

Horti v. Nestle Healthcare Nutrition, Inc.

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WHY IT MADE THE LIST

To assess “reasonable” consumers’ interpretations of a packaging claim, numerous product labeling cases have emphasized the importance of considering the context in which consumers encounter the claims. For instance, in *Horti v. Nestle*, the district court and the appellate court agreed generally on the relevance of marketplace context, such as the section of brick-and-mortar and online retail stores in which a product is placed, in assessing whether claims are deceptive to target consumers. In particular, the appellate court found that the at-issue “products’ placement in stores alongside legitimate diabetes treatments may create a ‘contextual inference[]’ that the product may have a positive effect on the regulation of blood sugar,”¹ and the district court agreed that “[t]he context in which products are marketed and sold is indeed relevant to the assessment of whether product labels are deceptive.”²

However, critically, the district court and the appellate court in this case disagreed on whether categorization or placement of the products relative to others in the marketplace were relevant to the litigation and Nestle’s liability. Specifically, the district court dismissed Plaintiffs’ Third Amended Complaint in part because Plaintiffs did not demonstrate that the physical or digital placement of the at-issue products in the marketplace is within Nestle’s control. In contrast, the United States Court of Appeals for the Ninth Circuit reversed the district court’s dismissal, noting that it is important to consider whether reasonable consumers may make a

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¹ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832, at 4 (9th Cir. Dec. 13, 2023) (citing *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. July 15, 2021)).

² *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH, at 5 (N.D. Cal. Nov. 7, 2022).



“contextual inference” based upon the placement of the product in certain categories or in proximity to other products.

These rulings in *Horti v. Nestle* demonstrate the importance of considering whether marketplace context beyond the product label itself, such as shelf placement, can be relevant to consumers’ understanding and decision-making. Further, such contextual inferences—as with consumer perceptions more broadly—can be different for the relevant target consumers with particular knowledge and experience than for the general consuming public. Future stages of this matter and other matters regarding product labeling claims may benefit from survey-based empirical assessments of the perceptions and behavior of reasonable consumers in the relevant target population, with inclusion of marketplace elements that could potentially be used by target consumers to draw contextual inferences beyond the product label itself.

DISCUSSION

Procedural Background and Ruling of the District Court

In August 2022, Plaintiffs Bruce Horti, Sandra George, and Jeanette Craig filed an amended complaint in a class action lawsuit against Nestle Healthcare Nutrition, Inc. The lawsuit concerned Nestle’s BOOST Glucose Control protein drinks that are sold by brick-and-mortar and online retailers such as Amazon, Walmart, Target, and CVS, as well as on Nestle’s own website.³ Plaintiffs took issue, for example, with the statement on the bottle reading “designed for people with diabetes” and alleged that Nestle’s BOOST Glucose Control products presented claims that were false and deceptive and “misleadingly represent that they were designed for people with diabetes and control and manage blood glucose.”⁴ Specifically, Plaintiffs alleged that the name of the products themselves, “BOOST Glucose Control,” along with the bottle packaging claims that the products “help[] manage blood sugar” and are “designed for people with diabetes,” deceived consumers into believing that the products “would have some affirmatively therapeutic impact on their blood glucose levels, or otherwise mitigate, treat, or prevent prediabetes or diabetes.”⁵ Pointing to a clinical trial commissioned by Nestle and discussed on its website, Plaintiffs alleged that Nestle’s BOOST Glucose Control products’ only beneficial impact on consumers’ blood sugar levels is that they “were only associated with a lesser rise in glucose levels as compared to one other nutritional drink that was unidentified in the study and . . . this is only because Boost Glucose Control drinks have less sugar[.]”⁶

In addition to allegations regarding the packaging claims specifically, Plaintiffs also alleged that the placement of Nestle’s BOOST Glucose Control on physical store shelves and in categories of online stores further misled consumers. In particular, Plaintiffs alleged that Nestle’s BOOST Glucose Control products are “sold in the health and nutritional supplement sections [of stores and websites], which [in physical retail stores] adjoin aisles selling over-the-counter medications,

³ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH, at ¶¶ 1–3, 7–10 (N.D. Cal. Aug. 1, 2022) (Dkt. 29, Third Amended Class Action Complaint).

