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False advertising class actions – absent evidence that reasonable consumers were likely to be misled, Seventh Circuit affirms summary judgment in favor of defendant

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Takeaway: To survive summary judgment, a false-advertising plaintiff must offer evidence that the challenged representations are likely to mislead a reasonable consumer. In *Weaver v. Champion Petfoods USA Inc.*, --- F.4th ----, No. 20-2235, 2021 WL 2678801, at *8 (7th Cir. June 30, 2021), the Seventh Circuit held summary judgment proper under Wisconsin law due to the plaintiff's failure to provide such evidence. As highlighted by the *Weaver* decision, false-advertising defendants should carefully evaluate whether a plaintiff has introduced sufficient evidence to prove the misleading nature of an advertisement, even in cases where a plaintiff's theory of deception has survived a Rule 12 motion to dismiss.

The *Weaver* plaintiff filed a putative class action against Champion for allegedly deceptive advertising of its dog food, which Champion marketed on the packaging as "biologically appropriate, made with fresh regional ingredients, and never outsourced." Claiming that the dog food actually contained chemical additives and frozen ingredients sourced from remote locations, the plaintiff asserted claims for violation of the Wisconsin Deceptive Trade Practices Act, fraud, and negligence. Champion moved for summary judgment on all three claims, and the district court granted its motion.

The Seventh Circuit affirmed. Reasoning that labels are deceptive under Wisconsin law if "likely to mislead a reasonable consumer in a material respect," the court analyzed the evidence offered by the plaintiff to determine whether he had carried his burden of proof. The plaintiff had not submitted any consumer surveys, market research, or expert testimony. Instead, he relied on his own testimony that "biologically appropriate" meant free of chemical additives, that "fresh regional ingredients" meant Champion used such ingredients exclusively, and that "never outsourced" meant Champion sourced the ingredients from local suppliers. While the Seventh Circuit noted that surveys and market research are not required to survive summary judgment if the challenged advertising is misleading on its face, the court found the marketing was not facially misleading and held the plaintiff's testimony insufficient to support a jury finding that a reasonable consumer could be misled by Champion's marketing. The plaintiff's testimony did not establish that a reasonable consumer would read "biologically appropriate" to mean the food was chemical-free or that the only ingredients were fresh and regionally sourced. Accordingly, the Seventh Circuit affirmed summary judgment on the plaintiff's deceptive trade practices claim.

The court also found the same evidentiary failures justified summary judgment on the claims for fraud and negligence, which both required the plaintiff to prove that Champion's marketing was false or misleading. Because the plaintiff "did not provide evidence that a reasonable consumer would be misled

by Champion's representations that its food is biologically appropriate, contains fresh regional ingredients, and is never outsourced," the court affirmed summary judgment on the plaintiff's common-law claims.