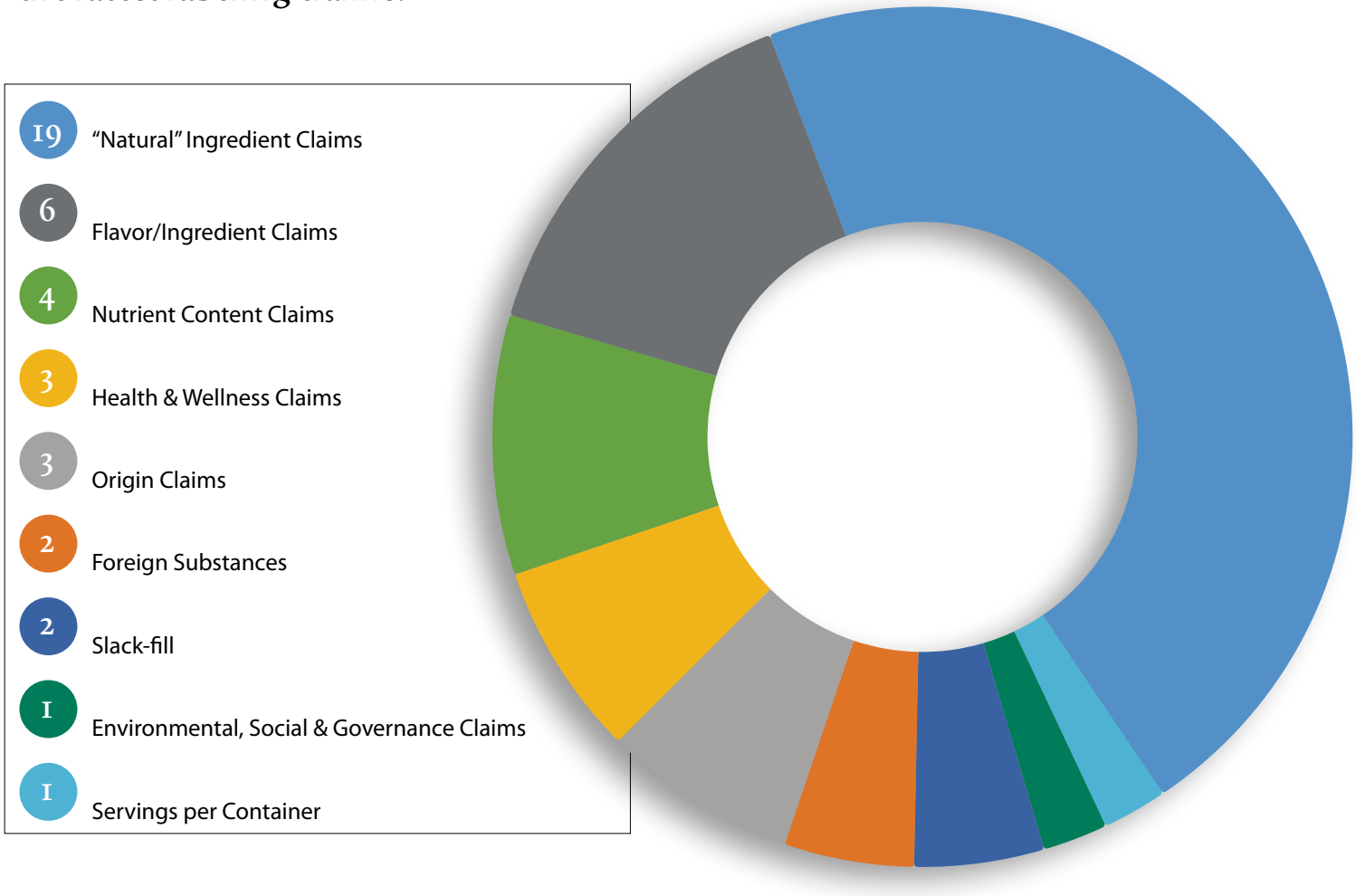
For Your Consumption

FOOD & BEVERAGE DIGEST

MARCH 2025

ALSTON & BIRD

For an amuse-bouche, we've gathered the details and served up a chart highlighting the variety of 41 new suits filed in January and February—a taste of the latest labeling claims.



