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The Latest In Calif. 'All Natural' Food Litigation

Law360, New York (August 10, 2012, 12:43 PM ET) -- In recent years, dozens of suits alleging deceptive "all natural" food labeling, usually along with other allegations of labeling deception, have been filed in California federal courts. These suits sometimes allege fraud and breach of warranty, but they almost invariably allege violation of three California consumer protection statutes — the Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act.

Because the U.S. Food and Drug Administration does not regulate the term "all natural" or related terms, such as "100 percent natural" and "natural," allegations arising from these label statements are not susceptible to dismissal based on preemption, making them much more challenging to defend against than claims against which viable FDA preemption arguments can be made.

Liability under the three California statutes is determined in part by considering the likelihood that the representation at issue would deceive a reasonable consumer. Plaintiffs often assert that "all natural" is likely deceptive to the reasonable consumer because one or more of the supposedly "all natural" product's ingredients are synthetic or highly processed. The ingredients plaintiffs sue over most frequently are high fructose corn syrup and alkalyzed cocoa processed with potassium carbonate.

In Hairston v. South Beach Beverage Co. Inc. et al., U.S. District Judge John F. Walter granted a motion to dismiss with prejudice an "all natural" claim. His opinion is noteworthy for two reasons. First, it appears to be the first to dismiss with prejudice a claim regarding an "all natural" statement under California's consumer protection statutes. Second, Judge Walter applied the reasoning of Williams v. Gerber Prods. Co., the controlling Ninth Circuit opinion on deceptive food labeling — and one that is quite problematic for defendants — to reach conclusions quite different from those in Williams.

The product at issue in Hairston was Lifewater, an enhanced water beverage manufactured by South Beach Beverage Company, a PepsiCo subsidiary. Plaintiff Charles Hairston alleged that he regularly purchased three flavors of zero-calorie Lifewater, each named after fruit combinations — "Macintosh Apple Cherry," "Strawberry Kiwi Lemonade," and "Black Cherry Dragonfruit."

Hairston contended that the term "all natural," prominently displayed on the front of each of the Lifewater labels, was likely to deceive a reasonable consumer because the Lifewater products were not all natural; each contained synthetic vitamins and synthetic xanthan gum. Hairston also asserted that using the names of fruits in the products' names and listing vitamins by their alphabetical names on the front of the label — e.g., Vitamin C, Vitamin B6 — reinforced the likelihood of consumer deception.

Hairston appended photographs to the complaint showing parts of each of the disputed Lifewater labels. The photos revealed that the “all natural” statements were not, as Hairston implied, absolute and unqualified. Rather, two of the Lifewater products were labeled “all natural with vitamins” and the third was labeled “all natural with B vitamins.”

Judge Walter agreed with the defendants that the use of actual names of fruits in the products’ names and listing synthetic vitamins by their alphabetical names were explicitly permitted by FDA regulations; therefore, claims about these label statements were preempted.

That left only the question whether the “all natural” statement was likely to deceive a reasonable consumer.

In addressing this allegation, Judge Walter first held that Hairston could not argue that the use of fruit names and alphabetical vitamin descriptions reinforced the allegedly deceptive nature of the “all natural” statements because they had been preempted.

Judge Walter then held that the term “all natural” as used on the Lifewater labels was not likely to deceive a reasonable consumer because the only way the term “all natural” could be misleading is to ignore both the immediate and broader contexts of the labels.

In the immediate context, the judge noted that the term “all natural” was followed immediately by “with vitamins” or “with B vitamins.” According to Judge Walter, "[N]o reasonable consumer would read the ‘all natural’ language as modifying the ‘with vitamins’ language” and believe that the added vitamins are suppose [sic] to be ‘all natural vitamins.’”

Judge Walter also found the broader context of the entire label to be important in evaluating the likelihood of deception. He pointed out that the vitamins were properly labeled and disclosed in the ingredient list, that Lifewater was labeled as a “nutrient enhanced hydration beverage,” and that the packaging contained no representations that Lifewater products were juices or that they were nutritious aside from their vitamin content. In Judge Walter’s view, the products were exactly what the labels said they were and so the labels were not likely to mislead a reasonable consumer as a matter of law.

