

## Don't Forget the Cocktail Sauce: Second Circuit Tosses Shrimp Tray Class Action

September 28, 2011 by [Sean Wajert](#)

We havewarned readers of *Mass Tort Defense* of the [alarming trend](#) of plaintiff lawyers seeking to [attack](#) every aspect of a product's packaging and [labeling](#) as somehow a case of consumer fraud -- often ignoring common sense in the process.

The latest example comes from a case rightly rejected by the Second Circuit last week. See *Verzani v. Costco Wholesale Corp.*, No. 10-04868, 2011 WL 4359936 (2d Cir., Sept. 20, 2011).

Plaintiffs brought a putative class action against Costco Wholesale Corp. over the size of its "shrimp trays." (We love em, especially for football parties.) Plaintiffs claimed that the wholesaler misled customers by labeling its shrimp trays as 16 ounce trays when the shrimp part of the tray itself only weighed about 13 1/2 ounces. The other few ounces were allegedly made up of the cocktail sauce and lemon wedges. (We pause and ask, how can you eat shrimp without those two accompaniments?)

The case had a somewhat lengthy procedural history, with issues of preliminary injunctions, choice of law, motions to dismiss, and jurisdiction, in play; the class issue was never reached. In relevant part, the trial court dismissed the claims in 2009, concluding that the plaintiffs' contention that a "reasonable consumer" would not assume that the net weight of the product included the cocktail sauce and other (useful and edible) elements was not well founded. The district court later denied the plaintiffs' motion to amend, 2010 WL 3911499 (S.D.N.Y.), noting that a reasonable consumer would not believe that the net weight disclosed on the label for the shrimp tray refers to only the shrimp. The label lists the ingredients in descending order based on their relative weight --shrimp, lemon wedges, leaf lettuce -- followed by a number of ingredients that comprise the cocktail sauce, such as, tomato paste, distilled vinegar, and horseradish; it clearly states "Net WT 160z (1.00 lb.)."

Verzani's interpretation of "net weight" as including 16 ounces of shrimp alone was objectively unreasonable; a simple visual inspection of the tray, with its clear plastic top, would reveal that shrimp is not the only edible item inside. In fact, the product's name alone, "Shrimp Tray with Cocktail Sauce," suggested that a consumer (at a minimum) is purchasing shrimp *and* cocktail sauce. A reasonable consumer reading the tray's label would not pick out "shrimp" to the exclusion of all the information on the label (including the product's name and the listed ingredients) when assessing the net weight of the product.

Plaintiffs appealed, but in a summary order, the panel found that court had been right to throw out the case and deny the motion to file an amended complaint.