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Is Application of the Reasonable Consumer Standard at the Motion to Dismiss Stage Reasonable?
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Is Application of the Reasonable Consumer Standard at the Motion to Dismiss Stage Reasonable?

BY CARLOS F. RAMIREZ

For several years now, courts have become more willing to dismiss consumer fraud class actions at the motion to dismiss stage relying on the "reasonable consumer" standard. Even the Ninth Circuit Court of Appeals has departed from its long-standing and widely-accepted holding in *Williams v. Gerber Products Co.*,[1] where it refused to apply the standard at the motion to dismiss stage. This practice should stop because it deprives a plaintiff of her constitutional right to a trial by jury. It also undermines the legislative process that enacted the class action mechanism to address conduct that could not be checked via traditional litigation due to the very small amounts in controversy.

This article will discuss the many problems surrounding the application of the reasonable consumer standard by courts armed only with a pre-discovery complaint and certain suppositions about how people should/should not behave when making consumer purchases. It will also argue that the better approach is to allow for the legal process to move forward as intended by our founding fathers and elected officials, as the Seventh Circuit Court of Appeals did in *Bell v. Publix.*[2]

Problems With Applying the Reasonable Consumer Standard at the Motion to Dismiss Stage

Application of the reasonable consumer standard at the motion to dismiss stage is fraught with difficulties that can, as demonstrated below, lead to inconsistent results in cases involving similar facts. First, the record before the court at the time of the determination is a skeletal, pre-discovery pleading versus the robust record of evidence that would likely be presented at trial. In addition, the determination is usually being made by a lone jurist versus a jury, whose jurors have been hand-picked by the parties in the action.

Second, application of the standard tends to preclude courts from accepting the complaint's allegations as true and construing the pleadings in the light most favorable to the non-moving party because, by dismissing the complaint, the court is effectively holding that the plaintiff is being untruthful about being the reasonable consumer of the product and about having been deceived. Moreover, all of this is being done without ever considering any testimony from the plaintiff concerning her experience when she entered into the alleged deceptive transaction, as well as her educational background, experiences with purchasing the product (or similar products) and/or any of the other life experiences that are likely to be probative of the way she interpreted the alleged deceptive representations.

Third, courts are also having to make numerous determinations of fact, which perhaps it may not be equipped to do, about how a group of consumers interpreted (or should have interpreted) numerous pieces of information at the point of sale while standing in a grocery store aisle. Again, this is done outside of a trial setting where the plaintiff would provide testimony and would be subject to cross-examination by the food manufacturer's counsel about her conduct's reasonableness. Fourth, the high level of education of federal court judges, their unique life experiences, and their experience with, or lack thereof, the offending products, may leave the consumer wondering whether the court is even capable of interpreting the allegedly

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deceptive representations in the same way that the group of aggrieved consumers interpreted them.

Finally, as shown in the next couple of case comparisons, application of the reasonable consumer standard tends to result in inconsistent results, thereby failing to provide manufacturers (as well as any potential plaintiffs) with guidance on what is/is not deceptive labeling. For example, in *Brodsky v. Aldi Inc.*,[3] the plaintiffs alleged that they purchased two cannisters of coffee that represented on their label that they made "up to" 210 6oz. cups of coffee when made with "one tablespoon" of ground coffee beans. When measured out using one tablespoon per serving, the plaintiffs found that one cannister made only 137 6 oz. cups (a whopping 35% deficit) and the other one only 173 (an 18% deficit). Describing what the "reasonable consumer" would and would not be deceived by solely on the pleadings, the court disregarded the complaint's allegations that one cannister made 35% less coffee cups than the advertised "up to" servings amount and, instead, noted that the plaintiffs had not complained that the advertised weight was incorrect. It also relied on cases outside of the Seventh Circuit that had found that "up to" representations do not deceive or confuse consumers.

The court made other findings that perhaps should have been left to a jury. For example, it found that the label did not promise that the maximum yield would be achieved "by following the instructions for a single serving" (but does a 35% deficit seem reasonable?). It also agreed with the defendants that people intentionally brew coffee at different strengths (but did the plaintiffs not measure the ground coffee using the 1 tablespoon recommendation on the label?). Although a finder of fact would probably agree with the defendants that requiring every cannister to make exactly 210 cups each time is unreasonable, it could find that a cannister that makes between 18% and 35% less coffee than advertised is unacceptable. Accordingly, it could find that such an "up to" representation is, in fact, false or deceptive.

