

3rd Circ. J&J Ruling Won't Halt Flood Of Food Labeling Suits

By **Greg Ryan**

Law360, New York (May 10, 2013, 8:47 PM ET) -- The Third Circuit's finding that federal law preempts food labeling allegations against Johnson & Johnson significantly hampers plaintiffs' ability to target advertising claims explicitly addressed by federal regulations, but it leaves the door open for them to pursue other types of labeling claims.

The appeals court on Thursday upheld the dismissal of a proposed class action alleging Johnson & Johnson misrepresented the health benefits of its Benecol brand of butter and margarine substitutes on the products' labeling. According to the court, the company is allowed to claim Benecol contains no trans fat, even though it allegedly contains small amounts of trans fat, because the U.S. Food and Drug Administration holds that food that contains less than half a gram of trans fat per serving can be marketed as having zero grams per serving.

The company can claim Benecol is proven to reduce cholesterol because it is based on the inclusion of plant stanol esters, a link allowed under FDA regulations, the Third Circuit ruled.

In so ruling, the Third Circuit joined the Seventh and Ninth circuits in finding food labeling claims are preempted by the Nutritional Labeling and Education Act. The consensus increasingly appears to be that companies can rid themselves of suits alleging they misrepresented a food's health benefits if the claims are expressly allowed by FDA regulations, according to attorneys.

"Once you've shown the court that, it's bada boom, bada bing. The court is going to find that claim preempted every single time," Mayer Brown LLP partner Dale Giali said.

However, the judicial outlook on labeling claims that do not fall directly within an FDA regulation is not as clear cut, attorneys say. If a plaintiff attacks a company's claim that a product is "wholesome" or "all-natural" — a particularly popular target — the company cannot point to preemption as easily, because there are no FDA regulations for those terms.

The Third Circuit's ruling also does not touch on allegations that a company's labeling claims do not adhere to FDA regulations. Plaintiffs in California, for instance, have tied claims to the state's Sherman Food, Drug and Cosmetic Law, which incorporates the federal Food, Drug and Cosmetic Act.

Because portions of the laws are identical, companies cannot assert plaintiffs are attempting to impose obligations different from federal requirements. They have argued, however, that such claims are still preempted, because the plaintiffs are effectively trying to enforce the FDCA, a task reserved for the FDA.

"No decision addresses all of the issues you want," Giali said of the Third Circuit ruling. "There are still many important issues left to be decided in food false advertising."

Still, the decision is an impressive victory for food manufacturers, attorneys say. The ruling could discourage plaintiffs from filing labeling suits in venues other than California, the center of the litigation and the venue where many plaintiffs attorneys believe they have the best shot at victory, McGuireWoods LLP partner Trent Taylor said.

"New Jersey had started to emerge as a new possible forum for such suits, but the ruling in this case may put a stop to future such suits," he said.

The ruling extends beyond the Seventh Circuit decision, known as Turek, because it provides manufacturers protection based on FDA-approved nutrient content claims, according to Perkins Coie LLP partner David Biderman.

In Turek, decided in October 2011, the Seventh Circuit upheld the dismissal of a proposed class action that accused General Mills Inc. and Kellogg Co. of falsely marketing Fiber One and Fiber Plus chewy snack bars as high in healthy dietary fiber when they actually use "non-natural" processed fiber. U.S. Circuit Judge Richard Posner authored an opinion that found the labeling desired by the plaintiff was not identical to federal labeling requirements.

"The ruling is important, as it is [another] appellate decision on this issue and does help clarify that NLEA preemption should prevent such suits," Biderman said.

The Ninth Circuit ruling, known as Carrea, upheld the dismissal of a proposed class action claiming a Nestle SA subsidiary misleadingly marketed ice cream as containing zero trans fat per serving, under reasoning very similar to the Third Circuit on Thursday. Like the Third Circuit ruling, Carrea was not for publication.

The decision on Thursday is limited somewhat by the fact that it is unpublished, attorneys say, but food manufacturers will not hesitate to cite it when they can, and some courts will not hesitate to look toward it for guidance. The Third Circuit pointed to the Carrea decision in a footnote.

"The fact that the court chose to make it nonprecedential is in itself potentially significant because it apparently believed the legal issues in the appeal to be well-settled," Taylor said. "This sends a strong signal to potential future plaintiffs that the Third Circuit will likely not allow such suits to proceed."

--Additional reporting by Dietrich Knauth. Editing by Elizabeth Bowen and Katherine Rautenberg.