# YEAR IN REVIEW

## 2021 FOOD, BEVERAGE AND SUPPLEMENT LITIGATION ROUND-UP

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## WHILE THE IMPACT OF THE GLOBAL PANDEMIC CONTINUED TO BE FELT THROUGHOUT 2021, THE YEAR WAS YET ANOTHER ACTIVE YEAR FOR NEW REGULATORY ACTIVITY AND LITIGATION TARGETING THE FOOD, BEVERAGE AND SUPPLEMENT INDUSTRIES.

In this round-up, Bryan Cave Leighton Paisner LLP presents a collection of regulatory developments, key court decisions, and notable settlements that were reached in 2021.

The highlights of this 2021 round-up include:

- New federal and state legislation and regulation governing food labeling, packaging, and ingredients
- Litigation trends within the food industry
- Food safety modernization update
- Multifunction ingredient lawsuit updates
- Plant-based product litigation update
- Slack fill litigation update
- Animal raising and welfare litigation
- Prop 65 and food safety update
- COVID-19 related litigation and regulation updates
- Notable rulings and settlements
- A preview of areas to watch in 2022

# NEW LEGISLATION AND REGULATION

## REGULATORY UPDATE

### FEDERAL "MADE IN U.S.A." RULE

In June 2021, the Federal Trade Commission (FTC) adopted its final rule for using "Made in U.S.A." or any variation of that statement, including the U.S. flag. While this rule imposes no new requirements, it codifies the FTC's long-standing enforcement policy regarding claims pertaining to U.S. origin.

The test for an unqualified claim of U.S. origin is whether all or virtually all of the product's components or ingredients come from the U.S. In order to claim a product is "Made in U.S.A.," or any version of that statement, the product must meet the following standards:

1. Final assembly or processing of the product occurs in the U.S.;

2. All significant processing that goes into the product occurs in the U.S.; and

3. All or virtually all ingredients or components are made and sourced in the U.S. The FTC declined to establish a percentage definition for "all or virtually all."

Under the rule as adopted, the FTC can seek redress, damages, and civil penalties of up to $43,280 per violation.

By contrast, California law allows a product to be labelled "Made in U.S.A." even if foreign components account for up to 5 percent of the final wholesale value of the product. Bus. & Prof. Code § 17533.7. That limit increases to 10 percent for products containing components that cannot be sourced or manufactured in the U.S. Cost cannot be the basis for determining whether a component can be sourced or manufactured in the U.S.

### FEDERAL BIOENGINEERED DISCLOSURE RULES

As of January 1, 2022, all regulated entities must comply with the U.S. Department of Agriculture's (USDA) final rule implementing the National Bioengineered Food Disclosure Standard (NBFDS) signed into law by President Obama in 2016.

The NBFDS requires manufacturers, importers and retailers of food sold in the U.S. to identify bioengineered foods and ingredients. The final rule defines "bioengineered food" as any food that "contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques and for which the modification could not otherwise be obtained through conventional breeding or found in nature," and excludes any genetically modified material that is "not detectable." Non-detectable amounts of modified genetic material do not require BE labeling.

Disclosure can be through text, a symbol, electronic or digital link, or text message, as follows:

- **Text:** Entities can state "bioengineered food" or "contains a bioengineered food ingredient" for multi-ingredient food.
- **Symbol:** Entities can use a variation of the following symbol, which incorporates the word "bioengineered" and can be used in either color or black and white.


- **Electronic or digital link:** An electronic or digital link must be accompanied by the statement "Scan here for more food information" or equivalent language, and the BE disclosure must be provided on the first page accessed through the link, without any marketing or promotional material. A telephone number that provides access to the BE food disclosure must be provided near the link, along with the statement "Call [number] for more food information."
- **Text Message:** If utilizing the text message option, the entity must not charge the consumer a fee to access the disclosure, and the text must include the statement, "text [command word] to [number] for bioengineered food information."

There are additional disclosure options for small food manufacturers (use of a telephone number, internet website), and modified disclosure options for small and very small packages. For foods sold in bulk containers, retailers are responsible for providing signage on or near the bulk item.

The final rule provides for several exemptions from the disclosure requirement:

- Foods served in a restaurant or similar retail food establishment are exempt, as are ready-to-eat items prepared by grocery stores.
- Very small food manufacturers (with annual receipts of less than $2.5 million) are exempt.
- Inadvertent or technically unavoidable presence of bioengineered substances of up to 5% for each ingredient, with no allowance for any BE presence that is intentional. Verification of compliance with the threshold will be done through records, not prescriptive tests or methodologies.
- Food derived from an animal is prohibited from being considered a BE food solely because the animal consumed feed produced from, containing, or consisting of a BE substance.
- Foods certified under the Agricultural Marketing Services' National Organic Program (NOP) are exempt. This exemption covers all NOP certified label categories ("100% Organic," "Organic" and "Made with Organic").

## STATE LAWS REGARDING FOOD PACKAGING

California passed several laws this past year intended to address packaging waste and safety for consumer products, including food products.

## USE OF RECYCLING SYMBOL

California has banned use of the chasing arrows recycling symbol unless the product or packaging meets statewide recyclability criteria. The law takes effect January 1, 2024.

Senate Bill 343 also prohibits making other false or misleading environmental marketing claims, and requires documentation, which must be disclosed to the public upon request, of any claims that a consumer good is environmentally friendly or beneficial. Bus. & Prof. Code § 17580(a).

As to recyclability claims, although plastic bottles and containers must be labeled with a numeric code indicating the type of plastic used, use of the chasing arrows recycling symbol is prohibited unless the products satisfy recyclability regulations to be issued by CalRecycle demonstrating that they are of a material type and form that is:

- collected for recycling by recycling programs encompassing at least 60 percent of the state; and
- routinely used as feedstock in the production of new products or packaging.

Pub. Res. Code § 42355.51(d)(2).

In addition, in order to qualify as recyclable, a product or packaging must meet the following requirements:

- No components, inks, adhesives or labels that prevent recyclability according to the APR Design Guide® published by the Association of Plastic Recyclers.
- No intentionally added chemicals that would act as a contaminant, as identified in Section 42370.2(g)(4).
- No perfluoroalkyl or polyfluoroalkyl substances or PFAs that are intentionally added and have a functional or technical effect, or exceed 100 parts per million.

*Id.* at § 42355.51(d)(3).

The law provides an exemption from all of the requirements above for a product or packaging that has a demonstrated recycling rate of at least 75 percent, meaning that "not less than 75 percent of the product or packaging sorted and aggregated in the state is reprocessed into new products or packaging." *Id.* at § 42355.51(d)(4). However, the Senate's legislative analysis indicates that a fairly narrow subset of goods are expected to meet this criteria, and that currently it is met only by PET #1 and DPE #2 plastic bottles and jugs. Senate Floor Analyses (Sept. 9, 2021).

The law also exempts products that meet the requirements of the California Beverage Container Recycling and Litter Reduction Act. Bus. & Prof. Code § 17580(e). A similar exclusion is provided where consumers are directed to properly handle or otherwise dispose of the good at the end of its useful life in accordance with the guidance in enumerated programs. *Id.* at § 17580(g).

The law provides a sell-through period for any product or packaging that is manufactured up to 18 months after January 1, 2024 or CalRecycle issues the recyclability regulations, whichever is later. Pub. Res. Code § 42355.51(b)(2)(A).

