

Third Circuit Holds That State-Law Based Food Mislabeling Claims Are Preempted

Over the past several years, the body of case law concerning the labeling, marketing, and advertising of food and beverages has steadily grown. A recent decision by the United States Court of Appeals for the Third Circuit, while not precedential, has added to this body of law. On May 9, 2013, the Third Circuit affirmed the District of New Jersey's dismissal of a putative class action involving food labeling misrepresentation, providing another example of the strength of "federal preemption" as a defense to misrepresentation claims.

In *Young v. Johnson & Johnson*, No. 12-2475, 2013 WL 1911177 (3d Cir. May 9, 2013), plaintiffs alleged that Johnson & Johnson's butter and margarine substitutes, Benecol® Regular Spread and Benecol® Light Spread (collectively "Benecol"), were falsely and misleadingly labeled. The alleged misrepresentations pertained to J&J's assertions that Benecol contained no trans fat and had cholesterol-lowering capabilities. The plaintiffs asserted "labeling misrepresentation" rather than "false labeling" because Benecol does in fact contain small amounts of trans fat. But the court found that the federal Food, Drug and Cosmetic Act ("FDCA"), as amended by the Nutrition Labeling and Education Act ("NLEA"), expressly preempted

the plaintiffs' suits. The NLEA governs food nutritional labeling and expressly preempts state-imposed nutrition labeling requirements. As such, states cannot impose requirements for nutrition labeling of food or beverages or for nutritional or health-related claims that are not "identical" to the requirements set forth in the Act.

The United States Food and Drug Administration ("FDA") regulations allow manufacturers to make "nutrient content claim[s]" for their products, such as "no trans fat," provided that the product contains less than 0.5 grams per serving and the label is not "false or misleading." 21 C.F.R. § 101.13(b), 101.13(i)(3). Furthermore, in the interest of avoiding consumer confusion, the FDA regulations allow the manufacturer to make statements as to nutrient content based on per serving amounts, even if the overall nutrient content claims per product are not entirely accurate. Under these standards, the Third Circuit agreed with the District Court that the words "no trans fat" on the Benecol label were permissible and not misleading. The plaintiffs' attempt to challenge the nutrient labeling under state law was preempted by the regulations promulgated by the FDA. The Third Circuit also found that the plaintiffs' cause of action as to the product's health claim was similarly preempted

by federal law holding that Benecol's cholesterol claims satisfied FDA regulations, which authorize health claims so long as they are "complete, truthful, and not misleading." 21 C.F.R. § 101.14(d)(2)(iii).

By means of the *Young* decision, the Third Circuit joins other federal courts in demonstrating the power of federal preemption theory as a defense in cases involving alleged misrepresentative labeling. In *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2010), the United States Court of Appeals for the Ninth Circuit held that the plaintiffs' allegations regarding a "0g Trans Fat" statement on an ice cream product's packaging was expressly preempted by FDA regulations, to which the labeling conformed. Similarly, in *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1121 (N.D. Cal. 2010), the court concluded that the FDCA preempted state action imposing requirements on nutrient content claims made by a food manufacturer "in the label or labeling of food that is not identical to the requirement[s]" of federal regulation.

In *Reid v. Johnson & Johnson*, No. 11-cv-01310-L-BLM, 2012 WL 4108114, at *10 (S.D. Cal. Sept. 18, 2012), the court found that federal regulation allows for "no trans fat" claims on Benecol labeling.

As the wave of food labeling litigation continues, the implications of these decisions will be far-reaching. An increasing number of food and beverage products are marketed and labeled as "all natural" or "healthy," and the amount of litigation concerning the labeling, marketing and advertising of these products seems also to be on the rise. The federal preemption defense will be an important weapon in the battle, along with the proven defenses based upon freedom of commercial speech, the standing doctrine, and the primary jurisdiction doctrine. Preemption theory being wholly dependent upon the wording of federal statutes and regulations, the food and beverage industry would be wise to be watchful of any attempts seek amendment of relevant laws.

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