

Food Industry Litigation and Regulatory Highlights, October 2021

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Welcome back from the annual food coma known as Thanksgiving dinner. If you're still dreaming of cranberries, stuffing, and pumpkin pie, continue the gastronomic journey with our monthly wrap up of what's been going on in the food court, NAD's opining on use of emojis to convey advertising claims, and highlights from FDA's recent summit on foods sold in e-commerce.



October Food Filings...More of the Same

As we have seen throughout the year, October brought a number of new class actions, mostly filed in various federal courts in Illinois, challenging representations that plaintiffs believe suggest the use of a specific *ingredient* in the product, as opposed to describing the product's *flavor*. These suits include challenges to:

- Bud Light's Platinum Hard [Seltzer](#) use of agave *syrup*, as opposed to the more desirable agave *spirit* (N.D. Illinois);
- Ore Ida pizza bagels' use of a "cheese blend" despite the label's suggestion that the product contained mozzarella, cheddar and Monterey Jack cheese (N.D. Illinois);
- The Kroger Company's use of artificial smoke flavor in its smoked gouda cheese rather than subjecting the cheese to a smoking process (E.D. Wisconsin);
- Kellogg's inclusion of fruits other than strawberries in its strawberry Pop Tarts product (S.D. New York);
- Trader Joe's use of combined strawberry and apple filling in its strawberry flavored "Frosted Toaster Pastries" (N.D. Illinois);
- Lorna Doone's [use of oils](#) and baking soda instead of butter in its shortbread cookies (S. D. Illinois); and
- Whole Foods' use of chocolate substitutes and vegetable oil as opposed to cacao ingredients in its vanilla ice cream bars marketed as being "dipped in organic chocolate" (N.D. Illinois).

We also observed a number of new "natural" filings against the food industry, including multiple suits challenging the use of artificial preservatives and flavorings such as citric acid, ascorbic acid, and malic acid in products marketed as "natural."

There were also a number of health related claims filed in October. Two such suits were [filed](#) challenging various kombucha drinks marketed in a way that suggests they can aid health when, in fact, they contain high amounts of sugar (N.D. California) or the benefits will only be observed by a small portion of the population with certain vitamin deficiencies (N.D. Illinois). Another alleges that Stop & Shop's "High Potency Fish Oil" fails to provide promised health benefits because it has been deprived of its omega-3 fatty acids through a chemical process called transesterification (S.D. New York). And a fourth suit alleges that Bowmar Nutrition LLC's whey protein-fortified nut spreads, powders, bars and frostings sold as dietary supplements and food replacements contain substantially less protein than represented on the products' labels and website (S.D. Iowa).

And Some Victories In The Courts

Despite the number of filings, the courts issued a handful of victories for the food industry in October. In *Amin v. Subway Restaurants*, the Northern District of California [dismissed](#) a putative class action alleging that Subway misrepresented that its products were manufactured with 100% sustainably caught skipjack and yellowfin tuna. More specifically, the plaintiffs alleged that the tuna was not sourced from sustainably farmed fisheries, and did not even consist of 100% tuna. The Court dismissed the complaint, finding that it failed to identify the specific representations being challenged, but granted plaintiffs leave to amend.

In *Chong v. Nestlé Water North America Inc.*, the Ninth Circuit [affirmed](#) the dismissal of claims that Nestlé's Arrowhead Water was sourced exclusively from Arrowhead Mountain. The Court found that this was one of the "rare" cases where it could conclude that no reasonable consumer would be misled based on the pleadings and product labels alone. The product label specifically noted that the water was collected from various mountain springs, and not from one specific mountain, and the Court ruled that the mountain and lake images on the label would not cause reasonable consumers to think otherwise.

In *Vizcarra v. Unilever United States, Inc.*, the Northern District of California [denied](#) class certification in a suit alleging that Breyers' Natural Vanilla Ice Cream contained *only* natural vanilla. In so ruling, the Court found flaws in the plaintiff's consumer perception survey, namely that the survey did not test the effect of the vanilla representations and instead tested the entire package which contains other statements and elements that were not being challenged in the suit. With no other evidence suggesting class-wide deception, the Court found that the central question in the case could not be resolved with common proof and therefore class treatment was inappropriate.

Finally, in *Iglesia v. Tootsie Roll Industries, LLC*, the District of New Jersey [dismissed](#) a slack fill case filed against Tootsie Roll Industries, alleging that the company dramatically underfilled boxes of Junior Mints and Sugar Babies. First, the court ruled that the plaintiff did not have standing to assert his claims regarding Sugar Babies, as he only alleges to have purchased Junior Mints, and the two products have different sizes and volumes, and contain different net weights. As to the products that Plaintiff did purchase, the Court ruled that the product's disclosure that it was sold by weight, and not volume, would not confuse a reasonable consumer and that the product's statement of net weight was obviously displayed on the front panel of the product's packaging. Finally, the Court ruled that the plaintiff's conclusory allegation that he was "shortchanged" was insufficient to establish damages, and that he should have specifically alleged how much he paid for the product and/or facts relating to the price of the product more generally.

