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Eleventh Circuit Rejects "Fear of Glyphosate" Claim for Lack of Standing

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Food, Drugs, and Devices

On May 20, 2020, the Eleventh Circuit in *Doss v. General Mills, Inc*. held that a consumer who bought a box of Cheerios containing allegedly "ultra-low levels of glyphosate" lacked Article III standing to sue General Mills. "Fear of Glyphosate" class actions against food manufacturers of this type have become increasingly common. While *Doss* is unpublished, it is the first circuit court opinion to decide such a case and should prove helpful authority for defendants facing similar cases.

Glyphosate is the most widely-used herbicide in the U.S. The EPA has established tolerances for glyphosate on a wide range of crops, including corn, soybean, oil seeds, grains, and some fruits and vegetables. For years, the plaintiffs' bar has targeted manufacturers whose food products contain trace amounts of glyphosate, taking one of two approaches. If the label said "All Natural," plaintiffs' theory was that even trace amounts of glyphosate rendered the term "natural" deceptive. If the label didn't say "Natural," plaintiffs would sue on an omission theory, alleging that the manufacturer should have disclosed that the product contains glyphosate – notwithstanding that, in one notable case, it was observed an individual would have to consume 544 boxes of cereal a day to exceed what the EPA considers safe.

Doss was an omission case. Plaintiff alleged that she and the putative class suffered Article III injury because, had they known the Cheerios contained trace amounts of glyphosate, they never would have bought the cereal. General Mills moved to dismiss on several grounds, but the district court granted the motion solely on the basis of Article III standing.

The Eleventh Circuit affirmed. Plaintiff was alleging purely an economic injury, so she must plead that she was deprived of the benefit of her bargain. Plaintiff alleged that she was misled by General Mills' "health-related statements" on the box—such as Cheerios' being "packed with nutrients" and "wholesome"—that are allegedly irreconcilable with the presence of glyphosate. The Court observed that plaintiff was "advancing a theory that the presence of glyphosate renders Cheerios unsafe to eat," but she never actually alleged that "glyphosate is wholly unsafe to consume, rendering the Cheerios she purchased valueless." That was the problem. Merely alleging that Cheerios "may be harmful to human health" is not the same as alleging that the cereal contained levels of glyphosate that were "so harmful the Cheerios are 'presumptively unsafe' and therefore worthless." The Eleventh Circuit held that Doss had alleged merely a "conjectural or hypothetical" injury, which flunks the test of standing under *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1548 (2016).

Doss could prove helpful to other food manufacturers facing Fear-of-Glyphosate claims. *Doss* could also be of value in defending claims that a manufacturer failed to disclose GMOs, a similar kind of "omission" claim that has been on the rise these past several years.

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