

# An Ingredient for Failure In “Reasonable Consumer” False Advertising Cases

December 14, 2018

Defendants have had a nice run recently in winning pleading-stage dismissal of “reasonable consumer” false advertising cases. That run came to an end yesterday, however, when the Second Circuit Court of Appeals in New York [reversed the dismissal](#) of claims regarding Kellogg’s “Cheez-It” crackers. The front of the “Cheez-It” package prominently describes the crackers as “Whole Grain,” but as a quick look at the Nutrition Facts panel on the side label would confirm, the crackers’ main ingredient is enriched white flour, not whole grain.

New York, California, and numerous other states apply a “reasonable consumer” test to false advertising claims. The test is meant to be objective, with courts asking whether an advertisement would mislead an objectively reasonable consumer, not whether the actual plaintiff was or was not misled. Federal courts regularly, and rightly, dismiss false advertising claims at the pleading stage where, as one court put it in a “slack fill” case involving an over-the-counter pain reliever, “the[] failure to read an unambiguous tablet count does not pass the proverbial laugh test.”

Courts have been much less likely to see the humor, though, in cases where a food package includes statements that plaintiffs contend are affirmatively misleading. In yesterday’s case of *Mantikas v. Kellogg Co.*, the Second Circuit agreed with the plaintiffs, at least at the pleading stage. In the Court’s view, “the large, bold-faced claims of ‘WHOLE GRAIN’” on the front of the package could be construed as “misleading because they falsely imply that the grain content is entirely or at least predominantly whole grain.” Quoting an oft-cited Ninth Circuit case, the Court wrote that the Nutrition Facts panel did not “cure[] the deceptive quality of the ‘WHOLE GRAIN’ claims because “reasonable consumers should not be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.”

The main good news in this bad outcome for the defendant is that the Second Circuit reiterated another core principle in cases like this: When ruling on an advertising claim, courts must “consider the challenged advertisements as a whole, including disclaimers and qualifying language.” Plaintiffs, in other words, cannot just include snippets of a package in their complaint and hope to avoid judicial scrutiny of the entire package at the pleading stage.

A second good sign is that the Second Circuit distinguished—and thus impliedly blessed—other district court decisions dismissing similar claims on “reasonable consumer” grounds. In one case the Court examined, for example, the plaintiffs claimed to have believed that crackers advertised as “made with real vegetables” contained a larger amount of vegetables than they actually did. The district court in that other case thought reasonable consumers know “the fact of life that a cracker is not composed of primarily fresh vegetables.” In the Cheez-It case, by contrast, reasonable consumers “understand that crackers are typically made predominantly of grain” and “look to the bold assertions on the packaging to discern what type of grain.” The case survived, therefore, only

because the alleged affirmative misrepresentation went to a central and material fact about the food product's nature.

Because of these limitations, the Second Circuit's decision should not be viewed as anything other than the reaffirmation of an established principle: Food product manufacturers cannot expect to win dismissal of a false advertising case at the pleading stage by claiming that an accurate ingredient label cures an affirmatively misleading material statement on the front of a package. If, by contrast, a plaintiff's purported read of an advertisement is objectively unreasonable, courts still can and should examine the entire package and dismiss claims that fail the "laugh test."