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Food Litigation's Search for the Reasonable Food Consumer: 2021 Update

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With a dramatic increase in claims over false and misleading food labeling over the past several years, the food and beverage litigation news cycle has spent much time analyzing a legal landscape rife with discussion of the "reasonable consumer." Pages upon pages are dedicated to the search of this elusive individual, yet a precise image of the reasonable consumer still evades demarcation—characterized by how they do *not* behave rather than how they do, the law's depiction of the reasonable consumer leaves an aura of questions rather than a beacon guiding industry and consumers to answers.

The reasonable person—a term etched into the fabric of American common law—is pervasive enough to be a foundational concept in both civil and criminal contexts. The law defines the reasonable person as "a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something."¹ Though slightly altered in terminology, in the context of litigation involving food products, the "reasonable person" standard then becomes the "reasonable consumer" standard. Often found in tort law, a reasonable consumer is thought to, at the essence of the analysis, weigh the benefits and risks of their conduct (purchasing decision) and ultimately behave in a logical and reasoned manner.

Most of the cases involving the reasonable consumer stem from a plaintiff who has purchased the product and has been deceived or could likely be deceived by the packaging or labeling. Because there is

¹ *Reasonable Person*, Merriam-Webster (online ed. 2021).

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no widely accepted definition or explanation of the reasonable consumer, courts are left to apply a test that is largely shaped by their own opinions and experiences, which may vary wildly from jurisdiction to jurisdiction. Despite the staggering increase in litigation involving the reasonable consumer over the past several years, courts are not much closer to identifying the reasonable consumer—or how even to predictably ascertain how they will react to any number of situations—than they were decades ago.

The most recent statistics show that, even in the face of the global COVID-19 pandemic, “more new class action lawsuits were filed against the food and beverage industry—220 cases—than in any other year of the past decade.”¹ Many of the lawsuits filed in 2020 claimed false and misleading labeling that included:

- “under- or over-reporting of the amount of a nutrient or ingredient in a product (e.g., level of sugar or protein)”;
- “Allegations that the food was not made in the manner suggested by the label (e.g., foods labeled ‘smoked’ deriving their smoke flavor from chemicals versus smoke)”;
- “Referring to ingredients as ‘real’ when they are allegedly processed (e.g. ‘real cocoa’)”; and
- “Misstating the number of servings in a contained (e.g., instant coffee yielding fewer servings than the label indicated, when used as instructed).”²

At the crux of these claims is an analysis of the reasonable consumer, but the application of this standard—as demonstrated by the inconsistent results across courts—regularly does little to connect the court’s perception of consumer behavior to reality, and thus establish a reliable standard upon which courts can rely for consistent and accurate decisions. Litigation surrounding claims of “100% natural” exemplify this unpredictable jurisprudence. The U.S. Court of Appeals for the First Circuit in *Lee v. Conagra Brands, Inc.*

held that it was plausible that consumers might be misled by the claim “100% Natural” on a product containing ingredients made from corn bred with bioengineering . . . consider[ing] the complaint’s citations to surveys purporting to show that some consumers believe bioengineered foods are not ‘natural,’ along with the plaintiff’s allegation that she believed the product was free of bioengineered ingredients, sufficient to pass the ‘low threshold’ of plausibility for her claim to proceed.³

In contrast to the First Circuit’s conclusion that the particular 100% natural claim was plausibly alleged as misleading, the U.S. Court of Appeals for the Second Circuit in *Axon v. Florida’s Natural Growers, Inc.* instead found that the natural claim did not render the product’s labeling misleading, despite the presence of trace amounts of pesticides.⁴ These cases, and their differing outcomes, are but a small selection of those filed in 2020 alleging “that a product labeled ‘natural’ contains some ingredient that is artificial or synthetic or, alternatively, that the ingredients were bred with the assistance of biotechnology.”⁵

In the food law sector, perhaps more than any other industry, “[t]he life of the law has not been logic: it has been experience.”⁶ Oliver Wendell Holmes, Jr., though describing the jurisprudence of legal realism as a whole, aptly characterizes food law’s approach to determining the actions of a reasonable consumer. When judges solely rely upon their own personal experiences to determine whether a consumer has

¹ Food & Consumer Packaged Goods Litigation: 2020 Year in Review, Perkins Cole, <https://www.perkinscoie.com/en/news-insights/food-litigation-year-in-review-2020.html>

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* For example, “gelatin, citric acid, ascorbic acid, dextrose, potassium sorbate, xanthan gum, and soy lecithin.”