NAD

The "Nauseated Face Emoji"



(and others) Can Convey Claims

In a SWIFT challenge between sports drink titans Stokely Van-Camp, maker of Gatorade, and BA Sports Nutrition, maker of BodyArmor sports drink, NAD determined that emojis can convey claims. The case involved social media posts by Cleveland Browns quarterback Baker Mayfield, who is also a BodyArmor endorse. As described in the decision, “The short video at issue begins with the caption “BLIND BODYARMOR TASTE TEST WITH BAKER MAYFIELD [eyes emoji].” Standing on a practice football field dressed in workout attire, Mr. Mayfield engages in a blind “taste test”, attempting to identify which of BodyArmor’s various flavors he has been handed by an individual who is off-screen. As Mr. Mayfield correctly verbally identifies the first three BodyArmor SuperDrink and BodyArmor Lyte flavors he samples, a green checkmark appears on the screen after each correct answer. He is then handed what is clearly a bottle of Gatorade’s Orange Thirst Quencher drink. After taking a sip, a green emoji depicting a face holding back vomit is displayed on the screen (the “Nauseated Face Emoji”), alongside the popular yellow laughing “Face with Tears of Joy Emoji.” Mr. Mayfield spits the Gatorade out on to the ground, and says to the camera, “Yo, that is not cool. That’s awful,” while removing his blindfold and shaking his head. Mr. Mayfield’s accounts caption the video with, “I’m not sure I’ll ever forgive you for this.” As shared by BodyArmor, the video is captioned “C’mon @BakerMayfield, please return our calls! We’re very sorry!!! [3 Face with Tears of Joy emojis] #TeamBODYARMOR.”

In addition to contending that the video disparaged Gatorade, the challenger requested NAD’s review of four express claims: (1) Gatorade is “awful”; (2) having to drink Gatorade is “not cool”; (3) Gatorade is nauseating (as depicted via nauseated emoji); and (4) people spit Gatorade out after drinking it. The advertiser asserted that the video was a “social media joke” and that the emojis were subjective expressions open to different interpretations. The advertiser also claimed that the video was puffery and did not convey objectively provable claims.

NAD focused on the “unmistakable negative” references to Gatorade in Mayfield’s express statements, e.g., Gatorade is “not cool”. Further, Mayfield spit out the Gatorade, an action timed with use of the “Nauseated Face Emoji” showing on-screen. In finding the video disparaging, NAD characterized it as a “harshly negative” statement about a specific BodyArmor competitor. The disparaging nature of the message also negated BodyArmor’s argument that the video constituted puffery. The decision highlights several recent NAD cases on point but ultimately concludes that “[e]xaggerated images and humor can be used to emphasize a message provided, however, that the underlying message is truthful. Here the advertising makes an expressly disparaging statement that Gatorade is “awful,” nauseating, or undrinkable. Because the Advertiser did not have any support for the messages about Gatorade, NAD recommended that the Advertiser discontinue the express claims made in the video.”

FDA

FDA hosted a three-day virtual [summit](#) to explore the safety of foods sold in e-commerce. Key themes included the following:

- **The Last Mile** – Even pre-pandemic, FDA was concerned about food delivery and, specifically, how to ensure food safety in the final stages before it reaches the end consumer. As food delivery and takeout options proliferated during the pandemic, the safety concerns did as well. Specifically, traceability poses a particular obstacle as delivery drivers may pick up food at

multiple restaurants or stores for delivery to multiple different consumers. These drivers may use varying measures to ensure food safety, such as insulated bags or coolers, or take no safety measures whatsoever. This variability in practices, training, and even awareness of the potential problem, along with willingness on the part of industry to address the issue, emerged as key issues.

- **Cross-Contamination and Traceability** – With the rise of subscription and e-commerce-only food options such as regional offerings for nationwide delivery, gift baskets, and meal kits, participants noted that labeling compliance – particularly use of lot codes and other traceability indicators – may not be sufficient to adequately identify adulterated or mislabeled products if needed. Further, given the single serving and convenience-sized packaging commonly used in meal kits, there is potential for cross-contamination particularly if an unpackaged but contaminated item is included in the kit. This very concern may have manifested in the form of the ongoing [onion recalls](#) due to presence of salmonella, which impacted meal kit services.
- **New Models** – As food delivery evolved and customers trended toward at-home dining, the restaurant industry has evolved as well to incorporate “ghost kitchens”. “Ghost kitchens” are restaurant kitchens used only for preparation without any in-person dining areas. For example, these kitchens may prepare orders only for delivery such that the ultimate customer never knows if their food was prepared in a traditional sit-down restaurant or a “ghost kitchen” functioning either out of standalone or, potentially, central kitchen-type location shared with similar services. On the food retail side, a similar concept called “dark stores” have cropped up, in which the stores function only as fulfillment operations without any in-person shopping available. Given the limited visibility into these operations, the concern is that it may be difficult for consumers – much less regulators – to identify food safety concerns.

FDA accepted comments through November 20, 2021 at docket no. FDA-2021-N-0929. While the comment period has ended, stakeholders should view this as an ongoing conversation with the agency and continue to maintain the dialogue to the extent they have useful perspectives to share.

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