Food Labeling – What Are You Eating?

A talk with Lauren Handel

I. FDA and Food Labeling Laws

A. Food and Drug Administration (FDA) is tasked with ensuring the safety of and efficacy of drugs, biological products, medical devices, the food supply, cosmetics, and others.
B. Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes the FDA to regulate the safety of food, drugs, and cosmetics. Chapter IV of the Act regulates food.
C. Fair Packaging and Labeling Act, 16 C.F.R. Parts 500, 501, 502, 503
    1. The purpose of the Act is to enable consumers to obtain accurate information.
    2. It directs the Federal Trade Commission and the FDA to regulate labels on products.
D. Packaging rules: 21 C.F.R. § 101.3 Identity labeling of food in packaged form
    1. Statement of identity: the name of the food, typically the common or usual name of the food, or an appropriately descriptive term.
    2. Principal display panel (PDP)
        a. Also known as the front label panel
        b. Required information on the PDP: statement of identity and the net quantity statement (amount of product)

II. Organic Foods

A. Organic Foods Production Act of 1990 (OFPA)
    1. Established the National Organic Program to regulate organic products. Authorized the USDA National Organic Program (NOP) to set national standards for the production, handling, and processing of organic products.
    2. The NOP oversees organic certifying agents and certified organic operations. Among other things, it accredits third party certifiers, sets standards of organically produced products, and investigates complaints of violation of organic regulations.
B. The FDA does not regulate the use of “organic” on labels. The NOP regulates crops and livestock and the USDA enforces those regulations.
C. What is organic?
    1. The OFPA requires that “organically produced agricultural products” be produced without synthetic chemicals, be grown on land treated with synthetic

chemicals during the 3 years preceding harvest, and be in compliance with an organic plan of a certifying agent.[1]

D. GMO: if a food is certified organic under the Act, the food may be considered a non-GMO product.[2]

III. False and misleading labeling

A. Misbranded food
   1. Generally, food labeling is misbranded if it is false or misleading in any particular, is offered for sale under the name of another food, or is an imitation of another food and is not labeled as such.[3]

B. Nutrient content claims
   1. Antioxidants
      a. 21 CFR § 101.54 – regulates nutrient content claims using the terms "good source," high," "more," and "high potency."[4]
      b. Subsection (g) regulates nutrient content claims using the term "antioxidant." It requires, among other things, that the claim have "recognized antioxidant activity; that is, when there exists scientific evidence that, following absorption from the gastrointestinal tract, the substance participates in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reaction."
      c. Nutrient content claims using the term "antioxidant" must identify the name of the nutrient that is an antioxidant.
   2. "Healthy" claims
      a. Depending on the food category, there are criteria for the level of nutrients required.
      b. In guidance issued ----------, the FDA stated that it will exercise enforcement discretion if a good labeled "healthy" exceeds the existing total fat requirements, if the amount of mono and polyunsaturated fats constitute the majority of the fat content. It will also exercise enforcement discretion where the food does not contain at least 10% of the daily value of vitamins A or C, calcium, iron, protein, or fiber but contains at least 10% of potassium or vitamin D.
   3. Relative claims[5]

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[1] 7 U.S.C. § 6504 – National standards for organic production: https://www.law.cornell.edu/uscode/text/7/6504
[2] 7 U.S.C. § 6524 – Organically produced food: https://www.law.cornell.edu/uscode/text/7/6524
[3] 21 U.S. Code § 343 - Misbranded food: https://www.law.cornell.edu/uscode/text/21/343
[4] https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=101.54
[5] FDA Guidance for Industry: A Food Labeling Guide. January 2013: https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Labe

a. "High," "rich in," or "excellent source of" claims: contains at least 20% of the daily value (DV) reference amounts customarily consumed (RACC).
b. "Good source," "contains," or "provides" claims: contains 10%-19% of the DV per RACC.
c. "More," "fortified," "enriched," "added," extra," or "plus" claims: contains 10% or more of the DV per RACC. These terms may be used only in reference to vitamins, minerals, protein, dietary fiber, and potassium.

