

Kraft, Hormel Dodge Deli Meat Action For Now

By **Christopher Norton**

Law360, Washington (September 12, 2011, 6:06 PM ET) -- A Florida federal judge on Monday dismissed a putative class action against Kraft Foods Inc. and Hormel Foods Corp. alleging the companies' fat-free percentage claims on certain products are misleading and deceptive, but gave plaintiffs leave to refile one claim.

The retail labels on Hormel and Kraft-owned Oscar Mayer deli meats tout fat-free percentages ranging from 95 to 98 percent, when the products "actually contain more than 10 times those stated amounts of fat," according to the complaint filed in April by named plaintiff Brad Kuenzig.

U.S. District Judge Susan C. Bucklew dismissed all of Kuenzig's claims but allowed him to file an amended complaint to assert a "Little FTC Act" claim based on the defendants' websites and nonlabel advertising by Sept. 30. State consumer protection laws, closely modeled on the Federal Trade Commission Act, are sometimes called Little FTC Acts.

"All of plaintiff's claims are based on the contention that defendants' 'percent fat-free' claims on their labels are misleading because the claims misrepresent that they are based on calories," she said. "Therefore, with the exception of the Little FTC Act claim, all of plaintiff's claims are preempted."

Hormel and Kraft had to submit their labels to the U.S. Department of Agriculture's Food Safety and Inspection Service for approval prior to using the labels on the products at issue, according to Judge Bucklew. If the FSIS had determined that the labels were false or misleading, the defendants' labels would not have been approved, and the FSIS would have prohibited them from using the labels, she said.

Both Hormel and Kraft's labels base their "percent fat-free" claims on the number of fat grams compared to the weight of their products, as required by the FSIS's nutrition labeling regulations, the judge said. Additionally, the number of calories per serving that come from fat is stated in the nutrition panel on their labels, as required by the FSIS's nutrition labeling regulations, she said.

“Because defendants’ labels comply with the FSIS’s nutrition labeling regulations and have passed the FSIS preapproval process (as evidenced by defendants’ use of their labels on the products at issue in this case), the labels are presumptively lawful and not false or misleading,” Judge Bucklew ruled.

Accordingly, any state law claim based on the contention that the labels are false or misleading is preempted, because such a claim would require the plaintiff to show that the information stated on the labels should have been presented differently — which would impose a different or additional labeling requirement than those found under the relevant federal statutes, she said.

Even if Kuenzig's claims were not preempted, all of his claims, with the exception of his Little FTC Act claim, would still be dismissed for failure to state a claim, according to Judge Bucklew.

A close reading of the complaint, though, reveals that the Little FTC Act claim, which must be analyzed under Florida's deceptive and unfair trade practices law, is based on the defendants’ websites and nonlabel advertising in addition to their labels, so the claim is not necessarily preempted, she said.

The proposed class would have included all people similarly situated throughout the country who purchased the defendants’ products containing “percent fat-free” claims on the labels since 2006.

Representatives for the parties could not immediately be reached for comment Monday.

The plaintiffs are represented by Aaron C. Mayer of Mayer Law Group.

Kraft is represented by Dean N. Panos, Stephanie Jean-Jacques and Richard P. Steinken of Jenner & Block LLP and Edward Martin Waller Jr. of Fowler White Boggs PA.

Hormel is represented by Kimberly J. Walker, Steven B. Toeniskoetter and Kristin R. Eads of Faegre & Benson LLP and Richard Michael Blau and Aaron J. Silberman of Gray Robinson PA.

The suit is Kuenzig v. Kraft Foods Inc. et al., case number 8:11-cv-00838, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by Carolina Bolado. Editing by Kat Laskowski.