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Food for Thought: Outcomes of Food Labeling Cases Prove Difficult to Predict

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As we wrote recently, the past year has seen a proliferation of lawsuits alleging that food product labels mislead consumers about the product's ingredients. The trend continued last month, with decisions from the Court of Appeals for the First Circuit and one of its district courts reaching different results on motions to dismiss complaints alleging deceptive food labels.

Last month, the First Circuit reinstated a class action lawsuit against New England Coffee for violation of Massachusetts' consumer protection laws related to the coffee brand's label for "Hazelnut Crème" coffee. *Dumont v. Reily Foods*, 18-2055 (1st Cir. Aug. 8, 2019) . Plaintiff alleged that the product name was deceptive because the product did not contain hazelnuts. A Massachusetts federal district court judge dismissed the suit because the complaint lacked sufficient particularized facts to satisfy the heightened pleading standard for fraud allegations.

The First Circuit reversed in a 2-1 decision. The majority noted that although the ingredient list on the product package's back label read "100% Arabica Coffee Naturally and Artificially Flavored," reasonable consumers might take different approaches in determining whether the coffee actually contained real hazelnuts. One might check the list of ingredients to ensure the coffee contained hazelnut while others may not, instead relying on the name of the product, without searching the ingredient list, "much like one might easily buy a hazelnut cake without studying the ingredients list to confirm that the cake actually contains some hazelnut." The majority accordingly concluded that whether the product name implied that the product contained hazelnuts was better suited for resolution "from six jurors, rather than three judges." In dissent, Circuit Judge Lynch argued that "a reasonable consumer plainly could not view the phrase 'Hazelnut Crème' as announcing the presence of actual hazelnut in a bag of coffee which also proclaims it is "100% Arabica Coffee."

Neither opinion is especially persuasive. As for the dissent, hazelnuts are not coffee, and the fact that a coffee product called "Hazelnut Crème" is said to contain 100% Arabica Coffee does not reasonably rule out the possibility that the product contains hazelnuts. By the same token, however, other courts have concluded that reasonable consumers do not ignore a product's prominently displayed ingredient list when information on the front label may be viewed as ambiguous concerning whether an ingredient is or is not contained in the product. *See, e.g.*, *Jessani et al. v. Monini North America*, which one of the authors litigated and which this blog covered. To the extent the *Dumont* majority suggests otherwise, the opinion would be misguided. That said, whereas the olive oil product in Monini was labeled as "truffle flavored," here, there was no modifier to suggest that the coffee in question simply tasted, or smelled, like hazelnuts. In such cases, perhaps, one could conclude that the front label lacked ambiguity, and thus would not compel prospective purchasers to search the label further.

Less than a week after the First Circuit's *Dumont* decision, Judge Alison Burroughs of the District of Massachusetts tossed a putative class action suit alleging that the advertising and packaging of the cereal "Honey Bunches of Oats" falsely suggested it was sweetened only or primarily with honey, when in fact the main sweeteners are sugar, brown sugar, and corn syrup. *Lima v. Post Consumer Brands,* 18-12100 (D. Mass. Aug. 13, 2019).The plaintiffs pointed to images of a sun, bee, and honey dipper as representing that honey was the principal sweetener in the cereal. They also cited surveys showing that most consumers believe honey is "better for you than sugar" and that approximately half of consumers are willing to pay more for foods that are primarily sweetened with honey.

In concluding that the consumers failed to state a claim, Judge Burroughs found that plaintiffs had offered no reasonable basis for their alleged belief that the honey references on the packaging implied that honey was the primary sweetener in the cereal rather than simply one of its primary flavors. In addition, even assuming the packaging could be viewed as portraying honey to be an ingredient instead of or as well as a flavor, Judge Burroughs found that plaintiffs still failed to state a claim. She noted that, unlike the "Hazelnut Crème" product in *Dumont* that did not contain *any* hazelnut, Honey Bunches of Oats did, in fact, contain honey. She also distinguished the case from *Mantikas v. Kellogg*, in which the Second Circuit found that a "made with whole grain" claim could imply that the product contained more whole wheat flour than white flour. Here, according to Judge Burroughs, the mere references to honey on the package carried no implication that honey was the primary sweetener, and a reasonable consumer concerned about how the cereal was sweetened would have consulted the cereal's list of ingredients.

If nothing else, these cases underscore the fact-specific nature of the inquiry as to what product labels imply about their ingredients. Watch this space as decisions continue to clarify the contours of this body of law.

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