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# Ninth Circuit holds product label preemption defense requires evidence and does not extend to materially-different statements on website

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**Takeaway**: The quickest, most efficient way to kill a putative class action remains a successful Rule 12 motion to dismiss. But in ruling on such a motion, a district court generally cannot stray beyond the allegations in the complaint and must accept the truth of all of the plaintiff's well-pled allegations. In a recent decision involving allegedly-deceptive product labels and website representations, the Ninth Circuit ruled that the district court did not have the necessary evidence – evidence that the U.S. Department of Agriculture approved specific product labels – to support its preemption ruling dismissing false advertising claims with prejudice. *See Cohen v. ConAgra Brands, Inc.*, --- F.4th ----, No. 20-55969, 2021 WL 4956243 (9th Cir. Oct. 26, 2021). The *Cohen* court further made it clear that website representations that materially differed from the representations on the supposedly-approved product label would not be subject to the preemption defense at all.

In that case, Robert Cohen, a California consumer of ConAgra frozen chicken nuggets and fried chicken, filed a putative class action against ConAgra. He alleged ConAgra falsely advertised its frozen chicken products as natural and free of preservatives, when in fact they contained synthetic ingredients to improve color and texture, as well as to prevent spoilage. His complaint alleged violations of California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law, all based on allegedly false product labels as well as allegedly false statements made on ConAgra's website.

The federal Poultry Products Inspection Act (PPIA) strictly regulates poultry labels. The PPIA preempts any state law claim based on an allegedly false or misleading product label where the label has been approved by the United States Department of Agriculture's Food Safety and Inspection Service (FSIS). 2021 WL 4956243, at *3.

The district court, apparently assuming that the product label had been approved by the FSIS, dismissed Mr. Cohen's claims on preemption grounds. The district court also dismissed his claims based on the allegedly false website representations, finding "no reason to distinguish between the packaging itself and an image of the packaging viewed over the Internet." *Id.* at *3 (quoting district court order).

On appeal, Mr. Cohen challenged the lack of evidence that FSIS had approved the labels, asserting that ConAgra had bypassed FSIS review by using a generic label approval process. The panel agreed, reversed the district court's preemption ruling, and remanded for the limited purpose of determining whether FSIS had in effect reviewed and approved the relevant product labels.

As for the website representations, however, the panel found at least one representation – that the frozen chicken products had been made "without preservatives, artificial flavors, or artificial colors" – not subject to the preemption defense, given that the representation materially differed from the

representations made on the allegedly-approved labels. *Id*. at *5. The panel concluded: "Accordingly, Cohen's state law claims challenging ConAgra's website representation that the chicken products as a whole contain no preservatives, artificial flavors, or artificial colors, are not preempted (whether or not the product *labels* were reviewed and approved by FSIS)." *Id*. (emphasis in original).