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11th Circ. Revives Suit Over Protein Powder Labels

By **Ryan Boysen**

Law360 (December 4, 2018, 5:44 PM EST) -- Hi-Tech Pharmaceuticals Inc. will get another shot at rival supplement maker HBS International Corp. over the allegedly misleading labeling on its HexaPro protein powder mix, after the Eleventh Circuit on Tuesday reversed the dismissal of Hi-Tech's Lanham Act claims.

A three-judge panel said a Georgia district court was right to dismiss Hi-Tech's state law claims against HBS under the Georgia Uniform Deceptive Trade Practices Act, since they were clearly preempted by the federal Food, Drug and Cosmetic Act but was too quick to throw out Hi-Tech's federal Lanham Act false advertising claims.

"The district court concluded that the complaint does not allow a plausible inference that HexaPro's label is misleading, which is the only ground on which HBS challenged the facial sufficiency of the complaint," the panel said. "We disagree with that ruling and reverse."

Hi-Tech sued HBS in 2016, and both of its claims hinged on allegations that the labeling for HBS' flagship HexaPro protein powder misleads consumers by describing the product as containing 25 grams of protein per serving, when really — after accounting for "spiking agents" and "free form amino acids" — the product only contains about 18 grams per serving of real, molecularly complete proteins.

The district court relied on HBS' argument that Hi-Tech's claims failed under the Lanham Act because they were "conclusory" and failed to show that consumers could be misled by the alleged discrepancy. The panel disagreed, however.

"The only sense in which it is 'conclusory' — and what HBS's argument boils down to — is that the complaint does not itself prove HexaPro's chemical composition," the panel said, a high bar that Hi-Tech wasn't required to clear at the motion to dismiss stage.

"With that in mind, we conclude that the allegations in the complaint and the undisputed product label allow the plausible inference that HexaPro's labeling is misleading," the panel said, adding, "Based on the total impression given by the label, it is plausible that only sophisticated consumers schooled in federal regulations or nutrition science would understand or even suspect that free-form amino acids or other non-protein ingredients form any part of HexaPro's stated 25

grams of protein per serving."

HexaPro's labeling is well within the relevant federal guidelines, since existing U.S. Food and Drug Administration rules allow "protein calculations based on free-form amino acids and other nitrogen-containing non-protein ingredients," the panel said.

That fact is clearly fatal to Hi-Tech's state law claims under the GUDTPA, but "as the Supreme Court made clear in *POM Wonderful*, the Food, Drug and Cosmetic Act does not generally bar claims of false advertising of food under the Lanham Act," it said.

The court was referring to the U.S. Supreme Court's 2014 decision in *POM Wonderful v. Coca-Cola*, which held that Lanham Act claims are not barred by the FDCA.

"Hi-Tech's claim under the Lanham Act would not require a court to question the [relevant] regulatory determinations," the panel said. "Instead, it would require a court to determine only whether the protein-content representations on the HexaPro label are misleading to consumers."

Neither party responded Tuesday to requests for comment.

Circuit Judges Gerald Bard Tjoflat and William H. Pryor Jr. and District Judge Stephen Joseph Murphy III sat on the panel for the Eleventh Circuit.

Hi-Tech is represented by David M. Barnes and Robert F. Parsley of Miller & Martin PLLC and Charles Ronald Bridgers and Edmund J. Novotny Jr. of DeLong Caldwell Bridgers & Fitzpatrick LLC.

HBS is represented by Ragesh K. Tangri and Joseph Gratz of Durie Tangri LLP and Ana Nicole DeMoss and Holly Hawkins Saporito of Alston & Bird LLP.

The case is *Hi-Tech Pharmaceuticals Inc. v. HBS International Corp.*, case number 17-13884, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Breda Lund.