ILLINOIS STATE BAR ASSOCIATION

DECEMBER 2020 VOL. 1 NO. 2

Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

Nothing-but-Cheese and the Uncommon Sense of the Reasonable Consumer: *Bell et al. v. Publix et al.*

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"[A]n otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue."[1]

Constructing legal definitions of "reasonableness" is an impossible practice. Such a determination requires factfinders to reduce the unquantifiable to components one might weigh and measure as if the result is a mathematical certainty. Law was once viewed "as a completed formal landscape graced with springs of wisdom that judges needed only to discover," with the admirable goal of "enhancing the stability or predictability of the law."[2] Yet courts have long abandoned this notion in light of the view that the "judicial role of boundary finding requires the exercise of reason—a reason now conceived, not as an embodying universal moral principles and knowledge of the public good, but strictly as the application of objective methodology to the task of defining the scope of legal right."[3] The philosophy of legal realism posits that jurists are usually subject to a "half-conscious battle on the question of legislative policy," a question central to the determination of the reasonable food consumer.[4]

Legal realists are also famously known for asserting—often in jest—"that a judge's decision could be traced to what he ate for breakfast."[5] In the context of food law cases, this may be true in a literal sense. When judges solely rely upon their own personal judgment to determine whether a consumer has acted in accordance with the elusive, to-date-un-extrapolated reasonable consumer standard, they are necessarily relying upon their own independent knowledge and understanding of food. Just as "legal realism primarily sought to prove the existence of the 'socially constructed character of frames of reference, categories of thought, and legitimating concepts,'"[6] it is these frames of reference and categories of thought that are prominently revealed in judicial decisions in food law cases resolved by individual judges rather than juries of six people or more.

The "reasonable consumer," as envisioned some, is an "erudite reader of labels, tipped off by the accent grave on the word 'créme,' and armed perhaps with several dictionaries, a bit like a federal judge reading a statute."[7] The Seventh Circuit recently came to a far different conclusion, reversing an Illinois district court for its dismissal[8] of Plaintiffs' consumer protection claims over numerous manufacturers' use of labels advertising parmesan cheese products as "100% Grated Parmesan Cheese."[9] Plaintiffs alleged that the product's use of "between four and nine percent added cellulose powder and potassium sorbate" (to prevent caking and molding) renders the use of the "100%" claim deceptive under state consumer-protection laws.[10]

Plaintiffs' claims all concerned "Little-FTC Acts," designed to "broadly prohibit unfair business practices, including deceptive advertising."[11] These state consumer protection statutes "'require plaintiffs to prove that the relevant labels are likely to deceive reasonable consumers,'" which "'requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[12]

Defendants set forth several theories that the Seventh Circuit did not find persuasive: (1) that any ambiguity as to the "100% Grated Parmesan Cheese" claim could easily be dispelled upon a

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look at the ingredient/back label; (2) that common sense defeats the Plaintiffs' claims because the reasonable consumer is "well aware that pure dairy products spoil, grow blue . . . or otherwise become inedible if left unrefrigerated for an extended period of time"; and (3) that Plaintiffs' claims were federally pre-empted[13] by the Food, Drug, and Cosmetic Act ("FDCA") labeling requirements and the FDA's power to set forth the standard of identity for "grated cheese."[14]

The district court originally concluded, following a string of cases in other jurisdictions, that because the ingredient label on the back of the package "would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context can cure the ambiguity and defeat the claim."[15] The Seventh Circuit, however, disputed this logic and joined three other circuits "in holding that an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers. Many reasonable consumers do not instinctively parse every front label or read every back label before placing groceries in their carts."[16]

The question of what a reasonable consumer can or should know and contemplate when purchasing food products prompted the court to propose the use of an altered version of the reasonable consumer standard. The Seventh Circuit recognized that "Lots of advertising is aimed at creating positive impressions in buyers' minds, either explicitly or more subtly by implication and indirection. And lots of advertising and labeling is ambiguous. Deceptive advertisements often intentionally use ambiguity to mislead consumers while maintaining some level of deniability about the intended meaning."[17] Drawing parallels to debt collection, trademark, and false advertising, the opinion compared the relative forgiveness with which the law treats the average consumer in those contexts to the much more stringent standard held against the reasonable food consumer.[18] Under the Lanham Act, courts factor in the "likelihood of confusion test,"[19] and further recognize that "even literally true claims may deceive, that implied messages in advertising may deceive, and that what matters is how consumers actually understand the advertising."[20] Similarly, consumer ambiguity under the Fair Debt Collection Practice Acts likens the standard to which shoppers are held to the "unsophisticated consumer."[21] Though the court did not articulate the content or definition of the reasonable food consumer standard, it did call into question the existing analysis and held "[p]laintiffs are entitled to present evidence on how consumers actually understand these labels."[22]

Judge Kanne's concurring opinion expounded upon the perplexities underlying the present usage of the reasonable consumer standard and its stark departure from the reality of consumer behavior:

