

# Food for Thought: Fast-Track to Trans Fat Removal Not Required for “Fast Bites”

August 10, 2018

*Hawkins v. AdvancePierre Foods, Inc., 733 F. App'x 906 (9th Cir. 2018)*

The Ninth Circuit, in an unpublished opinion, affirmed the lower court's decision dismissing a lawsuit against a manufacturer of frozen foods because the allegations did not establish that the manufacturer acted unlawfully, unfairly, or fraudulently. The plaintiff, Shovanda Hawkins, brought a putative class action suit on behalf of a nationwide class of consumers who purchased "Fast Bites," a line of microwavable sandwiches manufactured or distributed by the defendant, AdvancePierre Foods Inc. The plaintiff alleged that the product contained partially hydrogenated oil (PHO) and that use of the ingredient in human food violated state law. The plaintiff sued based on violations of California's Unfair Competition Law (UCL) and for breach of the implied warranty of merchantability.

The lower court dismissed the plaintiff's complaint because the plaintiff's state claims were barred by conflict preemption. Specifically, the lower court held that the plaintiff's claims were a "direct obstacle" to the Food and Drug Administration's (FDA) objective. In June 2015, the FDA issued a final determination on PHOs that called for companies to remove the ingredient from products by June 2018. The three-year compliance period would allow manufacturers the time necessary to phase out the ingredient while minimizing business disruptions. The plaintiff sued the defendant in 2015, before the deadline by which the defendant needed to comply with the FDA's directives.

The circuit court "assume[d] without deciding" that the plaintiff's claims were not preempted by federal law. However, the court also held that the plaintiff failed to state a claim for violation of the UCL or for breach of warranty because the plaintiff failed to establish the requisite "unlawful, unfair or fraudulent business act or practice." The court reasoned that a claim under the UCL's "unlawful" prong requires a predicate violation of another law. The defendant was not required to stop using PHO until 2018 and, as a result, the defendant did not violate the provision of the UCL because it did

not violate federal law. The court also rejected the plaintiff's claim alleging breach of the implied warranty of merchantability because her allegation that she "is a busy person and cannot reasonably inspect" ingredients in the food she purchases does not excuse the plaintiff from examining the labels on the products she purchased.

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