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Taco Shell Maker Gets Trans Fat Suit Paused, Partially Nixed

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By **Steven Trader**

A California federal judge on Monday crumbled a proposed class action claiming [B&G Foods](#) violated state consumer protection laws and put shoppers at risk of disease by selling taco shells containing partially hydrogenated oils, finding that the [U.S. Food and Drug Administration](#) had jurisdiction over the health claims.

After tossing Troy Walker's allegations that B&G mislabeled its taco shells as "0g trans fat" on the grounds they were preempted by federal law, U.S. District Judge Jon S. Tigar concluded that the FDA had primary jurisdiction over Walker's claim that the products posed serious health risks, saying the issue would require determining whether the amount of trans fat present in the taco shells was safe for human consumption. Therefore, Walker's suit should be stayed pending a final decision by the FDA on trans fat, Judge Tigar decided.

"Resolution of these issues require both expertise and uniformity in administration," Judge Tigar wrote. "Plaintiff's own complaint includes myriad citations to scientific studies purporting to show that 'there is 'no safe level' of [partially hydrogenated oil] or artificial trans fat intake.' This is 'precisely the kind of expert question that agencies are better suited to answer than courts or juries.'"

Walker had contended that B&G violated numerous consumer protection labeling laws by claiming its taco shells contained "0g trans fat" when they actually contained some level of partially hydrogenated oils, or PHOs. But the judge said Monday those allegations were preempted by the federal Nutrition Labeling and Education Act, which allows companies to express the amount of PHOs as zero if the products contain less than 0.5 grams.

With Walker's mislabeling claims gone, all that remained were Walker's allegations that B&G violated California's Unfair Competition Law and breached its implied warranty by putting him and others at risk of developing serious maladies such as heart disease by making its taco shells using the allegedly dangerous food additive. Judge Tigar didn't disagree, finding that, unlike the mislabeling allegations, Walker did have standing to bring these "product use" claims.

"Plaintiff alleges that the quantity of trans fat that he actually consumed as part of defendants' taco shells 'inflamm[e]d and damage[d]' his vital organs," Judge Tigar wrote. "Such an allegation, which the court must accept as true at the motion to dismiss stage, is more than sufficient to satisfy the standing requirement."

Ultimately though, even if the FDA didn't have jurisdiction over Walker's state law claims, Congress nonetheless granted FDA the authority to regulate food safety, therefore determining the alleged dangers of B&G's taco shells was best left in the agency's hands, Judge Tigar said.

Walker brought his suit in August, contending he repeatedly purchased B&G taco shells for many years as a result of deceptive claims on the product's box claiming they contained "0g Trans Fat" when in fact they didn't, according to the complaint.

In his complaint, Walker alleged violations of California's Unfair Competition and False Advertising Law as well as the Consumer Legal Remedies Act, and breaches of express and implied warranty, claiming he had been harmed by consuming a chemical that allegedly increases the risk of heart disease, diabetes, cancer and death, according to the complaint.

In June, Walker also sued [ConAgra Foods in a nearly identical complaint](#), claiming the company falsely markets its Crunch n' Munch popcorn as free of trans fat by putting "0g Trans Fat" on the label when the snack actually contains low levels of PHOs. A motion to stay that case is pending.

On Monday, Judge Tigar said the existence of Walker's other suit shows the importance of allowing the FDA to handle the issue in order to ensure uniformity across the food industry, given **how many cases** are riding on the FDA's final determinations about the safety of trans fat. **In June**, the agency pulled its "generally recognized as safe" trans fat designation, though it gave manufacturers until 2018 to comply.

"In short, 'obtaining expert advice from the FDA would help ensure uniformity in administration of the

comprehensive regulatory regime established by the [Food, Drug and Cosmetics Act],” Judge Tigar wrote.

On Tuesday, Noah Hagey of Brauhnagey & Borden LLP, a counselor for B&G, said the food maker was "gratified that its food labeling practices have been upheld by the court."

Representatives for Walker did not immediately respond to requests for comment.

Walker is represented by Gregory Weston and David Elliot of The Weston Firm.

B&G is represented by J. Noah Hagey, Matthew Borden and Rebecca B. Cross of Brauhnagey & Borden LLP.

The case is Troy Walker v. B&G Foods Inc., case number [3:15-cv-03772](#), in the U.S. District Court for the Northern District of California.

--Editing by Aaron Pelc.

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