

## Vermont Federal Court Orders Ben & Jerry's "Happy Cows" Lawsuit Out to Pasture

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A Vermont federal court dismissed a lawsuit alleging consumer fraud, breach of warranty, and unjust enrichment against Ben & Jerry's because representations about its dairy from "happy cows" did not run afoul of the law. But the court granted the plaintiff twenty days to amend.

In *Ehlers v. Ben & Jerry's Homemade Inc., et al.*, Civil Action No. 2:19-cv-00194, a Vermont plaintiff sued defendants Conopco, Inc. d/b/a Unilever United States (Unilever) and its subsidiary Ben & Jerry's Homemade Inc. (Ben & Jerry's) on behalf of a proposed class seeking compensatory damages and injunctive relief. The plaintiff alleged that statements on Ben & Jerry's ice cream cartons and website were materially misleading in violation of the Vermont Consumer Protection Act (VCPA) and constituted breach of an express warranty. The plaintiff also asserted a claim for unjust enrichment.

The plaintiff took issue with statements that Ben & Jerry's sourced its dairy from "'happy cows' on Vermont dairies that participate in a special, humane 'Caring Dairy' program." The at-issue ice cream cartons stated: "We strive to make the best possible ice cream in the best possible way. We source ... milk & cream from happy cows," and directed consumers to a website. The plaintiff's claims relied exclusively on a subheading on this Ben & Jerry's website regarding the Caring Dairy program. The subheading provided, "Basic standards for being a Caring Dairy farmer (required for all farmers)," before setting forth the standards for Caring Dairy farmers.

According to the plaintiff, with this single website subheading, Ben & Jerry's misrepresented to consumers that it exclusively sourced dairy from the Caring Dairy program. In actuality, only a percentage of the dairy used in Ben & Jerry's products is sourced from the Caring Dairy program, with the rest sourced from mass-production facilities. According to the plaintiff, this alleged misrepresentation was material to consumers who choose to purchase Ben & Jerry's products – i.e., consumers "who view Ben & Jerry's as a socially conscious, independent Vermont company."

By the time of the court's decision, both this webpage subheading and the "happy cows" language on the ice cream cartons had been removed by Ben & Jerry's. The defendants moved to dismiss for failure to state a claim. The court dismissed the plaintiff's claims on May 7, 2020.

Regarding the plaintiff's VCPA claim, the defendants argued that "happy cows" constituted an

opinion rather than a fact. The plaintiff conceded this point and refocused his claims on the Caring Dairy program. Noting that a statement is misleading under the VCPA only if it is “likely to mislead a reasonable consumer,” the court held that nothing about the Ben & Jerry’s carton, or the website to which it directed consumers, constituted an actual misrepresentation regarding its dairy sources “when considered as a whole.” The single subheading alone was insufficient to constitute a misrepresentation.

Although the plaintiff’s inability to point to a single misrepresentation alone was sufficient to warrant dismissal of his VCPA claim, the court also analyzed whether this allegedly problematic representation could even be considered material. The court stressed that materiality is a “mixed question of law and fact and is not immune from analysis at the motion to dismiss stage,” and where a plaintiff’s allegations do not establish materiality as a matter of law, “dismissal is appropriate.” Here, the court held the plaintiff’s allegations did not plausibly allege that reasonable consumers would make their purchasing decisions exclusively based on the single phrase the plaintiff highlighted on Ben & Jerry’s website. As a result, the court dismissed the plaintiff’s VCPA claim.

The plaintiff’s express warranty and unjust enrichment claims also failed because they were predicated on a single heading of a multipage website, which did not contain the material misrepresentation the plaintiff cited as the basis for his claim. Regarding the plaintiff’s breach of express warranty claim, the defendants argued that the alleged misrepresentation was not an affirmation of fact or description of goods needed to create an express warranty under Vermont law. The court agreed. The court held that the plaintiff’s claim that the so-called written warranty that “the milk and cream” the defendants used “originated exclusively from ‘happy cows’” simply did not appear anywhere on the product labeling or the corresponding website, and therefore could not have served as the “basis of the bargain.”

The court dismissed the plaintiff’s claims without prejudice but granted him leave to amend within twenty days. In the event the plaintiff refiles, we should learn whether he is able to milk a viable claim out of these facts.

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