

How many carbs? Label claims proceed against Atkins

By: Jessica Shumaker July 19, 2018

A Cole County man's suit in which he alleges Atkins Nutritionals, Inc. misrepresented the carbohydrate content of its Atkins Diet-branded products will be able to proceed in part following a federal judge's July 12 order.

U.S. District Judge Douglas Harpool partially denied Atkins' motion for summary judgment, allowing some of plaintiff Michael

Johnson initially filed the lawsuit in Cole County Circuit Court in June 2016. Atkins removed the case to federal court a month later.

Johnson's claims included a violation of the Missouri Merchandising Practices Act, as well as allegations of breach of express warranty and unjust enrichment.

Johnson's suit stems from his purchase of five Atkins-brand products: Atkins Meal Advantage Chocolate Peanut Butter Bars, Atkins Day Break Peanut Butter Fudge Crisp Bar, Atkins Advantage Five-Pack Chocolate Chip Cookie Dough Bars, Atkins Five-Pack Caramel Nut Chew Bar and Atkins Endulge Chocolate Candies.

He alleged in his suit that Atkins used a misleading calculation to determine the number of "net carbohydrates" in its products. He also alleged Atkins uses misleading statements to entice consumers to purchase its products because they believe the products are extremely low in carbohydrates.

In the suit, Johnson alleged that Atkins subtracts a product's sugar alcohols and dietary fiber from the total amount of carbohydrates to reach the net carbs calculation, and in doing so misleads consumers on the impact of sugar alcohols on blood sugar.

Prior to the order, Harpool ruled that some of Johnson's theories of Atkins' liability were preempted by federal law and dismissed Johnson's claim of implied warranty for failing to state a claim.

Harpool allowed Johnson to proceed on a theory that labels stating that an Atkins product contained "Only Xg Net Carbs" were false, misleading or deceptive because such labels may be illegal under federal law.

The court also allowed Johnson's theory that a "Counting Carbs?" label on Atkins' products also made false, misleading or deceptive statements concerning the effects of sugar alcohols on blood sugar.

Atkins argued that the case should be thrown out on summary judgment, contending that Johnson purchased the products for reasons other than what was represented in the labels.

In order to prevail on summary judgment, Atkins argued that Johnson must have relied on the labels or their contents must have factored into his purchasing decision. Harpool, however, wrote that nothing in the MMPA indicates a consumer must rely on the allegedly unlawful practice to pursue a claim.

He said the three types of unlawful practices outlined in the act — deception, unfair practices and concealment — are broad by design.

"The MMPA is a consumer-friendly law that is specifically designed to enable consumers to obtain relief even in those circumstances where they cannot prove fraud," he said. "Only when the consumer alleges concealment as an unlawful practice do they have to demonstrate that the fact so-concealed would have been material to their purchasing decision."

Harpool ruled there is a genuine question of fact regarding the “Only Xg Net Carbs” label and whether the claim made in the “Counting Carbs?” label concealed facts that would have been a part of Johnson’s decision to purchase had he known them at the time.

On Johnson’s remaining claims of breach of express warranty and unjust enrichment, Harpool evaluated two product labels on five products to determine if Johnson established the elements of the two claims.

To make the breach of express warranty claim, Harpool said Johnson must be able to demonstrate he was aware of the alleged misrepresentation made by Atkins. On the unjust enrichment claim, Johnson was required to have actually relied upon the misrepresentation in making his purchase.

Harpool granted Atkins’ motion for summary judgment on the two claims for the “Counting Carbs?” label on two products: the Peanut Butter Fudge Crips Bar and the Chocolate Peanut Butter Bars. His decision was based on Johnson’s testimony in a deposition in which he recalled seeing the label but not reading it.

Harpool did find a question of fact, however, as to the “Counting Carbs?” label on three products — the Chocolate Chip Cookie Dough Bar, the Caramel Nut Chew Bar and Indulge Chocolate Candies.

He also found a question of fact regarding the “Only Xg Net Carbs” labels.

Jay Barnes of Barnes & Associates in Jefferson City and Matt Dameron of Williams Dirks Dameron in Kansas City are representing Johnson. Amy Sestric of Dentons in St. Louis is representing Atkins. Neither side could be reached for comment.

The case is *Johnson v. Atkins Nutritionals, Inc.*, 2:16-cv-04213.

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