## PFAS IN FOOD PACKAGING

California also passed a law that prohibits, as of January 1, 2023, any company from distributing or selling food packaging that contains perfluoroalkyl and polyfluoroalkyl substances or PFAS, and to use the least toxic alternatives. "Food packaging" is defined to mean a nondurable package, packaging component, or food service ware that is comprised, in substantial part, of paper, paperboard, or other materials originally derived from plant fibers. Health & Safety Code § 109000.

## RECYCLED CONTENT IN BEVERAGE CONTAINERS

A California law that took effect January 1, 2022 requires that plastic beverage containers subject to the California Refund Value (CRV) must include at least 15 percent recycled content. The amount of recycled content increases to 25 percent in 2025, and to 50 percent in 2030.

Assembly Bill 793, which was passed in September 2020, seeks to help improve the market for recycled plastic by increasing the demand.

Non-compliant beverage manufacturers will be assessed penalties that will be deposited into the Recycling Enhancement Penalty Account and used to support recycling, infrastructure, collection and processing of beverage containers in the state. Beginning January 1, 2023, beverage manufacturers that do not meet the minimum content requirements are subject to annual penalties, which will be assessed March 1, 2024 and calculated at a rate of $0.20 per pound based on the shortfall of recycled content used compared to the minimum content requirement.

Beverage manufacturers who fail to meet the minimum content standard may submit a corrective action plan detailing the reasons they failed, or will fail, to meet the standard and how they plan to meet the standard in the future. CalRecycle may reduce penalties assessed against a beverage manufacturer if CalRecycle approves the corrective action plan.

In addition, the law requires plastic material reclaimers to report empty plastic beverage containers collected and sold. On or before March 1, 2024, and annually thereafter, a plastic material reclaimer must report to CalRecycle the amount in pounds and by resin type of empty plastic CRV beverage containers that the plastic material reclaimer has collected and sold in the previous calendar year.

It also requires manufacturers of postconsumer recycled plastic to report the amount of food-grade and bottle-grade plastic material sold in the state. On or before March 1, 2024, and annually thereafter, a manufacturer of postconsumer recycled plastic must report to CalRecycle the amount in pounds in food-grade flake, pellet, sheet, fines or other forms that were sold in the previous calendar year and their capacity to produce food-grade material.

"Food packaging" is defined to mean a nondurable package, packaging component, or food service ware that is comprised, in substantial part, of paper, paperboard, or other materials originally derived from plant fibers.

## HEAVY METALS IN BABY AND INFANT FOODS

The issue of heavy metals in baby and infant food was supercharged in 2021 as a result of activity by Congress, the U.S. Food and Drug Administration (FDA), state attorneys general and private litigants. Although the issue has been subject to litigation for years, in February 2021 the House Committee on Oversight and Reform, Subcommittee on Economic and Consumer Policy issued a report entitled "Baby Foods are Tainted with Dangerous Levels of Arsenic, Lead, Cadmium and Mercury." The Subcommittee had sought information from seven companies selling baby food products, a handful of whom complied with the investigation.

Although the FDA has not set limits for heavy metals in baby food other than for inorganic arsenic in rice cereal, the Subcommittee reported what it characterized as high levels of heavy metals in both finished goods and raw materials used by the responding companies (for example, arsenic in the 60-130 ppb range in finished products and even higher levels in raw materials). The Subcommittee recommended several actions, including mandatory testing of finished product, labeling of certain heavy metal content, phase-out of certain ingredients, and establishment of FDA standards for heavy metals.

The FDA did not sit idly by. In March, it published a "Letter to Industry" reminding manufacturers and brand owners of their obligation under the Food Safety Modernization Act to "consider chemical hazards that may be present in foods when conducting [a] hazard analysis" and that it has taken action in the past to cease distribution of products containing potentially harmful levels of toxic elements like arsenic and lead. Subsequently, in April, the FDA published its "Closer to Zero" action plan, which laid out a multi-year, phased plan to study the hazards associated with heavy metals in food destined for babies and young children.

In the meantime, the "Baby Food Safety Act of 2021" was introduced into the House in March, which would set statutory maximum action levels for heavy metals in infant and toddler food, to be lowered after three years and reviewed every five years. These levels range from 2 ppb for mercury, up to 15 ppb of inorganic arsenic in infant cereal. The legislation would also require testing of finished products and mandate disclosure of testing results.

As 2021 progressed, we saw several baby and infant food voluntary recalls relating to the naturally-occurring presence of heavy metals in food, as well as companies announcing that they were exiting certain segments of the market. The House Subcommittee issued a follow-on report in September with additional findings in support of its recommendations, and in October, attorneys general from 23 states petitioned the FDA to accelerate its plan to establish heavy metals action levels.

Of course, all of this activity had an impact on litigation in the space as well. Reports indicate that more than 80 additional lawsuits alleging damages associated with the presence of heavy metals in baby and infant food were filed within just a few months after the initial House Subcommittee report was issued. In June, the U.S. Judicial Panel on Multidistrict Litigation denied requests to centralize a large number of the proceedings, finding that because manufacturing processes, suppliers, advertising practices, and quality control measures vary among defendants, claims are likely to "rise or fall on facts specific to that defendant." Individual defendants have had more success in consolidating cases pending against them.

Obviously, these cases are still in their early stages, with activity centered around preemption arguments. Plaintiffs are having some early successes. In January 2022, the U.S. District Court for the Northern District of California denied a motion to dismiss based on preemption and found that the complaint at issue alleged a reasonable basis for misleading consumers by way of omission of heavy metals information. The court found no federal regulation creating a conflict with the disclosures requested by the plaintiffs, and rejected the defendant's argument that the court should defer to the FDA, citing the lack of speed with which the agency frequently acts and that nothing in the FDA's pronouncements to date indicates that its requirements will include labeling or have retroactive applicability.

This will clearly be an issue of great focus in 2022 at all levels and among all branches of government. Stay tuned for further information and analysis from BCLP's Food and Beverage Team.

# FOOD SAFETY MODERNIZATION ACT UPDATE

## NEW RULES & GUIDANCE FOR 2021

In December 2021, the FDA issued its Final Rule for Laboratory Accreditation for Analyses of Food (LAAF), as required by the Food Safety Modernization Act (FSMA). The LAAF rule establishes an accreditation program for food testing laboratories. When the rule is fully implemented, LAAF-accredited laboratories will be required to conduct food testing under certain circumstances specified in the rule, such as when an owner or consignee is seeking admission of an imported food detained at the border. Food testing conducted outside the specific circumstances listed in the rule need not be conducted by a LAAF-accredited laboratory. The rule will require a relatively lengthy implementation period, as accreditation bodies must first apply for recognition, and then laboratories must seek accreditation. Once there is sufficient LAAF-accredited laboratory capacity, the FDA will publish a notice in the Federal Register giving owners and consignees six months' notice before the FDA begins enforcement of the rule.

Also in December 2021, the FDA issued its FSMA Proposed Rule on Agricultural Water in response to recent high profile outbreaks of foodborne illness linked to contaminated pre-harvest agricultural water. The proposed rule would require covered produce farms to conduct systems-based, pre-harvest agricultural water assessments and consider taking corrective actions to mitigate concerns identified in those assessments. The FDA will solicit comments and hold public meetings on this proposed rule throughout early 2022.

