

Kellogg Ruling Guides On Easing Consumer Labeling 'Beef'

By **Ariel Radow and Jordyn Milewski** (October 13, 2022)

"Meatless," "plant based," and "veggie" are terms often used to describe food products that consumers reasonably understand to be meat alternatives. Or do they?

Vegetarian or meat substitute foods continue to gain popularity as consumers reduce or cease their meat consumption, and food manufacturers are grappling with how to market their meatless products in ways that are both appetizing and clear.

Kellogg Sales Co. recently beat a proposed class action alleging it violated federal food labeling laws when labeling its MorningStar brand meatless products as veggie products.

The plaintiff alleged that the "veggie" labeling falsely suggested the products were made primarily from vegetables.[1] The products, which among others include meat-alternative burgers, chicken nuggets and bacon, are made from grains, oils, legumes and other ingredients.[2]

So, what would a reasonable consumer think a "veggie"-labeled food product is offering? According to plaintiff Angela Kennard, reasonable consumers understand and expect that such products are made from vegetables rather than from other, nonvegetable plant-based ingredients.[3]

Kennard and the class of consumers she purported to represent contended that absent the misleading labeling, they would not have paid as much as they did or would not have purchased the products at all.[4]

Accordingly, they claimed, they lost money as a result of Kellogg's deceptive claims, and suffered damages in the amount they overpaid for the veggie products.[5]

For something to be deemed misleading to a reasonable consumer, a plaintiff must show that members of the public are likely to be deceived.[6] This standard requires a showing that a "significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[7]

Would reasonable consumers be misled by a "soy milk" label, believing the product comes from a cow? Or that a diet-labeled soda promises weight loss? Well, some have argued so, but without much success.[8]

Of course, the question here is whether veggie-labeled meat substitute products would mislead a reasonable consumer into thinking the food was primarily made from vegetables.

Kellogg moved to dismiss the initial complaint, alleging violations of the California Consumers Legal Remedies Act, False Advertising Law, Unfair Competition Law, breach of express warranty and breach of implied warranty of merchantability, arguing that no reasonable consumer would be misled by the "veggie" labeling because the term is understood as referring to vegetarian or meat substitute foods.[9]



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The U.S. District Court for the Northern District of California agreed and dismissed the complaint with leave to amend, after which Kennard introduced a consumer survey that demonstrated over 80% of consumers were misled by the labeling.[10]

The survey, which was aimed at meat-substitute-purchasing Californians between the ages of 18 to 79, asked respondents about "the ingredients you expect would be used in the following packaged food item offered by MorningStar Farms." [11]

Respondents were asked whether they would expect the products shown to be entirely or primarily made of vegetables, or made of other plant-based ingredients.[12]

Despite the survey results, the court determined there was a lack of support for the plaintiff's understanding of the term "veggie" because the survey did not ask respondents to define the term "veggie," and thus it was not sufficient to save the plaintiff's claim.[13]

Whether or not the "veggie" label may be ambiguous, Kellogg argued, there is still nothing on the products' packaging that would convey to a consumer a presence of any particular amount of vegetables.[14]

It provides "no indication that any particular vegetable or class of vegetable is present in the products," and even contains photographs of the products clearly mimicking meat as vegetarian substitutes.[15]

A federally compliant ingredients list is also readily identifiable on the packaging for consumers who may want to check whether the products contain primarily vegetables or other ingredients.[16] With this, the court says, any ambiguity is dispelled.[17]

The court agreed with Kellogg in that the challenged products are clearly meat alternatives whose labeling, especially in the context of the rest of the products' packaging, was neither false nor misleading to a reasonable consumer.[18] Case dismissed.

What does this mean for meatless food manufacturers and their advertising moving forward? Well, the meat industry is apparently concerned about the competition and has pushed for legislative changes.

In recent years, laws have been passed all over the country that restrict the use of the term "meat" in product labeling, including in Missouri, Arkansas, Oklahoma and others.

For example, Missouri passed a law in 2018 prohibiting a seller or advertiser from "misrepresenting a product as meat that is not derived from harvested production livestock or poultry." [19]

Similarly, many of these other states' laws require that only foods derived from food-producing animals may contain labels with terms like "meat," "burger," "sausage" and the like.[20]

However, many plant-based food advocates and manufacturers are unhappy with the advertising restrictions being imposed.

