Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

No Touch Up On 'Natural' Beauty By Calif. Court

Law360, New York (February 15, 2013, 2:32 PM ET) -- Recent Law360 expert analyses have focused on "Exploiting Calif.'s 'All Natural' Food Craze" and explaining how"Primary Jurisdiction May Be Useful in Food Labeling Cases." Phyllis Hamilton, district judge for the Northern District of California, recently delivered an opinion, Astiana v.Hain Celestial Group Inc., --- F.Supp.2d ----, No. C 11-6342 PJH, Nov. 19, 2012, (N.D.Cal. 2012), that combines these two themes, showing how primary jurisdiction can be applied to the plethora of California "all natural" labeling suits. Although the opinion addresses "natural" label statements on cosmetics products, it is also instructive in the context of "natural" label statements on foods.

Primary jurisdiction, according to Hamilton, is a discretionary doctrine that "allows the Court, 'under appropriate circumstances, [to] determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts.'"

In Astiana, Hamilton dismissed a putative class action alleging that two cosmetics manufacturers' "natural" labels were misleading. She declined to adjudicate, instead deferring to the primary jurisdiction of the U.S. Food and Drug Administration in crafting regulation for such label statements.

Her opinion is unusual in two respects — first, because it is based on primary jurisdiction rather than preemption analysis and, second, because it defers to the FDA's jurisdiction in an area where the agency has carefully avoided imposing any regulation at all.

Hamilton's opinion charts a reasonable and legally defensible path that results in a win for defendants. Many earlier federal opinions addressing similar claims have resulted in initial wins for the plaintiffs because the courts have declared that they are able to adjudicate whether conduct is false or misleading without the need for agency expertise.

The reason most opinions examine label statements in terms of preemption is because, as Judge Hamilton pointed out, food, beverage, and cosmetic labeling "is governed by the FDCA [Food, Drug, and Cosmetic Act] and by extensive FDA regulations … that can be remarkably specific."

When a court determines that the label statement at issue is expressly regulated by the FDA and conforms to the regulation, the court typically finds that dismissal is proper, based on conflict preemption principles.

Wary of preemption-based dismissal, plaintiffs bringing putative labeling class actions focus on statements that are not regulated by the FDA. Among their favorite targets are statements that products are "natural" or "all natural." The FDA has not regulated these terms, so arguments that state suits are preempted tend to fail, and plaintiffs are often able to escape early dismissal and preserve their paths toward class certification and potential settlements.

In Astiana, two repeat players in California food and cosmetic labeling litigation, Skye Astiana (previous "all natural" suits against Dreyer's Grand Ice Cream Inc. and Ben & Jerry's Homemade Inc.) and Tamar Davis Larsen (previous suits against King Arthur Flour Co. and Trader Joe's Co.) brought a putative class action alleging that Hain Celestial Group Inc. and its subsidiary JASON Natural Products Inc. used the terms "all natural," "pure natural," and "pure, natural & organic" on the labels of their cosmetic products in a manner that was false and misleading because the products actually contained artificial or synthetic materials.

As is typical, the plaintiffs brought their claims under a variety of California laws including the Unfair Competition Law, the Consumers Legal Remedies Act and the False Advertising Law. These three consumer protection laws permit plaintiffs to prevail if they can show that a reasonable consumer is likely to be misled by a particular label statement.

Hamilton first described the FDA's various pronouncements hinting at definitions of "natural" in the context of agency-regulated food products.

She pointed out that the FDA has issued an "informal policy statement" presented as a question-and-answer on the FDA website asking: "What is the meaning of 'natural' on the label of food?" The answer is that "from a food perspective, it is difficult to define a food product that is 'natural' because the food has probably been processed and is no longer the product of the earth."

Beyond that, she said, although the FDA has not developed a definition for use of the term "natural" or its derivatives, the agency has not objected to the term if the food does not contain added color, artificial flavors or synthetic substances. The FDA has also offered an informal policy that it considers "'natural' to mean that nothing artificial or synthetic (including colors regardless of source) is included, or has been added to" the food.

Hamilton also noted, "the FDA has not yet issued an official definition for 'natural,' even in the context of food labeling, and instead maintains that '[c]onsumers currently receive some protection in the absence of a definition of "natural" because the Federal Food, Drug, and Cosmetic Act and FDA's implementing regulations require that all ingredients used in a food be declared on the food's label.''

The plaintiffs argued that although there are no FDA regulations governing these terms on cosmetic labels, it would be appropriate for the court to apply the FDA's informal food guidance to cosmetics. They wanted the court to permit a jury to determine what "natural" and related cosmetics label statements meant and whether they were false and misleading based on the FDA's limited guidance.

The defendants contended, and Hamilton agreed, that the FDA had made no comment, provided no informal guidance, and made no regulations defining "natural" in the context of cosmetic labels.

The defendants also argued that while "natural" has a somewhat logical meaning with respect to food, which the FDA identified as being "from the earth," that logic should not be applied to cosmetics, products in which almost all ingredients are in some way processed and are therefore not "from the earth."

The defendants marshaled these arguments primarily in support of preemption, their notion being that the FDA's failure to enact any "natural" label regulation for cosmetics should be given preemptive effect over the plaintiffs' state law-based claims.

Hamilton rejected both the plaintiffs' and defendants' main arguments. She declined to import and apply the FDA's informal guidance from food to cosmetics, stating, "[b]ecause the FDA regulates food and cosmetics labels separately, and because cosmetics are by their nature artificial and/or synthetic, the court finds no basis for importing this policy into the cosmetics context."

She also declined to hold the plaintiffs' claims preempted. Although she did not say so, the apparent reason is that because there is no FDA regulation governing "natural" cosmetic label statements, any conflict between state law and federal regulation is difficult to identify.

Hamilton dismissed the action without prejudice, holding that the plaintiffs' claims were barred under the primary jurisdiction doctrine because "[i]n the absence of any FDA rules or regulations (or even informal policy statements) regarding the use of the word "natural" on cosmetics labels," an independent court determination of whether defendants' use of "natural" was false or misleading would risk undercutting the FDA's expert judgments and authority.

Hamilton's deference to the FDA's primary jurisdiction provided an initial win for defendants, although her dismissal was without prejudice. Astiana is one of several recent opinions that reinvigorates a judicial approach that could even the balance between plaintiffs and defendants in putative class action lawsuits alleging that "natural" and "all natural" claims on cosmetics, nutritional supplements and foods are false and misleading under state laws.

--By William Dance, Tucker Ellis LLP

William Dance is a counsel in the firm's Los Angeles office.