> [The standard] is impractical because, while lawyers and judges can find ambiguity in just about anything, that's not what we expect of the reasonable consumer . . . That, at bottom, is the flaw in the district court's rule: a court could decide as *a matter of law* that a statement is not deceptive even where it could deceive reasonable consumers *as a matter of fact*. . . . Just as important, however, is the corollary to this principle: that if a plaintiff's interpretation of a challenged statement is *not* facially illogical, implausible, or fanciful, then a court may *not* conclude that it is nondeceptive as a matter of law. The "determination of likelihood of deception 'is an impressionistic one more closely akin to finding

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of fact than a conclusion of law."[23]

The concurring opinion reasoned that reversal was especially warranted because of the district court's erroneous analysis of ambiguity's relation to the reasonable consumer standard.[24] The district court "did not conclude that Plaintiffs' interpretation of the '100% Grated Parmesan Cheese' statement is illogical, implausible, or fanciful," but rather "necessarily found the opposite: that reasonable consumers may interpret the statement multiple, plausible ways," which the concurrence noted was the very definition of ambiguity.[25]

In sum, the court's rejection of a rule imposing on the average consumer an obligation to legalistically parse prominent front-label claims by examining the fine print on the back provides some clarity on what claims may survive a motion to dismiss and aligns the Seventh Circuit with similar rulings in the First, Second and Ninth Circuits.[26] From a practical perspective in advising clients on labeling claims, however, we are still a long way from determining with any sort of precision the reasonable consumer, or in the food context, the reasonable eater. And therein lies the challenge, as manufacturers and retailers seek to distinguish and promote their products in a competitive marketplace without stepping across the elusive reasonable consumer line. ■

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1. *Bell et al. v. Publix et al.*, nos. 19-2581 & 19-2741 (7th Cir. 2020), at 12.
2. G. Edward White, The American Judicial Tradition 301–02 (New York: Oxford University Press, 1976).
3. Elizabeth Mensch, "The History of Mainstream Legal Thought," in *The Politics of Law: A Progressive Critique*, 28–29 (New York: Basic Books, 1998).
4. *Id.* at 34.
5. Morton J. Horwitz, The Transformation of American Law 188 (New York: Oxford University Press, 1992).
6. *Id.* at 182.
7. *Bell et al.*, at 8.
8. Applying the Rule 12(b)(6) standard. The standard under the dismissal rule is that plaintiffs' claims must be "plausible," as opposed to a demonstration by the nonmovant, during summary judgment proceedings, that there is no "genuine issue of material fact." *Id.* at 2, 19.
9. *Id.*
10. *Id.*
11. *Id.* at 4.
12. *Id.*
13. *Id.* "First, [Defendants] point out that the federal Food, Drug, and Cosmetic Act (FDCA) and its accompanying regulations expressly bar states from imposing labeling requirements that are not "identical" to the FDCA's, and they contend plaintiffs seek to use state law to impose different labels on them. Second, defendants say the FDA approved Kraft's use of the "100% Grated Parmesan Cheese" label in 1999 and 2000, thus rendering the plaintiffs' challenge both conflict-preempted and barred by state-law safe harbor provisions. These arguments do not persuade us. The first reads the FDCA's express preemption provision too broadly. The second fails at the first step because defendants have not shown that the FDA approved Kraft's "100%" labeling as nondeceptive." *Id.* at 22.
14. *Id.* "The defense theory seems to be that if the FDA defines 'grated cheese' in a way that allows added cellulose and potassium sorbate, their products with those additives thus qualify as '100% grated cheese.' We have no quarrel with defendants' ability to call their products 'grated cheese.' The problem lies in the '100%,' especially since the pleadings provide reason to think that consumers understand '100% grated cheese' to mean that the cheese does not have the additives. And how could a manufacturer of grated cheese without those additives differentiate its product from these defendants' products if, *pace* George Orwell, the courts said the products with the additives could lawfully claim to be '100% cheese'?" *Id.* at 19.
15. *Id.* at 5.
16. *Id.* at 7.
17. *Id.* at 9.
18. *Id.* at 12–16.
19. Based on real market conditions and real consumers' behavior. *Id.* at 12.
20. *Id.* at 13.
21. *Id.* at 16.
22. This evidence, the court noted, might include consumer surveys or affidavits from linguists to prove deception. *Id.* at 17.
23. *Id.* at 44.
24. The binding opinion noted the same, stating "Under the district court's ambiguity rule, as a matter of law, a front label cannot be deceptive if there is any way to read it that accurately aligned with the back label. And this would be so even if the label actually deceived most consumers, and even if it had been carefully designed to deceive them." *Id.* at 8.
25. *Id.* at 44.
26. See *Domont v. Reily Foods Co.*, 934 F.3d 35 (1st Cir. 2019); *Mantikas v. Kellog Co.*, 910 F.3d 633 (2d Cir. 2018); *Willliams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008).