Keeping Tabs On 'Natural' Beauty And Food

Law360, New York (June 18, 2013, 1:25 PM ET) -- A defendant's successful federal primary jurisdiction argument can go a long way toward winning a case by removing its issues from the courtroom and delivering them to a federal agency, where a private plaintiff often cannot pursue an individual legal claim. A court can apply this discretionary doctrine when it is convinced that court action could interfere with the proper exercise of a federal agency's statutory authority.

Defendants have advocated for the doctrine's application with varying degrees of success in recent food and cosmetic labeling litigation. Two recent "natural" labeling cases, one involving food and the other cosmetics, illustrate how tricky — even counterintuitive — application of the primary jurisdiction doctrine can be.

Both opinions come from the same judge, U.S. District Judge Phyllis J. Hamilton of the Northern District of California. Both address whether plaintiffs can pursue state law claims that "natural" label statements are deceptive and misleading. One case involves labels on cosmetics; the other, labels on foods.

Cosmetic and food product labels are both extensively regulated by the U.S. Food and Drug Administration. However, the FDA has issued no regulations governing "natural" label statements for either cosmetics or foods.

Despite these many points of similarity, the court reached opposite conclusions in these two cases.

In November 2012, in Astiana v. Hain Celestial Group Inc., a putative class action, Hamilton considered defendants' motion to dismiss based on primary jurisdiction. See here. In Astiana, the plaintiffs claimed that the "all natural," "pure natural" and "pure, natural & organic" label statements on the defendants' cosmetic products were false and misleading under California law because the products actually contained artificial or synthetic materials. The defendants argued that the court should stay or dismiss the claims, deferring to the primary jurisdiction of the FDA in matters of cosmetic labeling. The court agreed with the defendants, dismissing the suit without prejudice.

More recently, on May 10, 2013, in Janney v. General Mills, also a putative class action, Hamilton again considered a primary jurisdiction argument, this time, as it applied to food labels. Plaintiff Janney argued that General Mills' "100% natural," "all natural" and "natural" labeling of some of its Nature Valley products was deceptive under California law because the products contained high-fructose corn syrup and other sweeteners that she contends were fundamentally altered from their natural states.

General Mills argued that the court should defer to the primary jurisdiction of the FDA and refrain from exercising its own jurisdiction. But this time, Hamilton disagreed, denying the primary jurisdiction portion of defendants' motion to dismiss.

What accounts for these apparently paradoxical results? And more importantly, can anything be learned about the applicability of primary jurisdiction doctrine to "natural" cosmetic and food label statements from the facts and reasoning that led the court to different conclusions in the two opinions?

In both cases, the court pointed out that application of primary jurisdiction doctrine would be appropriate, stating that the doctrine applies when there is the need to resolve an issue that has been placed by Congress within the jurisdiction of an administrative body having regulatory authority pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that requires expertise or uniformity in regulation.

The court determined that the FDA had jurisdiction granted by Congress in the Food, Drug and Cosmetic Act and had imposed extensive, specific labeling regulations for both cosmetics and food products. But neither the FDCA itself nor the FDA regulations that implement the act define "natural" with respect to either food or cosmetics.

Hamilton found that the facts and regulatory frameworks of the two cases diverged in two significant respects. First, she observed that in contrast to food products, "cosmetics are by their nature artificial and/or synthetic." The court seemed to view this as a factor weighing in favor of the Astiana defendants' argument that regulation of "natural" label statements on cosmetic products required the special expertise of the FDA.

But more important to the court's evaluation than this factual difference was the variation in regulatory involvement by the FDA with respect to "natural" labeling of cosmetic and food products. Whereas the FDA has taken no steps whatsoever to regulate "natural" cosmetic label statements, the situation with respect to "natural" food label statements is much more nuanced, and the court seemed to weigh this consideration heavily.

In Astiana, Hamilton pointed out that while the FDA had crafted "remarkably specific" regulations regarding many aspects of cosmetic labels, and had even "shed light on what is considered to be 'false or misleading' in certain contexts," the regulations were "silent as to when, if ever, the use of the word 'natural' is false or misleading."

In the absence of any agency guidance at all in an area where the FDA has primary authority, and the issues are complex and require agency expertise, the court decided to defer to the primary regulatory authority of the FDA.

The alternative would have been to allow a jury to adjudicate the FDCA's basic proscription against labeling that is false or misleading in the complex context of "natural" label statements on cosmetic products, and that would risk undercutting the FDA's expert judgment and authority. Hence, the court granted defendants' motion to dismiss based on primary jurisdiction in Astiana.

In Janney, while acknowledging the viability of the defendants' primary jurisdiction argument, the court traced the history of contention between the FDA and elements of the public over "natural" food label statements. Hamilton pointed out that with respect to food, "notwithstanding repeated requests, the FDA has expressly declined to define 'natural' in any regulatory or formal policy statement."

The court also detailed the halting steps the FDA had taken with "natural" food labeling: In 1991, the agency solicited comments on a potential rule and acknowledged that use of the term on food labels "is of considerable interest to consumers and industry."

Then, in 1993, while acknowledging that ambiguity surrounding use of the term could be abated if it were adequately defined, the FDA declined to do so, citing resource limitations and other agency priorities. The agency again specifically declined to take action to define the term in both 2002 and 2006.

The court appears to have considered all the FDA's pronouncements over a two-decade period and concluded that it would not make sense to defer to the agency on the off chance that it would undertake regulation when it has not done so in the past and has said it will not do so in the near future despite repeated entreaties from courts, food companies and nongovernmental organizations such as the Center for Science in the Public Interest.

The court stated that "any referral to the FDA would likely prove futile. Thus, the court finds little reason to stay or dismiss the case to allow the FDA the opportunity to take action." The court denied the portion of the defendants' motion that was based on their primary jurisdiction argument.

Hamilton also referenced the FDA's 1993 guidance on "natural" food label statements as a position the agency had returned to and had cited in its warning letters as recently as 2011. In 1993, she noted, the FDA stated that it would "maintain its current policy not to restrict the use of the term 'natural' except for added color, synthetic substances, and flavors" and that it would maintain its policy that "natural" means "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food."

The court's discussion implies that in light of the FDA's explicit refusal to develop actual regulations, the court's best option is to apply the judicial process, informed by the agency's minimal 1993 guidance, to evaluate whether "natural" food label statements can deceive reasonable consumers. The court cited several other cases where courts took on this challenge and observed that in 2010, several courts had stayed "natural" labeling cases pending FDA regulatory action to no avail.

Hamilton's twin "natural" opinions will comfort defendants who label their cosmetic products "natural" and disappoint defendants who so label their food products.

In the short interval since Hamilton issued her Janney opinion, another federal court has followed her path, citing Janney in denying the defendant's motion to dismiss in a food "natural" labeling putative class action involving genetically modified organism ingredients on primary jurisdiction grounds. See here.

And, to keep things interesting, a different federal court just followed the path Hamilton seemed to regard as "likely to prove futile," announcing a tentative plan to stay a putative class action for six months to see whether the FDA will regulate use of "natural" label statements on food products containing genetically modified organisms. See here.

--By Matthew Kaplan and William Dance, Tucker Ellis LLP

Matthew Kaplan and William Dance are attorneys in the Tucker Ellis food, beverage and cosmetic practice group.