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The False Ad Class Action Assault On Food Cos.

Law360, New York (May 4, 2011) -- The wave of false advertising class actions filed against food companies keeps rolling. Recently, there have been significant developments in three such cases.

The U.S. Court of Appeals for the Eleventh Circuit affirmed (in large part) the certification of a class in Fitzpatrick v. General Mills Inc. A federal district court in New Jersey denied Campbell Soup's motion to dismiss in Smajlaj v. Campbell Soup Co. And a different judge of that same court granted Coca-Cola's motion to dismiss in Mason v. Coca-Cola.

In Fitzpatrick, the plaintiff sued General Mills, alleging that its subsidiary, Yoplait, had violated the Florida Deceptive and Unfair Trade Practices Act (FDUPTA) by misrepresenting that YoPlus brand yogurt has digestive health benefits above and beyond those of regular yogurt.

General Mills opposed class certification by arguing, among other things, that any efficiencies gained by deciding purportedly common issues in a single trial would be swamped by the need to resolve individualized issues concerning whether purchasers had relied on the challenged advertising.

The district court certified the class, choosing to follow a line of Florida decisions holding that only the named plaintiff — but not class members — need to prove reliance in order to recover under FDUPTA.

General Mills appealed, pointing to a contrary line of Florida decisions. With little explanation, the Eleventh Circuit largely affirmed, accepting the district court's reasoning that the better reading of Florida law was to require only a named plaintiff to show that he or she had relied on the alleged misrepresentation. Based on its ruling, the Eleventh Circuit remanded the case so that the class could be expanded.

In the Eleventh Circuit's view, the district court had drawn the class definition too narrowly by limiting it to consumers who bought YoPlus yogurt in reliance on the challenged advertising. The Eleventh Circuit indicated that, on remand, the class should be redefined to include all purchasers of YoPlus yogurt.

In Smajlaj, Campbell Soup argued that a state law false advertising claim was preempted by federal law.

The plaintiffs alleged that by labeling some types of condensed tomato soup as having "25%" or "30%

less sodium," Campbell was implying that the soups had less sodium than Campbell's regular version, when in fact Campbell Soup's reduced-sodium and regular condensed tomato soups had similar levels of sodium.

Campbell Soup argued that the percentage was intended to compare its reduced-sodium condensed tomato soup to the range of all of Campbell's condensed soups (not just its regular condensed tomato soup).

The company moved to dismiss on preemption grounds, pointing out that the labeling requirements of the Food, Drug and Cosmetic Act permit a company to compare its soups' sodium levels to those of all condensed soups as a group. The district court denied the motion in part, holding that the FDCA requires the "non-misleading identification of a proper reference food."

The district court did hold that the FDCA preempted one of plaintiffs' theories of fraud — specifically, the allegations that Campbell Soup had fraudulently failed to provide a comparison of sodium levels between its regular and reduced-sodium tomato soup on its labels. The court held that this theory of fraud was preempted because federal law does not require such a disclosure.

Mason involved a challenge to the Coca-Cola Company's labeling of certain soft drinks with the brand "Diet Coke Plus." The U.S. Food and Drug Administration issued a warning letter to Coca-Cola stating that Diet Coke Plus violated FDA regulations against fortifying snack foods and using the word "Plus" on a product without specifying another product to which the "Plus" product is being compared.

The plaintiffs filed the Mason action shortly after the warning letter was issued, alleging that the labeling — including the statement "Diet Coke with Vitamins and Minerals" — violated New Jersey's consumer-fraud statute because it falsely implied that the product was healthy.

The district court dismissed the complaint. The court explained that the label was literally true and that plaintiffs had failed to allege how the vitamins added to Diet Coke Plus fell short of consumers' reasonable expectations.

The district court also agreed with Coca-Cola's position that the FDA warning letter does not by itself substantiate the fraud claim. As the court observed, not every "arcane violation of FDA food labeling regulations" constitutes fraud, as it "is simply not plausible that consumers would be aware" of the allegedly violated regulations.

Fitzpatrick, Smajlaj and Mason are of significant interest to food companies and other businesses that might be targeted by false advertising class actions.

Fitzpatrick appears to resolve for federal courts within the Eleventh Circuit that class members need not prove reliance in order to recover under Florida law. But the decision did not address other potential arguments that defendants might make — including whether that application of Florida's consumer protection law would violate due process or other constitutional limits on state tort law. In addition, state courts may issue more authoritative interpretations of the Florida statute, especially given the lack

of comprehensive analysis contained in the Eleventh Circuit's opinion.

Smajlaj and Mason may be of special interest to food manufacturers facing challenges to food labeling that is regulated by the FDA. These cases are among the small but growing group of cases in which courts have addressed whether and under what circumstances federal labeling law preempts state law claims challenging food labels. Mason also demonstrates that basing state law false advertising claims on an FDA warning letter does not guarantee that the complaint will survive a pleading attack.

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