



## 15-SECOND ADVERTISING LAW ALERT

# KEEPING BOTTOM PLEADERS OUT OF THE POND

Rarely do courts dismiss false advertising cases because the complaint fails to state a cognizable claim. Rarer is a dismissal without a chance to amend that pleading. Rarest is permanently barring an allegedly deceived consumer who has sued under the sweeping *California Business & Professions Code*. This happened recently.<sup>1</sup>

### BACKGROUND

Plaintiff alleged that she had purchased “Cap’n Crunch with Crunchberries Cereal” in large part because of Defendant’s deceptive marketing of the product.

Plaintiff alleged that she and a putative class of other consumers were deceived into thinking that the product contains nutritious fruit, but it only had a touch of strawberry fruit concentrate and none of the expected fruit berries.

Some marketing described Crunchberries as “a combination of Crunch biscuits and colorful red, purple, teal and green berries.”

Pictures on the cereal package show Crunchberries are not fruit berries.

Defendant moved to dismiss the suit for failure to state a claim for which the court may provide relief.

### OPINION

The case was dismissed. Unlike cases under some state laws that use an “ignorant, unthinking, and credulous” consumer standard, the court used a “reasonable consumer” test. It found that such a consumer would not believe that the product contained “a fruit that does not exist.” It “is entirely unlikely that ... the public would be deceived in the manner described by Plaintiff.”

The fact that Plaintiff’s attorneys unsuccessfully had brought a similar case involving Fruit Loops cereal influenced the Crunchberries judge.

The court precluded further pleading because “it is simply impossible to file an amended complaint stating a claim based on these facts.” To allow more pleading “would require this Court to ignore all concepts of personal responsibility and common sense.”■

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<sup>1</sup> *Sugawara v. PepsiCo, Inc.*, No. 2:08CV01335 (E.D. Cal.; May 21, 2009).