⁴ *Id.* ¶¶ 1–5, 49.

⁵ *Id.* ¶¶ 3, 5.

⁶ *Id.* ¶¶ 5, 53.

and other FDA-approved treatments, and diabetes diagnostic tests.”⁷ They further alleged that “Nestle’s chosen placement of the [BOOST Glucose Control products] in stores and on websites enforces the conclusion Nestle and/or the retailers selling the [p]roducts view the products as treating health conditions, and that this is what they want consumers to believe.”⁸

Nestle filed a motion to dismiss Plaintiffs’ amended complaint at the end of August 2022.⁹ In November 2022, the district court sided with Nestle and dismissed Plaintiffs’ amended complaint with prejudice. The district court ruled that Plaintiffs failed to establish that “a reasonable consumer would be misled by the Boost labels,” stating that the “clear designations of the nutritional contents on the front of the label, along with the description as nutritional drinks, demonstrate that the products are a food that will necessarily impact glucose levels, not a health supplement or a drug that would treat the chronic disease.” The court further found that “this is particularly true for the targeted consumer group, persons with diabetes and prediabetes, who are aware of the relation between consuming sugar and blood glucose levels.”¹⁰ Additionally, the court found that “[t]he context in which products are marketed and sold is indeed relevant to the assessment of whether product labels are deceptive, but plaintiffs fail to plausibly allege that Nestle held control over placement of the products. The placement of the products thus does not sway the assessment.”¹¹

The district court also ruled that because Plaintiffs “[did] not allege facts that relate to their particular purchases . . . [they] simply [did] not provide enough detail beyond the barest descriptions of their injury to support standing.”¹²

Plaintiffs appealed the decision in April 2023, and the United States Court of Appeals for the Ninth Circuit issued its opinion in December 2023.¹³

Ruling and Reasoning of the Appellate Court

The appellate court reversed the district court’s ruling and remanded the case back to the district court. The appellate court found that the Plaintiffs did “sufficiently allege[] that the representations on the BOOST Glucose Control label are likely to mislead a reasonable consumer” at the pleading stage.¹⁴ The appellate court noted that although Nestle offered interpretations of the product labels contrary to those offered by Plaintiffs, “that disagreement is not appropriate for resolution on a motion to dismiss.” The appellate court further acknowledged that, consistent with Plaintiffs’ allegations, the at-issue “products’ placement in stores alongside

⁷ *Id.* ¶ 48.

⁸ *Id.* ¶ 45.

⁹ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH (N.D. Cal. Aug. 29, 2022) (Dkt. 32, Motion to Dismiss Third Amended Class Action Complaint).

¹⁰ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH, at 4–5 (N.D. Cal. Nov. 7, 2022).

¹¹ *Id.* at 5.

¹² *Id.* at 6.

¹³ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832 (9th Cir. Apr. 7, 2023) (Plaintiffs-Appellants’ Opening Brief); *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832 (9th Cir. Dec. 13, 2023).

¹⁴ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832, at 3 (9th Cir. Dec. 13, 2023).



legitimate diabetes treatments may create a ‘contextual inference[]’ that the product may have a positive effect on the regulation of blood sugar.”¹⁵

The appellate court further disagreed with the district court’s ruling regarding Plaintiffs’ allegations of economic harm. While the district court found that Plaintiffs “[did] not provide enough detail” to support their standing,¹⁶ the appellate court found that Plaintiffs’ allegations that “they purchased a product they otherwise would not have bought but for defendant’s alleged misrepresentations” are sufficient at the pleading stage to show they suffered harm.¹⁷ Moreover, the appellate court ruled that, despite not offering the explicit amounts Plaintiffs paid for the at-issue products, “Plaintiffs fairly alleged that BOOST Glucose Control has a higher price than other comparable products and that plaintiffs chose to pay the premium based on Nestle’s alleged misrepresentations.”¹⁸

