

Food for Thought: Ninth Circuit Addresses Standing, State Claims, Preemption, and Primary Jurisdiction in Consumer Class Action Against Energy Drink Manufacturer

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Fisher, et al. v. Monster Beverage Corporation, et al., 656 Fed Appx. 819 (9th Cir. 2016)

In *Fisher, et al. v. Monster Beverage Corp., et al.*, plaintiffs Alec Fisher ("Fisher"), Matthew Townsend ("Townsend"), and Ted Cross ("Cross"), brought a putative class action against energy drink manufacturer Monster Beverage Corp. ("Monster"). The plaintiffs claimed that Monster engaged in unfair and deceptive business and trade practices by representing that a line of its drinks could rehydrate like a sports drink, and by omitting the potential health risks associated with the frequent consumption of caffeinated drinks, in violation of California's Unfair Competition Law (UCL), California's False Advertising Law (FAL), and California's Consumers Legal Remedies Act (CLRA). The U.S. District Court for the Central District of California dismissed Fisher's complaint and he appealed. The Ninth Circuit addressed whether plaintiffs had Article III standing to bring their claims, whether they stated a claim under the UCL, FAL, and CLRA, whether plaintiffs' claims were preempted, and whether the primary jurisdiction doctrine applied to their claims. **Plaintiff Fisher Lacked Article III Standing** Monster only challenged Fisher's standing to bring his claims. The complaint alleged that certain specific misrepresentations, including a failure to warn consumers of the caffeine content, was on the labels and packaging of Monster's drinks ("on-label claims"). Fisher failed to allege that he relied on any specific misrepresentations by Monster. Instead, he claimed he "had no reason to believe" that Monster's drinks were "not safe or posed health risks." The court held that this allegation was insufficient to support Article III standing. **Plaintiffs Townsend and Cross Sufficiently Pled Their Injuries** Next, the court considered whether Townsend and Cross successfully stated a

claim for relief under the CLRA, FAL, and UCL. The court explained that a complaint is sufficient with regard to all three statutes when it alleges that (1) a representation was made; (2) it was false or likely to mislead a reasonable consumer; (3) the plaintiff saw and relied on the representations for their truth in purchasing the item; and (4) the plaintiff would not have bought the item otherwise. Townsend alleged that he relied on Monster's statements on one of its drinks that recommends consumers limit daily consumption to three cans. He also alleged that he read and relied on Monster's affirmative representation that each of the Monster drinks he purchased quenches thirst and hydrates like a sports drink. After five years of consuming up to three Monster drinks per day, Townsend experienced heart palpitations and his blood pressure was measured at 225 over 139. Similarly, Cross alleged that he purchased a Monster drink with the statement, "It's the ideal combo of the right ingredients in the right proportion to deliver the big bad buzz that only Monster can" ("Ideal Combo Statement"). Cross alleged that he relied on the Ideal Combo Statement's representation to mean that Monster drinks were safe for consumption and would not have purchased the drinks but for that representation. The court explained that the statements that Townsend and Cross relied on were not strictly false, but it is plausible that they were misleading, which is all California law requires. As such, the court held that both plaintiffs sufficiently pled their injury. **Some Claims Were Preempted, Others Were Not** Although the court determined that Townsend and Cross sufficiently pled their injury, it found their claims related to the caffeine content of Monster's drinks were preempted. However, the court found their other on-label claims were not pre-empted. Specifically, the court considered whether plaintiffs' claims were preempted by the federal Food, Drug, and Cosmetic Act (FDCA). The FDCA expressly preempts state laws that establish any requirement for nutrition labeling of food that are not identical to the requirements of certain statutory provisions, including 21 U.S.C. § 343(q). Federal law also provides, however, that this provision shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning safety of the food or a component of the food. Title 21 U.S.C. § 343(q) governs nutrition-information labels, including dietary supplements, and provides only that if caffeine is added to a food, it must be included in the ingredient list. Nothing at the federal level required Monster to include on the label the amount of caffeine in its drinks. However, the court determined that if plaintiffs were to succeed on their caffeine-related on-label claim, the only remedy would be to require Monster to identify the amount of caffeine in its drinks on the packaging. As such, the court held that the caffeine-related claim was preempted. As to plaintiffs' other on-label claims, such as those related to the Ideal Combo Statement, the court found those claims were not preempted. The plaintiffs did not seek further disclosure with respect to nutritional-labeling requirements, but instead sought to remove false or misleading statements or omissions, or to add the sort of safety warnings expressly excluded from preemption. **Primary Jurisdiction Did Not Apply to the Surviving Claims** Finally, the court held that plaintiffs' surviving claims were not within the sole purview of the FDA because the plaintiffs were not seeking to impose any labeling requirements inconsistent with federal law. Rather, they alleged violations of consumer-protection laws related to deceptive marketing and advertising. As such, the court held that the primary jurisdiction doctrine did not apply.

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