Pouting Likely After Court Rules in Baby Pouch Suit

Howard v. Gerber Products Co., No. 3:22-cv-04779 (N.D. Cal. Dec. 31, 2024).

A California court has decided to split the baby when it comes to litigation over food pouches for babies and toddlers. This follows the court's 2023 decision that trimmed down proposed class allegations that the defendant's "made with" claims purportedly made the food pouches appear healthier (or at least better) than they are. In an order granting in part and denying in part the defendant's motion to dismiss, the California court dismissed with prejudice the plaintiffs' fraud claims, finding that allegations that salt and sugar "may" or "might" or "risk" creating health conditions were mere baby steps and not the sort of allegations that sustain a fraud claim. The court likewise rejected and dismissed with prejudice the plaintiff's babbling (*cough, allegations*) that products "made with" a certain ingredient could be construed as unlawful nutrient content claims for the product. And the plaintiffs' request for injunctive relief was tossed by the court, though the court permitted them leave to amend that claim.

The plaintiffs' disappointment from this order, however, will likely be short-lived because other claims survived the ruling. The court declined to revisit its previous holdings and rejected the defendant's assertions on preemption and the plaintiffs' ability to bring claims for products they did not purchase. Likewise surviving are the plaintiffs' claims challenging certain implied nutrient content statements and claims related to statements about the vitamin content of certain products. The plaintiffs seemingly had their fill from this case because just two weeks ago they asked the court to dismiss the case *with* prejudice.

Dude, Where's My Protein?

Taylor v. Dave's Killer Bread Inc., No. 1:23-cv-16439 (N.D. Ill. Jan. 10, 2025).

Readers might recall our coverage of a complaint accusing a bread manufacturer of baking inflated protein content claims on its products' front labels and ignoring FDA labeling requirements about the amount of protein provided per serving. Since this publication is all about truthful advertising, we have held true to our promise to follow this case closely and can now report that although the manufacturer tried to end the lawsuit with a *killer* motion to dismiss, the court largely allowed it to continue germinating into discovery.

Addressing standing first, the court held that the plaintiffs adequately pleaded that they purchased the manufacturer's products on the (we think) half-baked belief that they contained more digestible protein than they did. And despite not having purchased all the challenged products, the plaintiffs were permitted to challenge ones they had never bought because of the substantial similarity of the alleged labeling misrepresentations across product lines. However, the plaintiffs' theory of future harm required additional kneading to develop support for injunctive relief, resulting in its dismissal without prejudice.

The manufacturer's preemption argument similarly failed to rise. Heeding Seventh Circuit precedent, the court held that the plaintiffs' front-label protein-content claim was not expressly preempted by the Federal Food, Drug, and Cosmetic Act (FDCA) because the challenged front-label protein claims were not required by federal regulations, opening the oven door to use a Protein Digestibility-Corrected Amino Acid Score (PDCAAS) to challenge the amount of digestible protein under state consumer

protection laws. Similarly, while the absence of percent daily values of protein per serving might run afoul of the FDCA, the plaintiffs' claims of deception caused by that absence merely paralleled a regulatory violation, apparently just the right amount of leavening agent for those claims to proceed as well.

Straight from the court's oven mitts, these protein disclosure cases can be summarized with this formulation: when consumers purchase a product in reliance on a front-label representation about protein content, those consumers are harmed if the products did not provide the actual benefits from that amount of protein as they were led to believe. According to the court, the plaintiffs not only plausibly alleged they were harmed but they also satisfied the heightened pleading standard for claims sounding in fraud, alleging the "who" (the manufacturer), the "what" (the fraud), the "how" (misrepresenting the amount of protein on the products' labels), the "where" (California, New York, and Illinois), and the "when" (2018 to the present).

Southern (District) Discomfort: Whiskey Maker's Class Cert Defenses Shot Down

Andrews v. Sazerac Co., No. 1:23-cv-01060 (S.D.N.Y. Jan. 2, 2025).

