



## Cloud Storage, Jake Paul, and the Reasonable Consumer

by Glenn Lammi

No manufacturer is safe from marauding class-action lawyers. Not even from plaintiffs who get exactly what they bargained for or a bit more than what they expected. Those very scenarios arose in lawsuits recently decided by the Ninth Circuit and the Southern District of New York, respectively. This post discusses each court's "reasonable consumer" analysis and offers four key takeaways from the decisions.

### **Additional Cloud Storage: *Bodenburg v. Apple Inc.***

Subscribers to Apple's iCloud service receive a complementary 5 GB of cloud storage. Apple offer a premium subscription of "[a]dditional iCloud storage for a monthly fee." Apple device owner Lisa Bodenburg purchased the 200 GB plan. Unhappy that the resulting storage was 200 GB, not the 205 she expected (the free 5 GB plus the purchased 200 GB), she sued Apple on behalf of every similarly situated iCloud consumer in the United States. She alleged violations of California consumer-protection laws and breach of contract. The district court granted Apple's motion to dismiss all claims, and Bodenburg appealed to the U.S. Court of Appeals for the Ninth Circuit.

In a unanimous [July 23 opinion](#), the Ninth Circuit affirmed the district court. On Bodenburg's consumer-fraud claims, the court decided that while some consumers may share Bodenburg's expectation, Apple's statements are "'not false and deceptive merely because [they] may be unreasonably misunderstood by an insignificant and unrepresentative segment' of consumers.'" Apple made no express representations that would reasonably lead one to think that "additional storage" meant 200 GB + 5 GB. In fact, the purchase agreement clarifies that each iCloud premium plan provides customers with a total of 50 GB, 200 GB, or 2 TB, depending on the payment amount.

The Ninth Circuit also dismissed Bodenburg's breach-of-contract claim, reasoning that no breach occurred. Bodenburg received exactly what Apple offered in the contract—"195 GB more than the 5 GB that she previously had." In other words, she received "additional storage." Bodenburg may have believed that additional storage meant 205 GB, the court explained, but that "does not alter the contract's clear language."

### **Additional Caffeine: *In Re: Prime Energy Consumer Litigation***

Prime Energy drinks contain a lot of caffeine, a fact that Prime Hydration—a business founded by internet influencers Jake Paul and KSI—stresses in its labeling and marketing. The brand is thus no stranger to controversy. Some schools in the U.S. and abroad have [banned](#) its sales. Unsurprisingly, it's also been the target of consumer class actions.

The suits at issue here don't allege physical harm. They instead claim Prime Hydration defrauded purchasers because Prime Energy drinks contain *more* caffeine than disclosed on their label. The plaintiffs' theory is they suffered financial harm when they paid more than they expected for an energy drink that provided a little more of what they wanted (a lot of caffeine). That's confusing but stick with us.

Several plaintiffs filed separate class actions in the S.D.N.Y. The lawsuits were consolidated before Judge Katherine Polk Failla, and Prime Hydration moved to dismiss the complaint. In a [July 31 opinion](#), Judge Failla granted the defendant's motion with prejudice.

The plaintiffs' consumer-fraud claim rests entirely on a laboratory test that found a can of Prime Energy contained 15-25 milligrams more caffeine than the 200 mg reflected on the label. The complaint reports this conclusion with no supporting details, such as the choice of laboratory or its qualifications, the testing methodology, or the origin of the cans and the number tested.

Without that information, Judge Failla concluded, the court could not make "'any inferences regarding the caffeine content'" of the Prime Energy the plaintiffs purchased. Without a plausible misrepresentation, the plaintiffs' claim fails.

Judge Failla went on, however, to assess whether Prime Hydration materially misled the plaintiffs. To do that, she conducted a reasonable-consumer inquiry. In the Second Circuit, that inquiry is a "'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'"

No reasonable consumer would find an additional "smidgen" of caffeine to be material, nor would they be misled, Judge Failla concluded. Consumers purchase Prime Energy for its whopping caffeine content, she reasoned, so "it defies common sense" to think they would be troubled by "a mere 7-11% additional caffeine." The judge, perhaps [channeling](#) Wallace Shawn's Vizzini in *The Princess Bride*, also found it is "inconceivable" that consumers so focused on a quick jolt of energy "would be concerned, much less disturbed" with a bit more caffeine. The plaintiffs even tried the "save the children" tactic by noting caffeine's negative impact on youth. Nonsense, Judge Failla retorted in a footnote, "none of the Plaintiffs is a child," nor do they allege any child consumed Prime Energy.

## Four Takeaways

1. **A precedential appeals court ruling.** The Ninth Circuit has produced few consumer class-action precedents over the past two decades. The court has had plenty of opportunities, but more often than not, it has released unpublished memoranda that lack precedential force. As a published opinion, *Bodenburg* will be a valuable precedent for consumer-fraud defendants as well as district courts.

2. **Judicial determination of deception.** In the Second Circuit, as Judge Failla wrote in her opinion, "it is well settled that courts may determine as a matter of law" whether the business practice at issue would deceive a reasonable consumer. The Ninth Circuit's rule expresses a strong preference for juries, not judges, to decide deception at the pleading stage. That rule has allowed district court judges, especially in California, to avoid dismissing questionable fraud claims, an outcome that ratchets up pressure to settle. But as *Bodenburg* noted, courts can conduct the reasonable-consumer analysis when the plaintiff cannot "plausibly prove" deception. The court didn't exactly set out an objective standard for when a claim is implausible as a matter of law. But this panel's willingness to decide the question can help defendants convince district courts that the judge, not the jury, should evaluate a plaintiff's deception claim.

3. **Testing the court's patience.** Consumer-fraud plaintiffs that rely on lab tests to show a material misrepresentation—without pleading facts establishing the test's credibility—have not fared well in the Southern District of New York. Even so, the *In re: Prime Energy* plaintiffs took exactly that approach. When allowing the plaintiffs to amend their complaints, Judge Failla offered them *three* chances to add testing information to their pleading. Their repeated failure earned the judge's scorn and a very thorough rejection of the plaintiffs' arguments. The opinion cited case after case rejecting bald assertions of test results. It methodically distinguished a Second Circuit opinion on which the plaintiffs relied. And it noted twice that the test was "commissioned by Plaintiffs' attorneys." Given Judge Failla's opinion, plaintiffs' lawyers should think twice about grounding a misrepresentation claim entirely on a friendly lab test in the Southern District .

4. **Intriguing Dicta on Injury.** In a footnote concluding her reasonable-consumer analysis in *In re: Prime Energy*, Judge Failla notes that the plaintiffs could not prove harm. The Prime Energy purchasers alleged only a monetary harm—the deception misled them into purchasing the drink and, alternatively, they paid a premium price. A 1999 New York Court of Appeals decision, *Small v. Lorillard Tobacco Co.*, unanimously [held](#) that monetary loss is not a redressable injury under New York's consumer-protection law. Judge Failla acknowledges that in consumer-fraud cases, the Second Circuit recognizes monetary loss as a harm, an interpretation she "struggles to reconcile" with the holding in *Small*. Consumer fraud litigators in the Second Circuit should consider advancing Judge Failla's skepticism of the circuit's flawed interpretation in future cases.