

What The Fudge?! Popular Breakfast Snack's Lack Of Key Ingredient Did Not Trigger Liability Under State Consumer Fraud And Magnuson-moss Warranty Acts

Article By:

Litigation at KL Gates

A recent ruling from the United District Court for the Central District of Illinois served as an important reminder to the Plaintiffs Bar regarding a significant and continuing shift in judicial attitude toward speculative class action allegations of consumer fraud and breach of warranty. In this case, the Court's order is a cautionary tale for those who make a living firing off indiscriminate legal claims without stopping to ensure all essential elements of their clients' claims are sufficiently alleged.

In *Reinitz v. Kellogg Sales Co.*, No. 21-cv-1239-JES-JEH, 2022 WL 1813891 (C.D. Ill. June 2, 2022), a putative class of consumers commenced action against the breakfast brand Kellogg Sales Co. ("Kellogg") after discovering that, despite its product name and branding, Kellogg's Frosted Chocolate Fudge Flavored Pop-Tarts did not contain common ingredients that ordinarily constitute fudge. More specifically, Plaintiffs alleged that Kellogg was duplicitous by falsely and nefariously advertising that "fudge" was included in its Chocolate Fudge Flavored Pop-Tarts, and subsequently charged a premium price for the product when in actuality Kellogg unscrupulously substituted the commonplace key ingredients of fudge—butter and milk ("milkfat")—with lower quality and less expensive vegetable oil and whey. Plaintiffs further argued they were intentionally deceived by Kellogg's product name and picture of a large chunk of fudge on the product's box, and therefore would have not purchased and/or paid the suggested premium price for the specific Pop-Tarts if Kellogg had made it known that its version of "fudge" did not contain milkfat.

Consequently, Plaintiffs brought claims including the violation of Illinois, Iowa, and Arkansas Consumer Fraud Acts, the Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, et. seq., and breach of various state law express and implied warranties, along with claims of negligent misrepresentation, common law fraud, and unjust enrichment. Plaintiffs requested disgorgement of profits, restitution, punitive damages, and an injunction to stop Kellogg's marketing practices and representations relative to the sale this specific product.

In response, Kellogg moved to dismiss Plaintiffs' consumer fraud act claims for failure to state a claim arguing, among other things, that: (1) while fudge is most commonly made with milkfat, it is well-recognized that several fudge recipes within the chocolate industry do not contain milkfat; (2) the term and meaning of "fudge" is not so specific that a reasonable consumer would be deceived when purchasing fudge that did not contain milkfat; and (3) the term "fudge" is a description of the taste of

the Pop-Tarts, and therefore does not refer to the Pop-Tart's specific ingredients. Although the Court took into consideration Plaintiff's references to chocolate industry subject-matter experts who opined that milkfat is the fundamental component of fudge, the Court noted that Plaintiffs failed to sufficiently establish that an average consumer would conclude a product containing fudge must necessarily be required to contain milkfat; and that a chocolate breakfast snack made from vegetable oil and whey would mislead a reasonable consumer to believe the product did not taste like fudge. As a result, the Court dismissed (without prejudice) the consumer fraud act claims because Kellogg's marketing and branding of its Chocolate Fudge Flavored Pop-Tarts was not misleading as a matter of law.

The Court held that Plaintiffs could not proceed on state law breach of express and implied warranty claims because Kellogg's labeling of its Chocolate Fudge Flavored Pop-Tarts would not mislead a reasonable consumer to believe the product specifically contained milkfat. And with no surviving or viable state law breach of warranty claims, Plaintiffs could not state a claim under the Magnuson-Moss Warranty Act. Similarly, Plaintiffs' common law claim for negligent misrepresentation was dismissed pursuant to the "economic loss doctrine," which prohibits recovery for purely economic losses stemming from tort claims. Plaintiffs' common law fraud claim fared no differently as the Complaint failed to sufficiently plead an essential element of fraud—scienter; which in turn undercut any possibility of an unjust enrichment claim because Plaintiff failed to effectively plead that Kellogg engaged in any wrongful or illegitimate conduct.

Finally, Plaintiffs' request for injunctive relief was deemed ineffective due to the absence of any wrongful conduct attributed to Kellogg. Since there was no finding of either a misrepresentation, deception, fraudulent act, or continuing violation of federal law, the Court lacked authority to order and enforce injunctive relief; and even if it did, the Court pointed out that Plaintiffs failed to plead a threat of future injury—an essential element for an injunctive relief claim. The Court found that Plaintiffs lacked standing to pursue injunctive relief claims again based on the fact that Plaintiffs did not assert the existence of any wrongful conduct on behalf of Kellogg that would attribute any liability for Plaintiffs' alleged damages.

TAKEAWAY: Courts are holding consumer class action plaintiffs' feet to the fire in respect to pleading standards. The age-old tactic of generally alleging fraudulent and/or deceptive conduct by a large consumer-good-producing corporation, in hopes of inducing a lucrative settlement prior to engaging in discovery, is now falling under intense scrutiny at the outset of class action lawsuits. On its face, a deceptive trade practice or consumer fraud claim may seem as clear cut as a corporate defendant marketing and labeling a product to include something that it does not. However, the burden remains on plaintiffs to satisfy Fed. R. Civ. P. 8(a)—which includes alleging all essential elements of each claim asserted—lest they quickly find themselves reading a 12(b)(6) dismissal order while scratching their heads and muttering "what the fudge?!?"

Copyright 2025 K & L Gates

National Law Review, Volume XII, Number 215

Source URL: <https://natlawreview.com/article/what-fudge-popular-breakfast-snack-s-lack-key-ingredient-did-not-trigger-liability>