

# Food Litigation and Regulatory Highlights – February 2021

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Welcome to our monthly digest of litigation and regulatory highlights impacting the food and beverage industry. February saw another win for industry on the vanilla front, a preemption win in California state court, and FDA continuing with COVID-19-related warning letters and foreign supplier verification enforcement. Let's take a look....

## Litigation

Industry scored another win on the vanilla front when a New York federal judge [tossed out](#) a class action alleging that Oregon Chai misleads consumers into thinking that its tea mixes contain real vanilla, noting that there is little differentiating the plaintiff's case from others that were dismissed on the basis that consumers see vanilla as a flavor but not necessarily as an ingredient. The judge also noted that there was nothing on packaging that suggested the predominant or exclusive use of vanilla as flavoring. This win didn't stop plaintiff's lawyers from scouring the aisles for new vanilla-labeled targets, though, including [Starbucks](#) and [Trader Joe's](#).

Post Foods [settled](#) a class action case involving allegations that the company misrepresented the nutritional value of its cereals by failing to disclose added sugar, thereby making the cereals seem healthier than they actually are. This settlement follows roughly five years of litigation and arguments by Post that the statements relating to the products' nutritional content are pre-empted by food labeling laws and regulations, protected by the First Amendment, and truthful insofar as they do not make any claim about the healthiness of the cereals overall. The court rejected these arguments and ultimately certified a nationwide class of people who bought any of the Post cereal products at issue, including Raisin Bran, Honey Bunches of Oats, Honeycomb and Waffle Crisp between Aug. 29, 2012, and Nov. 2, 2020. Pursuant to the settlement, Post will establish a \$15 Million fund to compensate the class and will make labeling changes to cereals if more than 10% of the calories come from added sugar. This settlement came on the heels of two similar "healthy" cereal lawsuits: one against General Mills, which was [dismissed](#) in 2019, and one against Kellogg for which settlement approval has been twice [rejected](#), most recently in November of 2020 because of an overly broad release provision.

In a case involving certifications and animal welfare, Foster Farms scored a significant win on a [preemption argument](#) in California state appellate court. Plaintiff Carol Leining alleged that she purchased Foster Farms chicken, labeled as "American Humane Certified" because she "assumed the birds lived comfortably and were killed quickly and painlessly but claimed she discovered that the AHA certification doesn't require special treatment." She also alleged that Foster Farms charges more for its chicken that bears the American Human Certified label but, since the AHA does not have humane treatment standards, the certification is meaningless.

The court disagreed, finding that the Poultry Products Inspection Act (PPIA) preempts Leining's state law false advertising claims. Per the PPIA, Foster Farms's labels were reviewed and approved by the USDA prior to use. The PPIA prohibits false and misleading labeling and, as such, the USDA could have prohibited use of the AHA seal, but it did not.

*And for dessert...*

A California federal judge [dismissed](#) a lawsuit against Hostess Brands alleging that the company's carrot cake mini donuts were falsely advertised because plaintiff believed that they contained significant amounts of real carrot when, in fact, they did not contain *any* carrots. Hostess made a number of labeling arguments that undermined the plaintiff's claims that she was misled by the label, including that the label did not display any pictures of carrots, did not list carrots in the ingredients declaration, and as of 2019 when plaintiff claims that she first started purchasing the product, the product was labeled as "naturally and artificially flavored carrot cake mini donuts." This decision stands in contrast to a 2017 decision in which the N.D. Illinois permitted a similar [claim](#) to proceed with respect to Dunkin Donuts' glazed blueberry doughnuts and other blueberry-flavored products.

(some links from [Law360](#), subscription req'd.)

#### **FDA**

FDA enforcement on false COVID-19-related claims continued with joint warning letters issued with the FTC relating to [tea products](#) and [supplements](#). FDA also issued several [letters](#) alleging failure to comply with the foreign supplier verification (FSVP) requirements.

#### **NAD**

NAD did not issue any food-specific decisions in February 2021, but see select dietary supplement highlights [here](#).

#### **FTC**

The FTC did not announce any food-specific settlements or litigation in February 2021 but see above the joint warning letters issued with FDA relating to allegedly false COVID-19 claims. The FTC now has [civil penalty authority](#) relative to deceptive COVID-19-related advertising.

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Thanks for reading our food industry litigation and regulatory highlights. See you in April!



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