

Bell v. Publix Super Mkts., Inc.

FRANCISCO CABRERA LOPEZ & MITAL PATEL*

WHY IT MADE THE LIST

Class action litigation over labeling on food products continues unabated as courts across the nation face a steady stream of cases from plaintiffs alleging that they are misled by product labels. Courts are left with the difficult task of determining whether an ambiguous label is misleading to a reasonable consumer. All courts consistently hold that claims on a product label must be analyzed in the context of the entire packaging and other contextual references, with some explicitly holding that reasonable consumers should look to the product's ingredient statement to dispel any possible ambiguities that could be identified on a food label.

The Seventh Circuit's decision in *Bell v. Publix Super Mkts., Inc.*,¹ however, has created a great deal of confusion regarding the role ingredient statements should play when assessing the reasonableness of a plaintiff's interpretation of an arguably ambiguous food label. In *Bell*, the plaintiff had contended that she was deceived into buying a cheese product because it had prominently claimed on its label that it was "100% Grated Parmesan Cheese."² The ambiguity of this claim was in whether it meant that the product was 100% parmesan cheese or that the parmesan cheese in the product was 100% pure. Reviewing the district court's finding that "100%" parmesan cheese was ambiguous and that a reasonable consumer would have clarified any such ambiguity by consulting the cheese product's ingredient statement, the Seventh Circuit reversed and held that it "joins [the First, Second, and Ninth Circuits] in holding that an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers."³

This decision marked the Seventh's Circuit rejection of what it called the "ambiguity rule," which generally posited that if a food product's front label is ambiguous, then a reasonable consumer should look to the ingredient statement on the back of the product to dispel any such ambiguity. The *Bell* court held that "an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives consumers."⁴ The court's rejection of the rule was based predominately over concerns of establishing a precedent that would validate highly deceptive food advertising on the basis that the ingredient statement could validate at least one reasonable interpretation of the label.

* Francisco Cabrera Lopez is an associate in the Trademark, Copyright and Unfair Competition Practice at Foley Hoag LLP in New York, and Mital Patel is an associate in the Intellectual Property Department at Foley Hoag LLP in New York.

¹ 982 F.3d 468, 473 (7th Cir. 2020).

² *Bell*, 982 F.3d at 474.

³ *Id.*

⁴ *Id.* at 476.

But the *Bell* court’s ruling, as many well-intentioned acts do, ended up creating distortions in false advertising jurisprudence that are as problematic as the problems it sought to prevent. The court’s rejection of the ambiguity rule was premised on a mistaken interpretation of the First, Second, and Ninth Circuit case law it relied upon for its decision. It missed a crucial factor in that case law—those cases held that an accurate ingredient list would not foreclose as a matter of law the deceptiveness of an unambiguously or clearly misleading claim on a front label, not arguably ambiguous ones. The *Bell* court expanded the rationale of those cases beyond their respective factual backgrounds and applied them to any case involving an arguably ambiguous label. Other circuits do hold that an accurate ingredient list can foreclose a finding that an ambiguous front label is misleading as a matter of law as long as there’s nothing unambiguously deceptive about the label. The *Bell* decision’s expansion of the rationale in false advertising case law relating to ambiguous labels runs against the well-established legal principle that claims on food packaging need to be viewed in the context of the entire package and other contextual references. Its ruling over what it called the ambiguity rule was not necessary to resolve the matter it had before it and resulted in distortions in applicable jurisprudence that can only serve to breathe life into otherwise spurious class action lawsuits.

DECISION AND BACKGROUND

Plaintiffs filed five consolidated class action complaints in the Northern District of Illinois against multiple defendants, described as “purveyors of grated parmesan cheese products with labels stating ‘100% Grated Parmesan Cheese’ or some variation thereof.”⁵ The complaints alleged 1) that labeling the product as “100% Grated Parmesan Cheese” was misleading because the product contained cellulose; and 2) that the ingredient list on the back of the canister was misleading because it described cellulose as an anti-caking agent when, in fact, the cellulose also acted as a simple filler.⁶

In 2018, the district court dismissed plaintiffs’ claims based on the phrase “100% Grated Parmesan Cheese.” To support their position that a reasonable consumer could believe that a “100% cheese” product could exist unrefrigerated on a supermarket shelf, plaintiffs submitted consumer survey evidence, reports from linguistic professors regarding the meaning of “100% Grated Parmesan Cheese,” and a Kraft patent stating that fully cured parmesan cheese “keeps almost indefinitely.” Regardless, the district court found this “evidence” unpersuasive and stated that “given the context provided by the ingredient lists and the products’ placement on unrefrigerated shelves, no reasonable consumer could be misled by the ‘100% Grated Parmesan Cheese’ labels into thinking that the products were 100% cheese.”⁷

Also in 2018 and 2019, the district court narrowed the scope of plaintiffs’ “anti-caking” claims.⁸ Following Parmesan II, the dispute headed to the Seventh Circuit

⁵ *In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig.*, 348 F. Supp. 3d 797, 801 (N.D. Ill. 2018) [hereinafter “Parmesan I”].