The FDA issued a number of industry guidance documents in 2021, including guidance clarifying the requirements for manufacturers subject to the juice and seafood Hazard Analysis and Critical Control Point (HACCP) FSMA regulations, as well as the regulation for low-acid canned foods. The FDA also published industry guidance advising facilities on how to comply with the agency's requirement to provide a unique facility identifier (UFI) when submitting food facility registrations or renewals in the FDA Food Facility Registration Module (FFRM).

## INCREASED FSVP INSPECTION ACTIVITY

The FDA is stepping up its inspection activity under the Foreign Supplier Verification Program (FSVP), with 1,900 inspections planned for FY 2022 alone—a steep increase over prior years. At least 1,300 of those will be re-inspections of importers who were required to take corrective actions during a previous inspection. More inspections have led to more enforcement; the FDA has issued significantly more warning letters to importers under the FSVP in the past two years. In 2019, the FDA issued just five warning letters under the FSVP. In 2020, that figure increased ten-fold, jumping to 50, and in 2021, the FDA issued 54 FSVP warning letters. Based on the FDA's increased inspection activity for 2022, it is likely that importers will also see an increase in FDA warning letters in 2022 for non-compliance with the FSVP.

# MULTIFUNCTION INGREDIENT LAWSUITS

In recent years, much litigation in the food and beverage space has centered on clean label claims—declarations that a product is free from processed or artificial ingredients, such as "no preservatives," "all natural" or "no artificial flavors." When it comes to these clean label claims, food marketers love to make them, and class action plaintiffs love to break them. Recent lawsuits—several of which have focused on multifunction ingredients like citric and malic acids—have soured clean label claims for food companies targeted by litigation.

## THE RECIPE FOR A MULTIFUNCTION INGREDIENT LAWSUIT

In the typical multifunction ingredient case, a food's label touts the absence of some additive—for example, "no preservatives." However, the food contains a multifunction ingredient like citric acid, which can serve as a flavor, a preservative, or both. The food manufacturer may have intended to use the ingredient only as a flavor, with any preservative effects being merely incidental. Nevertheless, a plaintiff brings a lawsuit under state consumer protection laws claiming that the presence of that ingredient, which has preservative qualities, renders the "no preservatives" label misleading, no matter the ingredient's primary function or intended effect.

Multifunction ingredients implicated in these labeling lawsuits have included citric, malic, lactic, fumaric and ascorbic acids together with dextrose maltodextrin and monosodium glutamate (MSG) among others.

## EXAMPLES OF RECENT MULTIFUNCTION INGREDIENT LAWSUITS

Last year, class action plaintiffs targeted a number of companies in multifunction ingredient lawsuits, with several cases surviving defendants' motions to dismiss. In one case, *Hayes v. General Mills, Inc.*, case no. 19-cv-05626, filed in the U.S. District Court for the Northern District of Illinois, plaintiffs challenged a "no artificial flavors" claim on General Mills fruit snacks that contained synthetic DL-malic acid—an ingredient that can be used as a flavor, flavor enhancer, or pH control agent. General Mills argued the ingredient was merely a "flavor enhancer," and therefore, its "no artificial flavors" labeling claim was not misleading. The court ruled that whether DL-malic acid was a "flavor" or a "flavor enhancer" was a triable issue of fact and denied the manufacturer's motion to dismiss. Defendants faced a similar outcome in *Mason v. Reed's, Inc.*, case no. 18-cv-10826, filed in the U.S. District Court for the Southern District of New York. In that case, the plaintiff alleged the defendant soda company's "no preservatives" labels were misleading because the company's sodas contained citric acid. The defendant claimed the citric acid in the product was functioning as a flavoring agent, not a preservative. The court held the issue was a fact question inappropriate for resolution on a motion to dismiss.

## COMMON ISSUES ENCOUNTERED IN MULTIFUNCTION INGREDIENT LAWSUITS

- **Obtaining a motion to dismiss can be difficult.** As illustrated by the cases discussed above, courts are reluctant to resolve multifunction ingredient lawsuits at the motion to dismiss stage because these cases usually hinge on a factual issue—whether a particular ingredient functions as a preservative or a flavor in a particular product. That means these cases often proceed to discovery, during which manufacturers may be required to reveal sensitive or proprietary information about their products.
- **Materiality is difficult for plaintiffs to prove.** In these cases, plaintiffs' alleged injury is that they were misled about the function of a particular ingredient. These claims are difficult to sustain because the plaintiff must prove that the function of the ingredient—not the ingredient itself—was material to their purchasing decision. For example, a plaintiff must argue that they would purchase a product containing citric acid used as a flavor, but not as a preservative—an illogical distinction that plaintiffs ultimately may have difficulty defending.

# SLACK FILL LITIGATION UPDATE

## WHAT IS SLACK FILL?

Slack fill lawsuits are typically putative class actions in which consumers allege a product's packaging is deceptive because it contains too much empty space, the technical term being "nonfunctional" slack fill, which disguises the amount of product in the package. Federal and state law regulate nonfunctional slack fill and while federal law does not provide a private right of action, many states do.

On the backs of enterprising plaintiffs' lawyers, slack fill class action litigation spiked five years ago flooding federal and state courts primarily in New York and California. While slack fill litigation has slowed in the last two years, courts continue to develop and refine this area of law. New York has proved to be a difficult forum for many slack fill plaintiffs, while California has been far more accommodating. The following notable rulings involving slack fill were issued in 2021:

*STEWART V. KODIAK CAKES, LLC*, 537 F.SUPP.3D 1103 (S.D. CAL. 2021)

The plaintiffs brought a putative class action against Kodiak Cakes, LLC (Kodiak) claiming that a line of its packaged breakfast and snack products, including its prominent pancake and waffle mixes, contained nonfunctional slack fill. Kodiak moved to dismiss the claims under FRCP 12(b)(1) and 12(b)(6). The court issued a lengthy order on the motion granting and denying it in part. The order contains two key rulings. First, the court granted Kodiak's theory that plaintiffs lack standing to seek injunctive relief against Kodiak because they cannot show a likelihood of future harm. The court found that "the exaggerated size of Defendant's packaging can be checked easily by Plaintiffs," and in the future they can "cross-check their previous disappointing purchases by examining the undisputed net weight on the face" of Kodiak's products. Second, the court rejected Kodiak's argument that plaintiffs cannot claim they were deceived by the alleged slack fill because they made their purchases online. The court reasoned that "consumers could plausibly rely on the online product's picture – without a measure of reference – to assume that the container's size bears some relation to amounts of its contents."

*MASIEL V. TOOTSIE ROLL INDUSTRIES, LLC*, 2021 WL 3185443 (N.D. CAL 2021); *IGLESIA V. TOOTSIE ROLL INDUSTRIES, LLC*, CASE NO. 3:20-CV-18751-AET-TJB (NJ 2021)

These identical cases resulted in different outcomes at the pleading stage, underscoring that the particular venue in which the lawsuit is brought can be an important factor in whether the claims survive. In *Masiel*, plaintiff brought a putative class action in California against Tootsie Roll Industries, LLC ("Tootsie") for slack fill in their Junior Mints and Sugar Babies products. The court denied Tootsie's motion to dismiss, showing great hesitancy to apply the reasonable consumer standard at the pleading stage, and declining to entertain other cases wherein the same products and claims were at issue. This case is currently at the class certification stage and will be one to watch in 2022.