⁶ OLIVER WENDELL HOLMES JR., *THE COMMON LAW* (1881).

acted in accordance with the elusive reasonable consumer standard, they are necessarily relying upon their own personal knowledge and understanding of food. Judges are usually the sole arbiter of the reasonable consumer, yet “[o]bservation of court decisions . . . shows that judges are deciding based on their response to the facts of the case—what they think would be ‘right’ or ‘fair’ on these facts—rather than because of legal rules and reasons.”¹ But without an established rule for what makes a consumer of food reasonable or not, judges can rely on nothing else.

Dismissal or settlement of the many reasonable consumer cases brought against food and beverage companies consequently leads to underdevelopment of the reasonable consumer standard on the judicial level, and leaves industry without accountability or helpful regulatory guidance that might lead to product labeling that better conveys its intended—and non-deceptive—message. Courts alone are not the answer to remedying the confusion that floods the food product market and prompts these lawsuits, but they do (or could) play a vital role in defining the boundaries by which industry and consumers operate in product marketing and purchasing. As the law stands, because food necessitates a strikingly different analysis from non-edible products, and because courts lack a substantive reasonable consumer standard, industry and consumers are left without clear boundaries of what constitutes deceptive marketing.

As an example of the pervasive confusion—of consumer, lawyers, and judges alike—surrounding reasonable consumer litigation, the First Circuit noted the following:

One might presume that a reasonable consumer who, like Dumont, cared whether the coffee she intended to purchase contained real hazelnut would check the list of ingredients. On the other hand, perhaps a reasonable consumer would find in the product name sufficient assurance so as to see no need to search the fine print on the back of the package, much like one might easily buy a hazelnut cake without studying the ingredients list to confirm that the cake actually contains some hazelnut. And the complaint makes clear that convention in the industry -- presumably in large part because of federal labeling requirements -- is to state on the front of a package containing a product that is nut flavored (but that contains no nuts) that the product is naturally or artificially flavored. Indeed, another Reily Foods subsidiary that sells a "hazelnut" coffee includes a "flavoring" disclosure on the front of its package.

The court ultimately determined that “we think it best that six jurors, rather than three judges, decide on a full record whether the challenged label ‘has the capacity to mislead’ reasonable acting, hazelnut-loving consumers.” But in declaring that the call of “reasonableness” is “certainly a close one,” the court also reinforced the judges’ own personal evaluation and imposition of ideas of reasonableness upon the plaintiff’s claims of deception, rather than a clear legal standard.²

Other recent court decisions reflect the same type of bare conclusions as to what reasonable consumers know and how they will act. For example, in *Fitzgerald*³—in response to a plaintiff’s claim that she believed Polar Ginger Ale contained ginger root⁴ because of the product label claim “MADE FROM REAL GINGER”—the court stated, armed only with the dictionary definition of ginger: “no reasonable consumer could rely on a claim of ‘real ginger’ in a soft drink as a representation that the drink contains chunks of ‘ginger root’ as opposed to a ginger taste. The court continued, “[a]s liberally as the consumer statute is meant to be construed, a viable Chapter 93A claim ‘depends on the likely reaction of a reasonable consumer rather than an ignoramus. In other words, any reasonable consumer would know ginger ale for what it is – a carbonated drink with ginger flavoring and probably containing an unhealthy amount of sugar. Nothing about the ‘made from real ginger’ claim is deceptively untrue and no public policy is served by allowing this matter to percolate further.”⁵ This type of analysis does nothing to advance

¹ *Id.*

² *Dumont v. Reily Foods Co.*, 934 F.3d 35 (1st Cir. 2019).

³ CIVIL ACTION NO. 20-10877-RGS (D. Mass. Nov. 10, 2020).

⁴ Ginger root is believed by many to provide certain health benefits when consumed.

⁵ CIVIL ACTION NO. 20-10877-RGS (D. Mass. Nov. 10, 2020).

development in the law that would accurately reflect the knowledge and behavior of reasonable consumers beyond creating an assortment of intuitive guesses by judges.

As litigation in the food and beverage industry increases, especially over the question of what labeling practices may or may not be considered deceptive or misleading, an articulated and clear standard—beyond the assigned judge’s personal opinion—is likely to significantly aid both industry and consumers. Consumers rely upon transparency and accurate communication in food labeling to inform their food purchasing decisions. If the law seeks to better reflect the reality of consumer purchasing behavior, development of the reasonable consumer standard beyond the personal thoughts and opinions of judges will be essential. From a practical perspective in advising food and beverage clients on labeling claims, the law remains a long way from determining with any sort of precision the reasonable consumer, or in the food context, the reasonable eater. And therein lies the challenge, as manufacturers and retailers seek to distinguish and promote their products in a competitive marketplace without stepping across the elusive reasonable consumer line.