Southern Comfort—the drink of choice of Janis Joplin, *Gone with the Wind* fans, country music singers, and college kids everywhere—found itself on the wrong end of a class certification order in January. A New York federal judge certified a class of consumers who were allegedly duped into buying a "malt beverage" version of Southern Comfort (sold in gas stations and grocery stores, where liquor laws prevent the sale of whiskey) that looks like the distilled spirit version but only contains "whiskey flavor." The malt beverage comes in three sizes—50ml, 100ml, and 355ml—and SoCo's manufacturer argued that differences among those three product offerings precluded class certification. For instance, the plaintiffs only introduced survey evidence intended to show that the malt beverage labeling was materially misleading on a classwide basis for the 50ml bottle. But the 50ml bottle is cylindrical, while the larger bottles have flat fronts and use larger fonts for the disclosure that the drink contains "malt beverage." The judge was not convinced, finding there was only one product in the case, which comes in three different bottle sizes, and each of the bottles has the same allegedly deceptive elements—branding identical to Southern Comfort whiskey.

But, though it was cold comfort (*see what I did there?*) for the maker of SoCo, the court did give the boot to one of the named plaintiffs. The plaintiff offered confusing and conflicting deposition testimony about whether he purchased the malt beverage or spirit whiskey, and—in fact—apparently learned for the first time at his deposition that there were two versions of Southern Comfort. That appalled the judge, who found the plaintiff displayed "an alarming unfamiliarity with the suit" and was an inadequate class representative (oh, and it didn't help that the plaintiff lied in his interrogatory answers). If there's a lesson here, it's a reminder not to sleepwalk through depositions—because, like a bartender's special, you never know what you're gonna get (oh, and don't lie).

Sweet, Sweet Victory

Cohen v. Saraya USA Inc., No. 2:23-cv-08079 (E.D.N.Y.), R&R Jan. 20, 2025, *adopted* Feb. 23, 2025.

In a sweet victory for sugar substitutes, a district court adopted a magistrate judge's report and recommendation in full to dismiss a complaint brought by a plaintiff seemingly bitter about "false and deceptive representations about the serving size, health impact and nutrient content levels" of a company's monkfruit-based sugar substitute products.

Even though the plaintiff tried to sweeten her claims with allegations "that 'separate studies,' 'independent tests,' and 'data results' show" that the front label "zero calorie" or "zero net carbohydrate" representations were false, the judge found that these allegations could not state a viable claim for deception because they were unlikely to mislead a reasonable consumer. In reaching this conclusion, the judge noted that the consumer need not look further than the back panel of the product labels, "which lists the amount of carbohydrates and calories," to cure any potential ambiguity created by these front-of-package labeling statements. The judge further noted that "to the extent that Plaintiff is bringing a separate cause of action premised on an alleged violation of an FDA regulation," those claims must be dismissed on preemption grounds.

The court also dismissed the plaintiff's claim that the sugar substitute products manufacturer violated FDA regulations in using an incorrect serving size (also known as a reference amount customarily consumed, or RACC) on the product labels. The judge noted that the plaintiff "allege[d] no testing, studies, literature, or any other specific facts to support [her] conclusion that the Products would not have the nutritional values and benefits advertised" if the plaintiff's preferred serving size was used.

The judge also recommended that the plaintiff's unjust enrichment claim be dismissed as duplicative of her New York General Business Law claims.

Finally, the judge recommended dismissal of the claim for injunctive relief on standing grounds, indicating that the claim that the plaintiff would not have purchased the products or would have paid less for the products had she known the truth about the products (i.e., that they were neither "zero net calories" nor "zero net carbohydrates") was insufficient to seek injunctive relief on behalf of a class because the plaintiff had not shown that she would be harmed again in a similar way in the future, even though she made a conditional promise to purchase the products again in the future.

Professional Plaintiff Pans to a Panoply of Plaintiffs' Firms to Press Slack-Fill Fight

Cody v. The Safe and Fair Food Co., No. 2:25-cv-01668 (C.D. Cal. Jan. 22, 2025).

Cody v. Gainful Health Inc., No. CVRI2500253 (Cal. Sup. Ct. Jan. 15, 2025).

A professional plaintiff continues to lead the pack in bringing slack-fill litigation against food manufacturers, bringing nearly 10 slack-fill actions since January 2025. In two recent, nearly identical complaints, filed by two separate plaintiff's counsel, the serial litigant claims that her expectations crumbled when she saw that the defendants' granola and protein powder product packaging contained nonfunctional slack-fill. The plaintiff alleges both products are deceptive to a reasonable consumer because a consumer can't see how much air (aka slack-fill) is in the packages before purchase. The plaintiff alleges that—despite her status as a self-proclaimed slack-fill product "tester"—she did not know that the products contained nonfunctional slack-fill. Had she known, she alleges she would not have purchased them.