Conversely, in *Iglesia*, filed in New Jersey, the court dismissed the same claims advanced against Toostie. The court showed no hesitancy to engage the reasonable consumer standard and find that it could not be met because "the net weight of the candy, both in metric and standard measurements, is displayed on the front of the Products' boxes in easily discernable font."

"Slack fill lawsuits are typically putative class actions in which consumers allege a product's packaging is deceptive because it contains too much empty space, the technical term being "nonfunctional" slack fill, which disguises the amount of product in the package."

*CLEVENGER V. WELCH FOODS, INC.*, 2021 WL 3616109 (C.D. CAL. 2021)

The plaintiffs brought a putative class action against Welch Foods, Inc. (Welch) claiming that its fruit snacks contain nonfunctional slack fill. Plaintiffs advanced a novel theory of liability claiming that while the packaging itself was not deceptive, it nevertheless violated California's version of the federal slack fill statute and thus also violated various state consumer protection laws. By doing so, plaintiffs moved the case out of the realm of "fraud" wherein they claimed that heightened pleading requirements under FRCP 9(b) and the reasonable consumer standard do not apply. The court agreed and denied Welch's motion to dismiss. Welch sought to have the court's ruling certified for an interlocutory appeal; however, the court denied Welch yet again. The case proceeds into 2022.

*KLAUSNER V. ANNIE'S INC.*, CASE NO. 20-CV-08467 (S.D.NY. 2022)

Plaintiff brought a putative class action against Annie's, Inc. (Annie's) for alleged nonfunctional slack fill in its fruit snack products. Contrary to *Clevenger* and *Maisel* and similar to *Iglesia*, the court dismissed the action in its entirety upon Annie's motion to dismiss. In doing so, the court stated it "does not write on a blank slate when it comes to so-called "slack fill" cases . . . several other courts in this District have dismissed nearly identical claims in cases where plaintiffs have alleged that nonfunctional slack-fill rendered a product's packaging misleading to consumers." The court went on to find that (1) Plaintiff's allegation that she purchased the product "multiple times a year for the past three years" and her failure to allege a desire to purchase the product again defeated her claim for injunctive relief, and (2) she did not have a viable cause of action because the box disclosed the actual amount of product plaintiff was getting.

# PLANT-BASED PRODUCTS LABELING LITIGATION

Last year we highlighted some key litigation led by Upton's Natural Co. and Turtle Island Foods challenging the constitutionality of newly enacted meat consumer protection laws. Since 2018, 26 states have introduced similar meat consumer labeling protection bills. States that have passed consumer protection laws related to plant based meats include: Arkansas, Alabama, Colorado, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, South Carolina, South Dakota, and Wyoming. Although the bills vary between states, they all generally attempt to regulate terms such as "meat" and "milk" on plant based products and/or requiring the use of "vegan" or "plant-based" on food labels.

On the Federal level, there have been two bills introduced to address concerns by those operating in the traditional meat and dairy industry. The Real Marketing Edible Artificials Truthfully Act of 2019 or (Real MEAT Act of 2019) was introduced in 2019 but has not been reintroduced. In February 2021, the Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act (DAIRY PRIDE Act) was introduced in the house of representatives. The DAIRY PRIDE Act was referred to the Committee on Health, Education, Labor, and Pensions.

## CONTINUING LITIGATION

Last year we provided a detailed review of four key litigation challenges to different states' legislation limiting the use of certain labels or requiring labels on certain key meatless meat products. Two of those actions are still entrenched in litigation.

The litigation challenging Louisiana's Truth in Labeling Food Products Act has continued to proceed, but the court has not yet ruled on the statute's legality. Accordingly, the State Department of Agriculture has continued not to enforce the law. Both parties filed for summary judgment and are currently waiting for the court to rule. Plaintiff argues that the law requiring specific language regarding plant-based meat is a violation of First Amendment free speech rights; defendant takes the opposite position.

In the litigation challenging the Oklahoma Meat Consumer Protection Act, the lower court dismissed the plaintiffs' claims challenging the requirement that plant-based packaging display that the product is derived from plant-based sources in the same size and appearance. After appealing that ruling, plaintiffs voluntarily dismissed their lawsuit. The Oklahoma Meat Consumer Protection Act remains enforceable at the moment.

## KEY LITIGATION

In September 2021, a consumer filed a class action in the U.S. District Court for the Northern District of California against a food manufacturing and packaging company, alleging that the main ingredients in some of their plant based meats are not chiefly derived from vegetables as the name suggests. In *Kennard v. Kellogg Sales Company*, Case No. 21-cv-7211 (N.D. Cal. 2021), the plaintiff alleges that the lack of vegetables as chief ingredients in the products are a violation of California's Consumers Legal Remedies Act, False Advertising Law, and Unfair Competition Law. Kellogg filed a motion to dismiss, which is pending. In support of that motion, Kellogg relies on a 2021 decision in *Puri v. Costco Wholesale Corp.*, Case No. 5:21- cv-1202-EJD (N.D. Cal.), issued by the same court dismissing an action against a large wholesale corporation that manufactures and packages "Chocolate Almond Dipped Vanilla Ice Cream Bars." The plaintiff in *Puri*, asserted claims under the same California laws, arguing that the labeling is misleading because the product does not contain ingredients derived from cocoa beans. The court dismissed the action finding that a reasonable consumer would not be deceived by the representations on the packaging mainly because there is no law that requires a product labeled as chocolate to be "chiefly" made of that ingredient. In addition, the court held that a reasonable consumer would know that chocolate must be combined with a significant amount of fat or oil to make it solidify on an ice cream bar. The defendant in *Kennard* asks the court to dismiss the plaintiff's claims for the same reasons.

## CELL-CULTURED MEAT & POULTRY

In September 2021, the Food Safety and Inspection Service (FSIS) published a notice of proposed rulemaking soliciting comments to guide the agency's future labeling requirements for cell-cultured animal products.

# ANIMAL RAISING & WELFARE LITIGATION

In 2019, the FSIS of the USDA, revised labeling guidelines on the documentation needed to substantiate animal raising claims for label submissions. The 2019 guidelines were intended to establish the requirements for labeling meat products with claims such as "cage-free," "free-range," "free-roaming," "pasture grown," "raised antibiotic free," "hormone free," and other animal raising claims. The uptick in animal raising claims litigation seems related to the revisions to these guidelines. This section highlights some of the key complaints and litigation regarding animal raising and welfare claims.

## FTC COMPLAINT

Earlier in 2021, the Animal Welfare Institute (AWI) filed a complaint against Boar's Head Provisions Co., Inc. (Boar's Head), requesting that the FTC investigate Boar's use of animal welfare claims such as "humanely raised." AWI argues that Boar's Head's representations that the turkey it uses only meets the baseline industry standard of care. AWI states that companies, like Boar's Head, are falsely representing to consumers that the turkeys labeled as "humanely raised" are raised to a standard of care that exceeds the turkey industry standard of care, not just meets the baseline standard of care.

