CARLTON FIELDS

Food for Thought: Court Denies Food Manufacturer's Preemption Arguments

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McMahon v. Bumble Bee Foods, LLC, No. 14-cv- 03346, 2015 WL 7755428 (N.D. Ill. Dec. 12. 2015)

In *McMahon*, the plaintiff claimed that Bumble Bee engaged in deceptive conduct when it sold various seafood products with labels that indicated they were an "excellent source of omega-3." Specifically, plaintiff alleged that Bumble Bee made impermissible qualitative statements about the quantity of omega-3 acids in Bumble Bee's chunk white tuna in water, chunk white tuna in oil, and albacore tuna in water. Plaintiff sought recovery under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFDBA); the Illinois Food, Drug and Cosmetic Act (IFDCA); and a variety of common law claims including unjust enrichment. Bumble Bee argued that plaintiff's claims pursuant to IFDCA were preempted and that his claim for unjust enrichment was not a viable cause of action under Illinois law. Bumble Bee also argued that, in the alternative, the case should be stayed until January 1, 2016, the effective date of the Food, Drug and Cosmetic Act's (FDCA) recently adopted rule concerning omega-3 nutrients. The court disagreed with Bumble Bee, finding that plaintiff's claim pursuant to the IFDCA was not preempted. The court provided background regarding a food manufacturer's obligations given applicable regulations concerning statements about a food product's nutritional value. The FDCA permits food manufacturers to state that a product is an "excellent source of" or "high in" a

nutrient only if the product contains at least 20 percent of the recommended daily intake (RDI) or the daily reference value (DRV). Food manufacturers can state a product is a "good source" of a nutrient if it contains 10 to 19 percent of that nutrient's RDI or DRV. If the FDA has not established an RDI or DRV for a particular nutrient, food manufacturers cannot make qualitative statements about it unless they submit a notification to the FDA and receive its approval. A food manufacturer's failure to comply with both federal and state regulatory requirements regarding qualitative statements about the nutritional value of a food product may result in that product being deemed as "misbranded."
The FDA has not established an RDI or DRV for omega-3 nutrients. Although the FDA has a process by which a food manufacturer can seek FDA approval to make qualitative statements about a particular nutrient, and three separate food manufacturers had sought FDA approval as to omega-3 nutrients, Bumble Bee was not one of them. The three manufacturers separately submitted nutrient content claims notifications to the FDA, claiming that the food and nutrition board of the Institute of Medicine (IOM) of the National Academy of Sciences published a report that qualified as an authoritative statement concerning the RDI for omega-3s. The FDA did not act on those three requests within 120 days. Therefore, on April 9, 2006, it became permissible for the submitting manufacturers to use their proposed labels stating their products were "high in" or an "excellent source of" omega-3s. However, on November 27, 2006, the FDA published a proposed rule whereby, going forward, food manufacturers could not make qualitative statements about their products' omega-3 content. In its proposed rule, the FDA rejected the IOM report as an authoritative statement. The omega-3 rule was not finalized until April 28, 2014, and its implementation was delayed until January 1, 2016. As to preemption, the court disagreed with Bumble Bee's argument that the FDCA expressly preempts plaintiff's state law claims. Bumble Bee did not contend that plaintiff's IFDCA claim was substantively different than an FDCA claim because Bumble Bee acknowledged that the IFDCA expressly adopted the FDCA, and the accompanying rules promulgated by the FDA. Instead, Bumble Bee alleged that plaintiff's state law claim was inconsistent with federal law, and therefore preempted, because plaintiff was beginning an enforcement claim under current law instead of waiting until the new omega-3 rule took effect on January 1, 2016. The court opined that Bumble Bee misconstrued plaintiff's complaint because plaintiff was not seeking to enforce the omega-3 rule that becomes effective in 2016, but instead was seeking to enforce provisions of the FDCA that are effective now—and were when plaintiff filed his complaint. Plaintiff alleges Bumble Bee's products were misbranded under existing law because Bumble Bee did not submit an application to the FDA for permission to make statements about omega-3s; and that it did not have license to make the claims because of the filings by, and approvals to, the three food manufacturers that did seek FDA approval. Furthermore, the court held there was no basis to infer that the FDA intended to invalidate the existing regulatory requirements governing omega-3 statements by deferring the implementation of the more stringent regulation. Thus, the court ruled that because the state requirements and the current FDCA requirements are one and the same, and neither was disturbed by the FDA's decision to delay implementation of the omega-3 rule, plaintiff's state claim does not fall within the purview of the FDCA's preemption provision. Similarly, the court rejected Bumble Bee's request to stay the case until the day the new omega-3 rule

becomes effective. Again, the court stated that Bumble Bee was relying on the faulty premise that the plaintiff was seeking to enforce the regulatory requirements of the new omega-3 rule. The court stated if Bumble Bee was not authorized to make the omega-3 statements pursuant to the current regulations, the court would have the power to enjoin Bumble Bee from selling misbranded products. Nonetheless, from a practice standpoint, the court found it unnecessary to stay the case because the case is at the motion to dismiss stage and the court cannot provide affirmative relief to the plaintiff. At this late stage, there is no risk of the court entering an injunction against Bumble Bee that would force it to remove omega-3 statements from its labels before January 1, 2016. Finally, the court also rejected Bumble Bee's argument that unjust enrichment was not an independent cause of action under Illinois law because it requires the plaintiff to prove unlawful conduct. The court opined that Illinois case law describes unjust enrichment as an independent claim. Furthermore, even if the unjust enrichment claim was not independent, it does not stand alone here and is not being asserted as an independent cause of action, but a derivative claim to plaintiff's allegations that Bumble Bee violated the IFDCA. *Read more significant court decisions affecting the food industry in Food for Thought: 2015 Litigation Annual Review.*

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