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### Appellate Courts Issue Reasonable Consumer Defense Wins in Food Litigation Cases



The U.S. Appeals Courts for the Second and Ninth Circuits recently issued rulings reinforcing the reasonable consumer standard.

In doing so, these cases refine prior precedent and strengthen a court's ability to properly dismiss cases over labeling claims where no reasonable consumer could plausibly be misled. As the Ninth Circuit put it, "a reasonable consumer does not check [their] common sense at the door of the store." *Weiss v. Trader Joe's*, 838 F. App'x 302, 303 (9th Cir. 2021).

#### **Context Is Key**

In *Moore v. Trader Joe's Co.*, the Ninth Circuit emphasized the importance of context in evaluating what a reasonable consumer would understand. 4 F.4th 874 (9th Cir. 2021). The case involved a product labeled as "100% New Zealand Manuka Honey." The plaintiffs challenged the labeling, alleging that the pollen used to produce the honey did not come entirely from the manuka plant. The appellate court rejected the challenge. Among other things, the panel reasoned that bees, by their nature, forage across different plants to obtain pollen for honey production. The panel further noted that the price point of this honey, at about \$14 per product, was far less than a reasonable consumer would expect to pay for a jar of honey produced with a higher concentration of manuka pollen, which could be several hundred dollars. Also, reasonable consumers of manuka honey would understand that the "10+" label on the honey product is relatively low on a specific manuka honey purity scale. Taken together, the panel concluded that the labeling would not be misleading to consumers acting reasonably.

#### **Back Panel Can Resolve Ambiguity**

In *McGinity v. The Procter & Gamble Company*, 69 F.4th 1093 (9th Cir. 2023), the Ninth Circuit clarified that a reasonable consumer could address ambiguous information on a product's packaging by looking at other parts of

the labeling. *McGinity* involved a "Nature Fusion" shampoo product. The plaintiff challenged the representation, reading the product's name as a promise that the shampoo was "natural." The Ninth Circuit's opinion distinguished its prior precedent, in which it was determined that back paneling could not cure misleading representations elsewhere on the package. Here, the panel held that the representation was ambiguous—namely, that "Nature Fusion" did not promise the product would be "wholly natural," and this ambiguity could be resolved by reference to the back labeling. The panel concluded that the representation, informed by the back labeling, would make it clear to a reasonable consumer that the product contained both natural and synthetic ingredients.

Similarly, in *Hardy v. Ole Mexican Foods, Inc.*, No. 22-1805, 2023 WL 3577867 (2d Cir. May 22, 2023), the Second Circuit revisited its prior caselaw. There, the labeling of four tortilla products was challenged when it conveyed, among other things, the phrase "A Taste of Mexico," graphics similar in appearance to the Mexican flag, and a set of Spanish words. The plaintiff alleged the labeling represented the product as made in Mexico, when it was actually produced in the United States. The panel distinguished prior Second Circuit precedent, *Mantikas v. Kellogg Co.*, and rejected an interpretation of *Mantikas* that would prevent the clarification of a front-label representation with information elsewhere on the products' packaging. Moreover, the Hardy court interpreted *Mantikas* to not directly apply to representations on labels made outside of the context of representations regarding a product's nutritional content. Even if *Mantikas* did apply outside the nutrition content context, the panel concluded that the front labeling of the product made no express statement about the products' place of origin, and any ambiguity would be resolved by the clear representations on the back panel that the products were made and manufactured in the United States.

## Takeaways

The appellate decisions in *Moore*, *McGinity*, and *Hardy* demonstrate the ongoing relevance and strength of the reasonable consumer defense in consumer class actions challenging purportedly misleading representations on food labeling. Taken together, these cases refine prior precedent in the Second and Ninth Circuits and guide the lower courts' interpretation of applicable standards.

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