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Calif. Ruling Will Help Cos. Fight Fraud-By-Implication Suits

By **Ashley Simonsen, William Stern and Megan McLaughlin** (July 2, 2020, 3:09 PM EDT)

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What you don't say may be used against you in a court of law. For almost a decade, the plaintiffs bar has been taking to heart this fractured spin on the familiar Miranda warning, working the aisles of grocery stores and shopping for purported label infractions, then suing over what the labels say.

But with the stock of supposedly offending labels dwindling, class counsel have now taken to suing over what labels don't say. These cases are vexing because what wasn't said leaves a lot of room for second-guessing. And, recently, some courts have accommodated these claims, letting them get past the pleading stage.

That may be changing. This article discusses the rise of fraud-by-implication and omission-based false advertising claims. It also discusses a recent California Court of Appeal case, Shaeffer v. Califia Farms,[1] which could provide a framework for disposing of such cases at the pleading stage.

Recent Circuit Court Fraud-by-Implication and Omission Rulings

Omissions cases have become the claim du jour in false advertising actions. For class counsel, they present a fissure waiting to be pried open. For defendants, they are a line not to be crossed, in part because the list of unsaid statements is bottomless, limited only by lawyers' imaginations.

In food labeling cases, omission claims typically allege that various label statements, albeit truthful, are nevertheless actionable, because the manufacturer failed to disclose other supposedly material facts, e.g., that the product contains trace but otherwise harmless amounts of glyphosates,[2] or that an ingredient (e.g., wheat or corn) is derived from genetically modified organisms, or GMOs.

In the latter case, the U.S. Court of Appeal for the First Circuit just held that a consumer plausibly alleged that the term "natural" on label of cooking oil could mislead a reasonable consumer into thinking the product was GMO-free.[3] If that claim is plausible, there is potentially no limit on what else the word "natural" might imply.

In the former instance, the U.S. Court of Appeals for the Eleventh Circuit just affirmed dismissal of an

omission claim against the manufacturer of Cheerios for failure to disclose trace amounts of glyphosates. However, it did so not on plausibility grounds, or for lack of merit, but rather for lack of Article III standing.

The fraud-by-implication cases are similar. Like omissions claims, the complaints typically do not allege that the label statement is untruthful. Rather, they allege that by advertising a specific product attribute or feature — e.g., "high in fiber," "low calorie," "no trans fats," "heart healthy" or "non-GMO" — the defendant has falsely implied that its competitors' products lack that virtue, or that the product has special attributes.

Implausibility

Common sense says that saying "X" on a label does not necessarily imply to a reasonable consumer an endless list of things not said, and that these cases would lend themselves to dismissal at the pleading stage. In fact, a claim that relies on implication to make it deceptive ought to be inherently nonactionable.

If the statement were truly deceptive, then by definition it should not require a two- or three-step leap of inference. In federal court, such claims are sometimes susceptible to a motion to dismiss by arguing that the complaint fails to state a claim for relief that is plausible on its face.[4]

Under this standard, a plaintiff must "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[5] The problem, however, is that many courts have not applied the plausibility filter at the pleading stage, as the U.S. Supreme Court instructed, finding instead that implied misbranding claims raise fact issues that must await summary judgment.[6]

Shaeffer v. Califia Farms

Shaeffer v. Califia Farms offers a new way of approaching these cases. It could provide a framework for disposing of such cases at the pleading stage.

The Issue in Shaeffer

As the appellate court said:
This case presents the question: Where a product label accurately states that the product has "no sugar added," is a reasonable consumer likely to view that statement as a representation that competing products do have sugar added, which, if untrue, renders the product label at issue deceptive?[7]

The Holding

Shaeffer concludes "that the answer is 'no,' and … as a matter of law." In so holding, the Shaeffer court established a framework for analyzing four types of food mislabeling cases, ranking them from the most to the least likely to deceive a reasonable consumer.[8]

The Hierarchy of Label Statements

At the most actionable end of the spectrum are affirmative and untrue statements, such as claims that a product was made in the U.S. when it was not.[9] Next are implied representations that, although

literally true, are sufficiently deceptive that "a reasonable consumer is likely to infer that representation from the labels affirmative content" — e.g., a fruit snack label with an image of four different fruits, even though the only fruit ingredient is grape juice.[10]

Third are affirmative statements about competitors' products that falsely imply superiority, for example, if the juice label in Shaeffer had read "The Only Juice with No Sugar Added." The fourth — and least compelling — are "statements a business affirmatively and truthfully makes about its product and which do not on their face mention or otherwise reference its competing products at all."

These types of statements are not actionable as a matter of law.[11] Why? First, "a reasonable consumer is unlikely to make the series of inferential leaps" necessary to be misled.[12]

Second, the court was "hesitant to adopt a theory upon which 'almost any advertisement [truthfully] extolling' a product's attributes 'would be fodder for litigation.'"[13] As the Shaeffer court colorfully put it, an airline that advertises "No Hijackers Allowed" is not implying that competing airlines allow hijackers.[14]

The court drew on other California mislabeling decisions that reached similar conclusions. For example, a green water droplet icon on a label might imply that the product is eco-friendly but not that the product is more eco-friendly than the competition.[15]

Conclusion

Shaeffer advances a legal framework that California courts must use at the pleading stage in evaluating mislabeling claims. This framework is binding only in one state — but California, after all, is where many mislabeling and false advertising class actions are filed.[16]

The decision marks a milestone in fraud-by-implication and omission cases, and adds an arrow to the quiver of food manufacturers facing such claims.

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[1] Shaeffer v. Califia Farms, 44 Cal. App. 5th 1125 (Cal. Ct. App. 2020).

[2] See e.g., Doss v. General Mills Inc., --- Fed.Appx. ---, 2020 WL 2554384 (11th Cir. May 20, 2020).

[3] See Lee v. Conagra Brands Inc., 958 F.3d 70, 79 (1st Cir. 2020).

[4] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[5] Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

[6] See, e.g., Williams v. Gerber Products Co., 552 F.3d 934, 938–40 (9th Cir. 2008).

[7] Shaeffer, 44 Cal. App. 5th at 1131.

[8] Id. at 1132.

[9] Id. at 1138.

[10] Id.

[11] Id. at 1139.

[12] The court identified three logical leaps that consumer would have to make to be deceived by products in the fourth category: (1) the statement is untrue with regard to competing products; (2) this product is therefore superior to its competition; and (3) the consumer is "likely to be deceived if the statement is true as to the comparable, competing products." Id.

[13] Id.

[14] Id.

[15] Id. at 1139 (citing Hill v. Roll Internat. Corp., 195 Cal. App. 4th 1295, 1298 (Cal. Ct. App. 2011)).

[16] See Nicole E. Negowetti, "Defining Natural Foods: The Search for a Natural Law," 26 Regent U.L.Rev. 329, 333 (2014) (recognizing that the Northern District of California is known as the "Food Court.").