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Is the "Food Court" Closing?

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For years the United States District Court for the Northern District of California has been known as the "Food Court." It acquired the name because both plaintiffs and defendants viewed it as pro-plaintiff in class action food product false advertising cases. This led to a disproportionate number of those cases being filed there. The decision in *Strumhauf v. Starbucks Corp.*, 2018 WL 306715 (N.D. Cal. Jan. 5, 2018) is the most recent of a number of cases indicating that the "Food Court" is closing for many food claim class actions.

The Narrowing of the *Gerber* Decision

The development of the "Food Court" has been attributed to the 2008 decision in *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008). The plaintiffs in *Gerber* alleged various claims that packaging of Gerber's Fruit Juice Snacks product for children was deceptive. This included depicting a variety of different fruits next to the words "Fruit-Juice," when the product only contained, as stated on its ingredient list, white grape juice. The district court dismissed the action holding no reasonable consumer could be deceived. The Ninth Circuit described the fruit depictions as "potentially suggesting (falsely)" those fruits were in the product and that the claim "specifically designed to help toddlers grow up strong and healthy" added to the potential deception. It went on to baldly state that reasonable consumers should not be expected to look at the ingredient list on the side of the box and reversed. There was no discussion of whether it would be reasonable, for consumer parents, particularly in this age of allergy awareness, to review the ingredient list before buying the product for their children. Recent decisions reflect a narrowing interpretation of *Gerber* allowing a more rigorous evaluation of who constitutes a reasonable consumer and whether the alleged deception is plausible.

In *Workman v. Plum Inc.*, 141 F. Supp. 3d 1032 (N.D. Cal. 2015), the plaintiff alleged that the pictures of different fruit on pureed fruit snack bar packages misrepresented the proportion of those fruits in the bars. After noting that *Gerber* had been decided before the decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which held a "claim for relief must be plausible on its face," the court held that "the plaintiff has not met *Iqbal's* plausibility requirement," and dismissed stating:

> a reasonable consumer would simply not ... assume that the size of the items pictured [on the front of a package] directly correlated with their predominance [in the product] ... Every reasonable shopper knows and distinguish the details ... any potential ambiguity could be resolved by the back panel of the products.

141 F. Supp. 3d at 1035. The results of a recent survey of similar cases in California and elsewhere were relied upon in *In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig.*, 275 F. Supp. 3d 910 (N.D. Ill. 2017). The plaintiff alleged that "100% Grated Parmesan Cheese" was deceptive. The court dismissed on the ground that, while the challenged text was ambiguous, the ingredient list would eliminate the ambiguity.

Courts also have rejected claims in cases that cannot be decided by the availability of ingredient lists or similar information, applying the principle stated in *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016), that an alleged deception must be material and plausibly deceptive to a significant number of reasonable consumers.
In *Strumhauf,* plaintiffs claimed that Starbucks' latte purchasers were deceived because the latte foam reduced the amount of the liquid portion of the drink. Plaintiffs offered two consumer surveys which the court rejected for

various reasons, including one that presumed consumers considered the issue of liquid versus foam when purchasing. The court pointed out that, by definition, foam was part of a latte, *i.e.*, the foam versus liquid distinction was not relevant, and granted summary judgment because no reasonable consumer could be deceived.

The *Strumhauf* case could have been dismissed at the pleading stage based on the court's reasonable consumer conclusion. This occurred in another unsuccessful case brought against Starbucks. The plaintiff in *Forouzesh v. Starbucks Corp.*, No. CV 16-3830 PA (AGRx), 2016 WL 4443203 (C.D. Cal. 2016), alleged that ice in cold drinks deceptively shorted purchasers on the amount of the liquid drink they received. The *Forouzesh* court dismissed with prejudice because no reasonable consumer could be misled and held that "no amendment could cure the deficiencies in plaintiffs' theories of liability." Other claims dismissed as not plausible during the recent years include: *Brod v. Sioux Honey Ass'n*, 927 F. Supp. 2d 811 (N.D. Cal. 2013) (honey is not honey if pollen removed from it); *Podpeskar v. Dannon Co.,* No. 16-cv-8478 (KBF), 2017 WL 6001845 (S.D.N.Y. Dec. 3, 2017) (yogurt is not "all natural" if the milk used came from cows given GMO feed); *Ang v. Whitewave Foods Co.,* No. 3:13-cv-01953, 2013 WL 6492353 (N.D. Cal. Dec. 10, 2013) ("Soymilk" and "Almondmilk" are deceptive if the products do not contain cow's milk); *Monchouck v. Mondelēz Int'l, Inc.*, No. C 13-02148 WHA, 2013 WL 5400285 (N.D. Cal. Sept. 26, 2013) (Fig Newtons do not contain "real fruit" because the fruit filling is pureed); *Werbeil v. Pepsico, Inc.*, No. C 09-04456 SBA, 2010 WL 2673860 (N.D. Cal. July 2, 2010) (Captain Crunch's Crunch Berries are not a type of fruit).

Conclusion

The standard set forth in *Gerber* for stating a claim incorporated interpretations of the reasonable consumer and plausibility requirements which encouraged claims that are at best highly questionable. More recent decisions have brought a more common sense approach to this analysis which eliminates alleged claims of deception based on interpretations of packaging that would not occur to a truly reasonable consumer.