Conversely, in a case that alleged facts virtually identical to *Brodsky*, the court reached an opposite conclusion. In *In re: Folgers Coffee, Marketing Litigation,*[4] the plaintiffs alleged that Folgers coffee cannisters, which provided an "up to" representation like in *Brodsky*, were routinely underfilled, including up to a 30% deficit at times. In sustaining the complaint, the court found that a reasonable consumer would "consider" the quantity of servings that a product will yield to be important in making his purchase decision. The court also noted that many courts have concluded that a question of fact arises when there is a significant disparity between the advertised "up to" amount and the quantity of servings that the product is able to produce following the manufacturer's directions. Thus, the court ruled that while it would probably be unreasonable to expect to brew the "up to" number of servings from every cannister, a huge disparity between the actual number of servings and the amount listed on the cannister could lead to deception. The huge disparity noted by the court here is 30%, which is lower than the 35% disparity in the now dismissed *Brodsky* case.

Another set of cases further illustrates the inconsistent results that can arise from application of the reasonable consumer standard at the motion to dismiss stage. In *Corker v. Costco Wholesale Corp.*,[5] the court sustained a complaint that charged the defendants with selling regular coffee as "Kona" coffee; a highly-prized and expensive coffee that can only be made from beans grown exclusively in the Kona District of the Big Island of Hawaii. The court found that, the plaintiffs having alleged that the defendant retailers had sold coffee bearing a false designation of origin, the defendants were in violation of Section 43(a) of the Lanham Act, which prohibited such representations.

Conversely, in *Moore v. Trader Joe's*

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Company,[6] the Ninth Circuit affirmed the dismissal of a complaint that charged the defendant with selling a product labeled as "100% New Zealand Manuka Honey," another highly-prized and expensive food item that, as the name clearly states, is imported from New Zealand; however, the honey contained a high percentage of other types of (non-Manuka) honeys. In doing so, the court first noted, without hearing testimony from any of the aggrieved consumers of the product, that there was some ambiguity in the statement "100% New Zealand Manuka." It then implied that the plaintiffs' interpretation of the statement was "unreasonable" and "fanciful." Invoking "common sense," the court then noted that the plaintiffs unreasonably believed the impossible; that is, consumers should know it is impossible to control where bees forage, or to create a honey 100% derived from one flower or plant. Again, this was done without hearing any expert testimony on the subject of bee foraging or the honey manufacturing process. Finally, the court noted that the reasonable consumer would have to know that the price paid for the honey ($13.99) was too low for it to only contain Manuka honey (but would the consumer know the exact price of Manuka honey per ounce and/or whether Trader Joe's was able to sell it at this price because, perhaps, it got a great deal from the honey producers due to its buying power?).

The Seventh Circuit Approach: *Bell v. Publix*

An approach that may provide more consistent results at the motion to dismiss stage is the one implemented by the Seventh Circuit in *Bell v. Publix*. This approach also protects a plaintiffs' constitutional right to a trial by jury and safeguards those consumer protections enacted by our federal and state legislatures.

In *Bell*, the plaintiffs alleged that the representation "100% Grated Parmesan Cheese" was false because the product also contained cellulose and potassium sorbate to help preserve the product. The district court dismissed the case holding, as a matter of law, that the reasonable consumer could easily dispel any ambiguity by reading the ingredient list. Imploring "common sense," the district court also noted that the reasonable consumer had to know that the products contained some type of preservative because they did not have to be refrigerated.

The district court also rejected reports filed by plaintiffs from two linguistic professors who opined on how the label would be read by the reasonable consumer. In rejecting the experts' opinions, the court found that the reasonable consumer does not approach or interpret language in the manner of a linguistic professor. And this is exactly the point, the best evidence on how the reasonable consumer behaves is the reasonable consumer of the product, which the court has to assume at the motion to dismiss stage is the aggrieved plaintiff.