C. "Natural" claims
1. The FDA has not developed a definition for "natural" but has not objected to its use if the food does not contain added color, artificial flavors, or synthetic substances. The FDA's informal policy does not address food production methods, e.g. pesticides use, nor does it apply for food processing and manufacturing.
2. Astiana v. Ben & Jerry's (2014) U.S. District Court for the Northern District of California
   a. Plaintiff filed suit alleging Ben & Jerry's ice cream labeled "all natural" were false and misleading because they contain synthetically alkalized chocolate. Ben & Jerry's claimed that its 15 cocoa suppliers used some alkali that are considered natural under the FDA rules and some that are not. The FDA regulations did not require the type of alkali to be specified.
   b. Plaintiff's motion of class certification was denied because the plaintiff failed to show a method for ascertaining who among the California purchasers of Ben & Jerry's would fit in the class.
3. Pappas v. Naked Juice Co. of Glendora, Inc., U.S. District Court for the Central District of California (2014)[6]
   a. Naked Juice agreed to a $9 million settlement of consolidated putative class action suit in California.
   b. Consumer plaintiffs alleged in part that the company deceptively advertised its products by labeling it "all natural" and non-GMO on their labels even though the products contained synthetic ingredients as well as GMO ingredients.
   c. Naked Juice denied allegations that its product labels were misleading or false but agreed to set up a verifications program for an independent tester to confirm the accuracy of its label's non-GMO claim and a database to electronically track and verify product ingredients.

D. Misleading labeling

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[6] Pappas v. Naked Juice Co. of Glendora, Inc., Case No. LA CV11-08276-JAK (PLAx): https://scholar.google.com/scholar_case?case=4171291233312764015&hl=en&as_sdt=6&as_vis=1&oi=scholarr

1. California hosts many of these types of suits where consumer protection laws tend to be more plaintiff friendly. The claims are commonly evaluated on "reasonable consumer test" – whether members of the public are likely to be deceived. Typical claims:
    a. Unfair, deceptive, untrue or misleading advertising (Unfair Competition Law)
    b. Unlawful for business to disseminate an untrue or misleading statement (False Advertising Law)
    c. Unfair or deceptive acts or practices (Consumer Legal Remedies Act)
2. Sugawara v. Pepsico, Inc. (2009) U.S. District Court for the Eastern District of California[7]
    a. Sugarawa filed suit against Pepsico, alleging fraud, breach of warranty, and the California Unfair Competition Law and Consumer Legal Remedies Act. She claimed that she had purchased "Cap'n Crunch with Crunch Berries" because she believed it contained real fruit and that she was misled by the use of the term "crunchberries" and the image on the box showing a colorful "berries."
    b. The District Court dismissed the complaint on the grounds so far as the Court knows, "there is no such [crunchberries] growing in the wild or occurring naturally in any part of the world," and that a reasonable consumer would not believe that it "contained a fruit that does not exist."

IV. Meat Labeling

A. Common label terms
    1. "Free range" or "free roaming": the poultry has been allowed access to the outside.
    2. "Natural": the product contains no artificial ingredient or added color is only minimally processed, which means that it was processed in a manner that does not fundamentally alter the product.
    3. "No hormones" (in pork and poultry products): because hormones are not allowed in raising hogs or poultry, the label "no hormones added" cannot be used on those labels unless it's followed by a statement that indicates that federal regulations prohibit hormone use.
B. Grass fed labels
    1. "Grass fed" is not a federally defined term.
    2. In 2016, the USDA's Agricultural Marketing Service (AMS) withdrew its Grass Fed Marketing Claim Standard and the Naturally Raised Marketing Claim

[7] Sugawara v. Pepsico, Inc., No. 2:08-cv-01335-MCE-DAD: https://scholar.google.com/scholar_case?case=11652353067126273362&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Standard in part because it determined that AMS did not have the authority to define labeling standards.

3. A producer may submit to have their “grass fed” label with supporting documentation to USDA’s Food Safety and Inspection Service, which will determine if the labeling claim is supported by the documentation. A producer may also elect to have use private certification.