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Cookie Co. Can't Kick 'All Natural' Labeling Class Action

By **David Siegel**

Law360, New York (September 10, 2014, 2:14 PM ET) -- A Florida federal judge refused Tuesday to toss a proposed class action alleging a cookie company misled customers by falsely claiming to use "all natural" ingredients, finding the court doesn't need to defer to the U.S. Food and Drug Administration because the agency never defined the term.

In an order denying a motion to dismiss filed by Bodacious Food Co., U.S. District Judge William P. Dimitrouleas rejected the argument that the primary jurisdiction doctrine should preclude him from hearing the case, finding the FDA has repeatedly declined to promulgate regulations governing the use of the word "natural" as it applies to food products.

"The FDA is free to promulgate regulations governing the term 'natural' but has not done so," Judge Dimitrouleas wrote. "Judges have experience interpreting terms in conjunction with parties' disputes, and the prospect of interpreting the term 'all natural' does not fall outside of that conventional experience."

Plaintiff Linda Dye filed suit in May, claiming Bodacious' use of the term "natural" in labeling on the company's line of Geraldine's Cookies products violates Florida's Deceptive and Unfair Trade Practices Act and the Magnuson-Moss Warranty Act, because the cookies contain synthetic or genetically modified ingredients like sugar, canola oil, corn starch, dextrose and citric acid.

Judge Dimitrouleas disagreed with arguments that the complaint failed to meet the \$5 million jurisdictional dollar amount required for diversity jurisdiction under the Class Action Fairness Act of 2005, saying Bodacious' supposed evidence refuting the plaintiff's claim of having met the threshold had not been properly filed with the court.

Bodacious told the court it would provide confidential sales figures "for review in a separate correspondence to ensure that the confidential nature of same is maintained," but Judge Dimitrouleas said all submissions to the court must be filed on the docket.

"Unless a motion to seal is properly filed pursuant to the local rules and is granted by the court, all filings on the docket will remain public," Judge Dimitrouleas wrote. "Thus, it does not appear to a legal certainty that plaintiff's class claim is really for less than \$5 million."

In rejecting arguments that Dye lacked standing to pursue injunctive relief, Judge Dimitrouleas said it is plausible a consumer might be misled by the statement "all natural" and falsely conclude items like synthetic or genetically modified sugar and cornstarch are not actually artificial ingredients. Bodacious had argued the inclusion of all ingredients on the box warranted dismissal of the case.

The Florida statute doesn't require a plaintiff to show an ongoing practice or irreparable harm

to obtain injunctive relief, Judge Dimitrouleas said, but rather grants standing to "anyone aggrieved" by an unfair or deceptive act.

Judge Dimitrouleas also said the complaint sufficiently stated unjust enrichment and breach of express warranty claims, finding it specifically alleged that Linda Dye purchased Geraldine's Italian Wedding Cookies for \$3.79 from a Publix Super Markets Inc. store in Palm Beach Gardens containing both the labeling and ingredients in question.

"Defendant has raised no argument warranting dismissal of plaintiff's claims," Judge Dimitrouleas wrote. "Although it is unclear whether any deceptive acts, unfair practices, misrepresentations, unjust enrichment, or breaches of warranties will be proven based on the words 'all natural' on cookie boxes or, alternatively, if plaintiffs will fail to establish liability as the litigation proceeds, the allegations, if true, state valid causes of action at this pleading stage."

Attorneys for the parties did not immediately respond to a request for comment from Law360.

Linda Dye is represented by Michael Thomas Fraser of The Law Offices of Howard W. Rubinstein PA, and by Michael J. Pascucci and Joshua H. Eggnatz of The Eggnatz Law Firm PA.

Bodacious Food Co. is represented by Scott M. Teich of Quintairos Prieto Wood & Boyer PA.

The case is Linda Dye v. Bodacious Food Co., case number 9:14-cv-80627, in the U.S. District Court for the Southern District of Florida.

--Editing by Mark Lebetkin.

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