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Ninth Circuit Tells Honey Buyers to Buzz Off in "100% New Zealand Manuka Honey" Appeal

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Consumer labeling class actions are increasingly getting stung in the Ninth Circuit. In *Moore v. Trader Joe's Company*, a three-judge panel from the Ninth Circuit unanimously affirmed the dismissal of three consumers' putative class action because their challenge was "not just unreasonable or fanciful. It is implausible."

The plaintiffs swarmed over an upscale grocer's Manuka honey products, claiming the products falsely represented that they were "100% New Zealand Manuka Honey" and "New Zealand Manuka Honey." The plaintiffs mistook these labels to mean the products contained honey that is 100% derived from Manuka flower nectar, when testing allegedly showed that only between 57.3% and 62.6% of the honey came from Manuka flower nectar. Because Manuka honey purportedly provides antibacterial properties and certain health benefits, the plaintiffs reasoned they paid a premium for the false belief they were getting a pure 100% Manuka nectar honey product.

The Ninth Circuit, however, did not find these allegations as sweet. Even observing that there was "some ambiguity" in what "100% New Zealand Manuka Honey" means, the Ninth Circuit still found that no consumer "of any level of sophistication" could reasonably interpret the labels as the plaintiffs asserted. Reasonable consumers, noted the Ninth Circuit, must take into account all the information available to them—including context and information that is not on the physical label.

That information would quickly disabuse reasonable consumers of the plaintiffs' "unreasonable or fanciful" interpretation that the defendant's products were 100% purely derived from Manuka flower nectar. First, common sense made clear that the plaintiffs unreasonably believed the impossible. Reasonable consumers would know it is impossible to control where bees forage or to create a honey 100% derived from one flower or plant. Second, the honey's comparatively low cost would have clued in reasonable consumers that the defendant's honey products contain lower concentrations of Manuka flower nectar. Even the complaint conceded that consumers know that Manuka concentrations vary considerably from product to product, and the Ninth Circuit observed that reasonable consumers would not credit a "100%" label to a product costing only $13.99. Third, the Ninth Circuit observed that a Manuka honey grade on the front label would put reasonable consumers on notice of "*something*" about the product, and consumers with even a cursory knowledge of the Manuka honey grades would know that the honey was not made from 100% pure Manuka nectar.

Finally, the Ninth Circuit also found that the ingredients list—which identified "Manuka Honey" as its lone ingredient—was not misleading as a matter of law. Under the Food and Drug Administration's honey guidelines, honey may be labeled with the plant or blossom of the chief floral source of the honey. The Ninth Circuit noted that in this case no other additive or product is present in the honey and—as the plaintiffs' testing concedes—the chief floral source is Manuka flower nectar. In other words, to the Ninth Circuit there was not even an affirmative misrepresentation that could mislead reasonable consumers; the ingredients list was literally true.

Key Takeaways

When reading or relying on product labels, consumers are expected to exercise their common sense with the information that is available to them. Just like the Ninth Circuit considered information readily available to consumers and the context in which that information was provided, litigants should be equally mindful of all available information on and surrounding a label. Consumers' willful disregard for important words on a label, contextual clues, or even their own common sense will significantly undermine a claim of deception.

Both the Ninth and Seventh Circuits appear to agree that "deceptive advertising claims should take into account all the information available to consumers and the context in which that information is provided and used." But the Seventh Circuit found that a label "100% Grated Parmesan Cheese" *was* misleading, so why not "100% New Zealand Manuka Honey"? Because the Seventh Circuit observed that there, the defendant added non-cheese ingredients and that reasonable consumers would expect a product so labeled to contain only cheese. In contrast, the Ninth Circuit remarked that kind of conduct was absent. Bees make the honey, the defendant's product was always pure honey, and consumers bring their reasonable experience and good common sense with them into the grocery store.

Appeals to "common sense" have doomed many a summary judgment motion, but it is playing an increasingly central role in the reasonable consumer standard. The continuing wave of flavoring and ingredients suits continues to push attenuated, legalistic claims of consumer deception. In response, courts at the district and appellate levels are growing more willing to find that labeling challenges do not pass the reasonable-consumer test. In fact, the Ninth Circuit notably did *not* reach the defendant's preemption argument and affirmed only on reasonable-consumer grounds, which may signal an increased willingness to police food and beverage labeling suits.

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