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Food & Consumer Packaged Goods Litigation

Notable Ruling: Lessons for Food Litigation, Second Circuit Upholds Preemption Defense in Cosmetics Case

In 2011, Perkins Coie's winning defense in *Turek v. General Mills* led to the first published federal appellate decision on the scope of the preemption defense under the Nutrition Labeling and Education Act (NLEA). Subsequently, the preemption defense remains strong under the NLEA and other aspects of the federal Food Drug & Cosmetics Act (FDCA), including in cases involving supplements. See *Dachauer v. NBTY, Inc.* 913 F.3d 844 (9th Cir. 2019). That trend continues. On May 11, 2020, the Second Circuit held that the preemption defense extends to cosmetic products regulated under the FDCA as well. In *Critcher v. L'Oreal USA, Inc.*, putative class plaintiffs argued that the cosmetic product labeling was accurate as to the amount of product in the container, but the dispensing instruments left product in the bottle. No. 19-2474-CV, 2020 WL 2311890 (2nd Cir. May 11, 2020). Drawing on the *Turek* decision, the Second Circuit found that the FDCA preempted plaintiffs' claims, reasoning that the FDCA blocks state-law claims, such as those brought under state consumer protection statutes, unless the requirements of the state law are identical to those under federal law. According to the Second Circuit, plaintiffs could not "avoid the sweeping preemptive force of the FDCA. Their state-law claims—all of which seek to impose labeling requirements that are additional to, or different from, those that federal law has established—are barred." The Second Circuit's decision in *Critcher* is an important reminder of the continuing vitality of the *Turek* decision and, more generally, the preemption defense in many cases involving the FDCA.

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