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Food & Consumer Packaged Goods Litigation

Court Dismisses In Part for Lack of Specificity

Thomas v. Gerber Prods Co., No. 2:12-cv-00835 (D.N.J.): The court granted in part and denied in part defendant's motion to dismiss in a putative class action alleging claims under New Jersey, California, New York, and Washington's respective consumer protection statutes, as well as New Jersey state claims for breach of express and implied warranty and unjust enrichment, based on defendant's labeling and advertising that its products provide immune system benefits and are similar to breast milk. First, the court found that the plaintiffs had sufficiently pleaded Article III standing based on their allegations that they were misled by defendant's labeling stating the health benefits of probiotics, as well as by print, television and in-store advertisements with the same representations. The court added that causation was sufficiently pleaded because plaintiffs had demonstrated a campaign of consistent messaging and that they relied upon that category of misrepresentations. However the court did agree with defendants that plaintiffs had failed to establish standing for injunctive relief because they had not pleaded any threat of future injury. Next the court addressed defendant's contention that plaintiffs had failed to satisfy Rule 9(b)'s specificity requirements. With respect to several of the plaintiffs, the court found they had met their burden by identifying the advertising campaign and the specific immune benefits statements at issue, as well as the date range and locations where they purchased the products. For several other plaintiffs, however, the court dismissed their claims, finding they had not satisfied their burden because they had not specified date ranges or locations where they purchased the products or when they viewed the advertisements at issue. Additionally, the court generally found insufficient and conclusory plaintiffs' allegations regarding defendant's claims that its products were similar to breast milk and dismissed those claims as well, with the exception of the New York Consumer Protection Act claim, which the parties agreed was not subject to Rule 9(b). Finally, the court addressed a choice of law dispute regarding the New Jersey state law claims and found no conflict and thus no need for a choice of law analysis. The court found that plaintiffs had adequately pleaded their breach of express warranty claim, but not the breach of implied warranty claim, because plaintiffs had not alleged that the products were unfit for consumption. Further the court held that plaintiffs had not sufficiently pleaded their unjust enrichment claim because their claims sounded in tort, and New Jersey does not recognize an independent tort cause of action for unjust enrichment. [Order.](#)

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