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PREEMPTION REJECTED IN ADVOCACY GROUP'S VITAMINWATER® CONSUMER CLASS ACTION

by

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A federal court in New York recently denied an effort to dismiss a consumer class action based on allegedly deceptive nutrient content and health claims made in relation to the highly popular VitaminWater® beverage

The consumer advocacy group Center for Science in the Public Interest (CSPI), along with a plaintiff's firm, [claims that VitaminWater's labeling and marketing mislead consumers](#) by (1) drawing consumer attention away from the significant amount of sugar in the product; (2) portraying VitaminWater as a healthy drink that provides nutritional benefits, when the nutrients in question are only available in the product through fortification; and (3) suggesting VitaminWater contains nothing but vitamins and water.

The defendants moved to dismiss the claims arguing the claims were preempted by the Federal Food, Drug, and Cosmetic Act (FDCA). The plaintiffs countered, arguing a lack of preclusion of their state law claims because the claims are based on misleading statements that violate FDA regulations. CSPI's [complaint](#) alleges violations in the form of (1) making health claims or implied nutrient-content claims despite the high amount of sugar in the product (up to 33 grams of sugar per 20 oz. bottle); (2) making health claims about the product despite the fact that VitaminWater has been fortified with vitamins in violation of FDA's fortification policy; and (3) prominently featuring the name of some, but not all of the ingredients on the product and in its name.

The court pointed out that while the FDA has recognized some "disqualifying nutrient levels" (i.e., levels of a particular nutrient such as fat, saturated fat, cholesterol, or sodium that preclude promoting health claims in conjunction with such a product), sugar was not placed on that list and hence, "any claim under state law solely premised on the notion that VitaminWater's high sugar content made its health or implied nutrient content claims misleading is preempted.

The defendants' victory, however, was small and short-lived, as the [court's opinion](#) went on to *reject* preemption of the plaintiffs' assertion that VitaminWater made health claims in violation of the FDA's fortification policy or "Jelly Bean Rule," and that the product name misleadingly references only two of VitaminWater's ingredients, but omits the presence of a key, unnamed ingredient (sugar).

Further, the court determined that most plaintiffs met the minimum pleading standards under each states' laws in question. It found unpersuasive the defendants' argument that placing the sugar content on the drink's label made consumer confusion relating to the health of VitaminWater unreasonable. The judge reasoned, "a nutritional panel, though relevant, does not as a matter of law extinguish the possibility that reasonable consumers could be mislead. . . ." The court found equally unavailing the Defendant's position that slogans such as "vitamins + water = all you need" and sayings like "healthy as a horse" constituted puffery such that "no consumer could reasonably be misled into thinking VitaminWater was a healthy beverage. . . ."

The outcome of the case remains to be seen. However, the court's decision clearly raises a warning flag for food and beverage companies who might be tempted to rely solely upon the nutrition label to "qualify" any claims that might otherwise be made.

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