

Food + Personal Care Litigation and Regulatory Highlights – January 2022

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Welcome to our 2022 inaugural issue of Food and Personal Care Litigation and Regulatory Highlights, where we explore trends and developments from around these industries. It's fair to say that the year has started off very busy in both the courtroom and the regulatory arena. On this chilly winter day, our first stop is in California.

Prop 65

Our friends at [Kelley Green Law Blog](#) get the starting position for this issue by highlighting a precipitous uptick in the number of Prop 65 filings over the prior year. While the Covid-19 pandemic caused all sorts of disruptions to society and the economy, at least one area of business has thrived over the last two years: private plaintiff enforcement of California Proposition 65. In 2020-2021, over 40% more Prop 65 actions were brought by private plaintiff “bounty hunters” than in the two years prior to the pandemic (2018-2019). Compared to a decade ago, private plaintiff groups now initiate three times more Prop 65 actions each year, and five times more than in 2008. Learn more [here](#) about the most frequently cited chemicals and those that are emerging, including PFAS.

Notable Dishes From the Food Court

The close of 2021 included two notable class action decisions for the food industry. In the first, *Bolden v. Barilla America, Inc.*, the Northern District of Illinois [denied](#) a motion to dismiss various state law consumer fraud and express warranty claims alleging that Barilla deceptively labeled its pasta sauces as containing no preservatives, even though the products contain the known preservative citric acid. However, the court granted Barilla’s motion to dismiss the implied warranty claim for lack of privity, and as also dismissed the negligent misrepresentation claim because it was barred by the economic loss doctrine. The court also denied the plaintiffs’ request for injunctive relief, ruling that they could avoid Barilla’s allegedly deceptive products by purchasing other branded sauces.

In the second, *Warren v. Whole Foods Market Group, Inc.*, the Eastern District of New York [dismissed](#) claims that Whole Foods Markets tricked consumers into believe its instant oatmeal product was sugar-free or low in sugar by using allegedly misleading phrases such as “dehydrated cane juice solids” and displaying picture of fresh raspberries on the label. The court found that, in the absence of any express claim that the product was sugar-free or low in sugar, consumers are “trained to

look” to the ingredient list, which disclosed the use of dehydrated cane juice solids, and found it “improbable” that reasonable consumers would gloss over the words “Sugar 11 g,” which were prominently displayed in the nutrition panel immediately next to the ingredient list and, in the court’s view, “hard to miss.”

In January, the Southern District of New York followed the overwhelming number of courts that [dismissed](#) “vanilla” claims throughout 2021. In this most recent case, *Santiful v. Wegmans Food Markets, Inc.*, the plaintiffs had alleged that the use of the words “vanilla” and “naturally flavored” on the label of Wegmans’ Gluten Free Vanilla Cake Mix misled consumers into believing that the product was flavored mainly from vanilla beans when it allegedly contained artificial flavors. The court disagreed, finding that the vanilla representations conveyed to consumers the *flavor* of the product rather than the *specific ingredients* used to impart that flavor. As to the artificial flavoring aspect of the complaint, the court held that that because the ingredients that contributed to the vanilla flavoring (ethyl vanillin, vanillin, maltol and piperol) can be artificial or natural depending on how they are derived, the plaintiffs were required to allege exactly how these ingredients were derived for this product. Because they had not done so, the court dismissed the complaint but permitted the plaintiffs to file an amended complaint.

Food Filings Trends

Furthering one of the growing trends of the last year, 2021 ended and 2022 started with a number of new “ingredient” class actions, including three suits challenging the use of non-dairy ingredients in “fudge”-based products, as well as others challenging the use (or rather, lack of use) of real cinnamon in cinnamon-flavored cereal, the lack of butter in “butter snaps pretzels,” and the minimal use of whole grains in various cracker products. We also saw a number of new “natural” and “preservative-free” lawsuits, and multiple new lawsuits challenging “healthy” marketing claims and protein content claims.

Hot Tip: For those reviewing or refreshing food labels, here are a couple of practical watch-outs:

- Terms that are subject to a “standard of identity,” i.e., a regulatory definition for what must be in a product to bear a particular name. Using defined names without meeting the regulatory definitions is increasingly drawing scrutiny.
- Multi-function ingredients such as malic acid, citric acid or fumaric acid, which can perform multiple functions in a product in conjunction with claims such as “preservative free”. Even if not acting as a preservative, courts have been reticent to dismiss claims of false advertising where the product include a multi-function ingredient and a claim that directly relates to one of those functions.

