

Three Reasons “Natural” Class Actions Are Here to Stay

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In a review of new class action cases filed against in 2017, we counted at least 11 actions in the food industry alone alleging that a product was not “natural” or “all-natural” as claimed in its advertising or labeling. “Natural” is, by a healthy margin, the most contested single word in food and personal care products class action litigation. Why do class action cases around “natural” continue unabated?

1. “Natural” Doesn’t Mean Much ...

There is no generic, official definition of “natural.” In November 2015, after being prodded by almost every stakeholder, the FDA put out a request for information and comments regarding the use of “natural” in foods. Since then, the FDA has done nothing. It hasn’t even closed the web page for submitting comments, which were supposed to end in May 2016 - you can still leave a comment if you want to. This doesn’t mean we have no idea what the FDA thinks “natural” means. There is enough guidance on narrower definitions, such as the FDA’s definition of “natural flavor” and its opposite, “artificial flavor,” and the USDA’s general definition of “natural,” that we can guess with some confidence what the FDA’s definition of “natural” would look like if it were issued tomorrow. But a guess doesn’t carry much authority, and isn’t much use in stopping litigation.

2. ... but Some Consumers Think It Means a Lot ...

In advertising law, however, neither the advertiser nor even the government is the final arbiter of what an advertising claim means. It is the consumer audience that gets to interpret advertising claims, and regardless of what was intended, the advertiser is responsible for any reasonable interpretation of its advertising. In private cases, the proxy that is used for a “reasonable consumer” is a significant proportion of consumers who report receiving a particular meaning in a competent consumer perception survey, that proportion sometimes being as low as 15%. The implicit assumption is that at least 85% of consumers are reasonable, so that any slice of 15% of consumers must include some reasonable ones. It may seem like a debatable premise these days, but it’s one we have to live with.

Even if we assume that barely half of consumers are rational, however, we still have to come to grips with the fact that, for example, studies show that a majority of consumers believe “natural” means that the product contains no genetically modified organisms (GMOs). This is not part of the traditional definition of “natural,” which focuses on the ingredients and processing of the product,

and not its origin or production process. But, what does this matter if consumers insist on understanding “natural” to include “no GMOs”? A number of class actions filed this year have alleged that food products’ “natural” claims are deceptive primarily because they contain GMOs.

3. ... and Some Advertisers Flirt with those Meanings.

Considering the meanings that some consumers pack into the word “natural,” it isn’t surprising that using the word sells products. That gets the attention of food marketers, who set out to try to use “natural” as effectively as they can while truthfully describing the product. This means charting a treacherous course through ambiguous government pronouncements and unknown, but probably exaggerated, consumer expectations. Sometimes, understandably, advertisers hit the shoals, or run afoul of pirates. One way in which some advertisers have been gone astray is by calling their products “natural” when they have significant natural ingredients, but also some ingredients that are unquestionably artificial or synthetic. In other cases, marketers of products that are mostly natural, and more natural than their competitors – and, thus, have a legitimate benefit to advertise, but one that must be carefully qualified – will use a claim such as “with natural ingredients” accompanied by nature-evoking imagery, which some consumers may fail to distinguish from an unqualified or 100% natural claim. With plaintiffs’ lawyers lying in wait for any arguable mistake, “natural” product claims will continue to be the subject of controversy and litigation.