

FDA Guidance on Evaporated Cane Juice Not So Sweet for Class-Action Defendants

November 8, 2016 – *The TMCA*

by Creighton R. Magid



In recent years, a boomlet of litigation – primarily in California – has arisen regarding the product known as “evaporated cane juice” or “ECJ.” The product – made by extracting fluid from crushed sugar cane, clarifying the fluid, evaporating the fluid to create a concentrate, filtering and crystallizing the concentrate, and then separating out the molasses using centrifugation – is sometimes used as a sweetener in consumer products, including yogurts and beverages. Several class-action suits have been brought in the name of consumers who claim to have been health conscious but duped into thinking that products labeled as containing ECJ were free of added sugars.

Courts largely put the cases on hold, awaiting guidance from the federal government under the “primary jurisdiction doctrine,” which allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.

In May, the U.S. Food and Drug Administration issued its long-awaited “[Guidance for Industry](#)” regarding ECJ. In its Guidance, the FDA concludes that “such sweeteners should not be declared on food labels as ‘evaporated cane juice’ because that term does not accurately describe the basic nature of the food and its characterizing properties (*i.e.*, that the ingredients are sugars or syrups). Moreover, the use of ‘juice’ in the name of a product that is essentially sugar is confusingly similar to the more common use of the term ‘juice’ – ‘the aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or puree’ (21 C.F.R. § 120.1(a)). Thus, the term ‘evaporated cane juice’ is false or misleading because it suggests that the sweetener is ‘juice’ or is made from ‘juice’ and does not reveal that its basic nature and characterizing properties are those of a sugar.” Further, because federal regulations require that “ingredients required to be declared on the label or labeling of food . . . shall be listed by common or

Related People

- Creighton R. Magid

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

usual name,” 21 C.F.R. § 101.4(a)(1), a food labeled as containing “evaporated cane juice” would be considered mislabeled; the proper term, according to the FDA, is “sugar” – with or without a descriptive term (such as “cane sugar” or “turbinado sugar”).

In light of the FDA’s Guidance, courts have lifted stays in several ECJ cases. See, e.g., *Swearingen v. Pacific Foods of Oregon, Inc.*, No. 3:13-cv-4157 (N.D. Cal.); *Perera v. Pacific Foods of Oregon, Inc.*, No. 3:14-cv-2074 (N.D. Cal.).

After lifting such a stay, Judge Susan Illston of the U.S. District Court for the Northern District of California issued a ruling on August 17, 2016, largely denying Santa Cruz Natural, Inc.’s motion to dismiss claims brought against it by a putative class of consumers who claim to have been misled by the use of “evaporated cane juice” on the label of a line of beverages. *Swearingen v. Santa Cruz Natural, Inc.*, No. 13-cv-04291 (N.D. Cal. Aug. 17, 2016). The plaintiffs, claiming to be “health conscious consumers who wish to avoid ‘added sugars’ in the food products they purchase,” claim that they read the labels on Santa Cruz Natural’s flavored beverages, noted that “sugar” was not listed as an ingredient, and supposedly therefore reached the conclusion that the products did not contain any added sugar. (The fact that the labels also disclosed that the drinks had between 29 and 35 grams of sugar apparently did not serve as a red flag; the plaintiffs claim that they assumed that the sugars were naturally occurring in the other ingredients, such as lemon juice and mango puree.)

Judge Illston’s decision to allow the case to move forward may serve as a playbook for plaintiffs in other ECJ lawsuits. The Court ultimately found plaintiffs had standing to bring the lawsuit, adequately pleaded “injury in fact” to establish standing under Article III of the Constitution, and that the state law claims were not preempted by the FDCA. In addition, Santa Cruz Natural’s argument that the plaintiffs could not meet the “reasonable consumer” test of the California consumer protection statutes – under which a plaintiff must show that consumers acting reasonably in the circumstances would have been deceived – fared no better. Although Judge Illston noted that she had “some reservations as to whether a reasonable consumer would be misled as regarding added sugars in the Lemonade Soda and Ginger Ale Soda” – whose 35 grams and 32 grams of sugar, respectively, were unlikely to occur naturally in ginger root or lemon juice – she nonetheless found that, because other sodas were closer calls (a reasonable consumer might conclude that the 29 grams of sugar in the Orange Mango Soda, for example, occurred naturally in the orange juice and mango puree listed as ingredients), the question of whether a reasonable consumer would have been misled was a question better decided by a jury.

The FDA’s Guidance is likely to embolden plaintiffs who have brought (or who are considering bringing) ECJ claims. Judge Illston’s opinion in *Swearingen*, moreover, provides sufficient direction on pleading and sufficient precedent (at least in the 9th Circuit) for careful plaintiffs to survive motions to dismiss. The combination of the two makes it unlikely that the boomlet in ECJ litigation will end anytime soon.

Read the full update [here](#).

