



*by Paul Chan*

# LIABLE *Labels*

## Consumer groups and regulators are continuing to test new theories against manufacturers over food labels

IN RECENT YEARS, virtually every aspect of food product labeling—from representations about “all natural” ingredients, to health benefit claims, to the content of nutrient and calorie listings—has come under scrutiny. Food manufacturers are facing heightened scrutiny from government regulators, who are initiating increasing numbers of enforcement actions. At the same time, consumer groups and plaintiffs’ attorneys are filing new food labeling lawsuits (primarily class actions) at unprecedented rates. In some jurisdictions—particularly in California—barely a day goes by without a new filing or a new ruling in a case based upon allegedly false or misleading food marketing claims.

Food companies trying to navigate this new wave of litigation face several challenges. First, food labeling cases are being decided against a backdrop of an unsettled regulatory

framework. Litigation often tends to focus on areas in which little or no statutory or regulatory guidance exists about what types of advertising and marketing claims may be made. For example, no FDA regulations specifically define “natural” or “all natural” as those terms are used in food product marketing. The FDA has consistently declined to engage in formal rule making to define the terms, citing “resource limitations and other agency priorities.”<sup>1</sup> Plaintiffs and consumer groups have stampeded into this regulatory void, filing food labeling lawsuits involving the terms “natural” and “all natural” as applied to products ranging from yogurt to pasta.<sup>2</sup> These cases are based upon allegations that, notwithstanding labels using those terms, the products contain ingredients that are synthetic or not naturally occurring in organic foods. In the absence of clear

statutory or regulatory definitions, many courts have concluded that lawsuits concerning the terms “natural” and “all natural” are not preempted and have allowed the suits to move forward, provided that plaintiffs meet the normal requirements of pleading and proof.

Second, food labeling lawsuits are increasingly based upon false advertising theories of liability and are no longer confined to claims involving actual product defects or health and safety risks to consumers. Recent lawsuits based upon foods developed through the use of genetically modified organisms (GMOs) are a prime example. The FDA does not require

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a separate labeling regime for food developed using biotechnology, nor does the FDA require that manufacturers make any special disclosures for foods that are the product of genetic engineering.<sup>3</sup> The FDA and the preponderance of scientific studies have concluded that GMO foods do not pose any “different or greater safety concern than foods developed by traditional plant breeding.”<sup>4</sup>

Nevertheless, in recent years many lawsuits have been filed based upon the inclusion of GMOs in food products. Plaintiffs in these

The types of food consumers have also increased to include not just vegetarians but also vegans, paleos, locavores, raw foodies, and others. These conscientious consumers expect full disclosure, or at least something close to precision, from their food product labels. Meanwhile, in law schools, food law is one of the most popular new areas of legal teaching and scholarship, with a primary focus on the need for increased regulation and the limitations of the existing food labeling regime.<sup>6</sup> This increased attention to food

Loops contain fruit. Theories of recovery have become more sophisticated, obtaining mixed results on recent pleading challenges.

A series of decisions by California federal district courts involving “all natural” labeling claims issued in late 2013 and early 2014 illustrate significant disparities (and inconsistency) in outcomes. In two cases, courts ruled the pleadings failed to satisfy the plausibility threshold. In *Kane v. Chobani*, a federal judge in the Northern District of California dismissed an action based upon

## Food companies still possess a number of potentially viable defenses to labeling lawsuits, at the pleading stage and in opposing class certification. Defendants have had particular success challenging theories of damages.

cases do not necessarily contend that GMO ingredients raise safety or health risks for consumers. Instead, anti-GMO plaintiffs have contended that product labels touting foods as natural are false because the labels either ignore or do not announce the presence of GMOs. According to the plaintiffs in these suits, safety or health risks are irrelevant; consumers allege they have been harmed because they paid for a product labeled as natural, when they would not have paid the same (or any) price had they known the products contain GMOs. These food labeling lawsuits therefore resemble traditional consumer class actions involving wholly economic false or misleading advertising claims.