We continue to see slack-fill claims filed against products in opaque soft-sided packaging despite recent success by defendants at the pleading stage arguing that the plaintiff could have felt or—in the case of the granola packaging in one of these complaints that contains a clear window to view the product—even seen the amount of space in the product before purchase. The plaintiffs continue to pump up their protein powder (and other food) complaints following a number of recent pleading decisions giving the plaintiffs a road map to survive a motion to dismiss. We will keep you updated as the slack-fill saga continues.

Natural Flavors Challenged as Unclean? "No B.S."

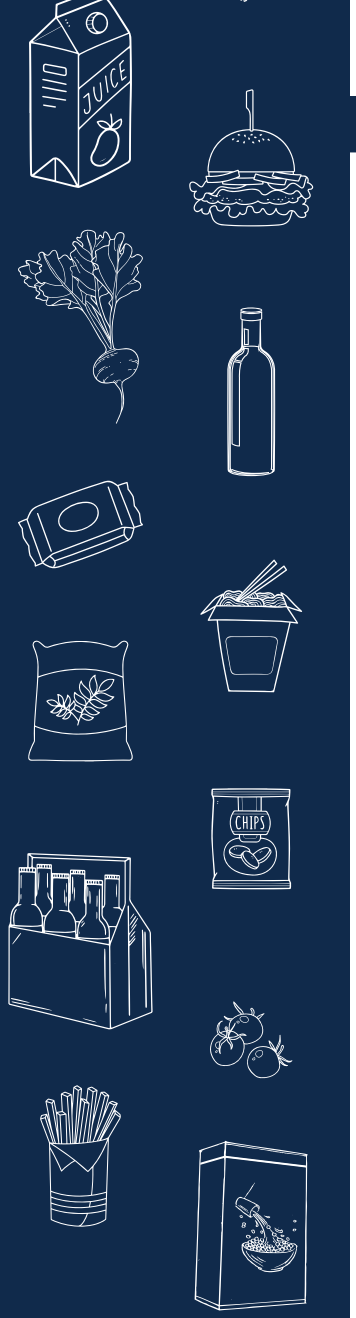
Wohl v. Insurgent Brands LLC D/B/A RXBAR, No. 1:25-cv-01275 (N.D. Ill. Feb. 5, 2025).

A complaint filed in an Illinois federal court contains the simplest of ingredients: five snack bar products lines, two putative class representatives, eight causes of action, and one challenged additive, with flavor notes of buyer's remorse. The health-conscious plaintiffs in this lawsuit were pumped up to purchase protein bars that display a short list of minimally processed ingredients on their front labels alongside the phrase "No B.S." Their satisfaction, like a post-workout swole, was short-lived—the plaintiffs were deflated to learn that the products also contain natural flavors. According to the complaint, natural flavors are highly processed and can refer to compounds ranging from monosodium glutamate (MSG) to a derivative of beavers' anal glands, which the complaint claims is the proverbial equivalent to skipping leg day for a product that offers "clean" snacks with "simple" and "minimally processed" ingredients. The plaintiffs seek both damages and injunctive relief on behalf of a nationwide class and two state subclasses.

Protein-Claim Cases Continue to Pump In

Cabrera v. Laura's Original Boston Brownies Inc., No. 3:25-cv-00262 (S.D. Cal. Feb. 5, 2025).

The manufacturer of a protein cookie is facing a class action over allegations that it failed to reveal material facts about the protein in those cookies. We've seen plenty of these cases



before, but as a reminder: back in 2023, the Ninth Circuit issued its decision in *Nacarino v. Kashi Co.*, which weighed in on federal regulations for protein claims on product labels. Those regulations relate to the fact that while the quantity of protein in two foods may be the same (e.g., 11 grams), the quality of that protein can vary based on how much of that type of protein the body can absorb and how well it fulfills nutritional needs.

