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NINTH CIRCUIT REVIVES BABY FOOD FALSE ADVERTISING CLASS ACTION

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The Ninth Circuit has revived a proposed class action against Gerber, saying the mother who sued it for labeling its sugar-laden baby food as “natural” only had to prove the labels were misleading, not necessarily false. “Even technically correct labels can be misleading,” the panel wrote in an unpublished order reversing the district court’s dismissal of the putative class action.

In *Bruton v. Gerber Food Products Co.*, Case No. 5:12-cv-02412-LHK, the plaintiff alleged that labels on certain Gerber baby food products included claims about nutrient and sugar content that were impermissible under Food and Drug Administration regulations incorporated into California law. She challenged the labels that describe the food as “excellent source,” “good source,” “as healthy as fresh,” “no added sugar” and “natural.” The products include a variety of snack foods that allegedly mislead consumers about being good sources of vitamins C and E, iron and zinc, and support “healthy growth and development.”

The district court denied class certification, and granted summary judgment for the company in 2013. The plaintiff appealed, and on Wednesday a three-judge Ninth Circuit panel reversed and remanded, with one judge dissenting in part and concurring in part. The panel held the district court erred when it held the class was not “ascertainable” and that there was a triable issue of fact as to whether the claims on Gerber’s products in violation of FDA regulations were likely to mislead the public.

“Bruton’s theory of deception does not rely on proving that any of Gerber’s labels were false,” the panel wrote, finding she had a viable claim for deception.

“Rather, Bruton contends that the combination of (a) the presence of the claims on Gerber’s products (in violation of FDA regulations), and (b) the lack of claims on competitors’ products (in compliance with FDA regulations), made Gerber’s labeling likely to mislead the public into believing that Gerber’s products were of a higher quality than its competitors’ products.

“Doubtless, Bruton’s theory of deception is unusual. But even technically correct labels can be misleading.”

Despite the panel's ruling, a Gerber representative said the company expects the case will ultimately be dismissed.

As we have previously reported, in the past several years, numerous private lawsuits have been filed by consumers, particularly in California, alleging that marketing and labeling of food products violate false advertising laws. At first those lawsuits targeted products labeled or marketed as "Natural" or "All Natural" when they contained any minimally processed ingredient. More recent lawsuits have targeted makers of sodas, fruity beverages, cereals, and other snack foods marketed as healthy, alleging that they are not healthy due to their high sugar content.

Such lawsuits alleging violation of state false advertising laws can subject companies to potential liability of thousands of dollars per violation. For example, California's false advertising law, Business and Professions Code § 17500, carries potential penalties of up to \$2,500 per violation, and the state's Consumer Legal Remedies Act, Civil Code §§ 1750, *et seq.*, provides minimum statutory penalties of \$1,000 per violation, restitution, and punitive damages.

For more information, contact the author or any member of our [Retail](#) team.

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