

Food Industry Regulatory and Litigation Highlights – April and May 2021

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Welcome to our April + May combined report on food litigation, regulatory trends and events. We have a lot to report in the food world, with a number of litigation currents starting to form, and some new waves building. Let's see what happened....

New Filings

Cheesy Goodness? General Mills was hit with five putative class actions challenging its Annie's [mac and cheese](#) marketing representations that the product is "Made with Goodness" when, in fact, it contains potentially harmful chemicals known as ortho-phthalates which are linked to asthma, breast cancer and diabetes. The cases are pending in the Southern and Eastern Districts of New York and the Northern District of California. The Kraft Heinz Company was named in [similar suits](#) filed in the Northern District of California and the Northern District of Illinois.

Sparkling Water/Seltzer: A number of companies were named in putative class actions alleging that various [sparkling water](#) products misrepresented the nature of the flavoring agents used. For example, a complaint against Whole Foods (filed in the Southern District of New York) alleges that the Lemon Raspberry Italian Sparkling Mineral Water does not contain an appreciable amount real lemons or real raspberries. Similarly, a complaint against Kroger (filed in the Northern District of California) challenges the non-disclosure of artificial flavoring chemicals. Finally, Molson Coors Beverage Company was named in a class action alleging that its "Vizzy" brand hard seltzers are marketed as containing a significant amount of healthful qualities and nutrients such as vitamin C which, according to the complaint, falsely implies that alcoholic beverages could provide health benefits.

More Vanilla: April and May saw two new [vanilla](#) filings, including a case against Prairie Farms Dairy, Inc., alleging that the defendant's "Premium Vanilla" ice cream was falsely labeled as containing "natural colors and flavors" (Northern District of Illinois) and a case against Hostess alleging that its vanilla wafer products were falsely advertised as containing real vanilla (Missouri

state court).

More Natural: The past two months have seen a [slew](#) of new “natural” filings in the food industry. Such filings challenge of synthetic preservatives and other ingredients including citric acid (3 cases), ascorbic acid (1 case), artificial coloring (1 case), and monk fruit extract, which is alleged to be natural but processed with artificial solvents and additives (1 case). The filings were made across the country, including in Missouri state court (4 cases), the Central District of California (1 case), and the Southern District of Illinois (1 case). In addition to the natural allegations relating to monk fruit extract, a case against Chobani also challenges claims relating to “complete nutrition,” “advanced nutrition” and the use of a “+” symbol in connection with prebiotics and probiotics which, according to the complaint, falsely suggests that the product has more pre- and probiotics than other comparable foods.

Coffee, Please: We have also seen an uptick in coffee-related class actions, with two actions alleging that ground coffee products artificially inflate the number of cups that can be made from their contents given the directions for use.

Delivery Fees: April and May saw a continued trend of challenges relating to food delivery charges during the pandemic, with cases filed against GrubHub, alleged to have charged an undisclosed \$2.50/delivery fee on top of its \$9.99/month “Unlimited Free Delivery” for GrubHub+ users, and against Panera, alleged to have falsely promised a flat delivery charge on food deliveries ordered through Panera’s app and website. Both cases are pending in California state court.

Food Settlements

Open or Closed? GrubHub [asked](#) a federal judge to approve settlement in the CO Craft, LLC dba Freshcraft v. Grubhub Inc., matter alleging that it steered customers to its partner restaurants by telling consumers that other establishments were closed or not accepting online orders. Per the settlement, GrubHub agreed to amend platform language and pay up to \$450k in attorney’s fees.

Even More Vanilla. On May 17, the Southern District of New York granted [preliminary approval](#) to a \$2.6 million settlement of a putative nationwide class action alleging that Blue Diamond almond milk yogurt was falsely labeled as containing vanilla “with other natural flavors” when it should have been labeled as “artificially flavored” because it uses vanillin to boost the taste of real vanilla. The settlement provides that class members can claim a cash payment of \$1 per product with proof of purchase or 50 cents per product without proof of purchase, for a maximum of 10 products.

Even More Natural. On May 7, 2021, the parties in a putative nationwide class action challenging McCormick & Co.’s labeling of various spices and seasoning products as “natural” reached a \$3 million settlement. Class members with proof of purchase can claim \$1 per purchase without limitation, whereas consumers without proof of purchase are limited to a total recovery of \$15. McCormick also agreed to modify the labeling and website representations of the challenged products, but is permitted to sell its existing inventory with the disputed labels. The case is pending in the Western District of New York.

After all of that, let’s turn to some potentially good news for industry from the world of Prop 65 litigation and our friends at [Kelley Green Law blog](#).

Prop 65

Acrylamide. In the latest of a string of potentially ground-altering developments under California’s Proposition 65, a federal judge has temporarily enjoined plaintiffs from initiating new cases alleging

failure to warn for foods and beverages that expose consumers to acrylamide, a Prop 65-listed carcinogen that has been the subject of hundreds of actions in the past several years. [See more detail here](#) at Kelley Green Law blog.

FDA

Sesame is the newest allergen. Per the Food Allergy Safety, Treatment, Education and Research (FASTER) Act, sesame is now the ninth major food allergen. The FASTER Act requires foods containing sesame to be clearly labeled on products entering interstate commerce as of January 1, 2023, and directs the Department of Health and Human Services to prioritize regular reviews of potential food allergy treatments and research.

Remote facility inspections are here to stay. FDA released its [“Resiliency Roadmap for FDA Inspectional Oversight”](#) in May, which details the massive impact that the pandemic had on the agency’s inspections. Going forward, FDA will continue to prioritize critical inspections of priority products and for-cause scenarios. More broadly, industry should expect remote inspection techniques to continue as the agency seeks to clear its backlog and keep up going forward.

A healthy symbol? FDA is seeking [public comment](#) on a potential voluntary symbol that could be used on labels to convey a “healthy” nutrient content claim. In furtherance of its Nutrition Innovation Strategy, FDA proposes to conduct three consecutive quantitative research studies—an experimental study and two surveys—to explore consumer responses to the draft FOP symbols that manufacturers could voluntarily use on a food product as a graphic representation of the nutrient content claim “healthy.” The comment period is open until July 6, 2021.

PFAS in bottled water. A group of 11 senators is [urging](#) FDA to promulgate Standards of Quality (SOQ) for per- and polyfluoroalkyl substances (PFAS) in bottled water to provide the public, federal and state governments, and emergency responders assurance that bottled water products are safe for everyday use and in times of need when tap water is compromised. The letter points out that EPA has set a PFAS limit for public drinking water, i.e., tap water. However, bottled water is regulated by FDA as a food. In the absence of a federal limit for bottled water, states are establishing their own standards, leading to a patchwork of regulation. The letter cites the International Bottled Water Association standard, which “requires its members to test for PFAS and set a limit of 5 ppt for one PFAS compound and 10 ppt for any combination of PFAS compounds in their products” as an “achievable and affordable” standard.

NAD and FTC

Neither the NAD nor the FTC directly addressed the advertising of a conventional food product in any decisions or settlements during April or May. Check out our [April coverage of the dietary supplement and personal care product space here](#), though, and stay tuned for our May wrap up on supplements and personal care products coming up soon!

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