

## NINTH CIRCUIT RECONSIDERS, NIXES DECEPTIVE LABELING CLAIM AGAINST GERBER

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Baby food maker Gerber has scored a partial victory in a false labeling would be class action. The Ninth Circuit in *Bruton v. Gerber Prods. Co.*, Case No. 15-15174, has reversed itself and thrown out a deceptive labeling claim based on the plaintiff's lack of evidence that reasonable consumers would be deceived.

Plaintiff Natalia Bruton filed the putative class action against Gerber Product Co. alleging that labels on certain baby food products included claims about nutrient and sugar content that were impermissible under Food and Drug Administration (FDA) regulations that prohibit such claims on products intended for children less than 2 years old. Bruton did not allege that the labels were false, but that the lack of such claims on competitors' products (in compliance with FDA regulations) made Gerber's labels likely to mislead the public into believing that Gerber's products were healthier.

As we reported in a [previous post](#), the Ninth Circuit previously reversed the district court's grant of summary judgment for Gerber on this issue. In doing so, the court stated that "even technically correct labels can be misleading." In its July 17, 2017 unpublished ruling, however, the court reversed itself and held that "even assuming the validity of Bruton's theory," she lacked sufficient evidence to show that reasonable consumers were likely to be deceived by Gerber's labels, because many of the competitors' labels included the same types of claims prohibited by the FDA regulations.

The court's decision highlights that plaintiffs in false labeling and advertising lawsuits cannot evade the requirement of demonstrating that reasonable consumers would be misled. The decision is important to retailers, who can face such claims based on their private label products.

### "No Added Sugar" Lawsuit Can Proceed Against Odwalla

Such class action claims have been proliferating recently. Last month a California federal judge declined to dismiss a proposed class action over a "no added sugar" label on Coca-Cola owned Odwalla Inc. juice drinks. The plaintiff in *Wilson v. Odwalla, Inc.*, alleged the labels are misleading because they imply that fruit juice, as a whole, normally contains added sugars.

In denying Odwalla's motion to dismiss, U.S. District Judge Dale Fisher of the Central District of California rejected Odwalla's argument that the claims are preempted by FDA regulations allowing a "no sugar added" label if the food the product resembles, and substitutes for, normally contains added sugars.

### **Honest Co. Settles "All Natural" Personal Products Class Suit**

Food and beverage products are not the only targets of deceptive labeling class actions. Jessica Alba's Honest Co. has agreed to pay \$7.35 million and stop labeling products as "all natural" or "100 percent natural" to resolve a consumer class suit alleging it deceptively marketed dozens of products containing many synthetic ingredients. Instead, products will be called "natural," "naturally derived," or "plant-based," and the terms will be defined on the Honest website.

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