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Court Tosses Hogwash Claims, OKs Pork Producer's Use of "Prime" in Advertising

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Judge Paul C. Huck of the U.S. District Court for the Southern District of Florida recently granted a motion to dismiss brought by Defendants The Fresh Market and Tyson Fresh Meats in a putative consumer class action alleging that defendants deceptively marketed their "Chairman's Reserve Prime Pork" product as graded prime by the federal Department of Agriculture ("USDA"). *Davis v. The Fresh Market*, No. 1:19-cv-24245 (S.D. Fla. June 26, 2020).

Plaintiffs acknowledged the USDA had approved Defendants' use of the term "prime" in labeling their pork products, and also that defendants were entitled to use the descriptive term "prime pork" on their labels. Nevertheless, Plaintiffs alleged that Defendants' promotional materials misled reasonable consumers into thinking that the USDA graded "prime" by the USDA. In reality, the USDA does not grade pork.

Plaintiffs' theory of the case centered on Defendants' use of "prime" in conjunction with comparisons of their product to prime beef. Unlike pork, the USDA does grade beef. For example, Defendants' newsletter stated "[j]ust like prime beef, the new Chairman's Reserve Prime Pork is the upper-echelon of quality," and their social media posts described "Prime Pork!" as being of "the same high-caliber as our Premium and Prime Beef." Plaintiffs asserted that these statements violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and related law.

Defendants first argued that the USDA's approval of the use of "prime" on the product's label preempted Plaintiffs' claims under FDUTPA's safe-harbor provision. The Court disagreed, noting that the USDA only approved the product name and label, but not other promotional materials like those challenged by Plaintiffs.

But Defendants found success with another argument, namely that the challenged references to “prime” would not deceive a reasonable consumer into believing the pork was USDA-graded. Importantly, Defendants’ promotional materials not only did not explicitly state the USDA graded the product as “prime,” they did not even mention the USDA. While Plaintiffs alleged that the use of “prime” as part of a comparison to prime beef creates a “false impression” that the pork is USDA-graded, the Court found this argument untenable. As the Court explained, plaintiff’s argument implausibly “assumes that a reasonable consumer, who is sufficiently familiar with the USDA grading scheme for beef, would simultaneously be ignorant of the fact that the USDA does not grade pork and would believe that defendants’ product is USDA-graded despite the absence of the term ‘USDA’.” The Court therefore not only dismissed the Amended Complaint in its entirety but did so with prejudice.

This decision serves as a reminder that false advertising claims not grounded in the explicit language of a advertisement are more susceptible to a motion to dismiss, because of the risk that the judge deciding the motion will conclude that the mental leap the Complaint contends consumers reasonably will make is contrary to what the judge perceives to be common sense. Watch this space for further developments.

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