In reversing the lower court's dismissal, the Seventh Circuit held that the defendants could not disclaim prominent, misleading front-label claims by qualifying them in the ingredient list on the back of the packaging. The court felt that to hold otherwise could allow for food manufacturers to purposely label foods in an ambiguous (and misleading way) only to clear it up somewhere in the back label in order to escape liability. The court also disagreed with the lower court's position that "common sense" dictated that the plaintiffs' interpretation of the product's label was unreasonable, as pure grated parmesan cheese can be shelf-stable for a long time without refrigeration. Finally, and even more important, the Seventh Circuit concluded that reasonable consumers understand defendants' "100% Grated Parmesan Cheese" representation is a "question of fact" that cannot be resolved on the pleadings.

The Second Circuit Court of Appeals took a similar approach when urged by the defendant to apply the reasonable consumer standard at the motion to dismiss stage. In *Mantikas v. Kellogg Company*,[7] the plaintiffs alleged that Cheez-It labels that stated "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN," both in large print on the front label, were deceptive because "enriched white flour" was the predominant ingredient, with whole wheat flour as either the second or third ingredient. The trial court dismissed the complaint, reasoning that the labels would not mislead a reasonable consumer into believing the crackers were predominantly "whole grain" because the boxes specified the grams per serving, which the reasonable consumer could use to calculate the ratio of whole grain wheat versus enriched white flour.

In reversing the district court's dismissal, the Second Circuit held 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. If anything, reasonable consumers should expect that the ingredient list contains more detailed information about the product that confirms the representations prominently made on the front label.

A year after the *Mantikas* decision was handed down, the First Circuit Court of Appeals weighed in on the subject in *Dumont v. Reily Foods Co.*[8] There, the plaintiff claimed that the New England Coffee Co. mislabeled their "Hazelnut Crème" coffee because it did not contain real hazelnuts. The lower court dismissed the case holding that the plaintiff should have known that the product did not contain real hazelnuts because that ingredient was not listed in the ingredient list, meaning that no consumer should assume that it contains that ingredient despite being prominent listed on the front label. The court also relied on the fact that the product's label disclosed that it contained artificial flavoring.

Reversing the lower court, the First Circuit held that perhaps a reasonable consumer would find in the product's name, a sufficient assurance of the product's ingredients so that he need not have to confirm this fact in disclaimers disclosed in fine print contained on another panel of the product's packaging. The court also rejected the lower court's reliance on the product's use of the French word crème,[9] which according to it signaled that the term "hazelnut" in the product's name referred to its flavor and not that it contained hazelnuts, since not everyone knows the meaning of that word. Importantly, the court provided the following instructive analysis about the problem with applying the reasonable consumer standard before trial:

> Our dissenting colleague envisions a more erudite reader of labels, tipped off by the accent grave on the word "crème," and armed perhaps with several dictionaries, a bit like a federal judge reading a statute. We are less confident

> that "common parlance" would exhibit such linguistic precision. Indeed, we confess that one of us thought "crème" was a fancy word for cream, with Hazelnut Crème being akin, for example, to hazelnut butter, a product often found in another aisle of the supermarket.
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> * * *
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> None of this is to say that our dissenting colleague's reading is by any means unreasonable. To the contrary, we ourselves would likely land upon that reading were we in the grocery aisle with some time to peruse the package. ***That being said, we think it best that six jurors, rather than three judges, decide on a full record whether the challenged label "has the capacity to mislead" reasonably acting, hazelnut loving consumers.***[10]

Thus, as noted by the court and argued elsewhere in this article, the level of purchasing acumen attributable to the reasonable consumer standing in a grocery store aisle, who may not have all of the information necessary to understand an ambiguous label (as well as any qualifiers disclosed elsewhere in small print) and process that information correctly to clear up any potential deception by the representations prominently displayed on the front label, cannot be compared to that of a judge sitting in chambers with more time and resources to decipher a potentially misleading label. The decision-making process at the point of sale is further complicated by the fact that the product's manufacturer may be a household name the consumer has grown to trust and/or he is rushing in order to make it in time to pick up his daughter from school.

