

Back Labels In False Ad Cases Get Some Clarity In 9th Circ.

By **Julie Simeone, Megha Hoon and Hannah Brudney** (April 11, 2024)

Courts in the Ninth Circuit have recently delivered a series of wins to advertisers, making clear that any ambiguity on the front of a package can be resolved by reference to the back label.

On this basis, the U.S. Court of Appeals for the Ninth Circuit and the district courts therein have affirmed dismissal of several cases, guaranteeing that defendants have a powerful tool to combat claims of deceptive labeling and hopefully encouraging plaintiffs to think twice before bringing suit based solely on a product's front label.

For example, in *Bryan v. Del Monte Foods Inc.*, a recent case challenging the labeling of fruit cups, the U.S. District Court for the Northern District of California continued what appears to be the growing consensus that a consumer cannot ignore a product's back label where the front is merely ambiguous.

In that case, the plaintiff alleged that the phrase "fruit naturals" misled her to believe the product contained only natural ingredients.[1]

The court disagreed, finding in October 2023 that, under the Ninth Circuit's June 2023 decision in *McGinity v. Procter & Gamble Co.*, any ambiguity created by the "fruit naturals" statement on the front label was resolved by reference to the product's back label, which disclosed the inclusion of synthetic ingredients.[2]

Similarly, the U.S. District Court for the Central District of California recently dismissed *Mier v. CVS Pharmacy Inc.*, a case regarding the labeling of hand sanitizer, where the plaintiff claimed that the statement "kills 99.99% of germs" was reasonably understood to mean "99.99% of all germs commonly found on hands." [3]

The court reasoned in January that it could not ignore statements that appear on a product's back label, which clarified that the hand sanitizer was "effective at eliminating more than 99.99% of many common harmful germs and bacteria in as little as 15 seconds." [4]

Likewise, in *Robles v. GOJO Industries Inc.*, another case involving hand sanitizer, the Ninth Circuit in August 2023 rejected the plaintiff's claim that a "Kills More than 99.99% of Germs" statement on the front label of the product meant that it would kill 99.99% of all known germs.

The court held that the hand sanitizer's front label — as clarified by the back — was not misleading because the rear label explains to a consumer that 99.99% applies only to most common germs that may cause illness.[5]

The McGinity Decision



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These recent decisions follow the precedent set by the Ninth Circuit last year, when the court upheld the dismissal of a claim related to P&G's Pantene Pro-V Nature Fusion shampoo and conditioner.

In McGinity, plaintiff Sean McGinity challenged the front label of the products, which display the words "Nature Fusion" in bold and capitalized letters, an image of an avocado on a green leaf, and then a picture of what appears to be a gold vitamin with the term "Pro-V."^[6]

McGinity asserted that the packaging represented to consumers that the products were "natural" when, in fact, the product contained nonnatural and synthetic ingredients, as well as "harsh and potentially harmful ingredients" rendering the product substantially unnatural.

McGinity further contended that the front labels of the products were deceptive and that no consideration should be given to the products' rear label describing the contents therein.

The Ninth Circuit disagreed. Drawing upon precedent, the court distinguished between those situations where the front label is unambiguously deceptive and those where it is ambiguous.

In the former case, a defendant is precluded from "insisting that the back label be considered together with the front label."^[7] But in the latter, the ambiguity created by the front would prompt a reasonable consumer to turn the product around.

Applied to the hair products at issue, the McGinity court determined that the phrase "Nature Fusion" in the context of its packaging is not misleading; but rather, it is ambiguous.

That ambiguity meant that the court had to consider what additional information is available to a consumer of the P&G products.^[8] Here, the back label contains phrases — e.g., "NatureFusion® Smoothing System With Avocado Oil" — that make clear to a reasonable consumer that the natural ingredient emphasized on the front label is avocado oil.^[9]

And the ingredient list goes on to clarify that many ingredients are, indeed, artificial. This demonstrates to any reasonable consumer that the products contained both synthetic and natural ingredients.

The survey data presented by McGinity's counsel could not save the day and, in fact, only bolstered the circuit court's determination.