Another recent development is that false advertising plaintiffs are no longer necessarily consumers or consumer rights groups. In the recent *POM Wonderful v. Coca-Cola* case, the U.S. Supreme Court held that in certain circumstances, food companies have standing to sue competitors for engaging in false or misleading product labeling under the Lanham Act. Specifically, the Supreme Court held that a business allegedly injured by a competitor’s false or misleading advertising (including through product labeling) can sue under the Lanham Act, even if the competitor’s labels were authorized by the FDA or otherwise complied with the Food, Drug, and Cosmetic Act (FDCA). The Court effectively held that regulatory approval provided the floor, but not the ceiling, with respect to food product marketing claims.<sup>5</sup> It is still uncertain whether this ruling will materially increase the volume of new false labeling lawsuits. What is clear is that food companies launching new marketing campaigns must now be prepared for potential labeling litigation initiated by their corporate competitors, not just consumers or consumer groups.

has only been amplified by new media. Numerous Web sites and blogs are now devoted to food safety, ingredients, and labeling. These new media serve as vehicles for communication and coordination among the plaintiffs’ bar, public interest groups, and consumers, creating fertile ground for potential new cases and plaintiffs. It is therefore unlikely that the number or frequency of food labeling lawsuits will relent in the near future. However, a number of strategies and defenses are available to companies attempting to mitigate the risks of or defend against these lawsuits.

### Implausible Pleadings

The first line of defense for a company responding to a food labeling lawsuit is to challenge the reasonableness, or the plausibility, of the theory of liability set forth in the complaint. Food companies have had measured success at the pleading stage based upon failure to satisfy the plausibility standard. In federal court, plaintiffs pursuing false or misleading food labeling claims must set forth factual allegations sufficient to give rise to at least a plausible entitlement to relief. Complaints must set forth “enough facts to state a claim for relief that is plausible on its face,” meaning factual content sufficient to allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>7</sup>

Some food labeling complaints have been dismissed because they did not set forth facts that supported an objectively reasonable theory of recovery. For example, courts dismissed lawsuits alleging that Froot Loops and Cap’n Crunch Berries cereals were mislabeled because the products did not, in fact, contain fruit or berries.<sup>8</sup> But most cases do not turn on whether it is plausible to believe that Froot

yogurt labels bearing the words “all natural.” The plaintiff alleged the labels were misleading, because the product was artificially colored with fruit and juice concentrate. The court rejected the allegations because the plaintiff failed to plausibly allege how Chobani’s processing of the juices rendered them unnatural.<sup>9</sup> Similarly, in *Pelayo v. Nestle*, a federal court in the Central District of California dismissed a lawsuit based upon “all natural” marketing claims for a pasta product, in part because the product’s ingredient list clearly set forth its ingredients, leading to the conclusion that no reasonable consumer could be confused.<sup>10</sup>

On the other hand, in labeling cases involving similar theories of liability, different California federal courts rejected motions to dismiss based upon the same implausibility arguments. In *Surzyn v. Diamond Foods, Inc.*, a court in the Central District of California rejected Diamond’s argument that “All Natural” on the label of its tortilla chips would not deceive consumers because other information on the product’s packaging would eliminate any customer confusion. Declining to follow *Pelayo*, the court found that it was not “implausible” that consumers would be misled or confused by the “All Natural” label on the packaging of food containing synthetic ingredients, notwithstanding that the synthetic ingredients were disclosed on the ingredient list.<sup>11</sup> A court in the Northern District of California also refused to dismiss three separate class actions involving the labeling of General Mills granola bars that contained GMOs as “100% natural.” The court found that the plaintiffs had plausibly alleged that the labeling was false and misleading because it could lead consumers to believe the products contained only natural ingredients and not GMOs, and

therefore went beyond mere puffery.<sup>12</sup> And in *In Re: Hain Celestial Seasonings Products Consumer Litigation*, yet another court in the Central District of California denied a motion to dismiss a complaint based upon the “100 percent natural” labeling of a tea product that contained traces of pesticides, also finding that the label was not mere puffery.<sup>13</sup> These disparate results illustrate the limitations (and uncertainty) of pleading challenges based upon the implausibility standard. The defense should certainly be asserted if it is available, but early dismissals of these cases are by no means assured.

