

# Food for Thought: Does Cheez-It Decision Establish a Concerning Precedent for Packaged-Food Makers?

December 11, 2018

*Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018)

In its newest opinion addressing class action claims related to allegedly misleading labels, the Second Circuit Court of Appeals vacated a decision from the Eastern District of New York granting the defendant's motion to dismiss — effectively validating the claims for deceptive advertising. The plaintiffs, Kristen Mantikas, Kristin Burns, and Linda Castle, alleged that defendant Kellogg Co., maker of Cheez-It crackers, falsely and deceptively labeled its product as "whole grain" or "made with whole grain" despite the product's primary grain ingredient being enriched white flour, not whole grain. The plaintiffs asserted claims for false advertising and deceptive business practices in violation of New York and California consumer protection laws, as well as unjust enrichment under Michigan law. The plaintiffs sought monetary damages and declaratory and injunctive relief on behalf of all putative class members residing in the United States and its territories who purchased the product since May 2010.

The district court granted the defendant's motion to dismiss for failure to state a claim, holding that the whole grain labels on the front of the package would not mislead a reasonable consumer. Specifically, the district court held that the statements "made with whole grain" and "whole grain" on the label of the product were not misleading because both statements were factually accurate. In fact, the district court stated that the ingredient list clearly showed whole grain flour as the second or third ingredient, and the nutrition facts label showed how much of the total grain in the product was whole grain versus enriched white flour. And, because the district court held that the plaintiffs failed to show the packaging was misleading, they similarly could not demonstrate injury and therefore lacked standing to pursue injunctive relief. The court also dismissed, and the plaintiffs did not appeal, plaintiffs' claims for unjust enrichment pursuant to Michigan law for lack of standing. The

district court did not consider the defendant's argument that the plaintiffs' claims were preempted by federal law, dismissing all counts of the complaint on other grounds.

The Second Circuit disagreed and rejected the lower court's reasoning, stating that the court misapplied the principle that an allegedly misleading statement must be viewed "in light of its context on the product label or advertisement as a whole." Rather, the district court concluded that the disclosures on the side of the box did not render the plaintiffs' allegations of deception implausible. Here, the plaintiffs alleged that the communications on the front of the package were misleading "because they communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, whole grain." And, although the disclosure on the front of the package accurately set forth both the presence of whole grain as an ingredient in the product and the amount of whole grain in the product, it was nonetheless misleading because it inaccurately implied that whole grain was the only or most predominant grain in the product. The Second Circuit held that reasonable consumers should not have to look beyond the representations on the front of the box to verify the accuracy of the claims because consumers expect that the ingredient list confirms other representations on the packaging or provides additional detail in support of the statements on the packaging.

The court rejected the defendant's argument that the plaintiffs' case was rightfully dismissed because several district courts had dismissed cases on the pleadings where consumers alleged that product labels stating a food was "made with" an ingredient misled them to believe that the stated ingredient was a major or predominant ingredient. The court held that those cases differed from the case at bar because they involved allegations of deceptive labeling that led consumers to believe that the product contained a significant quantity of a particular ingredient. Here, the plaintiffs alleged that the label was deceptive because it implied that most or all of the grain in the product was whole grain rather than enriched white flour. Furthermore, in the cases cited by the defendant, the plaintiffs alleged they were misled about the quantity of an ingredient that was obviously not the predominant ingredient. In the case at bar, the plaintiffs alleged they were misled about the prominence of whole grain as an ingredient in the product. Thus, the representations made by the defendant on the packaging would "plausibly lead a reasonable consumer to conclude that the product's grain ingredient was entirely, or at least predominantly, whole grain."

Thus, the Second Circuit held that the plaintiffs' claims were facially plausible because the plaintiffs adequately alleged factual content that allowed the court to draw the reasonable inference that the defendant was liable for the misconduct alleged. As a result, the court vacated the district court's order and remanded the case for further proceedings.

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