

Legal Update: Evaporated Cane Juice

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 crystalizing 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.

For a time, courts largely put the cases on hold, awaiting guidance from the federal government under what is known as the “primary jurisdiction doctrine.” The primary jurisdiction doctrine “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.” “[T]he doctrine is a ‘prudential’ one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.” *Saubers v. Kashi Co.*, 39 F. Supp. 3d 1108, 1111 (S.D. Cal. 2014) (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir.2008)).

In May, however, the U.S. Food and Drug Administration issued its long-awaited “Guidance for Industry” regarding ECJ. In its Guidance, the FDA concluded 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

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'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 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 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 likely will serve as a playbook for plaintiffs in other ECJ lawsuits. Judge Illston first ruled that the plaintiffs had standing to bring the lawsuit because they adequately pleaded reliance in their complaint; whether true or not, the plaintiffs at least claimed that they had read and relied upon the labels in making their purchasing decisions. On a closer issue, Judge Illston also concluded that the plaintiffs had adequately pleaded "injury in fact" to establish standing under Article III of the Constitution, at least as to those sodas listing ECJ as an ingredient. Santa Cruz Natural argued that plaintiffs had not claimed to have personally purchased the beverages and therefore lacked standing. Judge Illston, however, sided with those courts that have concluded that an actual purchase is not required to establish injury-in-fact under Article III, but rather, that when "plaintiffs seek to proceed as representatives of a class . . . the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased. *Swearingen*, No. 13-cv-04291 (N.D. Cal. Aug. 17, 2016) at 8 (quoting *Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012 WL 2990766, at *11 (N.D. Cal. July 20, 2012)). Because all of the fruit beverages at issue were of the same type of food product, Judge Illston concluded, the plaintiffs had standing.

Judge Illston also swept away Santa Cruz Natural's arguments that the plaintiff's

claims were expressly preempted, finding that the California consumer protection acts upon which the plaintiffs based their claims and the federal Food Drug and Cosmetic Act “contain identical prohibitions on false or misleading labeling,” *Swearingen*, No. 13-cv-04291 (N.D. Cal. Aug. 17, 2016) at 9, or impliedly preempted, concluding that “allowing a private individual to bring state law claims based on a violation of the [Food Drug and Cosmetic Act] did not conflict with Congress’s intent.” *Id.* at 11 (citing *Kane v. Chobani, Inc.*, 2013 WL 3702981, at *11-12 (N.D. Cal. July 12, 2013)).

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. (Judge Illston’s opinion was not a complete loss for Santa Cruz Natural: the Court dismissed the negligence and negligent misrepresentation claims as being barred by the economic loss doctrine; dismissed the unjust enrichment claims on the grounds that unjust enrichment was a restitution claim and not a stand-alone cause of action; and dismissed the claim for declaratory relief on the grounds that the plaintiffs acknowledged that they would not purchase the Santa Cruz Naturals beverages again.)

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.

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