

## **Court Dismissed False Advertising Suit Involving Coffee Creamer With Prejudice, After Finding Claims Preempted by Federal Law**

*Backus v. Nestle USA, Inc.*, No. 3:15-cv-1963 (N.D. Cal.): The Court granted Defendant's motion to dismiss with prejudice in this putative class action asserting violations of California's consumer protection statutes and common law warranty claims based on the contention that (1) Nestle misleadingly represents that its Coffee-mate creamer products contain "0g Trans fat" and (2) the use of PHOs in the creamer products is inherently unfair. The Court found Plaintiff's suit, which "seeks to make it immediately unlawful to market or sell" products containing PHOs in California, was in conflict with the FDA's order granting a 2018 compliance date and thus preempted. The Court also found the action was a barrier to the FDA's stated objectives of minimizing market disruptions, providing time to develop suitable alternatives to PHOs, and providing time to grow new varieties of edible oilseeds to meet consumer demands. The Court rejected Plaintiff's argument that an FDA had issued a statement finding state laws prohibiting PHOs in foods were not likely in conflict with its order. In so doing, the Court described the statement as ambiguous and noted that it was preceded by a statement in which the FDA expressly "decline[d] to take a position" on the preemptive effect of its order on state or local law. Finally, the Court noted that Congress' CAA § 754 ratifying the FDA's final determination rendered any argument that the FDA lacked the authority to legalize the use of PHOs moot until June 2018. The Court also found Plaintiff's "0g Trans Fat" labelling claims were expressly preempted under the NLEA. The Court relied on the Ninth Circuit's decision in *Carrea v. Dryer's Grand Ice Cream*, and the Northern District's decisions in *Walker v. B&G Foods*, *Guttman v. Nissin Foods*, and *Chacanaca v. Quaker Oats*. In each of these cases, the Court noted, other courts "found significant the FDA's expressed 'preference for internal consistency between the nutrition box and the rest of the label.'" Moreover, the Court distinguished the *Carrea* result when it cited 21 U.S.C. § 343(r)(2)(A)(i) for the proposition that nutrient content claims outside the nutrition box may be made when consistent with those inside the nutrition box. [Order](#).

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