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9th Circ. Clarifies What Consumers Must Read On Labels

By **Robert Guite and Abby Meyer** (January 21, 2021)

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With the wealth of information available to consumers, including nutrition panels and ingredient lists on food products, product descriptions and attributes on packaged goods, and additional information available from QR codes and websites, consumer product companies may be understandably frustrated when sued in purported class actions based on claims for false or deceptive advertising.

Despite the availability of information accurately describing ingredients and attributes, hundreds of false labeling class actions are filed each year. This raises the question: What must a consumer read on a product label?

To answer this question, courts apply the reasonable consumer standard — that is, whether there is a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.[1]

The recent decision from the U.S. Court of Appeals for the Ninth Circuit in McGee v. S-L Snacks National LLC confirms that nutrition fact panel and ingredient disclosures provide information that can support a motion to dismiss.[2] While the reasonable consumer standard may seem to raise more questions than it answers at first blush, in applying the standard to particular cases, the case law shows that courts typically require the following conduct from complaining consumers.

Consumers should read information on the front of a package.

In the context of a purported false advertising class action, "the primary evidence ... is the advertising itself."[3] Yet reasonable consumers are not expected to be "versed in the art of inspecting and judging a product … [or] the process of its preparation or manufacture."[4]

Thus, under the prevailing view, set out by the Ninth Circuit in 2008 in Williams v. Gerber Products Co., establishing a misleading representation on the front of a package is often determinative of whether a plaintiff will successfully state a claim.[5]

In McGee, the plaintiff alleged that the inclusion of partially hydrogenated oils, or PHOs, as an ingredient in Pop Secret popcorn was an unfair trade practice and breach of warranty, because PHOs cause heart disease, diabetes, cancer and other ailments. The Ninth Circuit affirmed dismissal of the claims, concluding that the plaintiff did not plausibly allege that she was harmed by the popcorn.

The PHOs were identified on the nutrition label, and — critical under the Williams v. Gerber standard — the plaintiff did not allege that the labels were themselves misleading. Affirming, the Ninth Circuit found that a plaintiff "must do more than allege that she did not receive the benefit she thought she was obtaining. The plaintiff must show that she did not receive a benefit for which she actually bargained."[6]

The Ninth Circuit found that while the plaintiff "may have assumed that Pop Secret contained only safe and healthy ingredients, her assumptions were not included in the

bargain," particularly given the labeling disclosure that the product contained artificial trans fat.

In evaluating whether a front-of-package representation is misleading, federal courts have found that consumers cannot selectively disregard information. For example, in Shaker v. Nature's Path Foods Inc.,[7] decided by the U.S. District Court for the Central District of California in 2013, the plaintiffs brought putative class action claims alleging that the use of imagery depicting strawberries on the front of a cereal box was misleading where the product did not contain dried strawberries.

Dismissing the plaintiffs' claims, the court found that accompanying language — including the words "Blueberry Cinnamon" above the image, and "strawberries shown as serving suggestion" at the edge — unmistakably indicated that the product contained blueberries and cinnamon, but not strawberries.[8] As that court put it, the plaintiffs' "interpretation of the photograph and selective reading of the labels notwithstanding ... the strawberries were merely a suggested addition" to the cereal.[9]

Likewise, in Gitson v. Trader Joe's Co.,[10] decided by the U.S. District Court for the Northern District of California in 2013, the plaintiffs complained that they, and the class they sought to represent, were misled into believing that Trader Joe's organic soy milk products possessed the same qualities as cow's milk, given the use of the term "milk" on the front of the label. The court found that this was impossible, where, in relevant part, the front and back of the packaging clarified that the product was lactose and dairy free.[11]

But even if consumers may be expected to read information on the front of a package, it is not a silver bullet. For example, in Stoltz v. Fage Dairy Processing Industry SA,[12] decided by the U.S. District Court for the Eastern District of New York in 2015, the plaintiffs alleged, in part, that they were misled by "Total 0%" language on the front of yogurt products into believing that the products contained "no fat, sugar, sodium, cholesterol, carbohydrates, calories, or any other item required to be disclosed" on the labels.[13]

The defendant's argument that the front label also included "clarifying language" that the product was nonfat was insufficient to remedy potential consumer confusion.[14]

Thus, although a consumer may not be able to ignore accompanying representations on the front of a package, the extent to which a consumer must consider other contextual information poses another level of complexity for food manufacturers. If a representation on the front of a package is arguably misleading, clarifying language — even if it is also on the front of the package — may be insufficient.

