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Eleventh Circuit Works Out Preclusion and Preemption Issues in Protein Powder Dispute

Proskauer on Advertising Law Blog on **December 13, 2018**

On December 4, 2018, the Eleventh Circuit partially reversed the dismissal of Hi-Tech Pharmaceuticals' suit against HBS International Corp. for alleged violations of the Lanham Act and Georgia's Uniform Deceptive Trade Practices Act. *Hi-Tech Pharmaceuticals, Inc. v. HBS International Corp.*, No. 17-13884 (11th Cir. 2018).

Hi-Tech alleged that the label of HBS's protein-powder supplement – its "Ultra-Premium 6-Protein Blend HexaPro" mix – misled customers about the quality and quantity of protein in each serving. The product's labeling indicated that each serving contained 25 grams of protein and highlighted its "6 Ultra-High Quality Proteins." Hi-Tech claimed this was misleading because each serving contained only 17.9 grams of these ultra-high quality and molecularly complete proteins, with the rest of the protein content consisting of free-form amino acids or other non-protein ingredients.

The district court granted HBS's motion to dismiss the Lanham Act claim on the ground that no reasonable consumer would be misled by the product's label because it provided a detailed breakdown of all HexaPro's ingredients, including the mix of amino acids. It also dismissed the state law claim, finding it was preempted by the FDCA.

On appeal, the Eleventh Circuit reversed the district court's dismissal of Hi-Tech's Lanham Act claim under the reasonable consumer standard. It held that, considering the "total impression" of the labels as a whole, Hi-Tech had plausibly alleged that a reasonable consumer could be misled to believe that all 25 grams of the protein in each serving come from the "Ultra-Premium 6-Protein Blend," as opposed to from other additives such as free-form amino acids.

The Eleventh Circuit then went on to consider an issue the district court did not reach: whether the Lanham Act claim was precluded by the FDCA. Citing to *POM Wonderful v. Coca-Cola*, the Eleventh Circuit rejected HBS's preclusion argument and found that it could simultaneously comply with both the FDCA's requirements and the Lanham Act by clarifying on the HexaPro label how much of the 25 grams of protein in each serving came from the six-protein blend and how much came from other ingredients.

However, the Eleventh Circuit did affirm the district court's finding that Hi-Tech's state law claim against HBS were preempted by the FDCA. Federal regulations allow protein content to be calculated "on the basis of the factor 6.25 times the nitrogen content of the food." 21 C.F.R. § 101.9(c)(7). Hi-Tech did not dispute that HBS's labeling complied with that standard; rather it alleged that the labeling misled consumers as to the nature, source, and quality of the protein. Because the state law claim was inconsistent with the FDCA's requirements, the claim was preempted and correctly dismissed.

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