

TYPES NOT MAPPED YET December 05, 2024 | TTR not mapped yet | Kimberly (Kim) Bousquet

Preservative Problems: Judge Greenlights Class Action Lawsuit Brought by Mac and Cheese Consumers

On November 13, 2024, Judge Mary M. Rowland of the U.S. District Court for the Northern District of Illinois issued a significant ruling in a putative nationwide class-action lawsuit against The Kraft Heinz Company and Kraft Heinz Ingredients Corp. The lawsuit alleges that the company falsely advertised its Macaroni & Cheese products as containing “no artificial preservatives” despite including synthetic preservatives such as citric acid and sodium phosphates. The lawsuit asserts claims of false advertising, breach of express warranties, unjust enrichment, and unfair business practices and sought both nationwide and various state classes.

The defendants’ motion to dismiss made two overarching arguments. First, defendants’ argued that plaintiffs have not plausibly alleged that the ingredients are artificial, and second, even if they had, plaintiffs have not plausibly alleged that the ingredients function as preservatives in the products.

The Court’s Order

The Court rejected both arguments.

First, the Court found that plaintiffs sufficiently alleged that the defendants’ products used an artificial source for the citric acid based on allegations referencing scientific studies and industry data indicating that over 90% of citric acid used globally is manufactured through fermentation processes involving *Aspergillus niger*, a type of black mold. According to the plaintiffs, this process is widely used because it is more economical than extracting citric acid naturally from citrus fruits. Plaintiffs also cited FDA guidance that classifies citric acid as a preservative and pointed to instances where the FDA issued warning letters to companies for mislabeling products as “natural” despite containing citric acid used as a preservative. The Court found that this data supported the conclusion that the citric acid allegations go beyond simple allegations of common industry practice and are sufficient to state a claim that is more than merely speculative.

For sodium phosphates, the plaintiffs included details about the synthetic production process, which typically involves acid-base reactions between phosphoric acid and sodium carbonate. Plaintiffs further alleged that sodium phosphates do not naturally exist in their pure form and are specifically manufactured for use in food products. Plaintiffs cited scientific articles describing these processes and the preservatives’ widespread application in foods, including cheese products. The Court found these sources, along with related allegations in the complaint, sufficient to plausibly allege that the sodium phosphates were artificially produced.

The Court also rejected the defendants’ argument that, even if the ingredients are artificial, plaintiffs did not adequately allege that the ingredients function as preservatives in the products. In making this determination, the Court relied on articles plaintiffs cited that describe both ingredients’ role in preserving food, as well as FDA guidance that describes citric acid as a preservative. The Court held that these allegations were enough to withstand a motion to dismiss.

Comparison With Similar Cases

In reaching its decision, the Court distinguished two similar cases, *Hu v. Herr Foods, Inc.*, 251 F. Supp. 3d 813 (E.D. Pa. 2017), and *Ivie v. Kraft Foods Global, Inc.*, 961 F. Supp. 2d 1033 (N.D. Cal. 2013), both of which involved claims related to the use of artificial ingredients in food labeling.

In *Hu v. Herr Foods, Inc.*, the plaintiff alleged that the “No Preservatives Added” label on certain food products was misleading because the products contained citric acid. However, the Court dismissed the complaint because the plaintiff did not allege sufficient facts to plausibly claim that citric acid functioned as a preservative in the specific

product at issue. The *Hu* Court found that the plaintiff's allegations required a speculative chain of assumptions about the function of citric acid in the product, which was too attenuated to survive a motion to dismiss (*Hu*, 251 F. Supp. 3d at 821-822).

In contrast, the *Hayes* Court found the plaintiffs' allegations were more detailed and specific. The *Hayes* plaintiffs cited FDA guidance recognizing citric acid as a preservative and scientific articles explaining the mechanism by which citric acid acts as a preservative in food. The plaintiffs also included evidence about the synthetic production of citric acid and its prevalence in food manufacturing, distinguishing it from natural citric acid. The Court concluded that the support cited in *Hayes* made the claims *more* plausible than those in *Hu*.

In *Ivie v. Kraft Foods Global, Inc.*, the plaintiffs alleged that certain ingredients were misleadingly labeled as "natural flavors" when they were, in fact, artificial. The Court dismissed the claims because the plaintiffs failed to make factual allegations establishing that the ingredients in question functioned as flavors in the product. The *Ivie* plaintiffs offered only a conclusory assertion that the ingredients simulated or reinforced flavor without providing scientific evidence or specific factual support (*Ivie*, 961 F. Supp. 2d at 1041-1042).

In contrast, the *Hayes* plaintiffs described how the artificial citric acid and sodium phosphates used in the defendants' products acted as preservatives. They included citations to academic studies and FDA materials explaining these ingredients' chemical properties and preservative functions. The plaintiffs also provided information about the production processes for citric acid and sodium phosphates, showing their synthetic origins.

The Court in *Hayes* emphasized that the plaintiffs' allegations went beyond mere speculation, unlike the claims in *Hu* and *Ivie*. By including detailed factual allegations, scientific evidence, and references to FDA guidance, the *Hayes* plaintiffs demonstrated a plausible basis for their claims. Consequently, the Court found that the reasoning behind the dismissals in *Hu* and *Ivie* did not apply.

Conclusion

The opinion in *Hayes v. Kraft Heinz Company* underscores the growing litigation risks of making product label claims. It serves as a cautionary tale for food companies, highlighting the increased sophistication of plaintiff's attorneys' abilities to draw on scientific data and regulatory information to support otherwise speculative claims. The Court's decision to allow the case to proceed demonstrates that complaints including references to scientific studies, FDA guidance, and data on industry practices can allow these types of labeling lawsuits to edge over the plausibility line and survive the motion to dismiss stage.

Given the prevalence of these types of lawsuits and courts' willingness to entertain them, food companies should not only carefully evaluate their labeling, marketing, and ingredient sourcing to ensure regulatory compliance but also for the increasing litigation risks.

About Food Fight

Thompson Coburn has long counseled clients in the agriculture, food, and consumer products industries. This blog provides analysis regarding emerging litigation trends and challenges related to those industries (the "Food Fight"), as well as relevant legislative and regulatory developments.

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