Depending on the advertising claim and food product at issue, defendants may also be able to obtain dismissal (or stay) of false labeling lawsuits by asserting a federal preemption defense. In the food labeling context, the preemption defense has largely focused on the 1990 Nutrition Labeling and Education Act (NLEA), which amended the FDCA and which “prohibit[s] the misbranding of foods.”<sup>14</sup> The NLEA prohibits state regulations that are not identical with its or the FDCA’s requirements.<sup>15</sup> The NLEA, however, specifically regulates only certain aspects of food product labeling. Thus, whether the preemption doctrine provides a viable defense depends entirely on the specifics of the labeling claim alleged to be false and misleading and, in some cases, where on the packaging the challenged claim is located.

For example, food labeling regulations distinguish between what are called principal display panels—where photographs, logos, and marketing terms such as “all-natural” tend to appear, typically on the front of food packaging—and the nutritional labeling, or nutrient content claims that tend to appear on the back.<sup>16</sup> As a general matter, the nutritional content claims that occur on the back of the label are more closely regulated than information that appears on the front. Thus, whether a preemption defense will succeed may depend on whether the challenged marketing statement appears on the front of the label, making it less likely to be preempted,<sup>17</sup> or in the nutrient content area, making it more likely to be preempted.<sup>18</sup>

The federal preemption defense may also succeed in subject areas in which the FDA is engaging in rule making. In the first half of 2014, for example, a number of cases targeting the use of the term “evaporated cane juice” instead of “sugar” on product labels were stayed or dismissed because the FDA was engaged in active rule making about that term.<sup>19</sup> However, a food labeling lawsuit will not be found to be preempted simply because it involves a product or an ingredient that is or has been the general subject of a federal regulation or statute. The particular federal statute or regulation at issue must be analyzed

to determine whether enforcement of state law claims or regulations would be inconsistent with the federal regulatory scheme or whether preemption applies for another reason.<sup>20</sup>

### Class Certification

The primary battle in food labeling litigation is often class certification. Although some classes have been certified,<sup>21</sup> food companies have still been successful in the majority of cases in defeating class certification.<sup>22</sup> One of the most effective means to defeat class certification is to attack the viability of the plaintiffs’ theory of damages. A number of courts have refused to certify classes or have decertified classes because plaintiffs have failed to prove a causal link between the alleged misconduct and the alleged damages. For example, a federal district judge in the Central District of California decertified a class action suit based upon the U.S. Supreme Court’s reasoning in *Comcast Corporation v. Behrend*, which requires that in determining whether class certification is appropriate, “plaintiffs must be able to show that the damages stem from the defendants’ actions that created the legal liability.”<sup>23</sup> The court discussed the factors that may affect a consumer’s decision to buy a food product—price, taste, nutritional information, or advertising—and concluded it was impossible to determine whether or to what extent a health claim that did not appear on the label was the cause of the purchase.<sup>24</sup> Accordingly, the Court found that the plaintiffs had not established that the claims of the class representatives would be typical of other class members, or that the “defendants’ action that created the legal liability” would be common to the class. Certification was therefore not warranted under the class action requirements set forth in Rule 23 of the Federal Rules of Civil Procedure.

Class certification motions have also been defeated in cases in which plaintiffs are unable to calculate damages because the consumer has received at least some benefit from the product. In a class action filed against the J. M. Smucker Company, based upon its labeling claims touting its product as healthy (although it contained hydrogenated oils and corn syrup), a different federal judge in the Central District of California denied class certification because damages could not be accurately determined for the class.<sup>25</sup> The Court ruled that because class members likely received some benefits from their food purchases, they were not entitled to full refunds of their purchase price. And because plaintiffs failed to present evidence on the difference between the true value of Smucker’s products and the market price, damages could not be accurately determined.<sup>26</sup>

