

# Food Industry Regulatory and Litigation Highlights – March 2021

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Welcome to our selected regulatory and litigation highlights impacting the food and beverage industry in March 2021. The food court saw its own brand of March Madness with disputes over food delivery fees kicking off this month's update.

## Litigation Developments

### **Hidden Delivery Fees**

A number of [suits](#) were filed in March regarding undisclosed delivery fees. These suits are framed in a couple of different ways. One such suit filed against Chipotle (*Dundon v. Chipotle Mexican Grill, Inc.*, N.D.N.Y.) alleges that Chipotle has offered “free” or “\$1” delivery, but charges more for delivery orders than for in-person purchases or pick-up orders of the same items. According to the complaint, Chipotle adds a 10% “service charge” to delivery orders that is not charged to pick-up orders or in-person purchases. The complaint also alleges that Chipotle charged more for individual food items when ordered for delivery as compared to the prices charged for the same items purchased in person or ordered for pick-up. Similar class action suits were filed against Chipotle in Florida federal court (*Hopkins v. Chipotle Mexican Grill, Inc.*) and against Chick-Fil-A in California state court (*Ortega v. Chick-Fil-A Inc.*).

### **Natural Flavoring and Ingredient Claims**

Four new natural flavoring and ingredient [class actions](#) were filed in March. One action (*Kinman v. The Kroger Co.*, N.D. Illinois) alleges that Kroger's smoked gouda products get their smoke flavor from artificial flavoring as opposed to the natural smoking process. Another (*Romaine v. Globus Food Products LLC*, Missouri state court) alleges that Globus Food Products' “all natural” pizza products actually contained a synthetic ingredient called powdered cellulose. The third (*Vanlaningham v. Sara Lee Bakery LLC*, Illinois state court) alleges that Sara Lee's waffle products are all natural when they contain citric acid, an artificial preservative. And finally, adding to the dozens of vanilla-related cases that have been filed of late, the fourth action (*Annmarie St. John v. The Price Chopper Inc.*, New York state court) alleges that The Price Chopper's PICS almond milk was represented as containing natural vanilla when it, in fact, contained artificial flavors.

### **Health Claims**

In *McMorrow v. Mondelez International, Inc.*, the Southern District of California certified a nationwide and New York class in an action alleging that Mondelez's belVita breakfast products are deceptively advertised as providing “nutritious steady energy all morning” and are “part of a balanced

breakfast,” when, in fact, they contain high levels of added sugar. The court blessed the plaintiffs’ damages model (at least for purposes of class certification), which proposed to conduct a survey isolating any price premium associated with the term “nutritious” as used in Mondelez’s marketing of its belVita breakfast products. Mondelez filed a petition with the Ninth Circuit for interlocutory review of the certification order, which is currently pending. For more discussion, see our blog post [here](#).

In *Hadley et al. v. Kellogg Sales Co.*, the parties submitted a third motion for preliminary settlement approval of a class action alleging that Kellogg falsely advertised various cereal products as “heart healthy” and/or “lightly sweetened” despite what the plaintiffs characterized as high percentages of added sugar. This version of the [settlement](#) (1) eliminated a voucher component that was in prior versions of the settlement; (2) increased the amount of the cash payment to \$13 million; (3) expanded the previously-agreed to injunctive relief; and (4) narrowed the scope of the release to claims based on the identical factual predicate as alleged in the complaint, including the specific products that were part of the previous class certification order.

Finally, in *Rand v. Kilwins Quality Confections, Inc.* (N.D. Ill.), the plaintiff [alleges](#) that various caramel and chocolate product labels materially misstated both the number of servings and the number of calories per serving. The plaintiff is asserting thirty causes of action, including claims for violation of a variety of state consumer protection statutes, as well as for breach of contract and unjust enrichment, and seeks to represent both a nationwide class as well as a number of state-specific classes.

### **Origin Claims**

In *Corker et al. v. Costco Wholesale Corp. et al.*, coffee farmers in the Kona region of Hawaii [alleged](#) that defendants (a number of suppliers and retailers) misleadingly labeled and sold coffee not from the Kona region as “Kona” coffee. The parties sought approval of a settlement with three suppliers/retailers that included substantial injunctive relief in the form of labeling changes and, in the case of one settlement, a payment of \$6.1 million to the class.

(links from Law360, subsc. req’d.)

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### **National Advertising Division**

Grocer Aldi agreed to permanently discontinue several price advertising claims, including the following:

- “The Lowest Prices Everyday”
- “Lowest Possible Prices on Groceries”
- “It’s Official. We Have the Lowest Prices on Long Island”
- “ALDI has the Lowest Prices on Long Island”

The decision followed a challenge by competing grocer Lidl via NAD’s SWIFT process.

Chobani LLC also permanently discontinued challenged express claims that its Chobani Complete 5.3-ounce yogurt cup contains 25 grams of protein.

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## **FDA**

FDA released its Foods Safety and Nutrition [Survey](#). Key findings include:

- Most consumers are familiar with the Nutrition Facts label
- Most consumers have seen menu labeling at restaurants
- Consumers are familiar with front of package claims
- Hand washing practices vary depending on the occasion
- The majority of consumers own a food thermometer, but usage varies depending on what is being cooked

FDA also announced that it is [further extending](#) the time allowed to obtain a unique facility identifier for food facilities to December 31, 2022.

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Thanks for joining us again this month. See you in May!