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## Dole Buyers Get Mixed Win In 9th Circ. Natural Label Ruling

By **Emily Field**

Law360, New York (October 3, 2016, 11:51 PM EDT) -- Consumers won a major false advertising battle Friday when the Ninth Circuit ruled the label on Dole's "all natural" frozen berry products may be misleading, but the panel's finding that the decertified class hadn't shown it could prove classwide damages greatly limits what the buyers can recover if they ultimately prevail, attorneys say.

The **Ninth Circuit handed a win** to consumers when it reversed a lower court's decision that reasonable consumers wouldn't be misled by a label claiming that Dole's frozen berry and other mixed fruit products are "all natural," despite the presence of two synthetic ingredients. But the proposed class still faces the challenge of showing damages for an allegedly deceptive natural food label claim, given the array of factors that can influence consumers' food decision-making, experts said.

Although products marketed as natural, healthy or organic have become more popular in recent years as consumers have grown more interested in knowing where their food comes from and what goes into it, that's not necessarily true for every food buyer, attorneys said.

"There are consumers who — it's safe to say so — who do not care about natural or not; they simply like the flavor, and the damages model must account for those consumers as well," Ted Craig of Gray Robinson said.

In its unpublished decision, the appeals panel ruled that U.S. District Judge Lucy Koh didn't err when she granted Dole's motion for decertification of named plaintiff Chad Brazil's class — a rare move in itself, as motions for decertification aren't often granted, Craig noted.

The appeals panel found damages were correctly limited to the difference between the prices consumers paid and the value of the fruit they bought. But since Brazil hadn't proven that the Dole products lacked value — which would mean that consumers could be refunded in full for their purchases — recovery will be limited to the premium paid under the misunderstanding that the products were indeed all-natural.

"Because Brazil did not explain how this premium would be calculated with proof common to the class, the district court did not abuse its discretion by granting Dole's motion to decertify," the panel said.

Brazil is still free to pursue injunctive relief on his claim that although Dole's frozen fruit products are labeled as "all natural," the fruit is packed in two synthetic, mass-produced ingredients — citric acid and ascorbic acid. But chances of winning any sizeable sum are now slim, Daniel Herling of Mintz Levin Cohn Ferris Glovsky & Popeo PC said.

"The reality of it is with the decertification, not approving the class really changes the economic value of this case," Herling said, noting that even if an individual plaintiff could be awarded damages for the premium paid for a Dole fruit product, it would be unlikely to be any award of a significant amount of money.

The panel also rejected Brazil's theory that the proposed class could pursue damages under a theory of "nonrestitutionary disgorgement." Under California law, a plaintiff who successfully shows that a defendant enriched itself at his expense can sometimes recoup all the unjust profits; in Brazil's case, the panel said any awards of unjust profits would have to be calculated the same way as an award for the price premium paid, and he hadn't shown how that would be possible on a classwide scale.

"I think this opinion mistakenly assumes that there are only two limited ways to measure unfair competition law restitution, which is not the law in California," said Kimberly A. Kralowec of The Kralowec Law Group.

Brazil has contended that under U.S. Food and Drug Administration policies, use of "natural" on a food label means nothing synthetic or artificial has been added, but that Dole uses artificial citric acid and ascorbic acid as preservatives.

The appeals panel did rule that a jury could find a reasonable consumer could be misled by Dole's label, reversing Judge Koh's December 2014 ruling that Dole's "all natural" labels refer only to the actual fruit used.

"It affirms the basic concept that if you're going to label something and speak in absolute terms, you have to be truthful about that," Jeff Westerman of Westerman Law Corp said.

Although the FDA hasn't established a formal definition of the term, the agency has a long-standing policy that "natural" means nothing artificial or synthetic, such as a color additive, has been added to a food. However, the agency is reconsidering the policy, and it asked for the public to weigh in on the issue last November.

Until the FDA renders its decision, attorneys said that consumers will continue to come forward with claims about natural labels on food.

"People have become very accustomed to products that are branded in different ways, and those terms are not regulated in ways that make sense," said Josh Schiller of Boies Schiller & Flexner LLP.

The Ninth Circuit is also mulling two other food labeling cases — *Kosta v. Del Monte Foods Inc.* and *Jones v. ConAgra Foods Inc.* — and **a number of similar cases** have been put on ice by the district courts pending the panel's decisions in this case and in those.

In the *Del Monte* case, lead plaintiffs Michael Kosta and Steve Bates claim that *Del Monte Corp.* used labels that duped consumers into thinking that its canned tomato products contained antioxidants and that its canned fruit was fresh, and are challenging a decision to deny them certification.

And in the *ConAgra* appeal, consumers claim the company's *Hunt's*, *Pam* and *Swiss Miss* products are falsely labeled, and are likewise challenging a denial of class certification. That case also involves some natural-food label claims.

The ruling in the instant case could possibly preview how the panel will approach those cases, Craig said, given the decision's "strong suggestion" that the district court won't be unable to enter summary judgment on an all-natural label claim.

"After this ruling, the district courts will be extremely reluctant to enter summary judgment on any claims involving all-natural labeling," Craig said.

--Editing by Philip Shea and Kat Laskowski.