



'All Natural' Litigation

California's litigation boom could be spreading closer to home.

By Neil A.F. Popovic and Paul Seeley



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Plaintiffs' attorneys have recently set their sights on a potentially lucrative target for class action lawsuits: Food and beverage companies that market their products as "all natural."

The typical suit alleges that consumers are misled because a product labeled as "all natural" in fact contains one or more ingredients that are not natural.

A plaintiff who purchased the product can file suit on behalf of all similarly situated consumers. The plaintiff typically claims that, had he or she known that the product contained something that was not natural, he or she would not have purchased the product.

Based on these allegations, the plaintiff seeks relief, usually a refund, on behalf of everyone who purchased the product. The food producer thus risks significant liability, in addition to the expense and disruption required to defend such an action.

As with other trends, California has become the epicenter of this "all natural" litigation. The raw numbers are staggering. As a test, we ran a search in a legal database to identify all judicial opinions since 2011 based on claims of false advertising relating to "all natural."

For the federal courts in the 49 states other than California, the search resulted in 26 judicial opinions. For federal courts in California, the search identified 97 judicial opinions.

This raises several questions: Why is California host to this litigation boom? To what extent are jurisdictions outside the Golden State likely to experience similar litigation trends?

Perfect Storm

In theory, injured consumers can sue a company in the state where they reside or where the company is based. The combination of a large population and plaintiff-friendly consumer protection laws makes California an attractive venue for litigation.

One such law is the Unfair Competition Law (UCL). The UCL prohibits any entity from engaging in a

business practice that is illegal, unfair or fraudulent, specifically including false or misleading advertising. Any person who has suffered "injury in fact" and lost money or property caused by such a practice can seek restitution and an injunction against the business.

Oftentimes, a consumer need only allege that he or she purchased the product or paid a premium based on a representation that the product was "all natural." California's low threshold for plaintiffs to get into court would mean little if defendants could routinely defeat such actions in their infancy.

Inconsistent Rulings

To date, no single defense strategy has regularly prevailed. Indeed, different judges within the same judicial district have reached opposite conclusions when faced with nearly identical facts.

For example, in *Cox v. Gruma Corp.*, 2013 WL 3828800 (N.D. Cal. July 11, 2013) and *Bohac v. General Mills Inc.*, 2013 WL 5587924 (N.D. Cal. Oct. 10, 2013), two different judges in the Northern District of California were faced with litigation about whether products that contained genetically modified organisms (GMOs) could be marketed as "all natural."

In both cases, the defendant raised an argument known as "primary jurisdiction," which essentially means that the court should refer the issue to an administrative agency, such as the FDA, and suspend the litigation, pending the determination of that agency.

In *Cox*, the judge accepted the argument and held the case to allow the FDA to determine whether GMOs made a product unnatural. In *Bohac*, the judge rejected the argument completely, forcing the defendant to litigate the case.

Other defenses, such as arguing that a "reasonable consumer" would not be

misled, have also resulted in different outcomes from different judges. Some have accepted the defense as a matter of law and others find it raises factual issues that require further litigation.

Until a higher court establishes clear precedent, the disparate decisions from lower courts virtually guarantee the plaintiffs' bar will continue filing "all natural" cases.

Increasing Litigation

A minimal pleading standard and inconsistent case law are by no means unique to California.

Numerous states have statutes that are similar to the UCL. Those statutes have been the basis for non-California "all natural" litigation against some of the major food and beverage producers in the country.

Lynch v. Tropicana Products Inc. alleges the company's label stating "100 percent pure and natural" was misleading under New Jersey law.

Because California courts have more experience with "all natural" litigation, other courts look to California's judicial decisions, effectively exporting California's confusion to other jurisdictions. *Krzykwa v. Campbell Soup Co.* cites decisions from California to deny a defendant's motion to dismiss a complaint filed under Florida's consumer protection statute.

Thus, even if California is the current "ground zero" for "all natural" litigation, it may only be a matter of time before the litigation boom spreads to other states. **FD**



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