Recent Application of the Reasonable Consumer Standard by an Illinois U.S. District Court

In a recent dismissal of a complaint by the U.S. District Court for the Northern District of Illinois applying the reasonable consumer standard, *Chiappetta v. Kellogg Sales Co.*,[11] the plaintiff alleged that Pop-Tarts' packaging, which exhibited on its front label the word "Strawberry," a picture of a strawberry and "oozing" red filling within the pastries, led consumers to believe that strawberry is the only fruit in the filling, while in reality it also contains dried pears and apples, and a food dye known as Red No. 40.

Despite the above allegations, which should have been accepted as true and construed in a light most favorable to the plaintiff, the court dismissed the complaint on the basis that no reasonable consumer could conclude that the filling contains a given amount of strawberries based on the package's images and its use of the term strawberry. In finding that the plaintiff's interpretation of the label was unreasonable, the court noted that the front of the product's packaging did not state or suggest anything about the amount of strawberries in the product's filling or guarantee that the filling contained only strawberries. The court also noted that the plaintiff conceded that the filling contained "some" strawberries (but would it be unreasonable for a jury to interpret the above-described label as implying that the majority of the filling is composed of strawberry, even if it contained other fruits in smaller amounts?).

The *Chiappetta* court also made several findings of fact without the benefit of the testimony of the person alleged to be the reasonable consumer: the plaintiff. For example, the court made assumptions concerning how the plaintiff processed information based solely on the pleadings. The court also made several findings of fact about how the plaintiff "should have" interpreted the product's label, and that the label in question provided all of the information it needed to not to render it misleading, both without the benefit of any expert testimony on these subjects.

Conclusion

As demonstrated above, the reasonable consumer standard should not be applied at the motion to dismiss stage due to the problems that tend to arise when doing so. First, it unfairly disregards those long-standing legal principles that provide for the fair evaluation of complaints alleging consumer fraud claims (i.e., construing the allegations in the light most favorable to plaintiff, accepting the allegations as true, etc.) and seems to contravene consumer class action statutes passed by the people's elected representatives to address unlawful conduct that would otherwise go unchecked. Second, it infringes on a plaintiff's constitutional right to a trial by jury. Third, in applying the standard, courts are having to make factual determinations and arrive at conclusions about, among other things, the way consumers behave, the alleged deceptive transaction and the products' labeling, without ever considering all of the information necessary to do so, which can only be obtained after a trial on the merits. Finally, application of the standard at the motion to dismiss is creating way too many inconsistent results without providing any real guidance to food and beverage manufacturers that may help them avoid liability in connection with their products' advertising and labeling. For these reasons, courts should follow the lead of the First, Second and Seventh Circuit Courts of Appeal when addressing the reasonable consumer defense and refrain from applying the standard at the motion to dismiss stage.■

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1. *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008).
2. *Bell v. Publix Super Markets Inc.*, 982 F.3d 468 (7th Cir. 2020).
3. *Brodsky v. Aldi Inc.*, No. 20-C-7632 (N.D. Ill. Sep. 28, 2021).
4. *In re Folgers Coffee Marketing Litig.*, No. 21-2984-MD-W-BP (WD. Mo. Dec. 28, 2021)
5. *Corker v. Costco Wholesale* Corporation, No. C19-0290RSL (W.D. Wash. Nov. 12, 2019).
6. *Moore v. Trader Joe's Company,* 4 F.4th 874 (9th Cir. 2021).
7. *Mantikas v. Kellogg Company*, 910 F.3d 633 (2d Cir. 2018).
8. *Dumont v. Reily Foods Co.*, 934 F.3d 35 (2019).
9. "'Crème' has distinct meanings, both in the dictionary and in common parlance: it is generally defined as a "cream or cream sauce as used in cookery" or "a sweet liqueur," with the latter "usu[ually] used with the flavor specified." Webster's Third New International Dictionary 534 (1993); *see also* Crème, Oxford English Dictionary, available at https://www.oed.com/view/Entry/44191 (defining "crème" as (a) "[a] cream or custard" or (b) "[a] name for various syrupy liqueurs")." *Id*. at 45 (Lynch, C.J., dissenting)(arguing that these definitions support the defendant's position that "crème," along with the word "hazelnut" and the representation "100% Arabica Coffee," are used to describe the coffee's flavor only and do not imply that there are real hazelnuts in the coffee).
10. *Id.* at 40-41 (emphasis added).
11. *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545 (N.D. Ill. Mar. 1, 2022).