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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Hershey Must Face Scaled Back Metals-In-Chocolate Suit

By **Bonnie Eslinger**

Law360 (September 12, 2023, 7:03 PM EDT) -- A federal judge has pared a putative class action against The Hershey Co., saying the plaintiff hadn't shown lead or cadmium levels in the company's chocolate products "create an unreasonable safety hazard," but allowed claims seeking an injunction for the company to disclose the presence of the heavy metals.

U.S. District Judge Anthony J. Battaglia said Monday that plaintiff Eva Grausz's theory of injury is sufficient for standing in that she claims she was harmed because she would not have purchased the chocolate or would have paid less had she known the products risked containing heavy metals.

"The theory survives in part because Hershey does not contest that its products risk containing these metals; rather, Hershey says that most food products, including chocolates, have similar levels of metal and those levels are safe," the judge stated.

Grausz's suit claims that lab tests found the products exceeded California's Maximum Allowable Daily Level, or MADL, for lead or cadmium. The court's Monday judgment notes that a nonprofit foundation called As You Sow sued Hershey and other chocolate manufacturers over the lead and cadmium levels, which resulted in a 2018 consent judgment reached in California Superior Court that raised the MADL thresholds.

Hershey provided the court with calculations to show that the testing results cited in Grausz's suit do not violate the relevant MADLs and the Superior Court's consent judgment, Judge Battaglia noted.

And while factual challenges are not typically adjudicated at this stage of litigation, Grausz does not plead that the amounts of the metals in Hershey's products "have caused harm or create an unreasonable safety hazard," he noted.

The judge, however, focused in on Grausz's assertion that because the labels on the Hershey's products didn't include a notice about the presence of the metals in the dark chocolate, that affected her buying decision.

The judge said the injunction Grausz seeks would require Hershey to disclose lead or cadmium levels, when present.

Grausz has "plausibly pled a threat of future injury sufficient" to give her standing to seek injunctive relief, the judge said in his Monday ruling.

To the extent that her claims are premised on an alleged future harm, Grausz's suit allows her to seek relief in the form of an injunction, the judge said.

However, Grausz's suit failed to plead a duty to disclose, the judge said, so he granted Hershey's motion to dismiss claims related to the alleged omission under California's Consumer Legal Remedies Act, which cover the state's false advertising and unfair competition laws. The judge, however, gave Grausz leave to amend to file a bolstered complaint if filed by Sept. 25.

The judge also tossed the suit's implied warranty claim, saying Grausz's "conclusory assertion that the products were 'unsafe for human consumption,' is not plausible unless she can plead supporting facts showing that the chocolates purchased by plaintiff were somehow distinct from those that are

safe."

Back in March, Hershey **urged the judge to dismiss** the suit, arguing it "never promised, in words or substance, that its products were utterly lead- and cadmium- free," just that they were safe to consume.

The Pennsylvania-based confectionery told the court that Grausz's complaint failed to claim she suffered injury, arguing the suit does not allege that the bars she bought were contaminated. Rather, it argues that some bars tested by the publication Consumer Reports came up positive for those heavy metals.

Moreover, it's a sad reality of "modern life" that lead and cadmium are omnipresent in the air, water and soil, Hershey said in its filing. That makes it impossible for anyone to make a product "absolutely free" of them, it said. As such, it had never made that guarantee, the company said.

Grausz's proposed **class action claims** she frequently bought Lily's Extremely Dark Chocolate 85% Cocoa, which is made by Hershey. The chocolate tested at 143% of the maximum allowable dose level for lead in the state of California and 101% of the maximum allowable dose for cadmium. Other products named in the Consumer Reports study included Hershey's Special Dark Mildly Sweet and Lily's Extra Dark 70% Cocoa.

The suit is founded on a Consumer Reports study published in December that tested 28 dark chocolate bars. All candy tested contained both of the toxic substances, but 23 of them contained more than 0.5 micrograms of lead, more than 4.1 micrograms of cadmium, or both.

The analysis chose those lead and cadmium amounts because they are what California has defined as the maximum allowable dose level for individual consumption of the toxic substances. The standards were established in Proposition 65, the suit notes.

Hershey asserted in its motion to dismiss that the Proposition 65 MADLs do not specify "thresholds" at which lead and cadmium pose a danger to the human body. Rather, the company said, they represent the maximum amount that can be consumed without any "observable effect."

While the Lily bars returned results above the California standard, those levels translate to about 24 parts per billion of lead and 138 parts per billion of cadmium. This means the bars fell well below a 2006 U.S. Food and Drug Administration consent judgment which put the maximum lead in chocolate at 100 parts per billion and 450 parts per billion for cadmium, according to Hershey.

In her opposition to Hershey's motion to dismiss, Grausz told the court Hershey is trying to "hide" information about the heavy metals in its products, "because it would hurt its sales."

Hershey is **not the only company** to come under fire after the results of the Consumer Reports story, as Mars Inc. and Trader Joe's **were hit** with **putative class actions** in January.

Representatives for the parties did not respond Tuesday to Law360's requests for comment on the judge's decision.

Grausz is represented by Jack Fitzgerald, Paul K. Joseph, Melanie R. Persinger, Trevor M. Flynn and Caroline S. Emhardt of Fitzgerald Joseph LLP, and Andrew B. Sacks and John K. Weston of Sacks Weston LLC.

Hershey is represented by Robert K. Dixon of Sanders Roberts LLP, and Steven A. Zalesin and Jonah M. Knobler of Patterson Belknap Webb & Tyler LLP.

The case is Eva Grausz v. The Hershey Co., case number 3:23-cv-00028, in the U.S. District Court for the Central District of California.

--Additional reporting by Jonathan Capriel, Lilyanna D'Amato, Gianna Ferrarin, Gina Kim and Craig Clough. Editing by Lakshna Mehta.

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