Consumers should take into account contextual information.

The federal courts are widely in agreement that context is crucial for understanding label claims and purportedly false advertising.[15]

The "white chocolate chips" versus "white chips" cases particularly demonstrate the importance of context. In 2012, plaintiffs filed a class action against Ghirardelli Chocolate Co. Inc. for its "Ghirardelli Chocolate Premium Baking Chips – Classic White" product, and others.[16]

The plaintiffs alleged that the products were misleadingly labeled because "[a]ll the packaging prominently uses the term 'chocolate' on the primary label panel when the products, in fact, contain no chocolate or white chocolate, cocoa butter, cacao fat, or any

cacao derivatives."[17]

At the motion to dismiss phase, the court found, "[r]eading this label as a whole and in context with the allegations about the marketing, the court cannot say, as a matter of law, that no reasonable consumer would be deceived by the baking chips label."[18] Ghirardelli ultimately settled this case for $5.25 million.

In 2019, Ghirardelli was sued again over its "white chips" product, but this time the label omitted the word "chocolate" from the front of the package — i.e., the product was called "Ghirardelli Premium Baking Chips – Classic White."[19] The plaintiffs alleged that the label was misleading, because "the product is labeled as 'White,' which … has been historically used to describe a distinct and real type of chocolate, and the understanding of both named Plaintiffs is that the term 'White' describes a distinct and real type of chocolate."

But this time, the court dismissed the case with prejudice, finding that the reasonable consumer would not be deceived by the description on the product packaging.[20] In pertinent part, the court found that:

> [The] adjective "white" in the term "White Chips" did not define the food itself but rather defined the color of the food. Given the common understanding of the word white, it would not be appropriate to base liability off of a misunderstanding of that word.[21]

For products that are well-known to be very expensive, the low or moderate price of a product may also provide relevant context. In Jessani v. Monini North America Inc., regarding truffle oil, the U.S. Court of Appeals for the Second Circuit found in 2018 that:

> [I]t is simply not plausible that a significant portion of the general consuming public acting reasonably would conclude that Monini's mass produced, modestly-priced olive oil was made with "the most expensive food in the world."[22]

Similarly, information contained in websites referred to on a product's packaging may provide such context where information on the website forms a basis for the claims.[23] Thus, a plaintiff's belief that Ben & Jerry's Homemade Inc. products were "sourced exclusively" from a dairy program was unreasonable where the plaintiff's impression was based on a "single [website] heading without reference to the contents of the section that immediately follow[ed]."[24]

Finally, because a challenged label or advertisement must be considered as a whole, the presence of qualifying language or disclaimers is also part of the context that consumers need to consider.[25] However, as discussed below, these are not certain to overcome a claim of deception.

Circumstances dictate whether consumers should read information on the back of a package and disclaimers.

In assessing class actions, courts generally start with the premise that consumers are not "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."[26]

While the courts agree that the ingredient list, for example, serves some purpose, manufacturers cannot rely on it to correct misinterpretations and provide a shield for

liability for alleged deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.

As to disclaimers, their viability depends on their relative size and placement on the product packaging or advertising. The following cases are illustrative of the principle.

In Sponchiado v. Apple Inc., a putative class action challenging a representation about a smart phone's screen size, the packaging included a disclaimer approximately 10 lines down from the screen display specification, which stated that the "actual viewable area is less" than when measured as a "standard rectangular shape." The U.S. District Court for the Northern District of California court ruled in 2019 that the disclaimer was sufficiently conspicuous.[27]

In Reyes v. Crystal Farms Refrigerated Distribution Co., a putative class action challenging a ready-to-eat mashed potato product, the plaintiff asserted that the claim "made with real butter" was misleading because the product also contained margarine. In its 2019 ruling, the U.S. District Court for the Eastern District of New York disagreed, finding that to the extent the front of the package created any confusion, the ingredients label on the back of the package twice stated, and once in bold font set apart from the rest of the items listed in the ingredients label, that the product contains margarine.[28]

In Liang v. BevMo!, a putative class action filed against a wine retailer, the plaintiff complained that she purchased several bottles of wine after seeing an in-store advertisement. She relied upon this sign, took two bottles from the section where the advertisement was located, and purchased them. After she purchased these bottles, she realized that the bottles were not from the advertised vintage.