## LITIGATION

In *Carol Leining v. Foster Poultry Farms, Inc., et al.*, 61 Cal.App.5th 203 [275 Cal.Rptr.3d 682], the court upheld the lower court's dismissal of certain claims and later upheld its summary judgment on the remaining claims ruling in favor of defendants after a consumer brought claims against Foster Farms for using allegedly misleading American Humane Certified labels on its products. Under the FSIS standards, companies like the American Humane Association provide verifiable logos for consumers and retailers, certifying that products with the American Humane Certified logo meet a rigorous, science-based animal welfare standard. The court held that the 2019 FSIS guidelines, "do not include substantive requirements for a claim of humane animal treatment, but simply require that the label either describe what it means by humane, or, if it uses a third-party certification, contain the certifier's name, logo, and website." (2021) Leining, 61 Cal.App.5th 203, 208 [275 Cal. Rptr. 3d 682]. An animal product with the American Humane Certified logo is to inform the purchaser that the animal meets certain "humanely raised" standards. The appellate court agreed that plaintiff's claims regarding the inclusion of the American Humane Certified logo is expressly preempted by the Poultry Products Inspection Act (PPIA) because the logos were pre-approved by the FSIS and that pre-approval means that the labels are not misleading under the PPIA.

In April 2021, a consumer filed suit in the U.S. District Court for the Southern District of New York, captioned *Mogull v. Pete and Gerry's Organics, LLC*, for deceptively labeling it egg products as being "free range," which allegedly led consumers to overpaying for them. The defendant filed a motion to dismiss arguing, among other things, that meeting any definition of free-range, including that proffered by the USDA, means the representations are true on their face or merely non-actionable puffery. Plaintiff relies on litigation against the same defendant filed by a different plaintiff in 2020, stating the action should survive dismissal for identical reasons. The court has not issued a ruling.

## USDA COMPLAINT

In June 2021, the Farm Sanctuary implemented an action in New York against the USDA and FSIS seeking an injunction against the Modernization of Swine Slaughter Inspection Rule contending that it would allow pigs to be slaughtered at unlimited speeds posing a risk to animal welfare and consumer safety. The U.S. District Court for the Western District of New York refused to dismiss the case stating that the plaintiff has standing and plausibly alleged that the USDA and FSIS's unlawful practices impaired and frustrated the plaintiffs' activities and limited resource.

"In 2019, the FSIS of the USDA, revised labeling guidelines on the documentation needed to substantiate animal raising claims for label submissions. The 2019 guidelines were intended to establish the requirements for labeling meat products with claims such as "cage-free," "free-range," "free-roaming," "pasture grown," "raised antibiotic free," "hormone free," and other animal raising claims."

# PROP. 65 AND FOOD SAFETY UPDATE

## ACRYLAMIDE ENFORCEMENT BRIEFLY ENJOINED

After a brief two-month reprieve following issuance of a preliminary injunction against enforcement of the Prop. 65 cancer warning for acrylamide, the Ninth Circuit issued a stay against the injunction that remains in effect, and the 60-day notices and lawsuits quickly resumed.

Judge Kimberly Mueller issued the preliminary injunction in March 2021 in a lawsuit by the California Chamber of Commerce against the California Attorney General challenging the Prop. 65 warning for acrylamide on grounds that the warning violates the First Amendment. *Cal. Chamber of Commerce v. Becerra (Bonta)*, No. 2:19-cv-02019-KJM-JDP (E.D. Cal. Oct. 7, 2019).

The California Chamber alleges that scientific studies show that exposure to acrylamide in food does not increase the risk of cancer in humans, and requiring cancer warnings for acrylamide therefore compels false and misleading speech in violation of the First Amendment.

In granting the preliminary injunction, the court reasoned that "the State has not shown that the safe-harbor acrylamide warning is purely factual and uncontroversial, and Proposition 65's enforcement system can impose a heavy litigation burden on those who use alternative warnings." *Cal. Chamber of Commerce v. Becerra*, 529 F.Supp.3d 1099, 1119 (March 30, 2021).

The Council for Education and Research on Toxics (CERT) appealed the preliminary injunction to the Ninth Circuit and moved for an emergency stay pending appeal. At a hearing on January 12, 2022 as to whether the stay should continue, a panel of the Court questioned whether CERT has standing to intervene in the case, but also questioned whether the preliminary injunction is overbroad and can enjoin private enforcers when the complaint is filed against the Attorney General.

Since the Ninth Circuit's ruling, the 60-day notices and lawsuits alleging exposure to acrylamide have only seemed to pick up speed. A total of 264 60-day notices for acrylamide were served in 2021.

## PROPOSED NEW WARNING FOR ACRYLAMIDE

Likely in response to the legal challenge and other criticisms, the California Office of Environmental Health Hazard Assessment (OEHHA), has proposed a new safe harbor warning for acrylamide:

> **CALIFORNIA WARNING:** Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide.

The proposed new warning is still under consideration. If adopted, the proposed regulation would take effect one year later.

## REGULATORY RELIEF

OEHHA is also still considering a proposed regulation that would establish limits for acrylamide in certain foods. Acrylamide below the following levels would not require a warning.

| FOOD/FOOD GROUPS | MAXIMUM AVERAGE CONCENTRATION LEVEL (PPB) | MAXIMUM UNIT CONCENTRATION LEVEL (PPB) |
|---|---|---|
| Almonds, roasted, roasted almond butter, and chocolate-covered almonds | 225 | --- |
| Bread, non-wheat-based products including loaves, rolls, buns, baguettes | 100 | --- |
| Bread, wheat-based products including loaves, rolls, buns, baguettes | 50 | --- |
| Cookies, animal and animal crackers (sweet) | 75 | 100 |
| Cookies, thin and crispy | 281 | 300 |
| Cookies, sandwich wafers | 115 | --- |
| Crackers, savory, including crispbread | 350 | 490 |
| Potato products, French fried potatoes | 280 | 400 |
| Potato or sweet potato products, not otherwise specified, such as hash browns and potato puffs | 350 | 490 |
| Potato or sweet potato products, sliced chips | 281 | 350 |
| Prune juice, 100% (not from concentrate) | --- | 250 |
| Prune juice, made with concentrate | --- | 150 |
| Waffles | 280 | --- |

The regulation proposing these levels is still under consideration.

## LEAD REMAINS TOP TARGET

Despite the attention acrylamide has been getting, lead remains the top target in food for private enforcers, with a total of 749 60-day notices served in 2021. The majority, but not all, of the notices alleged exposure to lead in food and beverage products, including seaweed, sea foods, dietary supplements, and frozen and dried fruits and vegetables.

Cadmium was the third most highly targeted chemical for food and beverage products, with 172 60-day notices served in 2021, including for dietary supplements, sea foods, fruits, meats, sunflower seeds, spaghetti and macaroni. The private enforcer group As You Sow served a slew of 60-day notices alleging exposure to cadmium from spinach and collard greens.

## THC ENFORCEMENT

Prop. 65 enforcement of THC has not been as robust as anticipated. The Prop. 65 warning requirement for THC, or Δ9-Tetrahydrocannabinol, took effect on January 3, causing speculation that cannabis, hemp and CBD products would be heavily targeted for private enforcement actions. Since the warning requirement for THC took effect, however, there have only been six 60-day notices – five for CBD oil products, and one for a marijuana product.

