

You Can Believe It's Not Butter: NY Judges Dismiss "Butter" Class Actions

The Bottom Line

- Courts will look to product packaging and advertising as a whole when evaluating whether those materials can support a false advertising or deceptive trade practices claim, unless the package or advertisement includes a prominent statement or description that is unambiguously false or deceptive.
- Manufacturers, distributors and advertisers should carefully evaluate advertising and marketing claims to be sure that they are correct and not misleading, and that the packaging or advertising materials in question provide the consumer with sufficient information to understand the claims.

Two federal judges in New York City have dismissed putative consumer class actions alleging deceptive marketing in connection with snacks and baked goods. The judges held that a reasonable consumer would understand that the products' use of "butter" in their names, when viewed in context of the packaging as a whole, did not mean the products contained no other fats or oils. The courts therefore held that the plaintiffs had no claims under New York's deceptive trade practices or false advertising statutes based on the foods' containing vegetable oils or other shortening.

Background: A Half-Baked Federal Case

The two cases involved Bimbo Bakeries' "Entenmann's All Butter Loaf Cake" and Pepperidge Farm's "Golden Butter" crackers. Plaintiff Monica Boswell alleged that Bimbo's description of its cake as "All Butter" was misleading because the product also contained soybean oil and artificial flavors. Plaintiff Hawa Kamara similarly claimed that the "Golden Butter" name implied that the crackers were made "predominantly with butter," suggesting that the product contained butter – and only butter – rather than synthetic substitutes such as vegetable oil, which the crackers also contained.

The plaintiffs both claimed that the butter-related representations on the packaging were material to consumers. Kamara alleged, for example, that consumers prefer butter-based products because butter tastes better, is rich in nutrients, does not contain trans-fats, and

is less processed than vegetable oils. Each plaintiff sought to represent a class of New York consumers who had purchased the products relying on the allegedly deceptive buttery descriptions.

Both Bimbo and Pepperidge Farm moved to dismiss the complaints, arguing that Boswell and Kamara had failed to state actionable claims. Specifically, the companies argued that no reasonable consumer could interpret “All Butter” pound cake and “Golden Butter” crackers as used on the product packaging to mean that those products contained no other fats or oils.

Citing similar lists of food-related packaging precedents, the judge in each case agreed with the bakery, and dismissed the class action complaint.

Spread the Word: Context is Key

The relevant standard under New York’s deceptive practices and false advertising laws is whether the advertising or packaging would likely mislead a reasonable consumer. In making that determination, both judges explained, “context is crucial.” Thus, a court must consider the challenged materials as a whole, including any disclaimers or qualifying language.

The cases applying this standard to product packaging fall into two categories:

1. First, there are cases in which the packaging includes a prominent label that is unambiguous and misleading. In such a case, context – such as an ingredient list or nutritional facts panel – will not cure the misleading statement. For example, a box of crackers bearing a prominent label stating “WHOLE GRAIN” or “MADE WITH WHOLE GRAIN” has been held to be unambiguously deceptive where the crackers merely contain some whole grain but the primary ingredient listed is enriched white flour.
2. The second group of cases involve packaging statements that are ambiguous, *i.e.*, merely vague or suggestive. In such a case, the reasonable consumer knows that “the devil is in the details,” and understands to look for clarifying information elsewhere on the package. For example, while “100% Grated Parmesan Cheese” has been held to be ambiguous, as it could mean either that the package contains parmesan cheese and nothing else, or that the cheese contained in the package is 100% parmesan, but the product could include other non-cheese ingredients such as cellulose, a non-nutritional polymer used as filler. A reasonable consumer knows they need to look at the ingredient list on the label for clarification.

Butter, Clarified: A Reasonable Consumer’s Understanding

The courts each held that the “butter” representation at issue was ambiguous and fell into the second category of cases. Reasonable consumers know that “All Butter” cake is not literally

made of “all butter” but instead contains other ingredients such as sugar, flour, and eggs. Consumers could also interpret “All Butter” in numerous non-literal ways: the cake has no butter substitutes, or butter is the only shortening ingredient, or the *flavor* of the cake is all butter (not almond- or cinnamon-flavored butter loaf). The ingredient list, however, makes it clear that the cake contains soybean oil and other “butter substitutes.”

Similarly, “Golden Butter” is ambiguous as a description of crackers. A reasonable shopper could understand that “Golden Butter” referred to the product’s flavor, not a representation about proportions of butter and other ingredients. While the plaintiff argued that reasonable consumers would understand “Golden Butter” to mean that butter was used in the product wherever it could be used, the court found this implausible.

The Icing on the Cake

As the “butter” cases confirm, context is a critical factor in evaluating consumer false advertising claims. Statements in advertising and on packaging need to be effective, but they also need to be clear and correct. Where a statement is subject to multiple interpretations, clarifying language elsewhere in the ad or on the package is critical to make sure the consumer correctly understands the message. Even clarifying language cannot correct a representation that would be unambiguously misleading to a reasonable consumer, however. Companies should be careful not to rely too heavily on the fine print in marketing their products to consumers.

For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

David S. Greenberg

Senior Attorney

212 468 4895

dgreenberg@dglaw.com

Neal H. Klausner

Partner/Co-Chair

212 468 4992

nklausner@dglaw.com

Ina B. Scher

Partner

212 468 4937

ischer@dglaw.com