The retailer was able to show that each advertisement contained a disclaimer box that clearly and unambiguously stated that customers should check the vintage on wine bottles because the vintages advertised might not be available. The Court of Appeal of California, 5th Appellate District, found in 2020 that the disclaimer was sufficiently visible and prominent, and affirmed dismissal of the case.[29]

Whether a plaintiff would be expected to read the information on the back of a package or on a disclaimer is likely to be a hotly contested issue in a false labeling or advertising lawsuit. The ability to demonstrate that the label information provides a consumer with knowledge of the actual contents of a package — even if additional information is provided on the labels or advertising — is critical to application of the reasonable consumer standard.

A plaintiff's atypical understanding of that information is insufficient to sustain a cause of action, and may be resolved on a motion to dismiss. Where a consumer claims to have been misled by truthful statements from which they inferred additional information, a motion to dismiss may still be granted if those inferences were unreasonable and too attenuated from the truthful statements.

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[1] Ebner v. Fresh Inc. , 838 F.3d 958, 965 (9th Cir. 2016).

[2] McGee v. S-L Snacks Nat'l LLC , 982 F.3d 700 (9th Cir. 2020).

[3] Williams v. Gerber Prods. Co. , 552 F.3d 934, 938 (9th Cir. 2008).

[4] Colgan v. Leatherman Tool Group Inc. , 135 Cal.App.4th 663, 682 (2006).

[5] Williams, 552 F.3d at 939.

[6] 982 F.3d at __.

[7] Shaker v. Nature's Path Foods Inc., 2013 U.S. Dist. LEXIS 180476, *13 (C.D. Cal. Dec. 16, 2013).

[8] Id.

[9] Id. at *14-15.

[10] Gitson v. Trader Joe's Co., 2013 U.S. Dist. LEXIS 144917, *22 (N.D. Cal. Oct. 4, 2013).

[11] Id.

[12] Stoltz v. Fage Dairy Processing Industry SA, 2015 U.S. Dist. LEXIS 126880, *13 (E.D.N.Y. Sep. 22, 2015).

[13] Id.

[14] Id. at *54-55.

[15] See, e.g., Axon v. Florida's Natural Growers Inc. , 813 Fed. Appx. 701, 705 (2d Cir. 2020) (product name does not guarantee no trace amounts of glyphosate); Ehlers v. Ben & Jerry's Homemade Inc. , 2020 U.S. Dist. LEXIS 80773, *18 (D. Vt. May 7, 2020) (concept included on one page of a multipage website is not deceptive when read in context); Cheslow v. Ghirardelli Chocolate Co. , 2020 U.S. Dist. LEXIS 62044, *12 (N.D. Cal. Apr. 8, 2020) ("white chips" on front of package refers to the color of the product).

[16] Miller v. Ghirardelli Chocolate Co. , Case No. 3:12-cv-04936 (N.D. Cal.).

[17] (Id., Dkt. 24.)

[18] Miller v. Ghirardelli Chocolate Co., 912 F.Supp.2d 861, 874 (N.D. Cal. 2012).

[19] Cheslow v. Ghirardelli Chocolate Co., Case No. 4:19-cv-07467 (N.D. Cal.).

[20] Cheslow v. Ghirardelli Chocolate Co., 2020 U.S. Dist. LEXIS 127400 (N.D. Cal. July 17, 2020).

[21] Id. at * 9.

[22] Jessani v. Monini N. Am. Inc. , 744 Fed. Appx. 18 (2d Cir. 2018).

[23] Ehlers v. Ben & Jerry's Homemade Inc., 2020 U.S. Dist. LEXIS 80773, *18 (D. Vt. May 7, 2020).

[24] Id. at *18.

[25] Mantikas v. Kellogg Co. , 910 F.3d 633, 636 (2d Cir. 2018).

[26] Williams v. Gerber Prods. Co. , 552 F.3d 934, 939 (9th Cir. 2008); accord, Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018).

[27] Sponchiado v. Apple Inc. , 2019 U.S. Dist. LEXIS 199522 (N.D. Cal. Nov. 18, 2019).

[28] Reyes v. Crystal Farms Refrigerated Distrib. Co. , 2019 U.S. Dist. LEXIS 125971 (E.D.N.Y. July 26, 2019).

[29] Liang v. BevMo! (Aug. 4, 2020, No. B296874) ___Cal.App.5th___ (2020 Cal. App. Unpub. LEXIS 5002).