⁶ *Id.* at 802.

⁷ *Id.* at 804.

⁸ Parmesan I, *supra* note 5, at 806–18; see also *In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig.*, 393 F. Supp. 3d 745, 756–66 (N.D. Ill. 2019) [hereinafter “Parmesan II”].

Court of Appeals. On September 17, 2020, the Seventh Circuit held oral argument *Bell v. Publix Super Markets, Inc.*⁹

The Seventh Circuit resolved the appeal in the consumers' favor, holding that— notwithstanding the product's ingredient list and placement alongside other nonperishables on store shelves—their “nothing-but-cheese” interpretation of the labeling claim was not unreasonable as a matter of law. The court reasoned that “an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers.”¹⁰ The Seventh Circuit refused to endorse the “ambiguity rule.” The panel claimed that “[u]nder the district court's [approach], as a matter of law, a front label cannot be deceptive if there is any way to read it that accurately align[s] with the back label”—“even if the label actually deceived most consumers, and even if it had been carefully designed to deceive them.”

The court cited examples from other circuits in concluding that the reasonable consumer standard does not necessarily presume that consumers will examine the ingredient list on the back to dispel front label confusion, especially when purchasing “low-priced, everyday items.”¹¹ The circuit court relied on *Dumont v. Reily Foods Co.*,¹² *Mantikas v. Kellogg Co.*,¹³ and *Williams v. Gerber Products Co.*¹⁴

IMPLICATIONS AND IMPACT

The *Bell* court's ruling was based on a misinterpretation of the case law it cited and unnecessarily distorted the general principle that product label elements must be viewed within the context of the whole package and other contextual references. The rationale in *Bell* sows confusion as to what role an ingredient statement—arguably one of the most important components of every food label—should play when analyzing whether a reasonable consumer would be misled by a certain claim on the label.

However, the cases from other circuits that *Bell* relied on in making the above holding, *Mantikas v. Kellogg*, *Williams v. Gerber*, and *Dumont v. Reily Foods*, involved products that made explicit, unambiguous ingredient claims that were directly and wholly contradicted by their ingredient statements. The product in *Mantikas* was a box of crackers which displayed the ingredient claims “WHOLE GRAIN” and “Made with WHOLE GRAIN” in large bold type on the front of the box, which in reality was overwhelmingly made with enriched white flour.¹⁵ The product in *Williams* was a fruit juice primarily comprised of white grape juice from concentrate despite having a label with the words “Fruit Juice” prominently juxtaposed with images of oranges, peaches, strawberries, and cherries.¹⁶ The product in *Dumont* involved a coffee product labeled “Hazelnut Crème,” which actually contained no

⁹ 982 F.3d 468 (7th Cir. 2020).

¹⁰ *Id.* at 476. Nor did the court find compelling the district court's determination that “common sense” would solve this problem given the non-refrigerated placement of the product in stores. And finally, the court rejected the manufacturers' argument that the buyers' state law claims were, in any event, preempted.

¹¹ *Id.* at 477, 479.

¹² 934 F.3d 35 (1st Cir. 2019).

¹³ 910 F.3d 633 (2d Cir. 2018).

¹⁴ 552 F.3d 934 (9th Cir. 2008).

¹⁵ 910 F.3d at 637.

¹⁶ 552 F.3d at 936.

hazelnut.¹⁷ In all of these cases, there was no ambiguity about the ingredient being claimed, but only about whether it was actually present in the product or was present in the amount implied by the label. The naming of a specific, unambiguous ingredient and an ingredient statement directly contradicting that ingredient claim were central to the holdings of all of these cases. *Mantikas* and *Williams* both held that reasonable consumers “should not be expected to look beyond *misleading* representations on the front of the box to discover that the ingredient list actually contradicts the prominent ingredient claims being made on the label.”¹⁸ The *Dumont* court noted, “[a]fter all, if there is nothing in the package other than coffee, what does Hazelnut Crème mean to say?”¹⁹ It is only when the label makes an unambiguous, misleading claim that is directly contradicted by the ingredient statement that an ingredient statement will not foreclose such a finding.

