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Kind Bar False Labeling Claims Curbed For USDA Guidance

By **Hayley Fowler**

Law360 (March 5, 2018, 4:16 PM EST) -- A New York federal judge on Friday put false labeling claims against Kind LLC in limbo while the government determines a national standard for genetically modified food disclosures, lumping consumers' state claims that it falsely advertised its products as non-GMO in a temporary hold with their "all natural" claims until August.

U.S. District Judge William H. Pauley III refused Kind's motion to toss consumers' amended complaint alleging the snack giant deceptively marketed its products as non-GMO after the same claims were tossed in 2016 for lack of specificity, siding instead with Kind's bid to stay that claim until after the U.S. Department of Agriculture issues an expected GMO disclosure standard in July.

He also denied consumers' request to lift a stay on their "all natural" claims pending separate regulatory action by the U.S. Food and Drug Administration, acknowledging the "glacial pace of agency action" since the stay was ordered in September 2016 but finding judicial economy favors litigating the two claims together.

"There is no telling when the FDA will complete its work on the term 'natural,' much less provide any public guidance on its progress," Judge Pauley said. "However, in the interest of litigating the 'natural' and 'non-GMO' claims concurrently, this court believes the August 15, 2018, deadline is a sensible benchmark from which it can re-assess whether a stay over both claims is proper."

Consumers re-pled their non-GMO and stayed "all natural" claims in October 2016 in an amended complaint that made nine claims on behalf of a putative nationwide class and various state subclasses, including claims under New York, California and Florida law.

Kind urged Judge Pauley to **toss those claims in June**, arguing that consumers' state law allegations for non-GMO labeling were preempted by a congressional law mandating the USDA establish a national standard for GMO disclosure by July 2018.

Judge Pauley disagreed Friday, saying the consumers' state law claims weren't aimed at establishing their own GMO standard in violation of of the law's preemption language.

"Plaintiffs here do not seek to impose new standards or requirements in connection with their consumer protection claims," he said. "They simply want to ensure that Kind's labels are truthful."

Judge Pauley sided with Kind's request to stay those claims, finding that a national GMO standard could buoy arguments for either side, and agency discretion coupled with the danger of inconsistent rulings favors a temporary hold.

Kind expressed some satisfaction with the ruling.

"We are pleased the court agrees that we should allow governmental agencies tasked with providing food labeling guidance to fulfill their charter and wait for them to deliver direction on these matters," Justin Mervis, senior vice president and general counsel at Kind, said in a statement Monday.

Judge Pauley said dismissal of the suit was otherwise unwarranted.

"The plaintiffs have, for now, addressed this court's concerns regarding the various shortcomings besetting their original complaint — they identified the plaintiffs who relied on the 'non-GMO' label; specified which Kind products contain GMOs; and established, through independent testing and plausible allegations, the likelihood that GMOs in Kind products are linked to the vast majority of genetically modified crops," he said.

The judge said analysis on whether to lift the stay on consumers' "all natural" labeling claims has been less straightforward.

In September, consumers **backed their bid to lift the stay** with President Donald Trump's requirement that two regulations be erased for every one implemented, saying waiting for federal guidance would be impractical.

But Kind said Congress signaled in a July report accompanying the 2018 FDA appropriations bill that the agency must take action soon to define the term "natural."

The courts have issued mixed decisions on whether to lift stays in "natural" labeling litigation given the FDA's lag, Judge Pauley said, and the congressional mandate for speedy action by the FDA is relatively "toothless" because the 2018 bill has yet to be passed.

But he said consumers and Kind have agreed the non-GMO and "all natural" labeling claims "should not be litigated in piecemeal fashion," so a stay on one claim necessitates a similar hold on the other — at least until August.

Counsel for the parties did not respond to requests for comment on Monday.

The consumers are represented by Todd S. Garber of Finkelstein Blankinship Frei-Pearson & Garber LLP.

Kind is represented by Dale Giali of Mayer Brown LLP.

The case is In re: Kind LLC, case number 1:15-md-02645, in the U.S. District Court for the Southern District of New York.

--Editing by Richard McVay and Catherine Sum.

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