

## Cheez-Its Class Action Revived in “Whole” by Second Circuit

Proskauer on Advertising Law Blog on Jan 03, 2019

We recently blogged about the Second Circuit’s December 3, 2018 decision in [Jessani v. Monini](#), where, applying the reasonable consumer standard, the Court of Appeals unanimously affirmed the dismissal with prejudice of a complaint alleging that the label of an extra virgin olive oil product advertised as “truffle flavored” falsely implied that the product contained real truffles. Just over a week later, on December 11, another Second Circuit panel decided an appeal which, like *Monini*, involved the application of the reasonable consumer standard to a food product label. But this time, the Court vacated the lower court’s dismissal of the complaint. [Mantikas v. Kellogg Company, — F.3d — \(2d Cir. Dec. 11, 2018\)](#). *Mantikas* did not cite to *Monini*, and the cases are readily distinguishable.

Plaintiffs in the *Kellogg* case, on behalf of a purported class of purchasers of whole grain-flavored Cheez-Its, alleged that the product’s labelling falsely suggested that its grain content was predominantly whole grain, when in fact it was mostly enriched flour. In support of this allegation, plaintiffs pointed to the prominent words “WHOLE GRAIN” and “MADE WITH WHOLE GRAIN” on the two versions of the product label that were challenged. The district court dismissed the complaint as a matter of law, holding that the claim that the product contained whole grain was true, and no reasonable consumer would think the product’s grain content was primarily whole grain because the label disclosed the exact amount of whole grain that was in the product, as well as the amounts of the product’s other ingredients.

The Second Circuit disagreed, holding that plaintiffs had plausibly alleged that the Cheez-Its label was capable of deceiving a reasonable consumer. The conspicuous words “WHOLE GRAIN” and “MADE WITH WHOLE GRAIN” could plausibly communicate to a reasonable consumer that the product’s grain content was entirely or at least predominantly whole grain. While the front label set forth the precise amount of whole grain in the product (5 or 8 grams depending on the version of the product), it did not make clear that the product contained more enriched flour than whole grain.

Further, despite acknowledging the principle that a challenged advertisement must be considered “as a whole, including disclaimers and qualifying language,” the Second Circuit found that the ingredient list on the product’s side panel did not cure the front label’s potentially deceptive content. First, Kellogg was not helped by the side panel’s specification that a serving consisted of 29 grams because that disclosure failed to indicate the ratio of whole grain to enriched flour. Second, Kellogg argued that because enriched flour was listed as the first (and thus most predominant) ingredient on the ingredient list, whereas whole grain listed as the second or third ingredient, this would indicate to a reasonable consumer that the primary grain was enriched flour. However, the Court held that a reasonable consumer should not be expected to consult an ingredient list to correct a *contradictory* statement on the front label.

It is that last point that distinguishes *Kellogg* from *Monini*. Readers may recall that in *Monini*, one factor in the Second Circuit’s decision was that truffles were not listed as an ingredient. *Kellogg* does not hold that courts must disregard the ingredient list when analyzing the reasonable takeaway from a food label; as noted, the Court expressly recognized the longstanding principle that an advertisement must be considered as a whole. Rather, *Kellogg* reflects the principle (previously recognized by the Ninth Circuit in *Williams v. Gerber*) that an ingredient list may not be used to *contradict* a claim that is clearly made on the front label. In *Monini*, by contrast, there was no claim that the product was “made with truffles” or “flavored by truffles,” so the absence of truffles on the ingredient list was *consistent* with the front label and thus was appropriately considered when construing the label.

In sum, *Kellogg* holds that reasonable consumers are free to rely on a front label claim that is clearly expressed, and are not expected to consult a contradictory ingredient list to decipher that the front label’s message is untrue. Thus, food product sellers should carefully assess what messages their labelling conveys and should not assume that a product’s ingredient list will cure any deceptive messages communicated by the front label about the product’s composition.

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