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Second Circuit: False labeling class actions – viewed in context, is the theory of deception plausible?

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Takeaway: In two recent cases, the Second Circuit explored the plausibility of theories of deception in false labeling/consumer fraud cases. In one case, the appellate court ruled that a plausibly *false* labeling statement could not be saved by accurate, qualifying language on the product package. In the other, the court ruled that the theory of deception was implausible, based on how reasonable consumers viewed (according the class plaintiffs' own allegations) a particular ingredient (truffles), and also based on what was *not* disclosed in the ingredient list on the product package. While the two cases went in different directions, they demonstrate a path to challenging false advertising class actions, and how to effectively use (or not use) qualifying and disclaiming language on product packaging at the initial pleadings stage.

In *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), the class plaintiffs purchased Kellogg's Cheez-It crackers. The Cheez-Its were labeled either "whole grain" or "made with whole grain." They filed a class action against Kellogg asserting that the whole grain labels were false and misleading, in violation of New York and California consumer protection laws. They alleged that such labeling would cause a reasonable consumer to believe that the grain in whole grain Cheez-Its was *mostly* whole grain, when, in fact, the main grain content was enriched white flour.

The Eastern District of New York granted Kellogg's Rule 12(b)(6) motion and dismissed the complaint. Because the "whole grain" and "made with whole grain" labels (which appeared in larger print) were qualified by more detailed statements, such as "MADE WITH 8G OF WHOLE GRAIN PER SERVING," in smaller print, the labels would not mislead a reasonable consumer, because the labels were true, especially as qualified by the further language specifying the number of grams of whole grain per serving.

On appeal, the Second Circuit reversed. As an initial matter, the appellate court agreed that, in a false advertising case, "context is crucial," and a district court must consider the challenged advertising as a whole, including any qualifying or disclaiming language. *Id*. at 636 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)). But the class plaintiffs' theory of deception was that the "whole grain" labels were misleading "because they communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, *whole* grain." *Id*. at 637 (emphasis in original). Contrary to the "reasonable expectations" imparted by the label, however, the grain was comprised mostly of enriched white flower. *Id*. While the more precise "grams per serving" qualifiers on the front were accurate, the labels were nonetheless misleading, "because they falsely imply that the grain content is entirely or at least predominantly whole grain, whereas in fact, the grain component consisting of enriched white flour substantially exceeds the whole grain portion." Id

Kellogg pointed to the side panel of the packaging, which disclosed, among other things, that the list of ingredients identified "enriched white flour" as the first and predominant ingredient. The Second Circuit

rejected this argument, as well. Quoting a Ninth Circuit case, the court ruled that "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. . . . Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that *confirms* other representations on the packaging." *Id*. at 637 (emphasis in original) (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008)). Accordingly, the Second Circuit vacated the judgment of the district court.

A week before the decision in *Mantikas*, a different Second Circuit panel reached the opposite conclusion in an unpublished decision. In *Jessani v. Monini North America, Inc.*, 744 F. App'x 18, 19 (2d Cir. 2018), the class plaintiffs purchased Monini's "mass produced, modestly-priced olive oil," based on a representation on the label that the oil was "Truffle Flavored." According to the class plaintiffs, the label was deceptive to a reasonable consumer, because the olive oil did not actually contain any truffles.

As a preliminary matter, the panel observed that a plaintiff must do more than allege that a "label might conceivably be misunderstood by some few consumers." *Id*. (quoting *Ebner v. Fresh Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)). Instead, plaintiffs must plausibly allege "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id*. (quoting *Ebner*, 838 F.3d at 965).

The Second Circuit ruled that plaintiffs' own allegations rendered their theory of deception implausible. Among other things, they claimed that "truffles are the most expensive food in the world," and that they are "seasonal" and "impossible to mass produce." *Id*. It was simply not plausible that a significant portion of the consuming public would believe that the olive oil contained such an expensive and delicate ingredient, as opposed to artificial truffle flavoring. This time, the Second Circuit did rely on the ingredient list, which did not list "truffle" as an ingredient. Accordingly, the court affirmed the dismissal of the class plaintiffs' consumer fraud claims.

Both *Mantikas* and *Jessani* emphasized that a court presented with an allegedly misleading label claim must consider the "context" of the label as a whole. *Mantikas*, 910 F.3d at 636-36 (citation omitted); *Jessani*, 744 Fed. Appx. at *19. And the panels' differing conclusions reflect a contextually-specific analysis. The *Mantikas* court focused on the impact of "large print" proclamations – illustrated by pictures pasted into the opinion – that a product contained an ingredient (whole grain) perceived as healthier than its common alternative (enriched white flour). It concluded such a proclamation would be misleading if, as alleged, the product actually contained far more of the less-healthy common alternative. The *Jessani* court, in contrast, emphasized that the allegedly misleading language only represented that the product had been "Flavored" to taste like an unusually expensive food. Such a representation could only be misleading if a product must contain the referenced ingredient to be "flavored" similar to that ingredient.

Placing themselves in the position of an average consumer selecting products in a grocery store, the *Mantikas* court found the "Whole Grain" representation misleading, while the *Jessani* court found that "Truffle Flavored" label not misleading. These decisions illustrate the importance in false labeling cases of demonstrating to a court how a typical consumer would react to the particular representation on a label in the real-world setting in which the products would be purchased. Unless a defendant can convince the court that an average consumer would understand what is (and what is not) represented in the quick decision about whether to purchase a particular product on the shelf, that defendant will be

unlikely to prevail on a motion to dismiss, where the class plaintiffs' allegations of falsity and deception are largely accepted as true.