

Food for Thought: Ninth Circuit Court of Appeals Holds FDCA Does Not Preclude or Preempt Lanham Act Claims by Supplement Manufacturer Against Competitor

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ThermoLife Intern., LLC v. Gaspari Nutrition, Inc., 648 Fed.Appx. 609 (9th Cir. 2016)

In *ThermoLife Intern., LLC v. Gaspari Nutrition, Inc.*, supplement maker ThermoLife International, LLC ("ThermoLife") asserted a variety of claims against Gaspari Nutrition, Inc. (GNI) related to Gaspari's alleged false advertising of testosterone products. ThermoLife claimed that GNI falsely advertised its testosterone boosters as "safe," "natural," and "legal," and compliant with the Food, Drug and Cosmetic Act (FDCA). ThermoLife sued GNI for six counts of false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and for unfair competition under Arizona law. In its *de novo* review, and citing the Supreme Court's decision in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), the *Gaspari* court found ThermoLife's false labeling claims were not precluded by FDCA. "[W]hereas the FDCA protects public health by relying on the FDA's expertise, Lanham Act claims like ThermoLife's protect commercial interests by relying on the market expertise of competitors." *Gaspari*, 648 Fed. Appx. 609 (2016). Evaluating the lower court's summary judgment against ThermoLife on its Lanham Act claims, the Ninth Circuit found triable issues indeed existed regarding the falsity, materiality, and injury on each of ThermoLife's six claims. Three of the counts dealt with GNI's advertisements that its products were "legal" and compliant with the Dietary Supplement Health and Education Act (DSHEA). While such statements generally reflect an interpretation of a regulation and are not actionable, an exception exists for situations where the speaker's beliefs contradict the statements. Here, because the record contained emails suggesting GNI knew its products were not

compliant with DSHEA, falsity was a triable issue. Another falsity issue the Ninth Circuit found triable dealt with GNI's advertising statements regarding its product's safety. Such non-interpretive statements are not of opinion, but of fact. Because a jury could find the contrary based on available expert testimony, the court found this allegation of falsity triable as well. The last statement, which the Ninth Circuit also found yielded a triable issue of falsity, concerned GNI's statements that its product was "natural," and made from ingredients "naturally occurring and [] found in natural foodstuffs." While not interpretive opinion statements or statements of clear fact, these statements were "capable of being reasonably interpreted as a statement of objective fact," and therefore actionable. The Ninth Circuit also found triable issues existed as to materiality, based on survey evidence suggesting that these claims influenced consumers' purchasing decisions. Injury, too, was determined a triable issue based on a presumption of commercial injury where the parties are direct competitors and the misrepresentations have a "tendency to mislead consumers." The court rejected GNI's argument that the presumption contradicted prior holdings that actual evidence supporting an injury is required, and in the absence of authority rebutting the presumption, a triable issue of injury will be presented to the jury on remand.

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