

Naturally Misleading? Ninth Circuit Keeps “All Natural” Fruit Labeling Dispute Alive

October 20, 2016 – The TMCA

by Robert J.M. Lee



Does a food label advertising a product as “all natural fruit” mislead consumers when that product contains artificial preservatives? That is the question presented in *Brazil v. Dole Food Co. Inc.*, which the Court of Appeals for the Ninth Circuit answered with a definitive “maybe.” The Court reversed the district court, sending the plaintiff’s claims to a jury. The case highlights the potential importance of the FDA’s informal policies for food products. The case also serves as a reminder that companies should keep in mind how consumers may understand an ad and not just focus on a literal

reading of the words.

The lawsuit started in 2012, when plaintiff Chad Brazil filed a class action suit against Dole in the Northern District of California, asserting a number of legal theories. By the third amended complaint, Mr. Brazil left in play only California state law claims, which nevertheless implicated federal labeling requirements because California has adopted federal food regulations as its own standard. Mr. Brazil’s remaining claims revolved around whether Dole mislabeled certain fruit products as “All Natural Fruit” when the products also contained artificially-made preservatives. Most of these claims require the plaintiff to prove that the accused labels likely misled a significant chunk of reasonable consumers. The district court granted summary judgment for Dole, viewing Mr. Brazil’s own testimony as his only evidence of deception and citing that only a few instances of actual deception are insufficient to survive summary judgment. The district court also expressly discounted the FDA warning letters about alleged mislabeling that Mr. Brazil proffered. The FDA has informally defined “natural” as “nothing artificial or synthetic... has been included in, or has been added to, a food that would not normally be expected to be in the food.” The district court agreed with Dole that these warning letters did not

Related People

- Robert J.M. Lee

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

address whether the particular artificial additives at issue would normally be expected in Dole's products.

The Ninth Circuit reversed summary judgment on these claims, seeing more potentially supporting evidence for deception than Mr. Brazil's testimony. Mr. Brazil proposed to use the label itself and Dole's own survey evidence as additional support, but the Court emphasized the proffered FDA warning letters. Mr. Brazil cited warnings letters to food sellers of "natural"-labeled products that did not--unlike Dole's argument--rely on whether the offending constituent is normally expected in the food. One letter in particular warned of labeling tomato products (which naturally contain citric acid) as "natural" when they also contained artificial citric acid.

Mr. Brazil's "misleading consumer" claims will may be headed for trial, unless the case settles before then. While the Ninth Circuit affirmed that Mr. Brazil cannot seek damages on behalf of a class, he still stands to win his individual damages and an injunction if successful at trial.

This case offers a couple key take-aways. First, food sellers might want to keep tabs on the FDA's informal stance on issues relevant to the seller's business, particularly warning letters. Fortunately, the FDA's website publicly posts warning letters, with several choices as to the search field (including by company and subject). The Ninth Circuit's opinion indicates at least a willingness to allow this sort of information as evidence to support a consumer deception claim.

Second, companies should bear in mind how consumers might take the wording in advertisements – whether in label form or otherwise. In this case, Mr. Brazil testified that he understood Dole's labels to mean that each product in its entirety was free of artificial additives. Though the labels stated "All Natural *Fruit*," the court denied Dole's attempt to axe Mr. Brazil's claims for alleging that something *other than the fruit* was not natural.