The Ninth Circuit explained, in interpreting the federal regulations, that a manufacturer can include a front-of-label protein claim (i.e., a statement found outside the nutrition panel that characterizes the amount of protein in the product), as long as the nutrition panel on the back label contains a "corrected" percent-daily-value protein measure, adjusted to reflect the quality of protein (called the "Protein Digestibility-Corrected Amino Acid Score" or PDCAAS). Here, the plaintiff is claiming the cookie manufacturer makes a protein claim on the products' front label ("12g protein") but did not include a PDCAAS in the nutrition panel on the back label.

This is your friendly public service announcement to always include the PDCAAS (expressed as the percent daily value) in the nutrition facts panel when you make protein content claims elsewhere on a product label. And beware that even label descriptions of protein that do not specify a particular quantity ("protein-packed") may be construed as implied nutrient content claims and trigger the "corrected" protein disclosure requirement.

New Year, Same (Malic Acid) Complaints

Bateman v. Acme Markets Inc., No. 55983/2025 (N.Y. Sup. Ct. Jan. 19, 2025).

O'Connor v. Aldi Inc., No. 150986/2025 (N.Y. Sup. Ct. Jan. 22, 2025).

Spencer Sheehan celebrated the one-year anniversary of his malic acid suit against a popular brand of "naturally flavored" blueberry granola bars by … filing more malic acid lawsuits. Sheehan filed two (very similar) complaints in New York state court alleging that apple cinnamon rice cakes (*Bateman v. Acme Markets Inc.*) and cinnamon apple straws (*O'Connor v. Aldi Inc.*) were falsely labeled as "naturally flavored" because they contain the ingredient malic acid. After waxing poetic on muckraking journalists and methods of malic acid synthesis and identification, the complaints assert that the products contain artificial malic acid based on laboratory testing of the products that "was or would be performed." That each product also contains "natural flavor(s)" is of no moment to the plaintiffs, who allege that the products should be labeled "Artificial Apple Cinnamon Flavored" or "Artificially Flavored Apple Cinnamon" because malic acid "imparts the taste of apples, and even cinnamon." Each complaint brings one cause of action for violation of New York General Business Law Sections 349 and 350 on behalf of a putative class of New York consumers.

Steeped in Controversy

Daldalian v. Pepsico Inc., No. 2:25-cv-01491 (C.D. Cal. Feb. 21, 2025).

Nothing brews up a legal battle quite like an (allegedly) misleading label, and the defendant is now finding itself in hot water over its Pure Leaf tea line. In a class action filed in California, the plaintiff alleges that the defendant misled consumers with the label "Brewed in USA"—all while sourcing tea leaves from countries far, far away.

The plaintiff, who purchased a six-pack of Pure Leaf Lemon Real Brewed Tea at a California grocery store, claims they relied on the prominent "Brewed in USA" claim—only to later learn (pause for dramatic effect) that the main ingredient (tea) is actually imported from India, Kenya, Indonesia, or Sri Lanka. Even the vitamin C (aka ascorbic acid) in some tea varieties allegedly comes from abroad. For tea lovers hoping for a sip of red-blooded "USA! USA! USA!" authenticity, this might feel genuinely un-American (we hear from unverified sources that there is still a healthy amount of tea sitting at the bottom of Boston Harbor).

Beyond standard consumer deception theories, the plaintiff also alleges violation of the Federal Trade Commission's "Made in USA" standard because the claims are unqualified express claims of American origin—one that is false, unfair, or deceptive, given that the products are substantially made with foreign ingredients. Finally, the lawsuit also argues that the combination of the "Brewed in USA" statement and the patriotic imagery of a tea drop adorned with an American flag motif near the "Brewed in USA" claim reinforces a false perception that the product is entirely made in the United States.

Will this case percolate all the way to a courtroom showdown, or will the defendant settle to avoid legal steeping? We'll continue to sip from the docket and report any further brewing.

OOOHHH Say Can You See?

McCoy v. McCormick & Co. Inc., No. 1:25-cv-00231 (E.D. Cal. Feb. 20, 2025).

