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Hungry Hounds and Heavy Metals: Second Circuit Holds Pet Food Packages Do Not Have to Disclose the Obvious

by Evan S. Nadel

Takeaway: Class actions challenging food product labels are not limited to products for humans. Pet food companies are also frequent targets of class actions alleging deceptive or misleading labels. The Second Circuit recently affirmed the dismissal of a class action alleging the label for Champion Petfoods USA's ACANA dog food violated New York's consumer protection law by failing to disclose that the products contain heavy metals. *Paradowski v. Champion Petfoods USA, LLC*, No. 22-962-cv, 2023 WL 3829559 (2d Cir. June 6, 2023). Importantly, the plaintiff did not allege that the products contain *unsafe levels* of heavy metals. The court found that Champion had no obligation to disclose that its products contain some amount of heavy metals because it is commonly known that heavy metals occur naturally in many foods, especially fish, which is an ingredient in the two challenged products.

From 2016 to 2018, plaintiff Kathleen Paradowski purchased ACANA Regional Meadowlands and ACANA Heritage Free-Run Poultry, both of which are dog food products manufactured by Champion. Champion markets its products as "Biologically Appropriate," claiming that it uses "animal-based proteins" to "mirror how wolves or wild dogs would get nutrition in nature." *Paradowski*, 2023 WL 3829559, at *1. In 2017, and in light of public scrutiny of heavy metal content in pet foods, Champion published a white paper disclosing the average levels of heavy metals in its products in comparison to known safety limits for pets, and reporting that the levels of heavy metals in its products were all within the acceptable ranges based on guidelines published by the National Research Council and the FDA for dog foods.

Plaintiff did not contend that Champion's pet foods were unsafe or had harmed her pets. Her complaint alleged, however, that by failing to disclose that its products "contained and/or had a material risk of containing" detectible amounts of heavy metals, Champion engaged in common law fraud-by-omission and violated New York General Business Law § 349, a consumer protection law. *Id*. Plaintiff maintained that she would not have purchased Champion's products at their retail prices if she had known that they contained heavy metals.

The district court granted Champion's summary judgment motion. Champion's motion argued that heavy metals are widely known to be naturally occurring in the environment and at safe levels in many foods, especially in the fish products listed as ingredients in the two products at issue. Champion also provided evidence that "nearly all pet food contains measurable quantities of heavy metals." *Id*. The district court agreed that Plaintiff's claims did not deserve a trial because "by ordinary diligence and attention, Plaintiff should have known that anything containing fish might also contain high concentrations of heavy metals." *Id*. at *2.

Plaintiff appealed the dismissal of her claims, but the Second Circuit affirmed. It noted GBL section

349's objective standard—whether the alleged representation or omission is "likely to mislead a reasonable consumer acting reasonably under the circumstances"—and further explained that plaintiffs bringing omission-based claims under section 349 must show that "the business alone possesses material information that is relevant to the consumer and fail[ed] to provide this information," or that plaintiffs could not "reasonably have obtained the relevant information they now claim the [defendant] failed to provide." *Id*. It agreed with the district court that no reasonable jury could conclude that the alleged omission—that Champion's pet foods contained heavy metals—was solely within Champion's possession.

While Champion alone might know the specific quantity or level of heavy metals in its products, Plaintiff did not plead a claim based on failure to disclose that information or that the products had heavy metals exceeding safe thresholds. Because her claim was that Champion should have disclosed the existence of any amount of heavy metals, it was not actionable; that was reasonably obtainable information. Nearly all pet foods contain measurable quantities of heavy metals, and the two products at issue both listed fish among their ingredients. Because "publicly available studies demonstrate that seafood typically contains high concentrations of heavy metals" and regulators have published guidelines for acceptable levels of heavy metals in dog food since 2005, the court found that the public has long been aware of the issue. *Id*. at *3. Any reasonable consumer could have discovered that Champion's products contain heavy metals.

The court acknowledged the importance of labeling but explained that Congress or federal agencies—not courts—should decide what information must be disclosed on consumer packaging. *Id.* In other words, common sense still applies, and plaintiffs cannot sue for concealment of the obvious. Regardless of how nefarious an ingredient might sound, failing to allege that a product contains unsafe amounts of the ingredient can prevent a deceptive labeling class action from getting to trial.