At first glance, Judge Walter’s holding that the term “all natural with vitamins” was not likely to be deceptive seems to be at odds with the Ninth Circuit’s holding in Williams v. Gerber. Many of the facts in Hairston are similar to those in Williams, yet Judge Walter applied Williams’s legal reasoning to reach an almost diametrically opposed result.

At issue in Williams was a Gerber food product called Fruit Juice Snacks marketed for toddlers. The front panel of the Fruit Juice Snacks package was prominently labeled “made with real fruit juice and other all natural ingredients,” and was illustrated with various types of fruit. The ingredient list, however, showed that the only fruit in the product was a small amount of white grape juice concentrate. The first ingredient listed — meaning the one present in greatest quantity — was corn syrup, which plaintiffs alleged was not all natural.

The Williams plaintiffs, like Mr. Hairston, sued under California’s consumer protection statutes and other theories of liability. They alleged that use of “fruit” in the product’s name, use of the phrase “made with fruit juice and other all natural ingredients,” the images of fruits, and the claim that it was “just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy” were all likely to mislead the reasonable consumer. Gerber prevailed in trial court, ultimately obtaining dismissal without leave to amend. Plaintiffs appealed.

The Ninth Circuit reversed. The court focused only on liability under the three consumer protection statutes. It refused to consider Gerber's preemption arguments because they were improperly raised for the first time on appeal.

The panel held that "made with real fruit juice and other all natural ingredients" was likely to mislead reasonable consumers into believing that the product was made with only all natural ingredients. Gerber argued, unsuccessfully, that "other" does not mean the same thing as "all" or "only."

Compare this to Judge Walter's holding that "all natural with vitamins" was not likely to mislead reasonable consumers into thinking that the vitamins were natural. The language at issue is similar — both are conditional or qualified claims of "all natural" — but the legal conclusions are in opposition.

Hairston and Williams can best be reconciled by examining one key difference and one shared aspect.

The key difference is that the Williams panel refused to consider preemption arguments. Williams might have come out quite differently had Gerber been able to argue that the name of the product, the depiction of fruit on the package, and the use of the phrase "made with real fruit juice" were permitted by FDA regulations and preempted, and therefore could not be considered in evaluating whether the labeling was likely to deceive a reasonable consumer.

But perhaps more importantly, both Judge Walter and the Ninth Circuit panel went to great lengths to emphasize the significance of the overall context of the respective products' labels.

As discussed, Judge Walter found that Hairston's claim of deception by the use of the term "all natural" was colorable only if viewed in isolation, and that when considered in the context of all the other labeling statements on the products, the term was unlikely to deceive a reasonable consumer.

The Williams court also cited contextual aspects of the Fruit Juice Snacks label — the name, pictures, statements and ingredient list — as adding to the likelihood of consumer deception.

Hairston may offer a way that a food company can label its products that contain synthetic ingredients "all natural" without deceiving a reasonable consumer under California's consumer protection statutes. Synthetic ingredients should be listed immediately adjacent to "all natural," as in "all natural with vitamins," and should be properly disclosed in the ingredient list. Equally important, the overall context of the label should not make claims that conflict with the qualified "all natural" claim or otherwise overstate, either directly or by implication, the beneficial heath qualities of the product unless those statements are permitted by the FDA.

Hairston also shows that application of Williams need not always come out in favor of plaintiffs if defendants can make well-founded preemption arguments and can distinguish the facts of their labels, taken in toto, from those at issue in Williams.

Of course, "all natural with vitamins" is one thing; it remains to be seen whether food companies will find it palatable to label their products, for instance, "all natural with high fructose corn syrup" or "all natural with alkalyzed cocoa" to reduce the risk of lawsuits. Hairston suggests for the first time that labeling approach is something they can realistically consider.

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[1] See, e.g., Lockwood v. ConAgra, 597 F. Supp. 2nd 1028 (N.D. Cal. 2009) (high fructose corn syrup); Astiana v. Dreyer's Grand Ice Cream Inc., 3:11-cv-02910 (N.D. Cal.).

[2] No. CV 12-1429-JFW (DTBx), (C.D. Cal.).

[3] 552 F. 3d 934 (9th Cir. 2008).