For an extra dose of patriotism—this is an all-American publication, after all—after purchasing three of the defendant's mustard products through a retailer's online marketplace, a California (and America-loving) plaintiff alleges the defendant has engaged in unlawful labeling practices by falsely representing that its products are manufactured in the United States. According to the complaint, the products prominently state that they are "Crafted and Bottled in Springfield, MO, USA" and feature a representation that the products are "American Flavor in a Bottle." Based on this labeling, the plaintiff believed the products were "of superior quality" and just as important was the belief "he was supporting U.S. jobs and the U.S. economy." The plaintiff argues in his complaint that as the California Supreme Court has said, "labels matter … and in particular … the 'Made in USA' label matters," and California business law has outlawed fraudulent "Made in America" representations.

Despite its patriotic imagery and representations, the plaintiff alleges that the defendant not only uses turmeric sourced from outside the States but the mustard seed itself is sourced from Canada and thus renders the products faux goods. The plaintiff seeks to represent a class of California purchasers

with claims that include violations of California business law, breaches of express warranty, unjust enrichment, negligent representation, and intentional misrepresentation.

Is the Juice Worth the Squeeze of Citric Acid Litigation?

Flexer v. Kraft Heinz Food Co., No. 1:25-cv-00414 (E.D.N.Y. Jan. 24, 2025).

The sun has yet to set on citric acid litigation. A juice pouch manufacturer is currently in the hot seat over the use of citric acid as an ingredient in its products featuring the front-label claim "All Natural Ingredients." Return readers may recall that citric acid litigation has been simmering for some time; as we detailed last spring, plaintiffs have targeted a number of different food products and dietary supplements containing citric acid for their "no preservatives" and "no artificial preservatives" label claims. A New York plaintiff has used this now-familiar playbook to challenge a lunch-box staple: the juice pouch.

The complaint alleges that the citric acid used is artificial because "natural" citric acid is "no longer commercially available" and cites FDA warning letters from 2001 to support the assertion that the FDA has determined that citric acid is synthetic. The plaintiff brings claims for violations of Sections 349 and 350 of the New York General Business Law on behalf of a putative New York subclass and breach of express warranty on behalf putative nationwide and New York classes. We'll have to wait and see whether these allegations will squeeze out a victory or wither under the heat of a motion to dismiss.

No-Preservatives Claims Are Getting Saucy

Milton v. Aldi Inc., No. 801219/2025E (N.Y. Sup. Ct. Jan. 16, 2025).

Pantano v. Local Folks Foods LLC, No. 2522-CC00173 (St. Louis City Circuit Court, Mo. Jan. 21, 2025).

Vanacore v. Topco Associates LLC, No. 603280/2025 (N.Y. Sup. Ct. Feb. 11, 2025).

Since we are on the topic of citric acid, in the crosshairs recently are tomato-containing products featuring "no preservatives" representations, which are allegedly false and misleading because the products contain citric acid, which functions as a preservative. The continued focus by the plaintiffs' bar on citric acid litigation is unsurprising given the recent successes that plaintiffs have had in defeating motions to dismiss in such cases as courts increasingly find that whether citric acid functions as a preservative in a food product is a question of fact that is not appropriate to resolve at the motion to dismiss stage.

Among the recent targets are canned tomato sauce featuring a "No Artificial Preservatives or Ingredients" claim, pizza sauce featuring a "No corn syrup or artificial ingredients" claim, and pasta marinara sauce featuring a "No artificial colors, flavors or preservatives" claim. The plaintiffs argue that the back-of-panel labels reveal citric acid, an artificial or synthetic ingredient that functions, at least in part, as a preservative, rendering these claims false or misleading. While this ingredient can be obtained from citrus fruit, these cases are premised on the citric acid used in the products being chemically derived and a reasonable consumer not expecting to find this type of ingredient in products bearing the specified labeling claims.

Plaintiffs Crumble over Sugar in Oatmeal Bars

Martin v. Natures Bakery LLC,
No. 2:25-cv-01377(C.D. Cal. Feb. 18, 2025).

Several plaintiffs are less than sugary sweet in a new class action filed in the Central District of California. Two California residents contend that they purchased various berry-flavored oatmeal bars. The plaintiffs contend that the manufacturer of the bars markets them as part of a healthy diet. But according to the complaint, the berry bars are chock-full of sugary additives masquerading as various types of syrups and fruit fillings. The plaintiffs contend that each bar contains so much sugar they violate guidelines set by the American Heart Association, FDA, and World Health Organization.