National Advertising Division

What’s in a name? NAD determined that Goli Nutrition had a reasonable basis for use of the name Apple Cider Vinegar (ACV) Gummies but also found that the advertiser could not substantiate that the gummies provided the health benefits typically associated with ACV and thus recommended that the advertiser qualify the use of ACV – including in the product name – to avoid conveying unsupported health benefit claims.

In a challenge brought by Bragg Live Food Products, maker of a competing apple cider vinegar shot, Bragg took issue with Goli’s use of “apple cider vinegar” in the product name, alleging that they do not contain enough acetic acid to qualify as apple cider vinegar or an ACV supplement. As such,

Bragg also alleged that Goli's use of the term "vinegar" in the product name and labeling runs afoul of FDA labeling requirements and Goli's gummies have little chemical similarity to apple cider vinegar or a true ACV supplement.

More specifically, Bragg alleged that Goli's gummies did not have sufficient acetic acid to be labeled "vinegar" per FDA's regulations and also fell short of the 5% naturally occurring acetic acid concentration found in traditional ACV. Goli countered that its ingredient is made from dehydrated apple cider vinegar. In support of its argument, Goli submitted Specification and Cook Sheets indicating that the apple cider vinegar powder component contained 5.88% acetic acid along with multiple laboratory tests demonstrating acetic acid at 25-33 mg. Based on this, NAD determined that Goli had established a reasonable basis for its product name.

NAD then examined Goli's advertising for its ACV product, which "created a powerful connection between the product and the expected health benefits of ACV" based on the combination of visual imagery and product scenes featured in ads. In evaluating the substantiation for those claims, NAD noted that the accepted threshold dose of liquid apple cider vinegar is one tablespoon, which delivers 750 mg of acetic acid. When consumed as directed or even at a modified dose, NAD found that the Goli gummies provided far less than 750 mg of acetic acid and that the advertiser did not provide support for a health benefit below that level. As such, NAD recommended that Goli discontinue or modify its advertising to avoid conveying the unsupported message that the amount of ACV contained in its gummies are associated with the health benefits of traditional liquid ACV. NAD noted that this includes modifying or qualifying the use of "Apple Cider Vinegar," "ACV," or "Vinegar" *including in its product name* when in the context of the challenged advertising so as to avoid conveying an unsupported implied health message.

Unsurprisingly, Goli is appealing the decision to the NARB. Given the popularity of ACV and gummies generally, this is one to watch.

Across the pond, the UK's ASA [roasted](#) Oatly's climate-friendly claims for conveying messages beyond the limits of the substantiation. If you aren't already following the trends regarding green claims and false advertising litigation, check out [these posts](#) to help get up to speed on related NAD decisions regarding sustainability in the fashion industry, a new California recycling law, and litigation around corporate aspirational environmental statements. These trends are only going to continue.

FDA

The big news at FDA is that the agency finally has a confirmed commissioner after over a year without one. Dr. Robert Califf was narrowly [confirmed](#) by the Senate earlier this week.

In a sign of things getting back to "normal," FDA also announced that it will be [resuming](#) in-person inspections for domestic facilities.

FDA released a list of [guidance topics](#) that the FDA Foods Programs expects to publish by the end of December 2022, which includes the following:

- Labeling of plant-based milk alternatives
- Labeling of plant-based alternatives to animal-derived food

- Multiple guidance documents relating to hazard analysis for various food types
- Three guidance documents relating to heavy metal levels in foods
- Two guidance documents relating to the new dietary ingredient process
- Guidance relating to testing methods for asbestos in cosmetic products that contain talc

Separately, BPA is again popping up as it has periodically for the last decade or so. A coalition of scientists, medical experts and environmental groups filed a [petition](#) with FDA asking the agency to restrict the use of BPA in food contact plastics. The petition cites findings published recently by the European Food Safety Authority (EFSA), which found that harmful impacts from BPA exposure can occur at levels 100,000 times lower than previously assumed. Many manufacturers have already moved away from BPA in their packaging materials

The FTC and State AGs

The FTC and state attorneys general are also hard at work. Companies that offer a subscription service or autoship options will want to pay attention to guidance and [enforcement](#) regarding allegedly deceptive practices, now branded as “dark patterns”. See [here](#) and [here](#) for our expert analysis on these topics.

And finally, in-house counsel should check on whether their marketers may be cherry-picking reviews in a way that could be deceptive. The FTC’s [settlement](#) with Fashion Nova regarding failure to post negative reviews is a helpful lesson for any company that curates reviews, whether manually or by algorithm.

We’ll see you next month with more developments. In the meantime, check out [Ad Law Access](#), [Cannabis Law Update](#), and [Kelley Green Law](#) blogs for regular updates.