

Food for Thought: Ninth Circuit Reverses Dismissal of Putative Class Action Alleging Misleading Label on Kroger Bread Crumbs

October 14, 2018

Hawkins v. Kroger Co., 906 F.3d 763 (9th Cir. 2018)

In *Hawkins v. Kroger Co.*, the Ninth Circuit Court of Appeals reversed the district court's dismissal of the plaintiff's putative class action alleging that the defendant, The Kroger Company, sold Kroger Bread Crumbs with packaging that included misleading labels. Specifically, the plaintiff alleged that the product's package stated "0g Trans Fat per serving," when in fact the product contained 0.05 grams of trans fats. The district court granted the defendant's Rule 12(b)(6) motion to dismiss, with prejudice, holding that the plaintiff lacked standing to bring these claims, and alternatively, the plaintiff's labeling claims were preempted by federal law.

In initially dismissing the plaintiff's putative class action, the district court found that the plaintiff lacked standing because she did not allege that she read the "0g Trans Fat per serving" statement on the face of the label and, therefore, had not relied on the allegedly misleading statement in purchasing the defendant's product, nor had she been injured.

On appeal, the Ninth Circuit held that the district court had misread the plaintiff's complaint in finding that she had not alleged reliance on the "0g Trans Fat per serving" statement. In its ruling, the district court had relied on a paragraph of the complaint wherein the plaintiff alleged that she "first discovered Defendant's unlawful acts described herein in August 2015, when she learned that Kroger Bread Crumbs contained artificial trans fat." However, the Ninth Circuit held that this paragraph did not state that the plaintiff first read the product label in August 2015, but that she first discovered that the label contained a misrepresentation at that time. The Ninth Circuit found that

there were at least three other paragraphs in the complaint in which the plaintiff "concretely alleged that she relied on the label."

The district court had further held that the plaintiff's claims were preempted by Food and Drug Administration (FDA) regulations that expressly permit the claim "0g Trans Fat per serving" on the face of the defendant's product. However, the Ninth Circuit, relying on its 2015 opinion in *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015), held that a requirement to state certain facts on the nutrition label is not a license to make that statement elsewhere on the product packaging. Thus, the Ninth Circuit held that while the FDA regulations relating to the Nutrition Facts label may have required the defendant to round down to zero where the amount of trans fat was less than one gram, this did not give the defendant the authority to make a nutrient content claim elsewhere on the packaging.

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