Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

No Cows Needed For 'Soymilk' Label, Judge Says

By **Greg Ryan**

Law360, New York (December 10, 2013, 7:39 PM ET) -- Finding the allegation "stretches the bounds of credulity," a California federal judge on Tuesday dismissed a proposed class action claim that Dean Foods Co. and two other companies mislabeled soymilk and other products as milk when they do not come from cows.

U.S. District Judge Samuel Conti also tossed other mislabeling claims against Dean, WhiteWave Foods Co. and WhiteWave unit Horizon Organic Dairy because the companies executed an $800,000 Florida class action settlement in June with a plaintiff making the same allegations. Those claims related to the companies' use of the term "evaporated cane juice," rather than "sugar" or "dried cane syrup," in their soymilk, almond milk, yogurt and other products, as well as their use of the term "yogurt."

The milk-related claim was not part of the settlement agreement, but it should be dismissed because no reasonable consumer would ignore the first words in the terms, such as "almond" in "almond milk," and assume the products derived from traditional milk, Judge Conti said.

"Under plaintiffs' logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour or that e-books are made out of paper," the judge said.

Judge Conti compared the allegation to a claim in another case that "Cap'n Crunch's Crunch Berry" cereal could be construed to contain real fruit, even though there is no such thing as a "crunch berry." That claim was also dismissed.

The milk-related claim also fails because it is preempted by the federal Food, Drug and Cosmetic Act, according to Judge Conti. Plaintiffs Alex Ang and Kevin Avoy pointed to U.S. Food and Drug Administration warning letters informing two manufacturers that their soymilk is misbranded because the product contains the term "milk," but the two missives are "far from controlling," the judge said.

Even though FDA regulations describe milk as derived from the milking of one or more cows, the provision "pertains to what milk is, rather than what it is not, and makes no mention of nondairy alternatives" such as the products at issue, Judge Conti said.

The plaintiffs tried to salvage the claims determined to be addressed in the Florida settlement by arguing that they were never adequately told about the settlement proceedings, but Judge Conti held that the Florida court previously rejected **their argument** and that he refused to revisit it in this case.

Ang and Avoy have appealed the Florida court's ruling to the Eleventh Circuit. In addition to their claim that they were not provided adequate notice of the settlement, they take

issue with the fact that the deal leaves the whole class with just $272,500, after taking out $200,000 for injunctive relief, $252,500 for class counsel and the class representative, and $75,000 for administrative costs.

Angela Agrusa of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP, an attorney for the companies, said her clients were pleased with the decision, which she called "well-reasoned."

An attorney for the plaintiffs declined comment on the ruling.

Ang and Avoy are represented by Ben Pierce Gore of Pratt & Associates and David Wilson of Provost Umphrey Law Firm LLP.

Dean, WhiteWave and Horizon are represented by Angela Agrusa, Randall Sunshine and Nathan Davis of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP.

The case is Ang et al. v. WhiteWave Foods Co. et al., case number 3:13-cv-01953, in the U.S. District Court for the Northern District of California.

--Additional reporting by Linda Chiem. Editing by Jeremy Barker.