Horti v. Nestle was consolidated with another case, *Owens v. Nestle*, and Plaintiffs submitted their consolidated class action complaint in February 2024.¹⁹ Nestle filed its answer to the consolidated complaint in March.²⁰

IMPACT

In both the district court’s dismissal of Plaintiffs’ amended complaint and the appellate court’s reversal, the courts assessed how a “reasonable consumer” could interpret the at-issue claims. In the appellate court’s order, the court found that, at the pleading stage, Plaintiffs’ arguments were “sufficient to show that a reasonable consumer could expect the product to exert some benefit on the control and regulation of blood sugar.”²¹ The appellate court found that, while this was sufficient for the pleading stage, the reasonable consumer test would require Plaintiffs to address the “probability ‘that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’”²²

Later stages of the consolidated case may benefit from empirical evidence that addresses to what extent, if any, the at-issue representations were interpreted by consumers as alleged, and whether those at-issue representations affected consumers’ purchase decisions. As the district court and appellate court recognized, several factors may affect consumers’ perceptions of the at-issue claims and their ultimate purchase decisions. These factors matter at different stages of the purchase funnel—keeping in mind that consumers’ purchase journeys do not typically start with evaluating the product packaging in isolation at the point of purchase, and

¹⁵ *Id.* at 4 (citing *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. July 15, 2021)).

¹⁶ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH, at 6 (N.D. Cal. Nov. 7, 2022).

¹⁷ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832, at 2 (9th Cir. Dec. 13, 2023).

¹⁸ *Id.* at 2–3.

¹⁹ *In re Nestle Boost Nutritional Drink Litig.*, No. 21-cv-09812-PJH (N.D. Cal. Feb. 20, 2024) (Dkt. 57, Order Granting Motion for Consolidation and Appointment of Interim Co-Lead Class Counsel); *In re Nestle Boost Nutritional Drink Litig.*, No. 21-cv-09812-PJH (N.D. Cal. Feb. 29, 2024) (Dkt. 59, Consolidated Class Action Complaint).

²⁰ *In re Nestle Boost Nutritional Drink Litig.*, No. 21-cv-09812-PJH (N.D. Cal. Mar. 21, 2024) (Dkt. 63, Answer to Consolidated Complaint).

²¹ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832, at 3 (9th Cir. Dec. 13, 2023).

²² *Id.* at 3 (citing *Ebner v. Fresh, Inc.* 838 F.3d 958, 965 (9th Cir. 2016)).

instead include multiple phases: Consumers identify a need, collect information on available products to meet that need, evaluate the products they identify, decide on and purchase a product, and then experience the product in the post-purchase process.²³ Of particular relevance for this case, the information consumers are exposed to and the other products they consider in their purchase process may inform their understanding of and reaction to different marketing claims.

Many methods are available to assess consumer perceptions and behavior, including gathering empirical evidence through well-designed consumer surveys. Consumer surveys, assuming they are designed and conducted to produce valid and reliable data, have the advantage of addressing highly specific aspects of consumer behavior—a benefit that sales data or other data sources often cannot offer. In this case, surveys could examine factors related to the reasonable consumer’s perceptions, beliefs, and purchase motivations about which the district court and the appellate court appear to disagree.

Relevant Population—Who is the Reasonable Consumer?

In the context of this case, the district court expressed concerns regarding Plaintiffs’ theory as to how certain consumers would be misled by the at-issue claims. In their dismissal of Plaintiffs’ Third Amended Complaint, the court concluded that deception was particularly unlikely “for the targeted consumer group, persons with diabetes and prediabetes, who are aware of the relation between consuming sugar and blood glucose levels.”²⁴ When the district court’s decision was overturned, the appellate court did not comment specifically on the at-issue products’ target population, finding generally that a “reasonable consumer could understand these [at-issue] representations to indicate that the product[s] will have a positive effect on diabetes and blood sugar levels.”²⁵ The two courts’ disagreement on a “reasonable” consumer’s interpretation of the at-issue representation thus sparks the questions of which type of consumer is targeted by Nestle’s BOOST Glucose Control protein drinks, and subsequently, how those targeted consumers understand the at-issue claims.

