

## Deceptive Labeling Claims Based on Trace Amounts Sent to the Dog House

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In dismissing a plaintiff's claims regarding dog food ingredients, the U.S. District Court for the Eastern District of Wisconsin confirmed the common-sense principle that manufacturers need not list anything and everything that could have possibly made it into a product as an "ingredient."

In *Weaver v. Champion Petfoods USA Inc., et al.*, case no. 18-cv-1996-JPS, a Wisconsin resident claimed that Champion Petfoods USA Inc. and Champion Petfoods LP deceptively marketed their dog food products. The plaintiff took issue with multiple characteristics of defendants' products, including that the product packaging stated the dog foods adhered to a "biologically appropriate nutritional philosophy," were made with "fresh" and "regional" ingredients, and were "never outsourced." The plaintiff asserted claims for fraud by omission, negligence and violation of the Wisconsin Deceptive Trade Practices Act. The defendants moved for summary judgment.

### **"Biologically Appropriate"**

The plaintiff contended that defendants deceptively marketed their products by stating their dog foods were made with a "biologically appropriate nutritional philosophy." According to the plaintiff, this phrase indicated to consumers that the products did not contain Bisphenol-A (BPA), which the plaintiff argued was in the products.

The defendants maintained that this phrase was not misleading for three reasons: (1) "biologically appropriate" is a "nutritional philosophy" and not a factual statement; (2) the defendants did not intentionally add BPA to their products; and (3) the defendants never warranted that their products are BPA-free. Laboratory testing showed that the BPA levels in the products would not cause harm to a dog.

Setting aside whether "biologically appropriate" was a mere philosophy or a statement of fact, and assuming it was an actionable representation under the law, the Honorable J.P. Stadtmueller, U.S.D.J., found that to hold the defendants "liable for the risk that their products contain unintended and non-harmful concentrations" of a material such as BPA, "a fact common to many other pet food manufacturers, would be extraordinary." The court held that "biologically appropriate" did not falsely represent that the products were BPA-free.

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## **“Fresh” and “Regional” Ingredients**

The plaintiff also argued that the defendants’ packaging, which stated the products contained “fresh” and “regional” ingredients, would not cause a consumer to expect the products contained non-fresh ingredients, such as frozen ingredients or ingredients from non-regional suppliers. Because the dog foods did contain such ingredients, the plaintiff claimed the product labels were misleading.

The court held that when the dog food packaging was viewed in full, it was clear on the face of the label that ingredients were “fresh, raw, or dehydrated,” and some were frozen. The court held that because the defendants did in fact use some regional suppliers, and because nowhere on the packaging did the defendants state that “all” ingredients were regional, the defendants’ packaging was not misleading.

## **“Never Outsourced”**

The plaintiff next took issue with the product packaging’s statement that the dog foods were “never outsourced.” The plaintiff conceded that the final products were not outsourced, but claimed that “many” of the products’ ingredients were outsourced. The court found that because defendants’ finished products were not outsourced, and the defendants merely received certain components for the dog food from outside vendors, the product packaging was not false or misleading.

## **Pentobarbital-Based Claims**

The plaintiff also asserted that the defendants’ product packaging was misleading because it did not warn that the dog foods might contain low levels of pentobarbital, a chemical used to euthanize animals, pointing to a May 2018 shipment of beef tallow used to make the dog food that tested positive for the chemical. The levels of this adulterant in the final dog food products were so low that the defendants did not recall the affected products. The court held that the plaintiff lacked standing to sue on this claim because he had ceased to purchase the products by the time this discovery was made.

## **The Plaintiff’s Fraud by Omission and Negligence Claims**

Because the court found no false representations in the products’ packaging, the court held that the plaintiff’s fraud by omission and negligence claims necessarily failed. The court also stressed that the defendants did not owe the plaintiff a duty to disclose the possibility that extremely low levels of BPA or undetectable amounts of pentobarbital may be in the products.

## **Conclusion**

The court granted summary judgment in favor of defendants on all counts. Weaver is a sensible decision that recognizes the practicalities and purposes underlying ingredient list requirements. In the context of dog food, manufacturers are not required to include a disclosure of unintended ingredients that only appear in trace amounts. The court in Weaver recognized that to hold otherwise would result in ingredient lists that would “surely cover the whole bag, and yet be false at the same time; perhaps a piece of dust entered the bag with the food itself, and dust is certainly not something a dog should eat.”

This decision reinforces that manufacturers are not responsible for listing each and every material

that may make its way into a final pet food product.

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