'One A Day' Will Not Keep Plaintiffs Away

By Robert Guite and Jay Ramsey

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In a recent decision, the California Court of Appeal for the Fourth Appellate District reaffirmed and clarified how the “reasonable consumer” standard should be applied at the pleadings stage to mislabeling claims. In simplest terms, if the packaging makes a definitive statement on the front that suggests one thing, but fine print on the back contradicts that statement, the defendant cannot rely on the fine print to escape a mislabeling claim at the pleadings stage.

In reaching that conclusion, however, the Court of Appeal appears to have laid a roadmap for how to defeat class certification.

In Brady v. Bayer Corp.,[1] a class of vitamin buyers sued Bayer AG, arguing that the packaging of One A Day’s VitaCraves adult multivitamin gummies was deceptive, given that two gummies per day — not one — were required to obtain the recommended daily values. The plaintiffs asserted claims for violation of California’s Consumer Legal Remedies Act, violation of the Unfair Competition Law and breach of express warranty.

The trial court sustained Bayer’s demurrer without leave to amend, but the California Court of Appeal reversed. In doing so, the Court of Appeal declined to follow federal decisions from the Northern District of California and the Eastern District of Arkansas, which disposed of identical claims on motions to dismiss.

The Court of Appeal’s decision cited Bayer’s, and its predecessor Merck’s, reputable history, prominence and superior knowledge in concluding that reasonable consumers “can be expected to adhere to that company’s advice. And when that company suggests, as it has with its products since 1949, that one vitamin pill a day is sufficient, it cannot then rely upon individual consumers reading the small — indeed miniscule — print on the back of its label to learn that instead of ONE A DAY, they should be taking two.”

Beyond this holding, the Court of Appeal provided an analytical framework for analyzing mislabeling claims at the pleading stage. According to the court, such claims often touch on four discrete themes.

The first theme is “common sense.” If a definitive statement is not misleading based on “common sense,” that claim is subject to dismissal on the pleadings. The court cited cases involving breakfast cereals as illustrative of “the triumph of common sense in this context,” and noted approvingly that a claim that a picture of Captain Crunch holding a spoon of berries on a cereal box promises real fruit received a dismissive “Nonsense.”

Likewise, “the thought that Kellogg's Froot Loops — note ‘froot,’ not even ‘fruit’ —

contains any measurable amount of actual, nutritious fruit is an idea not to be taken seriously.” The same rule of common sense applied to boxes of crackers that did not contain primarily fresh vegetables. These cases, the Court of Appeal recognized, were properly dismissed.

The second theme is “literal truth/literal falsity.” The Court of Appeal recognized that a claim based on a literally false statement will likely survive a pleadings challenge. On the other hand, a literally true statement may protect against a mislabeling claim, but only if that truth is meaningful in context.

The third theme is “front-back dichotomy,” where qualifiers on the packaging can excuse a mislabeling claim. In this context, the question is whether the back label contradicts the front’s messaging, or confirms or expands on it. If fine print on the back contradicts a definitive statement on the front, a mislabeling claim will likely survive dismissal on the pleadings. For example, the Court of Appeal explained that the ingredient list on the back of a package “should . . . confirm the implied representations on the front, not contradict them.”

The fourth theme is “brand names [that are] misleading in themselves.” A brand name that includes a description or characteristic of a product that the product does not contain can be misleading. For example, if the brand name includes the word “organic,” but one of its products is not, the brand name, as used on that product, may be deceptive.

In this case, the Brady court concluded that the label for One A Day’s VitaCraves adult multivitamin gummies was potentially misleading under each of the four themes. Common sense suggested that the brand name One A Day meant just one gummy per day, not two. In a similar vein, the court concluded that “One A Day” was ‘literally false,” and so the back’s fine print setting the dosage at two gummies per day directly contradicted the front’s messaging. The Court of Appeal reasoned that “You cannot take away in the back fine print what you gave on the front in large conspicuous print. The ingredient list must confirm the expectations raised on the front, not contradict them.”

The appellate court’s ruling gets plaintiffs past the first hurdle — the pleadings stage. Class certification may prove a hurdle too high. The opinion repeatedly emphasizes that the vitamin market is varied and “reasonable consumers within that market will represent many different approaches to vitamin purchases.” As the court noted:

Not all reasonable vitamin buyers can be said to be alike as a matter of law. Some consumers would scoff at what they might consider the paltry daily dosage recommendations of One A Day; they might believe they need much higher amounts. Or lower. Those are the consumers Bayer has in mind – the ones who scrutinize the back ingredients label to assure themselves they are buying the amounts they, or their health care provider, think are needed. But other reasonable consumers will consider the daily dosages recommended by Bayer and the FDA to be just fine. ...

As a result, “[i]t may be that many people — including some judges and lawyers — would [read the back label for dosage amounts]. It may well be that engineers and scientists and the vitamin cognoscenti would make such an inquiry. But we are convinced that other consumers — knowing they have very little scientific background — would rely upon the representation of a known brand with 70 years of goodwill and credibility behind it.” These variations in consumer purchasing behavior may well prove the end of plaintiffs’ class claims.

The key takeaways of this opinion are twofold. First, in crafting advertising messages, brands should be careful when making definitive statements. Definitive statements are fine to use, but if they are “literally false,” fine print will not prevent a mislabeling claim. Second, in litigating mislabeling disputes and similar misrepresentation claims, if companies can show that consumers may act reasonably in more than one way, they are more likely to prevail on class certification.

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[1] Brady v. Bayer Corp., 2018 Cal. App. LEXIS 800 (Cal. Ct. App. Sept. 7, 2018).