

It's Not Pop Secret, Ninth Circuit Affirms that Plaintiff Didn't Have a Leg to Stand On

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The Ninth Circuit's recent decision in *McGee v. S-L Snacks Nat'l*,¹ confirms that nutrition fact panel and ingredient disclosures provide information that can be used to support a motion to dismiss and remain important tools for defeating consumer class actions.

In the case, the plaintiff had alleged that the manufacturer of Pop Secret brand popcorn engaged in unfair practices, created a nuisance, and breached the warranty of merchantability by including partially hydrogenated oils ("PHOs") as an ingredient. The plaintiff also alleged that PHOs are an unsafe food additive that cause heart disease, diabetes, cancer, and other ailments. The district court concluded that the plaintiff lacked constitutional standing because she had not sufficiently alleged that she had suffered an injury in fact and, accordingly, dismissed the complaint. The Ninth Circuit affirmed, concluding that she did not plausibly allege that she was harmed by the popcorn.

In affirming, the Ninth Circuit rejected the three arguments plaintiff advanced in her attempt to show that she suffered an injury in fact (economic harm under a benefit of the bargain theory; economic harm under an overpayment theory; and physical injury). First, the plaintiff alleged a pure economic harm theory – that is, because of the PHOs, the popcorn was less healthy than she had expected it to be. The district court did not find that argument persuasive because the PHOs were identified on the nutrition label and the plaintiff did not allege that the labels were themselves misleading. Affirming, the Ninth Circuit found that a plaintiff "must do more than allege that she did not receive the benefit she *thought* she was obtaining. The plaintiff must show that she did not receive a benefit for which she actually *bargained*." ___ F.3d __; 2020 U.S. App. LEXIS 37856, *10. (emphasis original). The Ninth Circuit found that while Plaintiff "may have *assumed* that Pop Secret contained only safe and healthy ingredients, her assumptions were not included in the bargain, particularly given the labeling disclosure that the product contained artificial trans fat. Thus, even if those expectations were not met, she has not alleged that she was denied the benefit of her bargain. Absent some allegation that Diamond made false representations about Pop Secret's safety, McGee's benefit of the bargain theory falls short." *Id.*, *10-11. (emphasis added).

Next, the Ninth Circuit disregarded the plaintiff's allegation that she overpaid based on the presence of PHOs in the popcorn. The majority of the studies plaintiff cited about the harmful effects of PHOs

were published years before plaintiff filed her complaint in 2014. The Ninth Circuit concluded that the market was well aware of the health risks of consuming PHOs, and therefore the Court was not persuaded that the popcorn “was worth objectively less than what one could reasonably expect.” *Id.*, * 15.

Finally, the Ninth Circuit confirmed that the district court properly rejected plaintiff’s allegation of actual harm based on an increased risk of disease on the basis that the allegations were too speculative. The plaintiff did not allege that she had undergone actual medical testing; and the studies cited in her complaint did not “invariably” show that consumption of PHOs causes harm to the body.

While the opinion confirms that absent plausibly and sufficiently alleged injuries in fact a false advertising claim is subject to dismissal at the pleading stage, consumer packaged goods companies should bear in mind that this ruling leaves open the possibility that claims based on economic harm when paired with alleged false labeling or other label misrepresentations may withstand a motion to dismiss.

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