In support of his claims, McGinity's counsel commissioned an independent survey of more than 400 consumers to determine their impressions of the products' front labels, without giving the consumers access to the back labels. These results followed:

- 74.9% of consumers believed the front label meant that the shampoo contained more natural than synthetic and/or artificial ingredients; and 77.4% of consumers presented with the front label thought the same about the conditioner.
- As to the phrase "Nature Fusion," 52.6% of consumers thought the phrase meant that the product did not contain synthetic ingredients; 49.1% of consumers thought the phrase meant that the product contained only natural ingredients; and 69.2% of

consumers thought the phrase meant that the product contained both natural and synthetic ingredients.[10]

Given that the products' rear label was fair game when assessing the impression of a reasonable consumer, the court did not put much stock in the survey results.

The results themselves were tainted because the participants did not have access to the back label. Thus, the survey did not address the primary question: whether the labeling of the P&G products is misleading when taken as a whole.[11]

In any event, the survey confirmed that the term "Nature Fusion" was not misleading, but ambiguous. The survey respondents were mostly split on the question at the root of the case, i.e., whether the products contain a mixture of natural and nonnatural ingredients or if the products, instead, contain "all or substantially all natural ingredients." [12]

The 50-50 split demonstrated that there were two equally plausible interpretations of the front label, and that it was therefore ambiguous.

The very same day that the McGinity opinion issued, the Ninth Circuit affirmed in *Steinberg v. Icelandic Provisions Inc.* — albeit in an unpublished opinion — the dismissal of a plaintiff's claim that a front label's reference to "Icelandic Provisions" would reasonably deceive a consumer to believe that the product is manufactured in Iceland, when the back label "accurately states that the product is manufactured in New York." [13] The court cited McGinity.

These decisions reinforce existing Ninth Circuit law that the reasonable consumer inquiry takes into account all of the information available to a shopper and the context in which that information is provided.

Takeaways

Courts are rightly skeptical that a reasonable consumer will not consult the rear label of a product if the front label is open to more than one interpretation.

In *Hardy v. Ole Mexican Foods Inc.*, the U.S. Court of Appeals for the Second Circuit dispelled in May 2023 the notion that back- or side-label disclosures are irrelevant to how a reasonable consumer reads and interprets product packaging. [14]

The Second Circuit explained, like the Ninth, that unless the front of the package contains an unambiguous misrepresentation, courts, like reasonable consumers, should consider the packaging as a whole.

These recent cases arm defendants with powerful arguments to defeat deceptive advertising claims that ignore the text on a product's back label and provide helpful clarification to district courts evaluating such claims at the pleadings stage.

Additionally, the McGinity decision and the cases that follow it are an important lesson for plaintiffs to carefully consider a product's entire packaging before bringing suit.

They are also a sign of a growing consensus that any ambiguity on a package's front label can be resolved by reference to the back. [15]

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[1] Bryan v. Del Monte Foods, Inc., No. 23-cv-00865, 2023 WL 6959128, at *2 (N.D. Cal. Oct. 19, 2023).

[2] *Id.* at *3.

[3] Mier v. CVS Pharmacy, Inc., No. 20-cv-01979, 2024 WL 121880 (C.D. Cal. Jan. 10, 2024).

[4] *Id.* at *8 (emphasis added).

[5] Robles v. GOJO Industries, Inc., No. 22-55627, 2023 WL 4946601, at *1 (9th Cir. Aug. 3, 2023).

[6] McGinity v. Procter & Gamble Co., 69 F.4th 1093, 1096-98 (9th Cir. 2023).

[7] *Id.* at 1098.

[8] *Id.* at 1098-99.

[9] *Id.* at 1099.

[10] *Id.* at 1096.

[11] *Id.* at 1099.

[12] *Id.*; see also *id.* at 1097 ("The ambiguity of the phrase is further shown by the nearly 50/50 split in survey responses...").

[13] Steinberg v. Icelandic Provisions, Inc., No. 22-15287, 2023 WL 3918257, at *1 (9th Cir. June 9, 2023).

[14] See New York Law Journal, Second Circuit Revisits 'Mantikas' in 'Taste of Mexico' Case (July 13, 2023), available at <https://www.law.com/newyorklawjournal/2023/07/13/second-circuit-revisits-mantikas-in-taste-of-mexico-case/> (discussing Hardy v. Ole Mexican Foods, Inc., 2023 WL 3577867 (2d Cir. May 22, 2023)).

[15] See Misbranded Blog, Nothing Fishy About Expecting Consumers to Read the Ingredients List (March 1, 2023), <https://www.pbwt.com/misbranded/nothing-fishy-about-expecting-consumers-to-read-the-ingredient-list>.