Similar reasoning was applied in the *POM*

*Wonderful* case, in which the motion to decertify the class was granted in part because the plaintiffs could not articulate a viable theory of damages. One model sought recovery of the full purchase price paid for the products. However, the court noted that that model did not take into account the nutritional benefits that the plaintiffs received from purchasing the product, even if it were the case that the claimed health benefit representations were not true. The plaintiffs alternatively alleged a price premium model of damages, comparing the price of similar products and seeking the difference. The court also rejected that model, determining that unlike other markets, the fruit juice market was not necessarily an efficient market, meaning that price differentials between products were attributable to factors other than challenged health benefit claims, and it was impossible to determine how much, if any, of the price premium was related to the benefit claims. As the court put it, “rather than draw any link between [POM’s] actions and the price difference between the four juice average benchmark price and the average [POM] prices, the [price premium model] simply calculates what the price difference was.”<sup>27</sup>

Finally, courts may refuse to certify food labeling classes because the class is not readily ascertainable. In the *POM Wonderful* case, millions of consumers purchased the product at issue, but none of them were likely to have kept records of their purchases, and there was no way to distinguish between purchasers who bought the product based upon the challenged health claims and those who bought the products for other reasons. Accordingly, because the class was not “ascertainable,” the motion for decertification was granted.<sup>28</sup>

These recent decisions illustrate the considerable hurdles that still confront plaintiffs seeking to certify classes in food labeling litigation. In seeking to avoid class certification, food companies should focus on whether plaintiffs have truly satisfied their requirements to articulate a viable damages theory, and identify an ascertainable class. There is no indication that food labeling lawsuits will be waning any time soon. Food companies will always have an incentive to make marketing and advertising claims—they move products off shelves. And so long as labeling regulations and statutory definitions fail to keep pace with the expectations of consumers and competitors about what should be disclosed on food labels, food labeling law will continue to be made through the courts. Food companies still possess a number of potentially viable defenses to labeling lawsuits, at the pleading stage and in opposing class certification. Defendants have had particular success challenging theories of dam-

ages. However, until courts develop a sufficient and consistent body of case law delineating what types of food marketing claims are and are not actionable, food companies should expect a steady diet of food labeling litigation. ■

<sup>1</sup> See Letter from Leslie Kux, Assistant Commissioner for Policy, Department of Health and Human Services, FDA (Jan. 6, 2014), doc. 70 in *Cox v. Gruma Corp.*, No. 4:12-cv-06502-YGR (N.D. Cal. Jan. 7, 2014); *Hitt v. Arizona Beverage Co., LLC*, 2009 WL 449190, at \*4 (S.D. Cal. Feb. 4, 2009). The FDA's informal guidance on the term "natural" is that it 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 in the food." 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993). However, the FDA has not provided more specific guidance as to what ingredients are considered "artificial" or "synthetic," nor what can and cannot "normally be expected" to be in food.

<sup>2</sup> See, e.g., *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120 (N.D. Cal. Feb. 20, 2014) (yogurt); *Pelayo v. Nestle USA, Inc.*, 2013 WL 5764644 (C.D. Cal. Oct. 25, 2013) (pasta); *Janney v. Gen. Mills*, 944 F. Supp. 2d 806 (N.D. Cal. May 10, 2013) (granola bars); *Rojas v. Gen. Mills*, 2013 WL 5568389 (N.D. Cal. Oct. 9, 2013) (same); *Bohac v. Gen. Mills*, 2014 WL 1266848 (N.D. Cal. Mar. 26, 2014) (same).

<sup>3</sup> The FDA has chosen to regulate food based upon the "objective characteristics of the food and the intended use of the food," regardless of "the method by which [the food] is developed." Statement of

Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22,984 (May 29, 1992).

<sup>4</sup> 57 Fed. Reg. at 22,991. The FDA has expressly declined "to make a determination...regarding whether and under what circumstances food products containing ingredients produced using genetically engineered ingredients may or may not be labeled 'natural.'" 57 Fed. Reg. at 22,991.

<sup>5</sup> *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014).

<sup>6</sup> *Elaine McArdle, Thought For Food*, 65 Harv. L. Bull., 23, 23-27 (2014).

<sup>7</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1927, 1249 (2009).

<sup>8</sup> *Werbel v. Pepsico, Inc.*, 2010 WL 2673860, at \*3 (N.D. Cal. July 1, 2010); *Videtto v. Kellogg USA*, 2009 WL 1439086 at \*2 (E.D. May 20, 2009).

