

# Food + Personal Care Industry Insights – January 2023

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Welcome to the 2023 inaugural issue of our newsletter, where we explore litigation and regulatory trends and developments from around the food, dietary supplement, and personal care industries. Like most everybody else, we've given up on our new year's resolutions, so let's go to the food court.

## The Food Court - Vanilla Cases Melt Away But Other Ingredient Theories Rise

With courts expressing continued skepticism about vanilla bean false advertising theories, plaintiffs are targeting a slew of other ingredient-based false advertising angles. For example, in [Patoni et al. v. Spindrift Beverage Co.](#), the plaintiff claims that Spindrift's "clean" branding and messaging trumpeting that the drinks contain only water and fruit are false and misleading because the products also contain citric acid, which is plainly disclosed on the ingredient declaration. Because many courts do not expect consumers to look beyond a product's front panel to read ingredient declarations, those three words – *yup, that's it* – which are pervasive in Spindrift's branding, are likely to be highly significant because they expressly tell the consumer that there is nothing else in the products.



Where consumers are basing their lawsuits on assumptions rather than express claims, courts are more likely to view them as... half-baked. An Illinois court [dismissed](#) a claim that Bimbo Bakery's brown bread was falsely advertised because the bread's dark color, visible flecks of grain and "brown bread" name caused consumers to believe it has a higher grain content, when it is actually made with enriched flour and has only 4% of the daily fiber value. The court found that the plaintiff's assumptions about the bread content were unreasonable. Even if the bread's color and obvious presence of grain suggested that the product had whole grains, it was no guarantee of the product's precise grain content. The court stated: No reasonable consumer could conclude what percentage of whole wheat the bread contains merely by these toppings.

**What's the lesson:** Lawsuits based on consumer assumptions about what is in a product may lean in favor of a motion to dismiss; however, where the seller has expressly limited consumer

understanding with front panel language, courts may be unlikely to find that a reasonable consumer should look any further. *Yup, that's it.*

### **State AG - GrubHub Deceptive Fee Settlement Sets Standards for Price Disclosures**

**Wait....how much was that takeout?** If you, too, questioned how hungry you really were when you saw the final cost of a takeout order on one of the popular delivery apps, you're not alone. While food prices generally have increased, regulators have also been concerned about whether platforms are adequately disclosing fees tacked on to the orders.

The DC Attorney General [announced](#) a \$3.5 Million settlement with GrubHub relating to the platform's alleged use of false and misleading marketing tactics and deceptive fees. In addition to monetary relief, the settlement requires GrubHub to make the following changes:

- Prominently disclose to consumers when it presents search results that additional fees may apply at checkout;
- List the name and amount of each fee as a separate line item at checkout;
- Stop its practice of combining taxes and fees into one line item;
- Stop advertising that Grubhub+ subscribers receive "free delivery" and instead specify that the \$0 delivery fee only applies to eligible orders and that other fees may apply;
- Stop charging menu prices higher than those available at the restaurant itself unless it clearly discloses, both on the menu and at checkout, that prices may be higher on Grubhub; and
- Shut down all microsites for restaurants located in the District or transfer ownership to the restaurant.

These injunctive measures are intended to set best practices for pricing disclosures and follows similar suits against [DoorDash](#) and [Instacart](#). Check out our related posts on "dark patterns" [here](#) and State AG insights [here](#) to get up to speed on the latest enforcement priorities.

### **National Advertising Division - Medical Marketing 101 and More Green Claims**

NAD [parsed](#) Novartis's advertising for breast cancer drug, Kisqali. As NAD followers know, it's unusual to see challenges involving prescription drugs. However, the challenge involved questions that aren't unusual for those who regularly review medical marketing materials: which claims are appropriate for health care professionals (HCPs) and which claims are appropriate for consumers.

As the decision notes, NAD has long recognized that health care providers and specialists are a sophisticated audience and are better equipped to decipher the advertised results of clinical data than the general consumer, especially when provided with appropriate context and detail. In this instance, NAD concluded that clinical experience and the context provided in the advertiser's HCP-directed brochures would both inform the physician's takeaway of the claim and limit it to the recited facts, and that this audience would interpret the challenged comparative claim narrowly.

However, NAD did not think that consumers would have the necessary experience and context to understand similar claims relating to Kisqali's effectiveness and could reasonably understand messages that were not supported.

**So what do we do with this?** The lesson here is that advertisers can and should take into account

the intended audience when determining the suitability of marketing claims. A more sophisticated audience can be expected to understand more complex claims than the general public.

**Green, green, it's green they say....**Also, not to be missed, NAD notched another “green claims” challenge by issuing a [decision](#) involving Dyper, a diaper and baby wipes manufacturer. Dyper agreed to discontinue 15 different comparative and environmental claims, which NAD did not review on the merits. However, NAD found that Dyper provided a reasonable basis for claims that certain components of its bamboo viscose diapers are biodegradable but recommended that the claim be qualified to make clear the circumstances in which the diaper components would actually degrade, specifically when disposed of via the REDYPER service or a composting facility. This follows a decision in December 2022 in which NAD took a [strict view](#) of recycling claims made by the American Beverage Association. For more on recent green claims lawsuits and FTC updates to the Green Guides check out our coverage [here](#).

### **FDA *Still* Doesn't Think CBD Is A Dietary Supplement + Model Food Code Changes Regarding Allergens**

Although the Wall Street Journal [stoked](#) momentary optimism that FDA would release a framework for how CBD could be governed, no one who has watched this space for very long was truly surprised when the agency instead [said](#) that existing regulatory frameworks are not appropriate for the sale of CBD as a food or a supplement. FDA pledged to work with Congress to find a new path forward. Expect industry to finally address this regulatory uncertainty in the next iteration of the 2023 Farm Bill.

FDA also [released](#) an updated version of the Model Food Code, which is a set of food safety best practices for food retailers and restaurants. A detailed summary of the changes versus the 2017 version is [here](#). The changes that stood out most to us were those related to allergen disclosures and training. Specifically, the updated Model Food Code calls for employee training on elements associated with food allergy awareness and what topics food establishments can consider including when developing operational- specific allergen training programs for employees. In addition, the updated Code adds sesame as the ninth major food allergen (consistent with changes to federal law) and calls for express allergen disclosures relative to consumer-dispensed foods and unpackaged foods.

### **FTC - Updated Health Claims Guidance Seeks To Impose Inflexible Substantiation Standards**

**Misguided:** Just as December wound down, the FTC's Bureau of Consumer Protection released its Health Products Compliance Guidance—a sweeping overhaul of the 1998 Guidance, Dietary Supplements: An Advertising Guide for Industry. Unlike the recently announced effort to review its Green Guides, the FTC did not seek public comment.

According to an FTC blog post that accompanied its release, the new Guidance purports to “correct misunderstandings” and “urban myths” that have circulated about FTC substantiation standards. In actuality, however, the new Guidance represents a recitation of some of the positions the agency has taken in health-related enforcement matters over the last decade, continuing a stark departure from the prior “flexible” approach to substantiation set forth in the 1998 Guidance. Check out our blog post [here](#).

Check out our regular coverage of all things advertising, privacy, and consumer protection on our [Ad Law Access blog](#).