

Minnesota Federal Judge Says Glyphosate Claims are “Unreasonable”

July 14, 2017

A mini-trend in food litigation last year was the spate of class action cases alleging that foods advertised as “natural” contained trace amounts of the herbicide glyphosate. “Trace” is the operative word; to the extent plaintiffs alleged the amounts they found, those amounts always were far below even what the U.S. Department of Agriculture permits to exist in foods labeled “organic.” The plaintiffs nevertheless argued that foods labeled as “all natural” cannot contain *any* traces of a biocide, no matter how small.

In November 2015, the Food and Drug Administration announced that it would solicit comments on whether and how to further regulate use of the term “natural” in food marketing, after many years of declining to say much beyond that “nothing artificial or synthetic . . . has been included in, or has been added to, a food.” Last month, courts stayed at least two of the glyphosate cases in deference to the FDA’s “primary jurisdiction” in this area. (We are handling one of them.) Wednesday, however, a federal judge in Minnesota said he did not need to wait for the FDA before deciding that the plaintiffs’ consumer fraud claims were too unreasonable to proceed.

In re General Mills Glyphosate Litigation, No. 16-2869 (D. Minn), concerned that company’s chewy and crunchy Nature Valley granola bars, all sold as “Made with 100% Natural Whole Grain Oats.” The plaintiffs claimed “an independent laboratory . . . [found] 0.45 parts per million of glyphosate” in the bars. On that basis, they sued for consumer fraud and breach of warranty.

The court started by giving the plaintiffs some wins. It found they had standing to sue and to seek injunctive relief. It also found that they could sue over all types of chewy and crunchy Nature Valley granola bars because they all were similarly marketed, but bounced their claims related to oatmeal bars and other, different products that none of the plaintiffs claimed to have purchased. That, however, was the end of the good news for the plaintiffs.

In the judge’s view, no “reasonable consumer would believe that a product labelled as having one ingredient—oats—that is ‘100% Natural’ could not contain a trace amount of glyphosate that is far below the amount permitted for organic products.” Although the judge recognized that reasonability can at times be a fact question, *plausibility* is for the court to determine, and the judge found the plaintiffs’ claims to be implausible. “It would be nearly impossible,” he found, “to produce a processed food with no trace of any synthetic molecule.” The judge also found that General Mills “did not represent or warrant that Nature Valley Products would be free from trace glyphosate” because, principally, “there is no allegation that the oats, themselves, are not natural.”

The plaintiffs may appeal, but the court’s decision seems exceptionally well reasoned. On this track, the glyphosate cases may join claims that iced drinks contained ice and “Froot Loops” lacked fruit in the dustbin of consumer fraud class action law.