Although under federal law CBD products are allowed to contain up to .3 percent THC, no safe harbor level of exposure to THC has been established under Prop. 65. That means private enforcers can argue that any detectable amount can subject a product to the Prop. 65 warning requirement. Notably, the Prop. 65 listing applies to Δ9-THC, although the Prop. 65 requirements may still be triggered by residual Δ9-THC present in other THC products, like Δ8-THC distillates.

Cannabis (marijuana) smoke has been listed under Prop. 65 since January 2020. In September 2021, OEHHA proposed the following new safe harbor warnings for cannabis smoke and THC.

⚠ **WARNING:** Smoking cannabis increases your cancer risk and during pregnancy exposes your child to delta-9-THC and other chemicals that can affect your child's birthweight, behavior, and learning ability. For more information go to www.P65Warnings.ca.gov/cannabis

⚠ **WARNING:** Consuming this product during pregnancy exposes your child to delta-9-THC, which can affect your child's behavior and learning ability. For more information go to www.P65Warnings.ca.gov/cannabis

The new warnings are still under consideration. If adopted, the proposed regulation would take effect one year later.

## SHORT FORM WARNING

In December, OEHHA published revisions to its earlier proposal to amend the Prop. 65 short form warning. The proposed revisions would restrict use of the short form warning to labels of specific sizes and would require the identification of the chemical(s). Following is a summary of the proposed provisions:

- Total surface area of the product label must be 12 square inches or less.
- The packaging shape or size cannot accommodate the long form warning.
- The entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall the warning appear in a type size smaller than 6-point type.
- If the product bears the short form warning, online and catalogue pages also may use the short form. Online warnings may use link labeled WARNING, CA WARNING, or CALIFORNIA WARNING.
- Warning must list at least one chemical for which the warning is provided. Examples are listed below.

  ⚠ **WARNING:** Cancer risk from exposure to [name of chemical] – www.P65Warnings.ca.gov

  ⚠ **WARNING:** Exposes you to [name of chemical], a carcinogen – www.P65Warnings.ca.gov

  ⚠ **WARNING:** Reproductive harm from exposure to [name of chemical] – www.P65Warnings.ca.gov

  ⚠ **WARNING:** Exposes you to [name of chemical], a reproductive toxicant – www.P65Warnings.ca.gov

Public comment on the proposed new short form warnings closed in January 2022. If adopted, the new regulation would take effect one year later.

# COVID-19 REGULATION & LITIGATION

At the end of 2020, Congress passed the COVID-19 Consumer Protection Act, which makes it illegal under the Federal Trade Commission Act (FTC Act) to deceptively market treatments, cures, preventions, mitigation, or diagnoses of COVID-19. In addition, the COVID-19 Consumer Protection Act makes it a violation to deceptively market government benefits related to COVID-19. The FTC website reminds marketers that violators who make deceptive claims related to the treatment, cure, or prevention of COVID-19 are subject to penalties of up to $43,792 per violation.

The FTC has sent over 405 warning letters, informing both individuals and businesses that they are violating the COVID-19 Consumer Protection Act and to cease making the deceptive representations. In fact, the FTC issued a letter to a chiropractor in Missouri in April 2020. When the chiropractor and his business refused to stop making the representations, the FTC teamed up with the Department of Justice (DOJ) to pursue its first action under the COVID-19 Consumer Protection Act.

The DOJ, on behalf of the FTC, filed its first action in April 2021, alleging that a St. Louis based chiropractor and his company violated the COVID-19 Consumer Protection Act by marketing products that contain Vitamin D and Zinc as COVID-19 prevention and treatment. The products were marketed as being more effective than vaccines. The complaint alleges violations of the FTC Act Sections 5(a) and Section 12, COVID-19 Consumer Protection Act Violations, and seeks injunctive relief for consumer injuries. Initially, the parties agreed to and the court entered a consent order requiring, among other things, defendants to immediately remove videos, links, and other advertisements containing representations that defendants are prohibited from making regarding representations that the defendants' products provide equal or better protection against COVID-19 than vaccines. On December 8, 2021, the court denied defendants' motion to dismiss. Although defendants argued that plaintiff was required to seek a cease and desist order before seeking monetary damages under the COVID-19 Consumer Protection Act, the U.S. District Court for the Eastern District of Missouri disagreed: "[b]ecause the government adequately alleged COVID-19 Act violations, the court holds that the statute likewise authorizes the government to seek civil penalties and consumer refunds under the FTC Act §§ 5(m)(l)(A) and 19(a)(1)." *United States v. Nepute*, 2021 WL 5823898, *4 (E.D. Mo. Dec. 8, 2021).

In October 2021, the DOJ sued Xlear, Inc. for monetary penalties, alleging that it falsely pitched its saline nasal sprays as an effective way to prevent and treat COVID-19. The company claimed that the nasal sprays marketed under the Xlear Sinus Care brand contain, among other things, xylitol and grapefruit seed extract which the company advertised as providing four hours of protection from COVID-19. The claims are pending in the U.S. District Court for the District of Utah.

At the beginning of 2022, the FTC sent out a number of additional letters, informing marketers to avoid deceptively advertising its products, specifically reminding marketers to avoid misrepresentations about the Omicron variant.

# NOTABLE TRIALS, RULINGS & SETTLEMENTS

Courts were generally kind to the food, beverage, and supplement industry in 2021. We saw key victories arising from the Second and Ninth Circuits – hot beds for class action litigation involving false advertising claims. We also observe a few hard losses and interesting settlements.

## FOOD

In *Wallace v. Wise Foods, Inc.*, case no. 1:20-cv-06831, yet another judge from the Southern District of New York (SDNY) (indeed, the fourth one) dismissed claims that Wise's "Cheddar & Sour Cream Flavored" chips should have been labeled as "artificially flavored" due to the presence of diacetyl, which bolsters the product's aroma. The court ruled the label does not imply that the chips' flavor comes entirely from cheddar and sour cream, nor does the label indicate that Wise flavors its chips with only natural ingredients. The court further ruled that any confusion on the label is dispelled by the back of the package explaining the chips contain cheddar, sour cream, and artificial flavoring. The court also declined plaintiff's claims based on an alleged failure to comply with FDA regulations, ruling that it was "well established that acts cannot be re-characterized as 'deceptive' simply on the grounds that they violate another statute or regulation [like the identified FDA regulations] which does not allow for a private enforcement." This ruling is notable, given that plaintiffs routinely allege violations of FDA regulations in an attempt to substantiate state consumer protection laws.

In *Pardi v. Aldi* (case no. 1:19-cv-08975) and *Garidi v. Mars Wrigley Confectionary US, LLC* (case no. 1:19-cv-03209), the Eastern and Southern District Courts in New York dismissed similar allegations that the vanilla flavoring in certain products (Mars Dove's vanilla ice cream bars and Aldi, Inc.'s vanilla almond milk) was not derived exclusively or predominantly from vanilla beans or vanilla extract. These courts joined dozens of others that have dismissed similar claims, finding that no reasonable consumer would construe the challenged labels to make any claims about the source of the vanilla flavor, and that the labels simply alert consumers that the products taste like vanilla.