The Second and Ninth Circuits have been consistent in holding that an ingredient statement can foreclose a finding that a front label is misleading as a matter of law²⁰ and the rule remains good law in the First Circuit as well.²¹ While the *Bell* court clarified that it “stand[s] by the general principle 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,” its misinterpretation of the case law it relied on effectively eroded that principle. It is precisely when a plaintiff’s case turns entirely on an ambiguous label that the context of the entire food label becomes crucial to assessing the reasonableness of a plaintiff’s claim. Even if the *Bell* court would have preferred not placing any affirmative duty on a reasonable consumer to verify the ingredient list to clarify a potentially ambiguous label, it did not need to issue a ruling on the lower court’s “ambiguity rule.” The court could have just held that the claim “100% parmesan cheese” was too capable of misleading a substantial number of

¹⁷ 934 F.3d at 37.

¹⁸ *Id.* (quoting *Williams*, 552 F.3d at 939) (emphasis added).

¹⁹ 934 F.3d 35 at 41.

²⁰ See *Freeman v. Time, Inc.*, 68 F.3d 285, 289–90 (9th Cir. 1995) (“Any ambiguity that Freeman would read into any particular statement is dispelled by the promotion as a whole.”); *Locklin v. StriVectin Operating Co.*, No. 21-cv-07967-VC, 2022 U.S. Dist. LEXIS 52461, at *8–9 (N.D. Cal. Mar. 23, 2022) (“[I]nformation available to a consumer is not limited to the physical label and may involve contextual inferences regarding the product itself and its packaging.’ And asterisks might cabin sweeping claims or further define ambiguous language. But a company can’t say something misleading on the front of a label and escape liability by stating ‘that’s not actually what we mean’ in fine print on the back.”) (citing *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021)); *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) (“[U]nder certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception.”); *Solak v. Hain Celestial Grp., Inc.*, 3:17-CV-0704 (LEKJDEP), 2018 U.S. Dist. LEXIS 64270, 2018 WL 1870474, at *5 (N.D.N.Y. Apr. 17, 2018) (holding that consumers can resolve any potential ambiguity associated with the product’s front label, which emphasizes certain ingredients, by [looking at] the back panel of the products, which list[s] all ingredients in the order of predominance) (internal quotations omitted); *Brown v. Kellogg Sales Co.*, No. 1:20-CV-7283-ALC, 2022 U.S. Dist. LEXIS 60748, at *15–16 (S.D.N.Y. Mar. 31, 2022) (“To the extent the label contains any ambiguity about the presence or amount of strawberries in the Product, in the Second Circuit, courts are to consider ‘disclaimers and qualifying language.’ Here, the reasonable consumer would overcome any confusion by referring to the unambiguous ingredient list on the packaging. The ingredients list does not ‘contradict,’ but rather ‘confirm[s] . . . representations on the front of the box.’”) (citing *Mantikas*, 910 F.3d at 636–37).

²¹ *Lima v. Post Consumer Brands, LLC*, Civil Action No. 1:18-cv-12100-ADB, 2019 U.S. Dist. LEXIS 136549, at *19 (D. Mass. Aug. 13, 2019) (“[C]onsumers who are presented with images or information that would be recognized as ambiguous by a reasonable consumer are generally expected to resolve such an ambiguity by referring to other information on a product’s packaging.”).

reasonable consumers to be saved by an accurate disclosure of the ingredient list. Regardless of what one thinks about that specific claim, such a ruling would have at least fallen in line with the case law it cited and not created a precedent obfuscating a set of legal principles in favor of others.²² This obfuscation only provides articulable legal arguments to plaintiffs in the kind of class action lawsuit that food manufacturers have been facing over the years. It provides an added lifeline to claims that would otherwise would easily be dismissed at the pleading stage. Ironically, the Seventh Circuit's concern over highly deceptive advertising has led it to issue a decision that breathes life into highly deceptive lawsuits. The Seventh Circuit should clarify its jurisprudence to bring it more in line with the case law it agreed with in *Bell* to stop robbing Peter to pay Paul.

²² There are examples of courts making the same misinterpretations based on the Seventh Circuit's decision in *Bell*. See, e.g., *Pierre v. Healthy Bev., LLC*, No. 20-4934, 2022 U.S. Dist. LEXIS 35109, at *28 n.10 (E.D. Pa. Feb. 28, 2022) (holding that the First, Second, and Ninth Circuits repudiated the rule distinguishing claims based on labels that are unambiguous and misleading from claims aimed at ambiguous labels though the ambiguity can be resolved by a nutrition facts panel or ingredient list).