

The Reasonable Consumer's Understanding of "All Natural" – Legal or Factual Issue?

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In the ongoing California battle over lawsuits against food companies alleging false and misleading advertising, Plaintiffs claims are judged by the "reasonable consumer" test, in which plaintiffs must show that the public is likely to be deceived by the labeling or advertising. Defendants are trying to breathe new life into an old argument against these allegations – namely, to have the court decide as a matter of law what would be deceptive to a "reasonable consumer."

Defendants J.M. Smucker Co. (Crisco cooking oils) and Frito Lay (Tostitos, SunChips, and Fritos Bean Dip) were both unsuccessful in their argument that the court (as opposed to a jury) should determine that no reasonable consumer could interpret an "all natural" claim to mean GMO-free. In the *Parker v. Smucker* matter, Judge Samuel Conti found that "the Court cannot as a matter of law conclude ... that reasonable consumers would all understand that packaged, non-organic foods may contain bioengineered ingredients and that the only way to avoid such ingredients completely is to buy only certified organic products."

In the Frito Lay MDL, Eastern District of New York Judge Mauskopf reviewed FDA, FTC, USDA, and trade association documents to determine if there was a standard meaning of the term that the Court could rely on. Unfortunately for Defendants, FDA itself has stated that "natural" is a confusing and misleading term to consumers, triggering the Court to find that it was necessarily a factual dispute as to what a reasonable consumer believes is all natural.

In finding that the reasonable consumer's understanding of the term was necessarily a factual issue, Judge Mauskopf compared the Frito Lay case to the older cases against Kellogg and PepsiCo where the argument had been successful, e.g., that the court instead of a jury could determine what a "reasonable consumer's" understanding was. In those cases, the allegations were such that no reasonable consumer could believe the assertion because it bordered on fantasy. Which takes us back to the "froot" –the false advertising cases against PepsiCo involved "Crunchberries," and the one against Kellogg involved "Froot Loops." Plaintiffs alleged that based on the names of the cereal, they were misled to believe that there was real, nutritious fruit in it. Judge Morrison England of the U.S. District Court Eastern District of California dismissed the lawsuits, stating that "the fanciful use of a nonsensical word cannot reasonably be interpreted to imply that the Product contains or is made from actual fruit." Judge England did not allow plaintiffs to amend their complaints because it would be impossible to state a claim, and would require him "to ignore all concepts of personal responsibility and common sense. The Court has no intention of allowing that to happen."

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