A teaspoon of sugar may make the medicine go down, but that's exactly what these plaintiffs want to avoid. They bring statutory claims for purported violations of the California Consumers Legal Remedies Act and the implied warranty of merchantability, as well as a common-law claim for unjust enrichment. They seek to represent a class of California consumers who purchased the products between February 2021 and February 2025.

Cheesecake Gone Sour?

Raphael v. Schwan's Consumer Brands Inc.,
No. 501934/2025 (N.Y. Sup. Ct. Jan. 18, 2025).

A New York consumer filed a class action alleging that the defendant's "Original Whipped Cheesecake" does not contain cream cheese as its predominant ingredient or in a relatively significant amount despite the product being promoted as "Made with Real Cream Cheese" written beneath an image of a "schmear of fresh cream cheese." The not-so-sweet truth, the plaintiff says, is that the primary ingredient is sour cream. The plaintiff says he still wants a slice but would not have paid as much for the frozen dessert had he known that it contained only a small amount of cream cheese, which is listed as the product's seventh ingredient and present in an amount less than water. The plaintiff claims violations of New York's General Business Law and seeks to represent a class of similarly situated New York consumers.

Wrapping It Up—Tortilla Faces Rolling Claims of Misleading Representations

Gambino v. Ole Mexican Foods, No. 5:25-cv-00497
(C.D. Cal. Feb. 25, 2025).

A California plaintiff alleges that the nutrient content claims and representations on the defendant's tortilla product (including "High Fiber," "Carb Friendly," and "4g Net Carbs") are false and misleading. As the basis for her claims, the plaintiff cited data from two analytical tests that revealed discrepancies in the quantity of dietary fiber, total carbs, and calories per serving between what was stated on the product label and what the test data showed. According to the complaint, the testing results establish that the defendant's claims are false and misleading because the product does not in fact contain 4 grams of net carbs and 60 calories. Based on these allegations, the plaintiff seeks to represent a California class to pursue claims for violations of California consumer protection statutes, unjust enrichment, and breach of express warranty.

Presentations

Sam Jockel will speak on "Marketing Food and Beverage Products in the U.S.: Considerations for Exporters" in the webinar series Passport to Export, April 8.

Sam Jockel spoke on the panel "Elevating Sustainability in the Distilled Spirits Industry" at the DISCUS Annual Conference, March 26–28.

Publications & Media

Sam Jockel, **Angela Spivey**, and **Amaru Sánchez** wrote the Food & Beverage advisory "HHS Moves to Eliminate Self-Affirmed GRAS Pathway for Food Ingredients." (March 11)

Greg Berlin and **Andrea Galvez** wrote the *Law360* article, "Navigating the Uncertain Future of the Superfund PFAS Rule." (March 6)

Sam Jockel, **Elise Paeffgen**, **Hillary Sanborn**, **Andrea Galvez**, and **Henry Woods** wrote the Environment, Land Use & Natural Resources / Food & Beverage advisory "Brave New World of Extended Producer Responsibility: Compliance Considerations for Affected Industries." (February 25)

Other Resources

Washington Trade Watch Blog – International trade laws, regulations, and executive orders are constantly evolving, and the pace of change has never been greater than it is now. The Trump Administration has promised further sweeping changes in U.S. trade policy that will impact virtually all industries and companies engaged in global trade and investment. Alston & Bird's International Trade & Regulatory Team is working with clients to anticipate and respond to these developments in this blog. We aim to post useful content in real time to help you understand, prepare for, and remain in compliance as the international trade landscape evolves during the first 100 days of the Trump Administration.

Executive Order, Action & Proclamation Task Force – We are tracking and analyzing White House executive orders, proclamations, memoranda, and guidance and providing our clients with timely insights into their legal and regulatory impact. While all presidential actions can be found on The White House website, our attorneys and policy advisors break down the implications across industries, helping clients navigate compliance challenges and seize emerging opportunities. Whether you need strategic counsel or real-time updates, we are your dedicated partner in understanding and responding to executive actions that shape the legal landscape. We are here to help you stay informed, stay compliant, and stay ahead.

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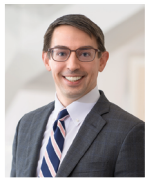

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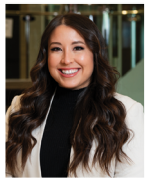

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