



***Wertymer v. Walmart*: The Seventh Circuit's Raw Lesson for Class Action Plaintiffs (and Their Lawyers)**

by Brooklyn E. Boyce

Almost a year after purchasing a container of Walmart Great Value raw honey, John Wertymer suddenly questioned whether his honey was *truly* raw. So, of course, he sent his 10-month-old honey to a specialized honey-testing laboratory. The results, at least in his eyes, confirmed his random suspicions. The test revealed elevated levels of HMF, a chemical found in honey, which suggested that the producer may have treated the honey with heat. And heated honey cannot be "raw." Wertymer decided to [sue](#) Walmart not only on his own behalf, but on behalf of a proposed nationwide class of wronged Walmart honey purchasers. His search for justice, however, quickly became a sticky mess.

Wertymer filed suit in federal district court in Illinois, alleging deception and unfairness under the Illinois Consumer Fraud and Deceptive Practice Act as well as a state common law claim for fraudulent misrepresentation. The district court dismissed his case for lack of standing and failing to show "what a reasonable consumer would believe about raw...honey." Wertymer appealed to the U.S. Court of Appeals for the Seventh Circuit. The appeal was met with more than just a run-of-the-mill dismissal; the unanimous opinion's tone and approach conveys the panel's frustration with lawyers who file poorly argued claims purportedly meant to advance a larger campaign against ["food label injustice."](#)

One of the attorneys behind *Wertymer v. Walmart, Inc.* is a familiar face in the class-action litigation world, Spencer Sheehan. One news article dubbed Sheehan the "Vanilla Vigilante" for the [over 100 lawsuits](#) he has filed against companies claiming their vanilla-containing products are falsely labeled. He has filed other lawsuits against Walmart involving different Great Value brand foods, as well as against Snapple, Chobani, and other food and drink makers.

The Court of Appeals focused on a different question than the district court in Illinois. Instead of asking whether a reasonable consumer would be misled by "raw," it asked whether Wertymer sufficiently proved that Walmart committed fraud. In alleging fraud, Wertymer's complaint was "subject to the heightened pleading standard." The court explained the higher standard discourages "a 'sue first, ask questions later' philosophy" because that philosophy can "'do great harm to the reputation of a business' even if the defendant is later exonerated."

The fatal flaw in Wertymer's case was that he included evidence that led to its own demise. Wertymer claimed that the elevated levels of HMF meant the product had been heated. However, as his complaint also mentions, HMF levels rise for a variety of reasons like storage, geographic origin, and chemical composition. As the court explained, "HMF is a proxy not merely for heating, but also for myriad other factors, most notably, length and conditions of storage." In simply asserting that

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heating caused the elevated HMF levels, Wertymyer rendered his theory speculative. Speculative claims cannot satisfy the higher bar required for fraud allegations.

To make matters worse, Wertymyer provided additional documents not required by the court that proved obvious alternate explanations to the elevated HMF levels. The submitted documents clearly showed that HMF is “an indicator of several factors including: (1) heating, (2) geographic, (3) chemical composition of the honey, or (4) degradation that comes from aging while in storage.” Wertymyer failed to explain why heating was the more likely cause than other factors.

Even the data point Wertymyer relied on in his complaint—that honey must be 10 mg/kg or lower for it to be raw—was proven speculative in his documents. Wertymyer cites a New Zealand honey seller’s website which, the court explained, was using “this number as a marketing tool for sales of its own honey.” The description mentions “storage changes” as one factor for a higher figure and that higher levels “may” indicate heating. Ironically, the seller likely used these hedging terms to avoid accusations of deceptive marketing. And while Wertymyer and his counsel claimed to have “numerous” sources to prove the limit, the court could not find a 10 mg/kg limit mentioned anywhere. The court also found unconvincing, if not contradictory, Wertymyer’s citation of an international food-safety document, the Codex Alimentarius, as support for his claim.

Wertymyer’s alternative claim that Walmart processed the honey, which also deprived it of its “raw” status, failed for the same reasons as his claim that the producer heated the honey. The documents his complaint cited at most indicated that the presence of a certain sugar *may* indicate processing. The documents noted alternative reasons for the sugar’s presence.

In *Wertymyer*, the Seventh Circuit joins the growing chorus of courts that are fed up with half-baked class action lawsuits that are filed only to make the lawyers richer. The court explicitly called out Wertymyer’s lawyers for their inconsistencies across cases. In four other cases, Wertymyer’s counsels have relied on the 40 mg/kg limit to prove their claims yet now they relied on a 10 mg/kg limit. The court described it as a “moving target” and it gave them “pause about the integrity of counsel’s claim.”

In a pointed footnote, the court showed similar concerns shared by a district court in the Seventh Circuit. The opinion from the district court judge in the Northern District of Illinois noted that the plaintiff’s counsel is known for filing many consumer labeling cases that don’t last long, comparing them to a “crash landing.” Continuing, they warned that lawyers who fail to file in good faith waste not only time and money for the opposing parties, but also the judiciary.

The Seventh Circuit’s decision in *Wertymyer v. Walmart* acts as a clear warning against speculative fraud claims. By subjecting Wertymyer to a higher standard and exposing that he planted the seeds of his own case’s destruction through contradictory evidence and speculation, the court reiterated its purpose to protect judicial resources and the reputations of businesses. Consumer fraud claims require credible, consistent, and compelling proof: not just an allegation.