Genetically Modified – Naturally!

November 8, 2017

On October 25, the U.S. District Court for the District of Massachusetts dismissed a consumer class action under Massachusetts law, contending that Wesson vegetable oil is falsely labeled “100% natural” because it allegedly is extracted from genetically modified corn, soybean and rapeseed. *Lee v. Conagra Brands., Inc.*, 1:17-cv-11042 (D. Mass Oct. 25, 2017). This was an unusually clean case in that there was no other ground challenging the “100% natural” claim and no counts for other legal violations. The court thus had squarely to decide whether the presence of genetically modified ingredients renders a product not “natural” under the law.

The court’s decision that GMOs are not necessarily not natural relied on the FDA’s longstanding approach to the use of the term. The FDA has no formal definition of “natural” as applied to foods, but its policy, as expressed in the Background section of FDA’s November 12, 2015, request for comments on the subject, is that “we have not attempted to restrict use of the term "natural" except for added color, synthetic substances, and flavors” and “we have considered "natural" to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there.” 80 FR 69905. The court was also influenced by the FDA’s policy not to require special labeling of products containing genetically modified ingredients based on its 1992 conclusion that “The agency is not aware of any information showing that foods derived by these new methods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding.” 57 FR 22984.

The court concluded, “Because Wesson's ‘100% natural’ label conforms to FDA labeling policy, it cannot be unfair or deceptive as a matter of law.” That is a strongly stated, absolute conclusion. This was not a pre-emption case, but a determination on the merits that the label is not deceptive. One might wonder how this sits with the view espoused by the Supreme Court in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), holding that food or beverage labels conforming to FDA labeling regulations can still be false or misleading under Section 43(a) of the Lanham Act. The Supreme Court limited its holding to the federal Lanham Act, so *POM Wonderful* does not control consumer class actions brought under state laws, but its underlying logic was that FDA regulations – to say nothing of informal “policies” – are not the final authority on whether advertising and labeling statements may deceive consumers.

It will be interesting to see how other courts handle this issue as it relates to GMOs and all-natural claims, an increasingly common type of food marketing class action. Also interesting is the potential gap opened up between Lanham Act and state consumer actions in terms of what is deceptive, which heretofore has been fairly coterminous. This *Conagra* decision suggests that in a case this one or like *POM Wonderful v. Coca-Cola*, a competitor Lanham Act action could be permitted despite the label satisfying FDA regulations or other pronouncements, but the consumer class actions that typically follow Lanham Act cases, seeking their own bite at the pie, might not be.