

The First Circuit Reinstates False Advertising Class Action Challenging “Hazelnut Crème” Coffee

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Imagine you are perusing the coffee aisle in the grocery store and see a product described as “freshly ground,” “100% Arabica Coffee,” “Hazelnut Crème,” “Medium Bodied,” and “Rich, Nutty Flavor.” Would you think that the coffee contains hazelnuts? Should consumers be expected to consult the ingredient list to clarify any confusion? And what exactly is “Hazelnut Crème?”

The First Circuit addressed these issues in *Dumont v. Reily Foods Co.*, in which a split panel concluded that a reasonable consumer could be deceived into thinking that the product contained hazelnuts when, in actuality, it contained only naturally and artificially flavored coffee. The court reversed the District of Massachusetts’ dismissal of the plaintiff’s Massachusetts General Law Chapter 93A claim, and permitted the case to proceed into discovery.

Judge William J. Kayatta Jr., writing for the majority, explained that while some reasonable consumers might be motivated to consult the ingredient label on the reverse side of the package, others might “find in the product name sufficient assurance so as to see no need to search the fine print on the back of the package, much like one might easily buy a hazelnut cake without studying the ingredients list to confirm that the cake actually contains some hazelnut.” As support for this, Judge Kayatta noted that the plaintiff’s complaint set forth that the industry practice—in large part due to federal labeling requirements—is to state on the front of a package containing a product that is nut flavored (but that contains no nuts) that the product is naturally or artificially flavored.

The majority also found ambiguity in the phrase “Hazelnut Crème,” with one judge believing that “‘crème’ was a fancy word for cream, with Hazelnut Crème being akin, for example, to hazelnut butter.”

Finally, the majority held that the plaintiff’s state-law consumer fraud claim was not preempted by the Federal Food, Drug, and Cosmetic Act (“FDCA”), which imposes specific labeling requirements for the coffee product at issue. The court ruled that such a claim must fit within a “narrow gap” to avoid preemption: the plaintiff must be suing for conduct that *actually violates* the FDCA (otherwise the claim would be expressly preempted by the FDCA), but the plaintiff must not be suing *because* the conduct violates the FDCA (which would be implicitly preempted). Because the complaint sought “to vindicate the separate and independent right to be free from deceptive and unfair conduct” separate and apart from any alleged FDCA violations, the chapter 93A claim was not preempted.

Former Chief Judge Sandra L. Lynch dissented, reasoning that the package as a whole undermined any reasonable belief that the coffee actually contained hazelnuts: “the front label plainly states that

the package contains '100% Arabica Coffee.' It does not say it contains anything other than coffee. The package here did not contain any misstatement of its contents, did not feature any pictures or illustrations of hazelnuts, and did not have any error in the ingredient list."

Judge Lynch then addressed the phrase "Hazelnut Crème," differentiating between the definition of cream—the oily or butyraceous part of milk—and that of crème—a "'cream or cream sauce as used in cookery' or 'a sweet liqueur.'" In her opinion, "[i]n the context of a package of ground, dry coffee, . . . the two words, 'Hazelnut Crème,' together plainly state the flavoring of the coffee." Judge Lynch similarly rejected the majority's analogy to a hazelnut cake which, presumably, contains multiple ingredients and could very well contain hazelnuts. In contrast, she noted that reasonable consumers would not approach a package of ground coffee in the same manner, especially one that was prominently labeled as "100% Arabica Coffee." Judge Lynch concluded that any consumer who was confused by the label, or specifically concerned with the presence of hazelnuts, could simply consult the ingredient label on the reverse side of the package to confirm the absence of hazelnuts.

While the majority found the case to present a close question for the very reasons set forth in Judge Lynch's dissent, it ruled that the complaint stated a plausible claim for relief and reversed the lower court's grant of the defendants' motion to dismiss.

The First Circuit's analysis resembles a recent [Second Circuit decision](#) involving Cheez-It crackers labeled as "WHOLE GRAIN" or "Made With WHOLE GRAIN" when the predominant ingredient was enriched white flour. In *Mantikas v. Kellogg Co.*, the Second Circuit concluded that while the product did, indeed, contain some whole grains, a reasonable consumer could be misled into believing that it was the predominant ingredient in the crackers.

While *Dumont* did not cite the Second Circuit's opinion, it is based on the same premise that reasonable consumers should not be expected to consult an ingredient list to correct allegedly misleading information on the front label. Judge Lynch's dissent, however, cautioned that permitting "meritless labeling litigation" like this one to continue beyond the pleadings stage "will have the effect of driving up prices for consumers" and cause an entirely different type of "harm to the consumer." For now, the *Dumont* decision marks another plaintiff-friendly outcome sure to be relied on by class action plaintiffs in the First Circuit and elsewhere.