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Dannon Beats False Ad Suit Claiming Activia Isn't Yogurt

By **Gavin Broady** Share us on:

Law360, New York (May 10, 2013, 1:04 PM ET) -- The Dannon Co. Inc. on Thursday escaped a putative class action alleging Activia Yogurt cut with a milk protein is adulterated and no longer actually yogurt, after a New York federal judge determined the additive has not been prohibited by federal regulators.

Although the U.S. Food and Drug Administration in 1981 proposed a narrowed definition of allowable milk product additives in the standard of identity for yogurt that would have excluded the protein concentrate, the agency has placed a hold on the effective date of that redefinition in response to objections, U.S. District Court Judge Vincent L. Briccetti said.

“The effect of the stay is that the FDA’s 1981 proposed limitation on what milk-derived ingredients may be added is not in effect, and because there is no limitation in effect, other optional milk-derived ingredients may be added to increase the nonfat solids content of the food,” Judge Briccetti said.

In dismissing the class action with prejudice, Judge Briccetti said the FDA has repeatedly clarified over the years that the stay allowed the addition of milk protein concentrate, citing as particularly relevant a 2004 agency memorandum to regional food and drug directors in which it expressly states that the additive is acceptable in yogurt.

Judge Briccetti also rejected the plaintiff’s arguments that milk protein concentrate was not listed in the FDA’s registry of “generally recognized as safe” ingredients and therefore yogurt that uses the concentrate should be considered adulterated. The judge said the agency would not have made a clear and unambiguous statement in the memorandum sanctioning its addition to yogurt if that addition would have rendered the yogurt illegally adulterated.

The fact that the FDA has declined to initiate any enforcement actions against yogurt makers over the use of milk protein concentrate further weighs in favor of finding that it should be allowed as a component of Activia and other yogurt products, according to the order.

Because the class cannot demonstrate the FDA has explicitly banned the additive, Judge Bricetti determined it was unnecessary to weigh in on arguments of jurisdiction, federal preemption or the private right of enforcement over FDA identity standards.

Plaintiff Kristie Conroy launched the **suit** in September, claiming Dannon deceived customers by packing Activia with filler additives in order to avoid the expense of manufacturing real yogurt and deriding the product as the yogurt equivalent of “fool’s gold.”

Conroy objected to 10 additives in all, including water, cornstarch, xanthan gum and inulin, but nine were whittled from the complaint as the dispute progressed until the milk protein

Documents

Order on Motion to Dismiss

Related

Sections

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- New York
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Case Information

Case Title

TRACK Conroy v. The Dannon Company, Inc.

Court

New York Southern

Nature of Suit

Contract: Other

Case Number

7:12-cv-06901

Judge

Vincent L. Briccetti

Date Filed

September 11, 2012

Law Firms

- TRACK** Arnold & Porter
- TRACK** Kurzman Eisenberg

Companies

- TRACK** Cabot Corporation
- TRACK** Groupe Danone
- TRACK** Safeway Inc.

Government Agencies

- TRACK** Federal Trade Commission
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concentrate became the basis of the complaint.

In finding that Conroy's claims were misguided, Judge Briccetti relied on a pair of similar **cases** against Cabot Creamery Cooperative Inc. and Safeway Inc. that found the FDA's memorandum guidance on the issue was entitled to deference.

Dannon has come under fire over Activia before, including a class action over its claims that consuming certain yogurts containing probiotic bacteria would improve digestive health. The company **shelled out** \$35 million in 2009 to settle those claims.

In 2010, Dannon paid an additional \$21 million to **settle** similar allegations brought by the Federal Trade Commission and 39 state attorneys general in what was the largest multistate settlement ever made with a food provider.

Conroy is represented by Scott A. Bursor, Joseph I. Marchese and Neal J. Deckant of Bursor & Fisher PA.

Dannon is represented by Zachary Allen, Jonathan Coronel, Angel Garganta and Jonathan Koenig of Arnold & Porter LLP as well as by Fred David Weinstein of Kurzman Eisenberg Corbin Lever & Goodman LLP.

The case is Conroy v. The Dannon Co. Inc., case number 7:12-cv-06901, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Sean McLernon. Editing by Eydie Cubarrubia.

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