

# Food Industry Regulatory and Litigation Highlights – June 2021

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For our June review, the action stays largely in the litigation arena with vanilla getting thrown out and sustainability as well as settlements getting called into question. Meanwhile, environmental and health stakeholders are pushing FDA to ban PFAS from food contact uses as many in industry move away from PFAS-containing packaging. How to digest all of it? Consider some yogurt. FDA updated the standard of identity, making it more delicious than ever. Let's take a look....

## LITIGATION

### Two More Vanilla Cases Get Thrown Out of the Food Court

In *Robie v. Trader Joe's Co.*, the Northern District of California dismissed claims that Trader Joe's Almond Clusters cereal should have been labeled as "artificially flavored." The court held that, because the vanilla flavor can come from both the vanilla plant and vanillin derived from tree bark, it was properly labeled as "Vanilla Flavored With Other Natural Flavors" under applicable FDA regulations and the plaintiff's claims suggesting otherwise were preempted. The court also found that the plaintiff had failed to allege facts suggesting that reasonable consumers would interpret "vanilla" on the product label to mean that the product's flavor is derived exclusively from the vanilla plant, especially given that the challenged label did not contain any other words or pictures suggesting that the flavor was derived exclusively from the vanilla bean.

A different judge in the Northern District of California dismissed a substantially similar vanilla class action alleging that Whole Foods' 365 Organic Almond Vanilla Almondmilk Beverage was falsely labeled as being flavored exclusively or predominately from vanilla beans. See *Fahey v. Whole Foods Market*. The court adopted similar reasoning as *Robie* relating to the mere use of the word "vanilla" on the product label. However, the court departed from *Robie* (and many other false advertising decisions) and rule that the complaint failed to sufficiently allege a price premium theory of damages because it did not compare the price of Whole Foods' almond milk to that of other similar products. Finally, the court rejected a consumer survey commissioned by counsel suggesting that over 71% of consumers expected the product's vanilla taste to come from vanilla beans because the complaint

did not provide any information about how the survey was conducted, what questions were asked, or how many consumers participated.

Despite the onslaught of vanilla-related dismissals over the last year or two, the vanilla plaintiffs' bar has yet to be discouraged. June brought the filing of at least four new vanilla cases filed in New York and California against Whole Foods, Ciobani, Simply Orange Juice and Fairlife.

### **Another Preemption Win for Trader Joes**

In a second victory for Trader Joe's this month, the Ninth Circuit affirmed the [dismissal](#) of claims alleging that the retailer mislabeled its chicken packaging. See *Webb v. Trader Joe's*. The court ruled that Trader Joe's followed federal testing and retention protocols imposed by the federal Poultry Products Inspection Act before declaring that its chicken contains up to 5% retained water. Thus, the plaintiff's claims that the products were mislabeled because her own independent testing, using different testing protocols, showed an average of 9% retained water, was preempted.

### **Food Settlements**

There was also a fair amount of class action settlement activity in California this month:

- *Briseño v. ConAgra Foods, Inc.*: The Ninth Circuit [overturned](#) an approved settlement of claims alleging that Wesson Oil was misleadingly labeled as "100% Natural". The court identified "a squadron of red flags" in the deal warranting further review for potential collusion, including: (1) while the parties contended the deal could be worth more than \$100 million, ConAgra ultimately paid out less than \$8 million; (2) class counsel was receiving \$6.85 million, which was seven times higher than what class members received; and (3) the proposed injunctive relief was arguably meaningless because ConAgra had sold the brand to another party.
- *Hisley v. General Mills, Inc.* (S.D. Cal.): The Southern District of California [denied](#) preliminary approval to a proposed pre-certification settlement of claims alleging that General Mills' fruit snacks were deceptively labeled as having "no artificial flavors." The settlement provided for injunctive relief, \$725,000 in attorney's fees and \$5,000 incentive awards. The court ruled that the settlement "provides no meaningful benefit to the class" because it "abandons the monetary relief requested" in the complaint, and had all three hallmarks of a potentially collusive settlement: (1) counsel's receipt of a disproportionate distribution of the settlement, (2) a "clear sailing" arrangement by which the defendant agreed not to oppose the request for attorney's fees, and (3) a provision that fees not awarded by the court would revert to defendants.
- *Krommenhock v. Post Foods, LLC* (N.D. Cal.): Final approval was [granted](#) in \$15 million settlement of claims that various Post cereals were healthier than they really were. The court approved attorney's fees in the amount of just under \$1 million and \$5,000 service awards to the class representatives.

