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Ninth Circuit Addresses Preemption in Recent Labeling Cases

MASS TORT AND PRODUCT LIABILITY | AUGUST 16, 2015

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The Ninth Circuit Court of Appeals recently addressed preemption in the context of food and cosmetic labeling.

Food Manufacturers Can Label Honey as "Honey"

In June, the Ninth Circuit issued an opinion in *Brod v. Sioux Honey Association Cooperative* and upheld a district court's finding that federal law preempts California law to the extent that California law prohibits de-pollinated honey from being labeled and sold as "honey." No. 13-15584, 2015 WL 3942982 (9th Cir. June 29, 2015).

The plaintiffs brought a claim against Sioux Honey Association Cooperative alleging that Sioux Honey violated California law by selling See Bee Clover Honey, which is de-pollinated, as "honey." The Northern District of California dismissed the action as preempted by federal law.

The Federal Food, Drug, and Cosmetic Act (FDCA), as amended by the Nutrition Labeling and Education Act, preempts state food-labeling laws that impose requirements that are "not identical" to federal labeling regulations. 21 U.S.C. § 343-1(a)(3). Under federal law, de-pollinated honey must be labeled with the "common or usual name of the food, if any . . ." because de-pollinated honey is not "a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341" of title 21 of the U.S. Code. The district court decided that the "common or usual name" of de-pollinated honey is "honey," and the Ninth Circuit agreed. In reaching its conclusion, the district court considered dictionary definitions, state standards of identity, and voluntary U.S. Department of Agriculture regulations.

Thus, the court explained that California law prohibits manufacturers from labeling and selling de-pollinated honey as "honey," while federal law requires manufacturers to label de-pollinated honey as "honey." Given the conflict, the Ninth Circuit held that the district court did not err in finding that California's law is preempted.

California Cosmetic-Labeling Claims Not Preempted by FDCA

In April, the Ninth Circuit held in a cosmetic-labeling class action that the FDCA did not expressly preempt state causes of action predicated on federal cosmetics-labeling laws and that the primary-jurisdiction doctrine was appropriately invoked by the district court. In *Astiana v. Hain Celestial Group*, a group of consumers brought a putative nationwide class action against cosmetic-products manufacturers Hain Celestial Group and JASON Natural Products (Hain) alleging that the manufacturer's use of the word "natural" on its products was false and misleading. 783 F.3d 753 (9th Cir. 2015). Hain moved to dismiss the plaintiffs' state-law claims asserting that they are preempted by the FDCA. The Northern District granted the

motion to dismiss and the plaintiffs appealed. Judge McKeown wrote for the Ninth Circuit.

The opening lines of the opinion made it clear where Judge McKeown stands on “all natural” labels on cosmetic products:

> A product labeled “all natural” or “pure natural” likely evokes images of ground herbs and earth extracts rather than chemicals such as “Polysorbate 20” or “Hydroxycitronellal.” This class action alleges that false or misleading product labels duped consumers seeking natural cosmetics into purchasing products that were chock-full of artificial and synthetic ingredients. Although the underlying question of what constitutes a “natural” cosmetic poses a fascinating question, it is not the one we answer.

Judge McKeown then turned to the issue of whether federal preemption prevents the district court from deciding when a “natural” label on cosmetic products is false or misleading. The court ultimately held that the FDCA does not expressly preempt state causes of action predicated on federal cosmetic-labeling laws. The FDCA proscribes any cosmetics labeling that is “false or misleading in any particular.” The more specific preemption language prohibits any state or local government from “establish[ing] or continu[ing] in effect any requirement for labeling or packaging of cosmetics that is different from or in addition to, or that is otherwise not identical with” federal rules.

Citing Supreme Court precedent in *Medtronic, Inc v. Lohr* and *Bates v. Dow Agrosciences LLC* , the court explained that the FDCA bars states from imposing new or additional labeling requirements. However, the FDCA is silent with regard to states’ ability to provide remedies for violations of federal law. Because the language of the FDCA is “virtually identical” to the statutory text at issue in *Lohr* and *Bates*, the court concluded that the FDCA does not preempt state laws that allow consumers to sue cosmetics manufacturers that label or package their products in violation of federal standards.