CARLTON FIELDS

Food for Thought: Plaintiff's Claim Still Has Some Muscle – Ninth Circuit Reverses Class Action Against Protein Powder Manufacturer Alleging Source of Protein Was Misrepresented

October 12, 2018

Durnford v. MusclePharm, Corp., 907 F.3d 595 (9th Cir. 2018)

The Ninth Circuit Court of Appeals reversed an order from the Northern District of California that dismissed an action against defendant MusclePharm Corp. alleging false or misleading statements. The plaintiff, Tucker Durnford, alleged that the defendant, a manufacturer of nutritional supplements, made false or misleading statements about the protein in one of its products by engaging in "protein spiking" or "nitrogen spiking." Protein spiking or nitrogen spiking is the practice of inflating measurements of a supplement's protein content using non-protein substances. Specifically, the plaintiff alleged that the defendant used creatine monohydrate and free-form amino acids to inflate protein figures. Thus, according to the plaintiff, the supplement's true protein value was 19.4 grams per serving, rather than 40 grams per serving. The plaintiff also alleged that, in response to an unknown individual's question to the defendant's official Twitter account regarding nitrogen spiking, the defendant denied engaging in that practice and stated that its products were scientifically backed. The plaintiff alleged that the defendant's supplements were misleading and violated California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA). The plaintiff also brought an action for breach of express warranty premised on the theory that the supplement's label, marketing, and advertising became part of the basis of the bargain at the time of purchase.

The lower court ruled in favor of the defendant and granted its motion to dismiss. The district court rationalized that the Food and Drug Administration (FDA) allows nitrogen spiking because regulations allow a manufacturer to use nitrogen content as a proxy for protein content. As a result, the district court held that the Food, Drug, and Cosmetic Act (FDCA) expressly preempts state law requirements and, even if the product's label might be considered misleading, California consumer law could not be used to create liability for an FDA-compliant measurement. The district court similarly ruled in favor of the defendant based on preemption grounds on the plaintiff's theory related to the source of the protein in the product. The court accepted the theory that the defendant's label falsely or misleadingly stated that the product's protein was derived entirely from hydrolyzed beef protein and lactoferrin, not from nitrogen spiking. Nonetheless, the district court also ruled in favor of the defendant on preemption grounds relating to the claim of the origin of the protein in the product. The court found that the plaintiff did not allege that his independent study demonstrating a lack of true protein "conformed to the FDA's requirements for measuring protein content." Finally, the district court ruled in favor of the defendant on the plaintiffs claims that he was misled by the defendant's statement on Twitter regarding nitrogen spiking because the plaintiff failed to adequately plead reliance, resulting in a lack of statutory standing under California's consumer protection laws.

The Ninth Circuit accepted the district court's ruling on preemption, in part. The court stated that federal regulations allow nitrogen to be used on the nutrition label as a proxy for protein content. As a result, the plaintiff's claim about the amount of protein in the product was preempted. However, the court agreed with the plaintiff on his claim regarding the source of the protein. Specifically, the court held that FDA regulations only concern the amount of protein, not the source of the protein. Thus, the court held that the plaintiff adequately alleged facts necessary to support a consumer claim premised on the theory that the label falsely or misleadingly suggested that the protein in the product was entirely composed of two kinds of actual protein (beef and lactoferrin) as stated on the product's label. The court further opined that because the defendant did not attempt on appeal to distinguish between the plaintiff's California statutory claims and his breach of express warranty claim, reversal on the protein composition theory applied to all claims in the complaint. Finally, the court agreed with the district court's dismissal of the claims relating to the defendant's tweets because the plaintiff failed to allege a connection between the tweet and his purchase of the product, and because he did not adequately plead the tweet as an independent basis of the plaintiff's claims.

Related Practices

Mass Tort and Product Liability
Litigation and Trials

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.