For example, trademark of Turtle Island Foods and vegan turkey brand Tofurky filed suit in 2019 claiming Arkansas' new labeling law, which prohibited plant-based manufacturers from using the term "meat" or other related words on its product labels, violated the First

Amendment right to free speech.[21]

Tofurky and others have also brought suit battling similar laws in Louisiana, Arkansas, Missouri and Oklahoma.

Whether meatless products are involved or not, litigation around food products has exploded in recent years. In 2020, the U.S. saw more false advertising cases in the food and beverage space than in any prior year, with an annual increase in cases filed since 2017, according to Food Dive.[22]

We've seen cases about the meaning of "100% parmesan cheese,"[23] "100% pure olive oil,"[24] "whole grain,"[25] "vanilla"[26] and a variety of other kinds of ingredient representations that consumers claim misleads them.

What can marketers do to mitigate the risk of a such a claim?

Here's some food for thought: For starters, when selecting a product descriptor, it's best to choose one that doesn't convey multiple possible meanings. If an ambiguous term is used, clarify it through other language or imagery, and avoid other imagery or words that could create further consumer confusion.

Take fruit snacks, for example. Consumers in *Williams v. Gerber Products Co.* in 2008 alleged that a product's "fruit juice snack" labeling alongside imagery of a variety of different fruits indicated the product contained fruit juice and other natural ingredients.[27] Although the U.S. Court of Appeals for the Ninth Circuit disagreed, Gerber clearly had to spend a lot of time and money defending that product description in court.

Marketers must be mindful of any representations they are making — whether in words or pictures — that might convey claims about a product's contents.

In some circumstances, to dispel any possible confusion, it may be prudent to include a clear disclosure on a product's label even if not mandated by regulatory requirements. For example, it's not uncommon for marketers of fruit-flavored products to include a disclosure that the product does not contain fruit.

What court cases and cases from the National Advertising Division make clear is that even if a food label includes all the information required under applicable laws and regulations, such as the Federal Food, Drug, and Cosmetic Act, and the Fair Packaging and Labeling Act, the label may still confuse or mislead consumers.

Marketers must not only ensure that their labels comply with technical requirements, but they must prioritize understanding what their consumers, acting reasonably in the circumstances, could take away from any information provided on a product's label and the context in which it is used.

We will continue to keep a pulse on discussions about legislation in plant-based food labeling and courts' reasonable consumer analyses in false advertising class actions.

Hopefully, by mitigating deceptive practices — and frivolous consumer claims — consumers and food marketers will settle their longstanding "beef" that is yet to be resolved.

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[1] Kennard v. Kellogg Sales Company, 2022 WL 4241659 (N.D.Cal., 2022).

[2] Angela KENNARD, on behalf of herself, all others similarly situated, and the general public, Plaintiff, v. KELLOGG SALES COMPANY, Defendant., 2021 WL 4244852

[3] Id.

[4] Id.

[5] Id.

[6] Kennard v. Kellogg Sales Company, 2022 WL 4241659 (N.D.Cal., 2022).

[7] Id. at 3.

[8] Gitson v. Trader Joe's Company, 2015 WL 9121232 (N.D.Cal., 2015); Becerra v. Dr Pepper/Seven Up, Inc., 945 F.3d 1225 (9th Cir. 2019).

[9] Kennard v. Kellogg Sales Company, 2022 WL 4241659 (N.D.Cal., 2022).

[10] Id. at 2.

[11] Id.

[12] Id.

[13] Id. at 4.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at 5.

[18] Kennard v. Kellogg Sales Company, 2022 WL 4241659 (N.D.Cal., 2022).

[19] <https://www.senate.mo.gov/18info/pdf-bill/intro/SB977.pdf>.

[20] <https://www.foley.com/en/insights/publications/2019/10/whats-in-a-name-plant-based-foods-labeling-debate>.

[21] <https://www.fooddive.com/news/tofurky-lawsuit-arkansas-meat-labeling-law-violates->

right-to-free-speech/559377/.

[22] <https://www.foooddive.com/news/false-advertising-lawsuits-are-ramping-up-in-food-and-beverage/604615/>.

[23] *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468 (7th Cir. 2020).

[24] *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y. 2014).

[25] *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018).

[26] *Steele v. Wegmans Food Markets*, 472 F. Supp. 3d 47 (S.D.N.Y. 2020).

[27] *Williams v. Gerber Prods. Co.* - 552 F.3d 934 (9th Cir. 2008).