

# Food Litigation and Regulatory Highlights – January 2021

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Welcome to our monthly digest of litigation and regulatory highlights impacting the food and beverage industry. As it has been for many months, the story was mostly about what's going on in the food court. Let's take a look....

## Litigation

Vanilla, vanilla, and more vanilla....The plaintiff's bar remains skeptical of any product labeled as vanilla. Among the many vanilla-related lawsuits filed, [McDonald's](#), [Whole Foods](#) and [Trader Joe's](#) defended suits alleging that their vanilla ice cream, vanilla almond milk, and vanilla almond cereal respectively were falsely labeled as vanilla. However, in a win for industry, a NY federal judge found that Topco [did not](#) improperly label its vanilla almond milk, ruling that although the product is not exclusively flavored with real vanilla, the suit failed to allege that a reasonable consumer would believe that a vanilla milk's flavor was solely sourced from vanilla.

Other flavorings haven't been immune from scrutiny, though. Frito-Lay appears to have [settled](#) a case involving allegations that the company's cheddar and sour cream chips are misleadingly labeled. The plaintiff alleged that the images of cheddar cheese and sour cream on the front of Ruffles-brand and Baked Lays Cheddar + Sour Cream Flavor potato chips, reasonable buyers would think that those ingredients flavor the chips. In fact, plaintiff claimed that Frito Lay used synthetic diacetyl to provide the sour cream flavor in the chips, but did not disclose the artificial flavor on the front of the packaging, as required per the FDCA regulations.

Consumers were also [dismayed](#) to find out that 7-Eleven's Yumions may not, in fact, be made from real onions and, separately, that the Keebler elves [allegedly](#) may not be making their cookies with "real fudge".

The lesson from these cases and others is that flavor and ingredient-related representations continue to face considerable scrutiny. If businesses are updating labels or branding for the new year, it's worth the time to review flavor descriptions and consider the arguments that these plaintiffs are asserting to help understand and assess risk.

(links from *Law360*, subscription req'd.)

## FDA

FDA warning letters focused on claims that cause products to be considered unapproved new drugs, including claims featured on an [aloe product](#) relating to joint mobility, inflammation, and acid reflux. In other enforcement, a Washington-state federal judge [entered](#) a consent decree against a juice processor accused of distributing adulterated juice products.

FDA published [findings](#) of its leafy greens e. coli outbreak investigation, identifying cattle grazing upslope from the growing area as the likely source of contamination.

In a recall turned class action litigation story, Midwestern Pet Foods, Inc., initiated a [recall](#) of multiple pet foods on December 30, related to the presence of aflatoxin. Consumers whose pets perished after consuming the food recently filed suit alleging that the foods caused their pets' deaths.

Undeclared allergens and potential presence of listeria monocytogenes and other contaminants were the most common reasons for food recall listed in FDA's recall [database](#).

## **Prop 65**

Our sister blog, [Kelley Green Law](#), featured two Prop 65 developments that may impact certain products, including [Prop 65 warnings](#) required on products that may expose consumers to THC and a [proposal](#) to minimize use of the short form warning format. Also, although not directly in the personal care space, given the proliferation of many products that feature disinfectant claims, companies may want to note [this post](#) regarding EPA enforcement on unregistered disinfectants.

## **FTC**

The FTC did not announce any food-specific settlements or litigation in January 2021.

## **NAD**

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

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Thanks for reading our first installment of the food industry litigation and regulatory highlights. See you in March!



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