We saw a continuation of existing trends in new food and beverage class action filings including one new case alleging that Kraft's macaroni and cheese products contains harmful phthalates, five cases challenging "natural" marketing practices (challenging allegedly artificial ingredients including powdered cellulose, xanthan gum and added coloring), two new cases challenging food delivery charges (both in California), one case challenging marketing relating to place of origin against King's Hawaiian Bakery, two cases challenging "low calorie" and "zero calories" representations, and six cases challenging use or concentration of specific ingredients (including one case alleging that

alleging that Kind's dark chocolate clusters do not contain the amount of protein claimed on the product's label and one in the N.D. Ill. alleging that TGI Friday's packaged onion ring snacks do not contain real onions).

### **But is it sustainable?**

Finally, two new food-related sustainability claims were [filed](#), which is in line with a general uptick in sustainability cases more generally. The first, a consumer class action filed in the Central District of California, alleges that Red Lobster uses inhumane methods and environmentally damaging farming practices despite claiming on its menu that its seafood is "sourced to the highest standards." The second was filed by Earth Island Institute, an environmental advocacy group, in the District of Columbia Superior Court alleging that Coca-Cola markets itself as environmentally "sustainable" despite being the largest generator of plastic waste in the world.

Links from Law360, subsc. req'd.

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## **FDA**

### **PFAS in Food?**

Early in the month, as published in [Kelley Green Law](#), a coalition of environmental, food safety, and consumer health advocacy groups petitioned the U.S. Food and Drug Administration (FDA) yesterday to ban per- and poly-fluoroalkyl substances (PFAS) from food contact uses, and to "take aggressive action to protect consumers from all PFCs [per- and poly-fluorinated compounds]."

The petition contends that the scientific evidence shows "widespread harm" to health from PFAS exposure, and that the substances' "widespread use and their ability to remain intact in the environment means that over time PFAS levels from past and current uses can result in increasing levels of environmental contamination" and accumulation in humans and animals.

***"The cumulative effect of PFAS from all these sources on our health, including our risk of cancer, harm to our immune system and impaired development of our children, has resulted in a national outcry for comprehensive action; states have been compelled to take action because the federal government's piecemeal approach has left residents at risk." - June 3rd Petition to FDA***

Meanwhile, numerous food service and other companies are moving to adopt policies that prohibit PFAS in food packaging, including McDonald's Corp., Wendy's Co., Whole Foods Market, Inc., Chipotle Mexican Grill, Inc.; Office Depot, LLC; and Koninklijke Ahold Delhaize NV, which owns Food Lion, the Giant Co., and Fresh Direct.

For decades, the FDA has authorized several broad classes of PFAS for use in food contact substances due to their non-stick and grease, oil, and water-resistant properties. The authorization of the use of a food contact substance (FCS) requires that available data and information demonstrate that there is a "reasonable certainty of no harm" for that use. To make this finding, the FDA conducts an extensive review of scientific data, including data on migration of the substance into food, expected consumer exposure to the substance, and potential health impact from this exposure.

Currently, according to the FDA, PFAS are authorized for the following general categories of food contact uses:

- Non-stick cookware: PFAS may be used as a coating to make cookware non-stick. Gaskets, O-Rings, and other parts used in food processing equipment: PFAS may be used as a resin in forming certain parts used in food processing equipment that require chemical and physical durability.
- Processing aids: PFAS may be used as processing aids for manufacturing other food contact polymers to reduce build-up on manufacturing equipment.
- Paper/paperboard food packaging: PFAS may be used as grease-proofing agents in fast-food wrappers, microwave popcorn bags, take-out paperboard containers, and pet food bags to prevent oil and grease from foods from leaking through the packaging.