<sup>9</sup> *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120 (N.D. Cal. Feb. 20, 2014).

<sup>10</sup> *Pelayo v. Nestle USA, Inc.*, 2013 WL 5764644, at \*1 (C.D. Cal. Oct. 25, 2013).

<sup>11</sup> *Surzyn v. Diamond Foods, Inc.*, No. 14-cv-00136-SBA (N.D. Cal. Jan. 9, 2014).

<sup>12</sup> *Rojas v. Gen. Mills, Inc.*, 2014 WL 5568389, at \*1 (N.D. Cal. Oct. 10, 2014); *Bohac v. General Mills, Inc.*, 2014 WL 1266848, at \*5 (N.D. Cal. Mar. 26, 2014); *Janney v. Gen. Mills, Inc.*, 944 F. Supp. 2d 806 (N.D. Cal. May 10, 2014).

<sup>13</sup> In *Re: Hain Celestial Seasonings Prod. Consumer Litig.*, No. 13-cv-01757 (C.D. Cal. Nov. 06, 2013).

<sup>14</sup> 21 U.S.C. §§301 *et seq.*

<sup>15</sup> 21 U.S.C. §343-1(a).

<sup>16</sup> See 21 C.F.R. §§101.1; 101.3, 101.13-18 (front panel), *id.* §§101.2; 101.4, 101.9, 101.12 (back panel).

<sup>17</sup> *Garrison v. Whole Foods Mkt. Inc.*, 2014 WL 2451290, at \*3 (N.D. Cal. June 2, 2014); *Garrison v. Whole Foods Mkt. Cal. Inc.*, 14-cv-00334 VC \*1 (N.D. Cal. June 24, 2014).

<sup>18</sup> *Chacana v. Quaker Oats Co.*, 752 F. Supp. 2d 1111 (N.D. Cal. Oct. 14, 2010).

<sup>19</sup> *Reese v. Odwalla, Inc.*, 2014 WL 1244940, at \*2 (N.D. Cal. Mar. 25, 2014); *Swearingen v. Yucatan Foods, L.P.*, 2104 WL 2115790, at \*1 (N.D. Cal. May, 20, 2014); *Gitson v. Clover Stornetta Farms*, WL 2638203, at \*1 (N.D. Cal. June 9, 2014).

<sup>20</sup> See *Brown v. Hain Celestial Grp.*, Inc., 913 F. Supp. 2d 881 (N.D. Cal. Dec. 22, 2012).

<sup>21</sup> See, e.g., *Brazil v. Dole Food Comp. Inc.*, 935 F. Supp. 2d 947 (N.D. Cal. Mar. 25, 2013); *Peviani v. Natural Balance, Inc.*, 774 F. Supp. 2d 1066 (S.D. Cal. Feb. 24, 2011); *Werdebaugh v. Blue Diamond Growers*, 2013 WL 5487236 (N.D. Cal. Oct. 2, 2013).

<sup>22</sup> See, e.g., In *Re: Pom Wonderful LLC Mktg. and Sales Practices Litig.*, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Leyva v. Medline Indus. Inc.*, 716 F. 3d 510 (9th Cir. 2013); *Astiana v. Ben & Jerry's Homemade Inc.*, 2011 WL 2111796 (N.D. Cal. May 26, 2011); *Caldera v. J.M. Smucker Co.*, 2013 WL 6987893 (C.D. Cal. Oct. 4, 2013).

<sup>23</sup> *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

<sup>24</sup> *Pom Wonderful*, 2014 WL 1225184, at \*5-6.

<sup>25</sup> *Caldera v. J.M. Smucker Co.*, 2014 WL 1477400 (C.D. Cal. Apr. 15, 2014).

<sup>26</sup> *Id.* at \*4.

<sup>27</sup> *Pom Wonderful*, 2014 WL 1225184, at \*5-6.

<sup>28</sup> *Id.* See also *Astiana v. Ben & Jerry's Homemade Inc.*, 2011 WL 2111796 (N.D. Cal. May 26, 2011).

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