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Sugar and Spice and Cases on Ice: Evaporated Cane Juice Case Stayed Until FDA Issues Formal Guidelines

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Last week, a California federal judge **revived a putative class action** accusing **Amy's Kitchen Inc.** of misleading customers by labeling sugar as "evaporated cane juice" on its products. In a finding that puts the case on hold until the FDA weighs in, Judge Illston found that a decision to permanently dismiss the case would be unjust if the FDA later decides that "evaporated cane juice" is not an acceptable term for sugar on food labels.

A number of similar lawsuits have sprung up in the last few years alleging deceptive labeling for use of the term "evaporated cane juice" rather than sugar. To support these claims, plaintiffs cite to the FDA's *draft* guidance, issued in March 2014, wherein the agency stated that referring to sweeteners as "evaporated cane juice" is

misleading. On the other hand, defendants in these cases argue that the court should defer to the FDA, who has yet to issue formal guidelines on the matter, and dismiss these claims under the doctrine of primary jurisdiction.

As Judge Illston's ruling demonstrates, the trend among courts is to put these cases on ice until the FDA issues final guidance on the issue. Last October, this space discussed a similar situation where California courts were staying false advertising suits until the FDA takes a formal stance on use of the term "natural." However, the FDA has not taken a formal, binding stance on the term "natural" and has officially declined to do so. Here, the FDA *has* taken a stance—albeit an informal one—on "evaporated cane sugar," has re-opened the comment period on its draft industry guidance, and will likely issue amended/final guidelines in the near future. So we expect a different outcome for the "evaporated cane juice" cases than what we witnessed in the "naturals" cases.