Determining the target customer is an important consideration in an analysis regarding the reasonable consumer standard because the purchase process, and especially the sophistication and knowledge based on which buyers examine a product, may vary substantially between those who have purchased or would consider purchasing the at-issue product, and those who are not in the market for the at-issue product. In general, during the information search phase of the consumer buying process, consumers may conduct their own research, learn from professionals (such as physicians), receive information from friends or family, or recall their experience with the same or similar products.²⁶ The information that different consumers consider could impact how they interpret and act on marketing claims—if they do so at all. Because the perceptions and behavior of those who belong to a population of interest may differ systematically from those who do not, it is

²³ PHILIP T. KOTLER & KEVIN LANE KELLER, *MARKETING MANAGEMENT* 194–201 (15th ed. Pearson 2016).

²⁴ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH, at 5 (N.D. Cal. Nov. 7, 2022).

²⁵ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832, at 3–4 (9th Cir. Dec. 13, 2023).

²⁶ KOTLER & KELLER, *supra* note 23, at 196.



important to carefully consider the target population of research aimed at assessing these issues.²⁷

Marketplace Context—Does the Presentation of the Products Influence Consumer Behavior?

In its decision, the appellate court found that “the [at-issue] products’ placement in stores alongside legitimate diabetes treatments may create a ‘contextual inference[]’ that the product may have a positive effect on the regulation of blood sugar.”²⁸ Plaintiffs also reference the positioning of the at-issue products under the “Diabetes Care” section of the CVS website as contextual information that may lead consumers to interpret the at-issue claims as alleged. In contrast, in its dismissal of Plaintiffs’ Third Amended Complaint, the district court found that “[t]he context in which products are marketed and sold is indeed relevant to the assessment of whether product labels are deceptive, but plaintiffs fail to plausibly allege that Nestle held control over placement of the products.”²⁹ Irrespective of whether shelf placement of the at-issue product was in Nestle’s control, it is reasonable to hypothesize that marketplace context may sway consumer behavior in this case. A well-designed survey could be informative in assessing the extent, if any, to which consumers interpreted the at-issue claims as alleged, in the context of their presentation in the marketplace.

Surveys can provide valuable insights into the ways in which consumers interpret and respond to the information presented to them by emulating—at least to a certain degree—how consumers experience contextual cues in the marketplace.³⁰ Accordingly, a guide on survey research conducted for litigation states that “a primary criterion for assessing the reliability of surveys . . . is based on the degree to which they alter the fundamental conditions in which the marks or terms at issue are encountered by buyers in reality.”³¹ In this matter, the marketplace context to consider when designing a survey may include the channels through which consumers search for the at-issue products, which other products may appear alongside the at-issue products on store shelves (or online), and in which section of brick-and-mortar stores or online retailer websites the at-issue product can be found.

Well-constructed surveys whose designs carefully consider the appropriate target population, realistic stimuli, and the marketplace context described above can provide evidence on the effect (if any) of particular marketing representations on consumers’ perceptions and behavior that other data sources cannot directly address. In the *Nestle Boost Nutritional Drink Litigation*, survey research may help the courts to sharpen their view of the reasonable consumer by eliciting to what extent, if any, actual and prospective purchasers of the at-issue products interpret the at-issue

²⁷ Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 376–77 (3d ed. The National Academies Press 2011).

²⁸ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 22-16832, at 4 (9th Cir. Dec. 13, 2023) (citing *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. July 15, 2021)).

²⁹ *Horti v. Nestle Healthcare Nutrition, Inc.*, No. 21-cv-09812-PJH, at 5 (N.D. Cal. Nov. 7, 2022).

³⁰ See, e.g., James R. Bettman, Mary Frances Luce & John W. Payne, *Constructive Consumer Choice Processes*, 25 J. CONSUMER RSCH. 187 (1998).

³¹ Itamar Simonson & Ran Kivetz, *Demand Effects in Likelihood of Confusion Surveys: The Importance of Marketplace Conditions*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN 259 (1st ed. American Bar Association 2012).

claims in the marketplace context as alleged, and if the alleged misrepresentations are material to consumers' purchase decisions.