# Chew on This: Consumer Fraud Claim on Snack Bars Preempted

October 31, 2011 by Sean Wajert

The Seventh Circuit ruled earlier this month that federal food labeling law expressly preempts state law claims seeking certain additional health-related disclosures on chewy bars. Turek v. General Mills Inc., No. 10-3267 (7th Cir. 10/17/11).

The bars have been around since at least the early 1980's, but have grown into a nearly $2 billion segment of the food industry. Consumers love their portability, and relatively low calorie count.

Plaintiffs brought a diversity class action suit under the Illinois Consumer Fraud and Deceptive Business Practices Act, and the Illinois Uniform Deceptive Trade Practices Act, alleging that the label of certain "chewy bars" was misleading regarding fiber content. Specifically, the complaint alleged that the principal fiber, by weight, in the bars was inulin extracted from chicory root. The complaint describes inulin so extracted as a processed, "non-natural" fiber which was not as beneficial to consumer health as other fiber.

Those state law claims ran smack into a provision of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343-1(a)(5), added by the Nutrition Labeling and Education Act of 1990, which forbids states to impose "any requirement respecting any claim of the type described in section 343(r)(1) [of the Food, Drug, and Cosmetic Act] . . . made in the label or labeling of food that is not identical to the requirement of section 343(r)." A state thus can impose the identical requirement or requirements, and by doing so be enabled, because of the narrow scope of the preemption provision in the Nutrition Labeling and Education Act, to enforce a violation of the Act as a violation of state law. See also In re Pepsico, Inc. Bottled Water Marketing and Sales Practices Litigation, 588 F. Supp. 2d 527, 532 (S.D.N.Y. 2008); "Beverages: Bottled Water," 60 Fed. Reg. 57076, 57120 (Final Rule, Nov. 13, 1995). This is important because the Food, Drug, and Cosmetic Act does not create a private right of action. Medtronic, Inc. v. Lohr, 518 U.S. 470, 487 (1996).

The question thus became what requirements the federal law imposes on the labeling of dietary fiber. Section 343(q)(1) of the Act contains a requirement that the "label or labeling" of food products intended for human consumption state "the amount of . . . dietary fiber . . . contained in each serving size or other unit of measure." Other requirements for labeling claims relating to dietary fiber are set forth in implementing regulations.

The labeling of the products challenged by the plaintiff was compliant with these regulations relating to health claims for dietary fiber. See, e.g., 21 C.F.R. § 101.76. All the FDA's requirements relating to labeling dietary fiber are requirements to which any labeling disclosures required by a state must be *identical.* But the disclaimers that the plaintiff wants added to the labeling of the defendants' inulin-containing chewy bars were not identical to the labeling requirements imposed on such products by federal law, and so they were barred, held the court of appeals. The information required by federal law does not include disclosing that

the fiber in the product includes inulin or that a product containing inulin allegedly produces fewer health benefits than a product that contains only product that contains only “natural” fiber, for example.

Even if the disclaimers that the plaintiff wants added would be "consistent" with the requirements imposed, importantly, consistency is not the test. Identity is, said the court.

The Seventh Circuit thus affirmed dismissal of the case. But clarified, procedurally, that when a state law claim is expressly preempted under section 403A of the Federal Food, Drug, and Cosmetic Act,” a dismissal on the merits is the proper outcome, with prejudice like other merits judgments, not dismissal for want of federal jurisdiction, as the district court had ordered.

This is a victory for consumers when one considers why Congress did not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy the food products crazy. A granola bar you buy in California ought to look just like the one you buy in Maine.