In *Amin v. Subway Restaurants Inc., et al.*, case no. 4:21-cv-00498, the Northern District of California dismissed a putative class action alleging that Subway misrepresented that its products were manufactured with 100 percent sustainably caught skipjack and yellowfin tuna. Plaintiffs alleged Subway did not use tuna sourced from sustainably farmed fisheries and the tuna used did not consist of "100% tuna." The court dismissed the complaint with leave to amend, finding that plaintiff failed to identify the specific representations being challenged. This case is one to watch in 2022.

In *Padilla v. Whitewave Foods Company*, 2021 WL 4902398, the court approved a nationwide class action settlement involving labeling and packaging practices of protein powder products made, marketed, distributed and sold by Sequel Naturals ULC and Vega US LLC. The terms of the settlement include (1) injunctive relief wherein the products will now include a "fill line" that shows the expected minimal level of fill in the product carton and a disclosure statement in the front label indicating the number of servings included, (2) attorneys' fees and costs in the amount of $220,000, (3) class representative award of $2,500 each, and (4) a full release of claims.

## VANILLA LABELING CHALLENGES FAIL

Following an avalanche of lawsuits in 2019 and 2020 challenging the use of "vanilla" to describe products where the vanilla flavoring allegedly is not derived exclusively from the vanilla bean plant, these cases were largely dismissed by federal courts nationwide. The lawsuits continue, though still unsuccessfully. Following are three recent examples.

*Parham v. Aldi, Inc.*, 1:19-cv-08975 (PGG) (SDA), 2021 WL 709632 (S.D.N.Y. Feb. 15, 2021): The complaint alleged that Aldi's store brand "vanilla" almond milk misled consumers because the milk's vanilla flavoring did not come exclusively from vanilla beans. The plaintiff acknowledged that the product's ingredient list did not contain vanilla flavoring, but instead listed "natural flavor," a term used for a flavor that may contain synthetically produced vanilla flavoring, such as vanillin.

The district court dismissed the case with prejudice, citing eight other previously dismissed vanilla labeling lawsuits in New York with nearly identical allegations. The court explained that "a reasonable consumer would understand that the word "vanilla" on the front of the carton describes how the product tastes, not what it contains, expecially in circumstances where the ingredients listed on the product do not mention vanilla at all."

In *Fahey v. Whole Foods Market, Inc., et al.*, No. 20-cv-06737-JST (N.D. Cal. June 30, 2021), the plaintiff alleged that the labeling of Whole Foods' 365 Organic Unsweetened Almond Vanilla Beverage was false and misleading because the vanilla flavor is derived from synthetic vanillin, rather than from the vanilla bean plant.

Citing district courts around the country, the court in *Fahey* held that the word "vanilla" standing alone (without any qualifying terms) would be unlikely to lead a reasonable consumer into believing that the product's vanilla flavor came exclusively or predominantly from vanilla beans. The court noted that its conclusion was bolstered by the fact that the product label lacked any phrases or images, such as "made with," that would lead a reasonable consumer to understand "vanilla" to be referencing an ingredient rather than a flavor.

Similarly, in *Garadi v. Mars Wrigley*, No. 19-cv-03209-RJD-ST (E.D.N.Y. July 6, 2021), plaintiffs alleged that they were deceived by the words "vanilla" on the packaging of Dove-brand ice cream bars because the flavor does not come exclusively from vanilla beans or extract. The court held that plaintiffs failed to plausibly allege that a reasonable consumer would be misled by the phrase "vanilla ice cream." Instead, the court found that a reasonable consumer would interpret the product's label as indicating that the ice cream is vanilla flavored.

## NINTH CIRCUIT REACHES TWO DIFFERENT CONCLUSIONS ON PREEMPTION OF POULTRY CLAIMS

In *Webb v. Trader Joe's*, 99 F.3d 1196 (9th Cir. June 4, 2021), a unanimous Ninth Circuit panel affirmed dismissal on preemption grounds of a putative class action against Trade Joe's challenging labeling of Trader Joe's poultry products. Although the court four months later declined to apply preemption in a similar challenge to labeling claims on poultry products in *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283 (9th Cir. Oct. 26, 2021), that case was limited to the evidence in that particular case, and *Webb* remains good law.

In *Webb*, the plaintiff challenged as false and misleading labeling on Trader Joe's poultry products stating the products contain "[u]p to 5% retained water." The plaintiff alleged that her own testing demonstrated that the products had a higher water content. The district court granted Trader Joe's motion for judgment on the pleadings on preemption grounds, and the Ninth Circuit affirmed.

As the court explained, poultry testing and labeling are overseen by the federal Food Safety and Inspection Services (FSIS) and regulated under the Poultry Products Inspection Act (PPIA), which prohibits states from imposing requirements "in addition to, or different than those" described under federal law. FSIS had already inspected and approved Trader Joe's claim, and also reviewed and did not object to the test protocol Trader Joe's used for data supporting the claim.

The Ninth Circuit therefore held that plaintiff's claims were preempted by the PPIA. Since the FSIS had already reviewed and accepted Trader Joe's test protocol and labeling, requiring Trader Joe's to conform to plaintiff's test protocol, or to accept plaintiff's test data, would impose requirements "in addition to, or different than those" required under the federal PPIA. *Id.* at 1199.

Four months later, the *Cohen* court did not apply preemption to a similar challenge regarding the labeling of ConAgra chicken products. Cohen claimed the labeling statements "Made with 100% Natural White Meat Chicken," "No Preservatives," "No Artificial Colors," "No Added Hormones," "No Artificial Flavors," and "0g Trans Fat per Serving" were false and misleading due to the alleged presence of three synthetic ingredients in the products. The district court granted ConAgra's motion to dismiss on preemption grounds, accepting ConAgra's argument that the challenged labels included multiple special statements (including the same "no added hormones" statement from *Webb*), and thus FSIS had necessarily reviewed the entire label and concluded that it complied with federal law.

The Ninth Circuit reversed. The panel began by reaffirming many of the principles stated in *Webb*: (1) all poultry labels with special statements "must be submitted to FSIS in the form of a final label for approval"; (2) "when the agency reviews and approves a label, the agency is deciding that it is not false or misleading under the PPIA"; (3) "allowing private consumers to second-guess the agency's decisions through state law claims against producers would both circumvent that pre-approval process and conflict with the PPIA's goal of national uniformity"; and, (4) as a result, "if ConAgra's labels *were* reviewed and approved by FSIS, then Cohen's claims challenging the labels would be preempted."

The panel ultimately declined to dismiss Cohen's claims, however, because "there [were] no affidavits or other documentary evidence showing that the label was submitted to and approved by FSIS." Although the panel recognized that in *Webb*, "label evidence alone was enough to conclude that a retained water claim was federally approved," it found *Webb* distinguishable because the plaintiff there "did not challenge whether the label was reviewed by FSIS." *Cohen*, by contrast, "contend[ed] that ConAgra used the generic approval process for its labels, improperly bypassing FSIS review."

*Webb* remains good law, however, as it is unlikely that a plaintiff in future cases will be able to plausibly allege that the FSIS review protocol required by regulation was not followed for a given poultry label.

## SEVENTH CIRCUIT REVIVES "100% GRATED PARMESAN CHEESE" CLAIMS

*Bell v. Publix Super Markets*, 982 F.3d 468 (7th Cir. 2020): The Seventh Circuit reversed a district court's dismissal of a class action false advertising complaint, holding that reasonable consumers could interpret "100% Grated Parmesan Cheese" as meaning the product only contains parmesan cheese and nothing else, despite the fact that other ingredients are included in the ingredients panel and the product is sold in grocery stores alongside other nonperishable items.

