# Class Action Complaint on 100% Natural Oil Dismissed

November 29, 2011 by Sean Wajert

A federal court recently dismissed a proposed class action accusing a food company of misleadingly labeling cooking oils as 100% natural when they allegedly were made from genetically modified plants. Robert Briseno, et al. v. ConAgra Foods Inc., No. 2:11-cv-05379 (C.D. Calif.).

Quick research reveals that 88-94% of the nation's crops of corn, soy and canola are grown from seeds that are the product of bioengineering. There is no credible science that there are serious health issues with these products, and multiple peer reviewed studies on "GM" crops worldwide show farmers in underdeveloped countries have seen an increase in yield of about 29% from using them, along with decreased use of insecticide applications.

Plaintiff alleged that he regularly purchased Wesson Canola Oil, bearing labels that state the product is "100% Natural." Plaintiff contended that contrary to these representations, ConAgra used plants grown from genetically modified organism seeds that have been engineered to allow for greater yield, and to be pest-resistant, to make Wesson-branded oils. He asserted that the genetically modified organisms are somehow not "100% natural," and thus the labels and advertising are deceptive. Plaintiff filed a complaint seeking to represent a class of all persons in the United States who have purchased Wesson Oils from 2007 on. As is typical, he alleged violation of California's false advertising law ("FAL"), California's unfair competition law ("UCL"), and California's Consumer Legal Remedies Act ("CLRA").

Defendant moved to dismiss. The first issue was preemption of the state law causes of action, based on FDA guidance regarding food labels. Federal preemption occurs, generally, when: (1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. Specifically, ConAgra argued that Briseno's claims were preempted because the FDA has repeatedly concluded that bioengineered foods are not meaningfully different from foods developed by traditional plant breeding, and thus that the fact that a food product is derived from bioengineered plants need not be reflected on a product's label. Plaintiff responded that he was not arguing that ConAgra was required to state whether its products were made from genetically modified plants. Rather, he contended that the decision to label its products "100% Natural" was misleading.

Courts have split on food preemption issues. *Compare* Dvora v. General Mills, Inc., 2011 WL 1897349 (C.D. Cal. May 16, 2011)(cereal-yes); Turek v. General Mills, Inc., 754 F.Supp.2d 956 (N.D. Ill. 2010)(snack bars-yes); Yumul v. Smart Balance, Inc., 2011 WL 1045555 (C.D. Cal. Mar. 14, 2011)(yes), *with* Lockwood v. Conagra Foods, Inc., 597 F.Supp.2d 1028 (N.D. Cal. Feb. 3, 2009)(pasta-no); Wright v. General Mills, Inc., 2009 WL 3247148 (S.D. Cal. Sept. 30, 2009)(granola bars-no).

Here, the court found no preemption on most of the complaint. The bulk of the complaint, said the court, alleged that use of the phrase “100% Natural” is misleading, and did not contend that additional information must be added to Wesson Oil labels. Regulations requiring that each product list its ingredients by their “common or usual name,” together with the regulations requiring that vegetable oils be denominated “ oil,” were inapplicable since plaintiff’s central argument was not that ConAgra cannot use the common or usual names of canola oil, vegetable oil or corn oil.

The FDA has expressed that it has no basis for concluding that bioengineered foods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding. So, plaintiff, in essence, sought to create a distinction – between “natural” oils and those made from bioengineered plants when the FDA has determined that no such distinction exists. The court rejected this argument, refusing to read the FDA guidance as formal enough or clear enough on the issue.

Plaintiff did also seek an order requiring defendant to adopt and enforce a policy that requires appropriate disclosure of GM ingredients. Entering an order of this type would impose a requirement that is not identical to federal law, and thus this particular prayer for such relief was preempted.

Rule 9(b) requires that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. The pleading must identify the circumstances constituting fraud so that a defendant can prepare an adequate answer to the allegations. While statements of the time, place and nature of the alleged fraudulent activities are often sufficient, mere conclusory allegations of fraud are insufficient. Even if fraud is not a necessary element of a claim under the CLRA and UCL, when a plaintiff alleges fraudulent conduct then the claim can be said to be grounded in fraud or to sound in fraud.

Plaintiff alleged that he regularly purchased Wesson Canola Oil for his own and his family’s consumption. But his complaint contained no allegations as to whether he became aware of the representation through advertising, or labeling, or otherwise. He provided no information about how often he was exposed to the allegedly misleading statement. He did not allege how frequently he purchased the product and over what period of time, whether he relied on statements on canola oil labels, on a website, in advertisements, or all of the above, whether the statements remained the same throughout the class period, or, if they did not, on which label(s), advertisement(s) or statement(s) he relied.

Thus, this complaint did not afford ConAgra adequate opportunity to respond. Consequently, defendant's motion to dismiss was granted (without prejudice).