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Suit Over Use of American Heart Association Certification Mark Maintains a Pulse

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Is it deceptive to label food products with the mark of the American Heart Association ("AHA") without disclosing that the AHA was paid for use of its certification mark? This was the question raised by a putative class action lawsuit in the Northern District of New York, which largely survived dismissal on March 25, 2019. *Warner v. StarKist Co.*, 18-406 (N.D.N.Y. 2019). The court found that plaintiff had adequately stated his claims under New York state statutes and common law, but held that he did not have standing to seek injunctive relief. The defendant filed a motion for reconsideration last month.

Defendant StarKist Co. is a producer of seafood products, a number of which bear the "Heart-Check Mark," a white checkmark in a red heart accompanied by the statement: "American Heart Association – CERTIFIED – Meets Criteria for Heart-Healthy Food." The complaint alleged StarKist does not disclose that it paid the AHA to place the mark on its products, and that inclusion of the mark on labels is therefore misleading as an undisclosed paid-for endorsement. In addition to claims for deceptive practices under GBL § 349 and false advertising under GBL § 350, the complaint included claims for dealing in misbranded food and for unjust enrichment.

StarKist moved to dismiss, arguing that its use of the Heart-Check Mark is not materially misleading because the information it contains is accurate – the StarKist product meets AHA's certification standards. The court rejected this argument, noting that the complaint alleges the labelling is misleading because StarKist does not disclose that it pays an annual fee to the AHA to use the mark, and that StarKist failed to argue that this omission would not mislead a reasonable consumer. Although StarKist noted that the AHA discloses on its website that participants in the Heart-Check program pay administrative fees to the AHA, the court declined to take judicial notice of this part of the AHA website.

The court also rejected StarKist's argument that the unjust enrichment claim was duplicative of the GBL claims. Because the elements for an unjust enrichment claim are different from those for either a deceptive practices or a false advertising claim, and Starkist did not argue that the plaintiff failed to plausibly allege facts to support unjust enrichment, the court denied dismissal of this count "in an abundance of caution."

The ruling was not a complete victory for the plaintiff, however, with the court accepting StarKist's argument that the plaintiff lacked standing for injunctive relief because he did not allege a future harm. It noted a split of authority within the Second Circuit as to whether plaintiffs in the consumer protection context must allege a future injury in order to be eligible for injunctive relief, and determined that such an allegation was necessary. Because plaintiff did not explicitly allege that he was at risk of future injury, and was now aware of StarKist paying for use of the Heart-Check mark, there was no real and immediate threat of future injury.

This decision, while only a denial of a motion to dismiss, underscores the importance for advertisers to consider whether the use of certification marks that require payment could be considered misleading where the fact that use of the mark requires a fee is not communicated to the consumer. It also adds to the growing body of case law grappling with the question of when injunctive relief is available in consumer protection actions – a subject that the Supreme Court recently declined to address, as we covered in a previous post. Given that no resolution on the issue of injunctive relief appears to be forthcoming from the nation's highest court, this will be an area to monitor closely.

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