

# CA Court Considers When Disclosures Can Modify Claims

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Pop quiz: If you purchased a bottle of “One A Day” gummy vitamins, would you: (a) assume that you should take one a day; or (b) check the back of the label to figure out how many you should take? If you answered (a), and didn’t check the back of the label, you might have been surprised. That’s one of the issues in a putative class action pending against Bayer in California.

Despite the name of the product, the back panel of a bottle of “One A Day” gummy vitamins directs consumers to “chew two vitamins daily.” In 2016, a



consumer filed a putative class action against Bayer, arguing that the name of the product is misleading because it suggests that people only need to take one vitamin per day, when the company recommends otherwise. Bayer disagreed, arguing that consumers carefully read labels to look for nutritional values and, thus, that the disclosure on the back panel prevents the name of the product from being misleading. Although the lower court agreed with Bayer and dismissed the case, last week, a California appellate court reversed the dismissal.

“The front of the product makes no attempt to warn the consumer that a one-a-day jar of gummies is in fact full of two-a-day products.” Instead, consumers have to turn the bottle over to find a direction that they should chew two vitamins daily. (The court worried that this direction appeared “in the smallest lettering on the bottle, an ocular challenge even when the bottle is full-sized and held in good light.”) The product name made things worse. Although consumers may be more likely to look for the directions “if this product were called Gazorninplat Gummies or Every Day Gummies,” that isn’t the case here. “The front label fairly shouts that one per day will be sufficient.”

Although this case is still pending, it illustrates a critical point about disclosures. As the court put it: “You cannot take away in the back fine print what you gave on the front in large conspicuous print.” Lesley Fair at the FTC [has made that same point slightly differently](#): “What the headline giveth, the footnote cannot taketh away.” Either way, keep in mind that there are limits to what you can do with disclosures. Although they can help to prevent a claim from being misleading, they only work if (a) they are presented in a “clear and conspicuous” manner and (b) they clarify, rather than contradict,

the claim.