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9th Circ. Kellogg Ruling Offers Protein Claim Defense Tips

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Since 2022, dozens of false advertising class actions have been filed in the U.S. District Court for the Northern District of California challenging the protein-related representations that food and beverage manufacturers often include on their product labels.

The cases typically challenge the accuracy of protein claims — e.g., representations about the amount of protein that appear on a product label outside the familiar nutrition facts panel, or NFP.

Plaintiffs often argue that such claims are both false and misleading to the extent they overstate the products' protein content and the quality of the protein, meaning the amount of protein in the product that is actually usable by the human body.

Federal district courts have reached different conclusions as whether these claims are preempted by federal law, but in consolidated cases against Kashi Co. and Kellogg Co., the U.S. Court of Appeals for the Ninth Circuit on Aug. 14 provided much-needed clarity on this front.

The court's opinion should be required reading for the increasing number of food and beverage companies that include protein-related representations on their product labels.

The Ninth Circuit's Opinion

Federal regulations permit manufacturers to use the so-called nitrogen method to calculate the quantitative amount of protein that is reported in the NFP, and protein claims elsewhere on the pack generally reflect the same amount.

In various complaints, plaintiffs asserted that such protein claims are false pursuant to both federal and state law because the nitrogen method allegedly overstates the amount of protein the product contains.

These plaintiffs insisted that the advertised protein amounts should be adjusted using the protein digestibility corrected amino acid score, or PDCAAS, to reflect the digestibility and quality of the protein.

District courts had uniformly found that such claims are preempted by the Federal Food, Drug, and

Cosmetic Act, and in a consolidated appeal arising from cases brought against Kashi and Kellogg — Nacarino v. Kashi and Brown v. Kellogg — the Ninth Circuit recently agreed.[1]

After reviewing the text and interplay of several U.S. Food and Drug Administration regulations, the court concluded that those regulations provide that "the nitrogen method may be used to calculate protein quantity in the NFP" — in other words, the quantitative amount of protein reported in grams in the NFP — "and to make quantitative protein claims" that appear elsewhere on the pack.

However, the court offered an important caveat: Per the regulations, "if a product label includes a protein claim outside the NFP," the manufacturer must also include "the PDCAAS-corrected percent daily value figure in the NFP."

This refers to the disclosure of protein content as a percent daily value figure within the NFP in addition to the protein quantity in grams. The challenged Kashi and Kellogg labels satisfied both those requirements.

Accordingly, the court concluded the challenged protein claims were not false within the meaning of federal law, and the plaintiffs' argument to the contrary under state law was expressly preempted.

The Ninth Circuit's opinion on this point appears to foreclose state law challenges to protein claims that are calculated using the nitrogen method where the NFP also includes a percent daily value that has been adjusted using PDCAAS.

However, the opinion leaves the door open to claims under state law that a protein claim is misleading where the percent daily value is omitted from the NFP.

As the court observed, the regulations expressly contemplate that "advertising protein quantity outside the NFP can be misleading" if the manufacturer does not comply with the "requirement to include a PDCAAS-corrected percent daily value figure in the NFP."

That holding resolved a growing split in the district courts, which had reached what the Northern District of California in Guerra v. Kind LLC recently called "a kaleidoscope of outcomes" on whether such claims were preempted or not.[2]

Finally, the court identified another type of state law claim that could avoid preemption under its analysis: where a manufacturer added voluntary language modifying the disclosures required by regulation.

For example, the court observed that "a false-or-misleading state-law claim about something like '11g High-Quality Protein' or '11g Digestible Protein' would not be preempted, even though a claim about '11g Protein' is preempted."

Open Questions

The Ninth Circuit's opinion does not explicitly address another theory of deception that the plaintiffs have put forth in several cases. These plaintiffs have pursued a misleading-by-omission theory: that where a company makes a protein claim but fails to include the percent daily value in the NFP, that omission itself — as opposed to the protein claim — can be misleading under state law.

At least one court — in Chong v. Kind LLC in the Northern District of California last year — has concluded that this theory is impliedly preempted under the U.S. Supreme Court's 2001 decision in Buckman Co. v. Plaintiffs' Legal Committee, reasoning that the claims were "ultimately ... dependent on the existence of violations of federal law" and that plaintiffs may not sue for conduct that violates the FDCA solely because the conduct violates the FDCA.[3]

The majority of district courts have concluded, however, that a misleading-by-omission claim is not impliedly preempted.

Because the Ninth Circuit has not squarely addressed this issue, however, it seems likely that plaintiffs will increasingly move away from this theory and allege instead that a protein claim is misleading in the absence of a percent daily value in the NFP, as the Ninth Circuit has now held such a claim can survive preemption.

Takeaways

The Ninth Circuit's opinion significantly clarifies the viability of state law challenges to protein claims that appear on food and beverage products. Manufacturers can mitigate the risk of potential litigation and heighten the feasibility of a preemption defense by addressing the types of viable claims identified by the Ninth Circuit.

First, the court has now held that FDA regulations permit a manufacturer to use the nitrogen method when calculating the quantitative amount of protein reported both inside the NFP and in a protein claim elsewhere on the pack. This holding should be welcome to the many manufacturers that rely on the nitrogen method when making protein claims.

However, manufacturers should ensure the nitrogen-based calculation was performed correctly, as the Ninth Circuit cautioned that the "text and structure of the FDA regulations demonstrate that [a company's] protein claims could be misleading if they did not accurately state the quantity of protein" pursuant to the nitrogen method.

Second, if a product label does include a protein claim, the manufacturer should include a percent daily value in the NFP that is adjusted based on PDCAAS. Failing to include the percent daily value could lead to a cognizable claim that the protein claim is misleading under state law.

Finally, manufacturers should avoid using modifiers in any protein claims and instead use a straightforward representation about how much protein the product contains. As the Ninth Circuit observed, adding even a single word to a protein claim — such as "high-quality" or "digestible" — could defeat a preemption defense.

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[1] Nacarino v. Kashi Co., -- F.4th --, 2023 WL 5192559, at *5 (9th Cir. Aug. 14, 2023).

[2] Guerra v. KIND, LLC, 2023 WL 3436093, at *6 (N.D. Cal. May 11, 2023) (discussing different approaches district courts had adopted for such claims).

[3] Chong v. Kind LLC, 585 F. Supp. 3d 1215, 1219 (N.D. Cal. 2022).