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Trump's 'One In, Two Out' Rule Pops Up In Kind Bar Battle

By **Pete Brush**

Law360, New York (September 15, 2017, 5:36 PM EDT) -- President Donald Trump's requirement that two regulations be erased for every one implemented reared its head in a false labeling suit targeting Kind LLC on Friday, with snack bar buyers telling Manhattan U.S. District Judge William H. Pauley III the directive makes waiting for federal guidance no longer feasible.

A year ago, Judge Pauley stayed New York- and California-law claims targeting Kind's use of "all natural" on 70 products, citing the U.S. Food and Drug Administration's attempt to regulate such labeling, after plaintiffs Amanda Short, Sarah Thomas and Charity Bustamante claimed damages for false advertising.

In June, the consumers' counsel asked Judge Pauley to lift the stay, arguing President Trump's **anti-rulemaking policy** hinders their ability to advance a potentially big-dollar class action. Their counsel, Todd S. Garber of Finkelstein Blankinship Frei-Pearson & Garber LLP, put the potential amount at \$100 million Friday.

While the FDA has the power to issue a regulation governing natural labeling, it is unlikely to do so under the current administration, Garber argued. Judge Pauley is capable of deciding the matter without delay, he said.

Kind's counsel, Dale J. Giali of Mayer Brown LLP, told Judge Pauley the one-for-two argument amounted to "a lot of noise."

"Nobody knows what the Trump administration is going to do," Giali said, adding that the agency, with its **new chief**, is "on the job."

Kind may also have Second Circuit precedent on its side. A 2006 decision in *Ellis v. Tribune Television Co.* saw the circuit let stand a stay that had dragged on for five years in favor of an agency rulemaking effort.

"Here we have less than two years, your honor," Giali said. "This motion is not a close case."

In reply, Garber said that even in the unlikely event President Trump's FDA makes a labeling rule at some point, that rule was unlikely to impact the Kind litigation.

He invited Judge Pauley to lift the stay by considering, as called for by *Ellis*, if "the question at issue is particularly within the agency's discretion."

Whatever the fate of the litigation, much of it will be backward-looking. Giali said Friday that Kind has removed the allegedly unlawful labeling from nearly all of the products at issue and will complete that process in the near future.

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

Kind is represented by Dale J. Giali of Mayer Brown LLP.

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

--Editing by Adam LoBelia.

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