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11th Circuit revives false advertising case against supplement maker

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(Reuters) - A federal appeals court on Tuesday revived a lawsuit by dietary supplement maker Hi-Tech Pharmaceuticals Inc alleging the label for a protein-powder drink mix marketed by rival HBS International Corp misleads consumers.

The 11th U.S. Circuit Court of Appeals partially reversed a ruling by an Atlanta federal judge dismissing the case, holding that Hi-Tech had raised plausible allegations that the label for "Ultra-Premium 6-Protein Blend HexaPro" was misleading.

U.S. Circuit Judge William Pryor, writing for the three-judge panel, said Hi-Tech's 2016 complaint alleged sufficient facts to state a case that HexaPro's label misled consumers about the quantity and quality of the proteins it contained.

He said the product's label identified HexaPro as an "Ultra-Premium 6-Protein Blend" that contains "25 G Protein Per Serving," yet the label provided no suggestion the 25 grams of proteins came from any source other than the "6-Protein Blend."

Pryor said the label never explains that the 25 grams includes free-form amino acids or other non-protein ingredients, which Hi-Tech alleged were "spiking agents" that helped increase its claimed protein content.

While the U.S. Food and Drug Administration permits protein calculations that include free-form amino acids and nitrogen-containing non-protein ingredients, Pryor said it was plausible only "sophisticated consumers" would know that.

"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," Pryor wrote.

Pryor said Canada's HBS was "mistaken" in arguing the Food, Drug, and Cosmetic Act bars Hi-Tech from pursuing its federal Lanham Act claim because it could not follow both laws at the same time and had to follow the FDA's protein calculation rules.

Pryor said that's because no federal law would prevent HBS from both using the 25-grams-per-serving figure as required by the FDA while clarifying on its label how much protein comes from the six-protein blend and how much comes from amino acids.

Robert Parsley, a lawyer for Georgia-based Hi-Tech with Miller & Martin, said he was pleased with the ruling. Ragesh Tangri, a lawyer for HBS at Durie Tangri, did not respond to a request for comment.

The ruling reverses a July 2017 decision by U.S. District Judge Timothy Batten in Atlanta, who dismissed claims that Hi-Tech brought under the Lanham Act and a Georgia consumer protection law.

While the 11th Circuit revived Hi-Tech's federal Lanham Act claim, the court agreed with Batten that the FDCA preempts a state-law claim brought under the Georgia Uniform Deceptive Trade Practices Act.

Pryor wrote that the state-law claim was expressly preempted by the FDCA because it would impose liability for labeling that does not violate the federal law or the FDA regulations that implement it.

The other members of the 11th Circuit panel included U.S. Circuit Judge Gerald Tjoflat and U.S. District Judge Stephen Murphy of Detroit, who was sitting by designation.

The case is Hi-Tech Pharmaceuticals Inc v. HBS International Corp, 11th U.S. Circuit Court of Appeals, No. 17-13884.

For Hi-Tech: Robert Parsley of Miller & Martin

For HBS: Ragesh Tangri of Durie Tangri

--- **Index References** ---

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