

Fine Print May Not Be Enough to Avoid False Advertising Liability

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If you were shopping for snack crackers and saw Cheez-It packages that looked like the ones shown here, how much whole grain content would you think the crackers contain – a little, a lot, all of it?



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The Second Circuit recently considered this question in *Mantikas v. Kellogg Company*, holding that the plaintiffs had “plausibly alleged that a reasonable consumer would be misled by Defendant’s whole grain labels to believe that the grain in whole grain Cheez-It crackers was predominantly whole grain.”

On the package shown above at left, the words “**WHOLE GRAIN**” were featured in large print on the front panel, and “*made with 5g of whole grains per serving*” appeared in smaller print on the bottom. The second version on the right displayed the words “**MADE WITH WHOLE GRAIN**” in large print on the front panel, with “*made with 8g of whole grain per serving*” in smaller print on the bottom. Both versions contained a “Nutrition Facts” section on the side panel of the cracker package, revealing in small print that a serving size of the crackers was 29 grams, and an ingredients list in which the first-listed ingredient was “enriched white flour.” Whole wheat flour was also listed as either the second or third ingredient, included in order of ingredient predominance as required by federal regulation.

Plaintiffs asserted claims for false advertising and deceptive business practices under state consumer protection laws, based on the theory that they were misled into believing that the Cheez-It crackers were made “predominantly” from whole grain. On Kellogg’s motion to dismiss, the district court dismissed the claims, holding that neither version of the Cheez-It packages would mislead a reasonable consumer because both “WHOLE GRAIN” and “MADE WITH WHOLE GRAIN” were true statements, qualified by further accurate language about the number of whole grain grams per serving. The Second Circuit vacated the decision and remanded the case for further proceedings.

The appellate court began its analysis with the oft-cited principle in false advertising cases that “context is crucial.” Here, that meant a consideration of the Cheez-It packaging as a whole, including disclaimers and qualifying language. The court

determined that while disclosures on the front of the box accurately stated the amount of whole grain per serving, “they are 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.” Moreover, the information conveyed in the Nutrition Facts and ingredient lists for the products did not cure the deceptive aspects of the packaging. As the court explained, “reasonable consumers expect that the ingredient list contains more detailed information about the product that *confirms* other representations on the packaging” (emphasis in original). Consumers “should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in bold type on the front of the box.”

The court distinguished a case cited by Kellogg in which crackers labeled as “made with real vegetables” was held to be not misleading because most reasonable consumers would know that crackers are not composed primarily of fresh vegetables. In contrast with respect to the Cheez-It crackers, reasonable consumers would likely understand that crackers are in fact typically made predominantly with grain, and would therefore look to the “bold assertions” on the front of the packaging “to discern what *type* of grain” the crackers contain.

In concluding its analysis, the Second Circuit rejected the general proposition that it is acceptable to state that a product is made with a specific ingredient so long as that ingredient is in fact present in the product. According to the court, that would “validate highly deceptive advertising and labeling” and permit a marketer to advertise the presence of an ingredient in product labeling so long as there was “an iota” of that ingredient in the product.

The TMCA will continue to follow and report on any significant new developments in the decision. For now, if you’re a product marketer, be careful of relying on fine print and side panel explanations to avoid false and misleading impressions created by prominent labeling claims, especially where the fine print is inconsistent with bold claims featured on the front panel of product packaging.