The petitioners contend that FDA's historic actions have been "a significant contributor to the consumer's exposure ... but the extent of the food contamination from the substances the agency currently allows is largely unknown because the agency does not test for them." In 2012, FDA reached agreements to remove long-chain PFAS from food packaging, though the agency continued authorizing FCS made from short-chain PFAS. In 2019, FDA reached agreements with manufacturers to phase out some food use short-chain PFAS by 2023.

The petitioners specifically request that FDA:

- Revoke existing food contact authorizations that have been granted for PFAS;
- Evaluate other FDA regulations to identify and remove other food contact approvals for PFAS;
- Ban PFAS use in food packaging and food handling equipment; and
- Require companies to demonstrate that all PFCs, including PFAS, "do not biopersist or [] cause cancer by non-genomic means in order for their continued use in food contact materials to remain authorized."

The June 3rd petition was filed by the Environmental Defense Fund, Breast Cancer Prevention Partners, Center for Environmental Health, Center for Food Safety, Consumer Federation of America, Consumer Reports, Defend Our Health, Environmental Working Group, Green Science Policy Institute, Healthy Babies Bright Futures, and the League of Conservation Voters. Read more about it in our sister blog, Kelley Green Law.

Later in June, FDA released a constituent [update](#) on PFAS in foods. The most recent update included release of testing results on a survey of food products. Of the 94 food samples surveyed, only one had detectable levels of PFAS. That one sample - cod - had detectable levels of perfluorooctane sulfonate (PFOS) and perfluorononanoic acid (PFNA), two types of PFAS. Based on the best available current science, the FDA "has no indication that the PFAS levels in the cod sample present a human health concern." More information regarding the sampling and testing is included in the constituent update.

Clearly, more is to come on the developing science. Meanwhile, [many](#) in industry are rapidly moving away from PFAS-containing products.

### **Sneak Peak into Food Priorities**

FDA also released a [list of guidance](#) topics the agency is considering for publication as draft or final by the end of June 2022. Food safety figures prominently, which is unsurprising given FDA's emphasis on the "New Era of Smarter Food Safety". Stakeholders can submit comments on the

guidance topics at [www.regulations.gov](http://www.regulations.gov) at Docket FDA-2021-N-0553. Relatedly, FDA's 2022 [budget requests](#) also place food safety front and center.

### **Last But Not Least, Yogurt.**

In an effort to update the standard of identity for yogurt to be consistent with technological changes in the market, FDA released a [final rule](#) to amend and modernize the standard of identity for yogurt as part of the agency's [Nutrition Innovation Strategy](#). The final rule makes several notable changes including the following:

- Expands the allowable ingredients in yogurt, including sweeteners such as agave, and reconstituted forms of basic dairy ingredients.
- Establishes a minimum amount of live and active cultures yogurt must contain to bear the optional labeling statement "contains live and active cultures" or similar statement. For yogurt treated to inactivate viable microorganisms, the statement "does not contain live and active cultures" is required on the label.
- Supports the many innovations that have already been made in the yogurt marketplace, including continuing to allow manufacturers to fortify yogurts, such as adding vitamins A and D, as long as they meet fortification requirements.
- The rule also allows various styles or textures of yogurt as long as they meet requirements in the standard of identity.

The compliance date of this final rule is January 1, 2024, which is the uniform compliance date for final food labeling regulations issued in 2021 and 2022.

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The FTC did not directly address marketing of food products but has had a raucous start to the summer. We encourage you to read [this post](#) from our AdLaw Access blog, which chronicles recent events including the change in leadership, formalization of the "Made in USA" rule, and potential enforcement priorities going forward.

And with that, we'll see you in August!