Foods, Inc.*, 17-cv-1317 (S.D. Cal.) (octopus products)
  - *In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Litig.*, 16-cv-1442 (C.D.Cal.)
  - *Silva v. Unique Bev. Co.*, 17-cv-00391 (D. Or.) (coconut water)

# Geographic/Location Claims

- ▶ Claims brought against manufacturers of beer, olive oil, and other products that advertise or are valued because of their geographic location.
- ▶ Plaintiffs claim that manufacturers misled them about the geographic origin of products to justify a price premium.
- ▶ Examples include:
  - *Broomfield v. Craft Brew Alliance*, No. 5:17-cv-01027-BLF (N.D. Cal.) (Kona beer)
  - *Bowring v. Sapporo U.S.A., Inc.*, No. 16:cv-1858 (E.D.N.Y.) (Sapporo beer)
  - *Dumas v. Diageo PLC*, No. 3:15-cv-01681-BTM-BLM (S.D. Cal.) (Red Stripe beer)
  - *Kumar v. Salov N. Am. Corp.*, No. 4:14-cv-02411-YGR (N.D. Cal.) (olive oil)

