

## 'All Natural' Class Action Wave May Be Short-Lived

By Erin Fuchs

Law360, New York (October 19, 2011, 1:42 PM ET) -- Plaintiffs' lawyers are filing scores of suits over "all natural" claims in popular foods as more advertisers peddle products as nutritious, but the burden of proving that consumer classes actually relied on those claims could kill such cases, lawyers say.

In recent months, plaintiffs' lawyers have hit major companies including Kellogg Co. and PepsiCo Inc. with lawsuits alleging they falsely touted their products as all natural or nutritious even though they contain unhealthy ingredients such as high-fructose corn syrup.

Amid the wave of litigation, the U.S. Food and Drug Administration has declined to define all natural more precisely, or to decide whether high-fructose corn syrup qualifies as such. A federal judge overseeing a proposed class action over Snapple asked the FDA last year to determine whether high-fructose corn syrup was all natural, but the regulator refused to weigh in.

"In terms of their prioritizing for protecting the public health, this is fairly low," said Madeleine McDonough, a partner with Shook Hardy & Bacon LLP who closely follows the food industry. "[The FDA] realize[s] there is some level of puffery allowed in labeling."

In light of this regulatory uncertainty, class actions over nutrition claims in ads could continue to swell for some time, lawyers said. However, judges may begin to dismiss the suits more readily if plaintiffs' lawyers can't show that masses of consumers actually relied on claims such as "100% natural" when choosing the advertised products, lawyers said.

"I think there will continue to be a movement to ensure that if I want to purchase products that are all natural or have certain health benefits, I want to be able to understand with some common meaning whether a product fits that or not," said Richard Alderman, who directs the Consumer Law Center at the University of Houston.

But, he conceded, "you would have to show that the people who brought the lawsuit — if these are class actions — everybody relied on it. It's getting harder and harder in the U.S. to maintain class actions — and part of it is that element of reliance."

To be sure, litigation over food labels is relatively easy to bring in the first place, as plaintiffs' lawyers can just peruse labels for synthetic-sounding ingredients, said Stuart Friedel, a partner at Davis & Gilbert LLP whose specialties include advertising.

"I think it's not difficult to make these allegations," Friedel said. "There is a big disparity between some very prominent groups about what is nutritious food and what is not. Because of that, it's going to be easy for people to raise an action."

However, plaintiffs' attorneys could still have difficulty proving that ads promoting products as nutritious actually spurred consumers to buy foods and were not just obvious exaggerations, experts said.

The problem is that the plaintiffs' lawyers must demonstrate a common reliance on nutrition claims among class members, as well as potentially a concerted effort to defraud them, McDonough said.

"It gets exponentially more difficult to try to establish that when you have got a large number of people," she said.

Because the FDA has not clarified what all natural means, the cases will turn on what consumers construe those claims to mean, according to Randal M. Shaheen, a consumer protection and advertising lawyer at Arnold & Porter LLP. For their part, consumers can read all natural labels and then potentially read a list of ingredients to form their individual opinion, he said.

"I can look at the ingredients and see that it has high-fructose corn syrup or a preservative or whatever," Shaheen said. "When I was seven and I was eating Froot Loops, I knew I wasn't getting real fruit."

Still, plaintiffs' lawyers could argue that consumers' reliance on these claims in general is what spurs advertisers to use them, according to Alderman.

"To me, it goes without saying, if a company spends millions of dollars on advertising something they have already made the decision that [the advertising] works and that people rely on it," he said. "Just walk into any store and see how often the words health and natural appear."

For their part, product makers might be wise to be careful these days about how they use such words. Companies are keeping an eye on the litigation — which is costly, but likely a "tempest in a teapot" — and being conservative about product claims, McDonough said.

"In my experience, product manufacturers are trying to be careful, and they are aware of litigation threats," she said. "And they do know that the regulatory structure for this is not settled."

--Editing by Pamela Wilkinson and John Williams.