# A Rose by Any Other Name Is a Lawsuit, Part 1

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William Shakespeare once wrote:
*What's in a name? That which we call a rose*
*By any other name would smell as sweet.*

Shakespeare, while perhaps the greatest writer in the English language, would never have made it as a lawyer. Because, as a recent litigation trend makes clear, what is in a name, what label one gives to describe an item, makes a huge difference, at least with regard to the potential liability of a food manufacturer.

One of the most explosive litigation trends in our tort system right now is the large uptick in the number of suits targeting the labeling practices of food manufacturers. Indeed, a huge number of such suits were filed in 2012 alone. And more such suits appear to be on the way in 2013. The New York Times documented this trend in an article on Aug. 18, 2012, titled "Lawyers From Suits Against Big Tobacco Target Food Makers."

The current landscape of such lawsuits can be divided into three categories.

**Lawsuits by individuals or groups of plaintiffs against a food manufacturer**

Most of the lawsuits related to labeling involve groups of plaintiffs suing a food manufacturer. Most allege that the labeling of a food item was deceptive. One recent example is the recently-settled suit against the maker of fruit roll-ups alleging deceptive advertising based on the word "fruit"[1]. The plaintiff alleged that she "relied upon the representations [that the product was 'made from fruit'] in making her decision to purchase the products at [a] premium price"[1]. The

defendant moved to dismiss. In what may have been a surprise to some in the food industry, the court allowed parts of the case to proceed toward trial.

The chief focus in recent months has appeared to be on foods labeled as “natural” or “healthy.” One example is a recent lawsuit filed against a manufacturer of granola bars alleging that the bars were deceptively labeled as “all natural”[2]. Another is a proposed class action challenging “All-Natural” labeling against a manufacturer of nutrition bars when the bars allegedly contain synthetic ingredients. The suit survived the defendant’s motion to dismiss in late 2012[3].

Such suits, at least in recent months, have mostly been filed in one of two jurisdictions — California and New Jersey. California appears for now to be the favored forum for these suits based in large part on that state’s strong statutory prohibitions against false or deceptive advertising.

These suits have met with mixed success thus far. While some have resulted in multi-million dollar settlements against the food manufacturer and certifications of class actions, others have been dismissed. For instance, one recent case resulted in a settlement that offered consumers who had purchased the allegedly deceptively labeled product $4 for each jar previously purchased, up to $20 total[4]. On the other hand, a California state court recently dismissed a class action against a manufacturer of coconut water, holding that allegations that the defendant’s product contained a false nutritional label were preempted by federal law5. The court also found that other claims related to the product’s “superior” hydrating powers were allowable puffery[5].

The fate of this litigation, whether it is merely a blip, or as the New York Times suggests, a threat akin to the tobacco litigation, is still undecided as many of them have been filed only recently. Whether these suits move forward and result in large monetary awards will bear watching by those in the food industry.

**Lawsuits by one food manufacturer against another**

There have also been recent lawsuits by those in the food industry against others in the food industry related to labeling. One example is a lawsuit by a group of sugar growers against Archer Daniels Midland Co. and three other high fructose corn syrup producers, alleging that the defendants conspired to deceptively brand corn syrup as a “natural” product equivalent to sugar[6]. The sugar growers allege that they have lost business as a result of the alleged deception. Recently, the trial court rejected the defendants’ motions to dismiss, and allowed the suit to proceed against most of the defendants. By all accounts, the financial stakes are potentially huge, considering the plaintiffs have alleged that the defendants have already spent at least $50 million on their rebranding effort.

*Please tune into the Chemical Equipment daily for part two of this two-part piece. For more information, please visit* www.mcguirewoods.com *[1].*

*1 Lam v. General Mills, Inc., no. 3:11-cv-05056 (N.D. Calif.)*

*2 Janney v. General Mills, no. 4:12-cv-03919 (N.D. Calif.)*
*3 Colucci v. Zoneperfect Nutrition Co., no. 12-2907 (N.D. Calif.)*
*4 Nutella Marketing and Sales Practices Litigation, no. 3:11-cv-01086 (D. N.J.)*
*5 Shenkman v. One World Enterprises, LLC, no. BC467165 (Los Angeles County)*
*6 Western Sugar Cooperative et al. v. Archer-Daniels-Midland Co. et al., case number 2:11-cv-03473 (C.D. Calif.)*

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