Plaintiffs alleged the claim was deceptive because the products also contain cellulose and potassium sorbate to prevent caking and mold. The district court granted the defendants' motion to dismiss, on grounds that any ambiguity could be resolved by reading the ingredient list on the back label, and that common sense dictates the products must contain added ingredients because they are sold unrefrigerated.

The Seventh Circuit rejected that reasoning and reversed, pointing to several decisions of other circuits, including *Williams v. Gerber*, 552 F.3d 934 (9th Cir. 2008), that found a defendant could not immunize itself against prominent, misleading front label claims by disclosing the truth about a product's ingredients on the back label. The court also disagreed that common sense rendered plaintiffs' interpretation of the product labels unreasonable, as pure grated parmesan cheese can be shelf stable for a long time without refrigeration.

## HONEY CONTENT CLASS ACTION SWATTED

*Moore v. Trader Joe's Co.*, 4 F.4th 874 (9th Cir. 2021): A Ninth Circuit panel affirmed dismissal of a putative consumer class action alleging Trader Joe's misleadingly labeled its store brand honey as "100% New Zealand Manuka Honey," where plaintiffs' pollen content testing showed that only about 60 percent of the honey was derived from Manuka flower nectar.

By the FDA's own definition, Manuka honey is a honey whose "chief floral source" is the Manuka flower. Trader Joe's Manuka Honey met this standard. The panel agreed with the district court's conclusion that Trader Joe's label was accurate because there was no dispute that all of the honey involved was technically manuka honey, albeit with varying pollen counts.

Even though Trader Joe's front label was accurate under the FDA's guidelines, plaintiffs maintained that "100% New Zealand Manuka Honey" could mislead consumers into thinking that the honey was 100% derived from Manuka flower nectar. The panel held that a reasonable consumer would be dissuaded from this unreasonable interpretation by three key contextual inferences from the product itself: (1) the impossibility of making a honey that is 100% derived from one floral source; (2) the low price of Trader Joe's Manuka Honey, and (3) the presence of the "10+" on the label.

Honey as the sole ingredient on its ingredient statement was not misleading as a matter of law, which refers to the honey's Unique Manuka Factor (UMF) score measuring a Manuka honey product's concentration of honey derived from Manuka flower nectar. Although there are "no other details on the jar about what '10+' means," reasonable consumers of Manuka honey would likely have some knowledge about this rating system and know that Trader Joe's Manuka Honey was on the lower end of the scale, which ranges from 5+ to 26+.

## BEVERAGE

In *George v. Starbucks*, case no. 20-4050, the Second Circuit affirmed the dismissal of a putative class action challenging Starbucks' claim that its drinks are the "best coffee for you" and that its coffee is "watched over … from the farm to you," despite the use of pesticides to kill for cockroach control at retail locations. The appellate court ruled that the challenged claims were not specific enough to misrepresent a quality or characteristic of Starbucks' coffee, and that no reasonable consumer would interpret them to suggest anything about the use of pesticides in Starbucks' stores.

In *Engurasoff, et al. v. Coca-Cola Refreshments USA, et al.*, the Ninth Circuit decertified a class of consumers claiming that Coca-Cola falsely labels its drinks as having no artificial flavors when they contain phosphoric acid, holding that consumers lacked standing to pursue injunctive relief. The appellate court found plaintiffs' claims that they "would consider purchasing" Coke in the future if certain disclosures were included or if the product's labels were truthful, were insufficient to show an actual or imminent threat of future harm.

## NINTH CIRCUIT AFFIRMS DISMISSAL OF ALKALINE WATER COMPLAINT

*Weiss v. Trader Joe's*, 838 Fed.Appx. 302 (9th Cir. 2021): The Ninth Circuit affirmed the dismissal of a putative class action alleging that Trader Joe's misled consumers by representing its Alkaline Water product as "ionized to achieve the perfect balance." In rejecting plaintiff's allegations that the advertising referred to balancing the consumer's internal pH rather than the balanced pH of the product itself, the court stated that "a reasonable consumer does not check her common sense at the door of a store." *Id.* at 304.

The Alkaline Water product label stated the water is "ionized to pH 9.5+," will "refresh & hydrate," and depicts "hundreds of plus symbols." Trader Joe's newsletter touted that the water was purified and charged through electrolysis, changing the structure of the water and raising the pH to 9.5+, making the product "water and then some."

In granting Trader Joe's motion to dismiss, the district court found several of these representations (including "water and then some," "a drink that can satisfy," and "refresh") constituted non-actionable puffery, and the remaining challenged statements concerning the drink's pH and ionization would not mislead a reasonable consumer.

The Ninth Circuit agreed, finding a reasonable consumer would not interpret these representations as suggesting internal pH balancing benefits or superior hydration. When considered in the context of the package as a whole, the court found the phrase "ionized to achieve the perfect balance" clearly referred to the water itself being balanced, not the body of the consumer.

## SUPPLEMENT

In *Rosas v. Hi-Tech Pharmaceuticals* (case no. cv-20-00433) and *Ottesen v. Hi-Tech Pharmaceuticals* (case no. 19-cv-07271) plaintiffs putative class actions against Hi-Tech alleging that the company's weight loss supplements contained an ingredient that had not been approved by FDA and the products were therefore adulterated and not properly classified as dietary supplements. Plaintiffs brought claims for violations of various California and New York consumer protection laws. While plaintiffs based their claims on deceptive labeling, their argument keyed in on the products' "dietary supplement" labeling. Relying on FDA Warning Letters plaintiffs claimed the challenged ingredient was either a "new dietary ingredient" for which FDA had not received the required new dietary ingredient (NDI) notification or it was an unsafe food additive. Hi-Tech argued that this case has nothing to do with advertising and should be designated a product classification case. Hi-Tech further argued that plaintiffs were asking the court to assume regulatory powers and determine whether a product met the statutory definition of a dietary supplement under DSHEA, which was outside of the court's jurisdiction. Both courts agreed.

In *United States v. Confidence USA, Inc. et al.*, case no. 2:19-cv-3073, the Eastern District of New York granted the government's motion for summary judgment in a case seeking a permanent injunction against New York dietary supplement firm Confidence USA and its operators for continued FDA violations. Confidence USA manufactures a variety of dietary supplements available on their website and in stores. The government alleged defendants violated current good manufacturing practice regulations by failing to ensure that finished batches met required specifications and failing to conduct the appropriate tests to verify the identity of ingredients. The court found such violations rendered the supplements adulterated as a matter of law.

# WHAT'S TO COME IN 2022

Undoubtedly, 2022 will see trends emerge in the world of food, beverage, and supplement litigation. We expect the following issues to dominate the field in the coming year:

- Litigation related to online food purchases
- New York as the newest preferred venue for slack fill litigation filings
- Litigation related to the "chief" or "primary" make-up of food items that purport to include real chocolate or fudge
- Litigation related to the guidelines for "free range", "cage-free", and other environmental labels on food products
- Litigation related to health and nutrient claims regarding sugar, protein, and Vitamin C content
- Litigation related to heavy-metals in baby food
- First Amendment labeling challenges to Prop 65 warnings
- New York as a venue for heavy metals litigation in foods beyond just baby food

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