

## 9th Circ. Dole Decision May Spark More 'All Natural' Claims

*Law360, New York (October 6, 2016, 2:33 PM EDT) --*

Last week, the Ninth Circuit provided guidance on deceptive advertising claims concerning food products labeled “all natural.” In *Brazil v. Dole Packaged Foods LLC*, No. 14-17480, the Ninth Circuit ruled, in an unpublished opinion, that a trier of fact could find that Dole’s “all natural fruit” labels are misleading to a reasonable consumer because the products contain synthetic citric and ascorbic acid.

The Ninth Circuit’s opinion, although not binding precedent, will likely encourage additional “all natural” class action litigation, reinforcing the need for companies in the food and beverage industry to seek advice from counsel before labeling or advertising products as “all natural.” The opinion also underscores the evidentiary burden on class action plaintiffs to establish that damages can be measured on a classwide basis.

### Background

Plaintiff Chad Brazil filed a putative class action alleging that Dole violated California’s unfair competition law, false advertising law, and the Consumer Legal Remedies Act by falsely and misleadingly marketing several of its products as “all natural” when, in fact, those products contained synthetic ingredients. At the pleadings stage, Judge Lucy Koh of the Northern District of California dismissed with prejudice Brazil’s claim that Dole engaged in the sale of “illegal products.” Judge Koh then certified an injunctive relief class under Rule 23(b)(2) and a damages class under Rule 23(b)(3), but later decertified the damages class, holding that the plaintiff had failed to establish that damages could be calculated on a classwide basis through common proof, and that individualized inquiries regarding each consumer’s reliance on the alleged misrepresentations would predominate over common issues.

In addition to decertifying the damages class, Judge Koh also granted Dole’s motion for summary judgment on the merits of the false advertising claim, holding Brazil had failed to prove that Dole’s use of the term “all natural” was deceptive as a matter of law.

Brazil appealed these orders to the Ninth Circuit. With respect to his “illegal products” claim, Brazil argued that dismissal was erroneous because Dole made deceptive misrepresentations about the fruit on its website, causing the fruit to be mislabeled and therefore “illegal.” As to the decertification order, Brazil argued that the district court erred in finding that damages could not be calculated on a classwide



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basis, and suggested several models that, he argued, could provide a classwide measure of damages.

Regarding the grant of summary judgment, Brazil argued that Dole's use of the term "all natural" in connection with food products that include synthetic ingredients would be deceptive to reasonable consumers. In addition to the label itself, Brazil would have relied upon his own testimony that he was deceived, Dole's consumer surveys prepared for the litigation, and the U.S. Food and Drug Administration's informal, non-binding policy on the use of the word "natural" in food labels.

### **The Ninth Circuit's Opinion**

The Ninth Circuit reversed the district court's order granting summary judgment to Dole on Brazil's individual claim, but affirmed the dismissal of the "illegal products" claim and the order decertifying the damages class.

In reversing summary judgment, the Ninth Circuit held that, "[t]aken together," Brazil's proposed evidence could allow a trier of fact to conclude that Dole's description of its products as "all natural" is misleading to a reasonable consumer. The court further found that, based on the conflicting testimony of expert witnesses and Dole employees, a trier of fact could reasonably have found that the synthetic ingredients in Dole's products were not "natural."

Regarding Brazil's "illegal products" claim, the Ninth Circuit affirmed the district court's dismissal on the ground that Brazil did not see the allegedly offending statements before he purchased the fruit, and therefore could not establish the required element of reliance. Indeed, the Ninth Circuit rejected as "outlandish" Brazil's theory that his purchase of the "illegal" fruit products subjected him to risk of fine or prosecution for possession of the products.

Finally, the Ninth Circuit affirmed the district court's class certification decisions, reaffirming the rule that a plaintiff cannot be awarded a full refund unless the product was worthless. Because Brazil had not proven that Dole's products were worthless, damages were properly limited to the difference (if any) between the prices customers paid and the true "value" of the products they bought — i.e., the "price premium" attributable to the "all natural" representation. The Ninth Circuit affirmed the lower court's holding that Brazil had failed to explain how this price premium could be calculated with proof common to the class.

For the same reason, the Ninth Circuit rejected Brazil's argument that, in lieu of restitutionary damages, he can recover Dole's wrongfully obtained profits under a theory of "nonrestitutionary disgorgement." The court held that Dole's wrongfully obtained profits are equal to the victims' losses: the total price premium paid by all misled purchasers. Thus, Brazil's failure to show that a price premium could be calculated on a class-wide basis likewise doomed his attempt to recover under a disgorgement theory.

Accordingly, the Ninth Circuit remanded the case to allow Brazil to proceed against Dole on his individual claim for damages and for injunctive relief on behalf of a class.

### **Takeaways**

Although the Ninth Circuit's unpublished ruling will not be binding on district courts within the circuit, the decision signals that food labeling class actions, in particular those based on "all natural" claims, present significant challenges both for the plaintiffs' bar and for the defense bar.

For plaintiffs, the decision reaffirms that they cannot simply “phone it in” with respect to establishing a valid damages model at the class certification stage: Courts are increasingly rejecting the “full refund” theory and are requiring a methodology that is capable of isolating the “price premium” paid by consumers according to common proof. This is a difficult challenge for plaintiffs to overcome, and the economic consequences of failing to certify a damages class are drastic.

On the other hand, the decision also shows that even seemingly baseless claims for deceptive advertising may be sufficient to survive summary judgment. Until the FDA clarifies or changes its official policy, food and beverage companies should continue to be on high alert with respect to food labeling claims, and particularly “all natural” claims.

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