

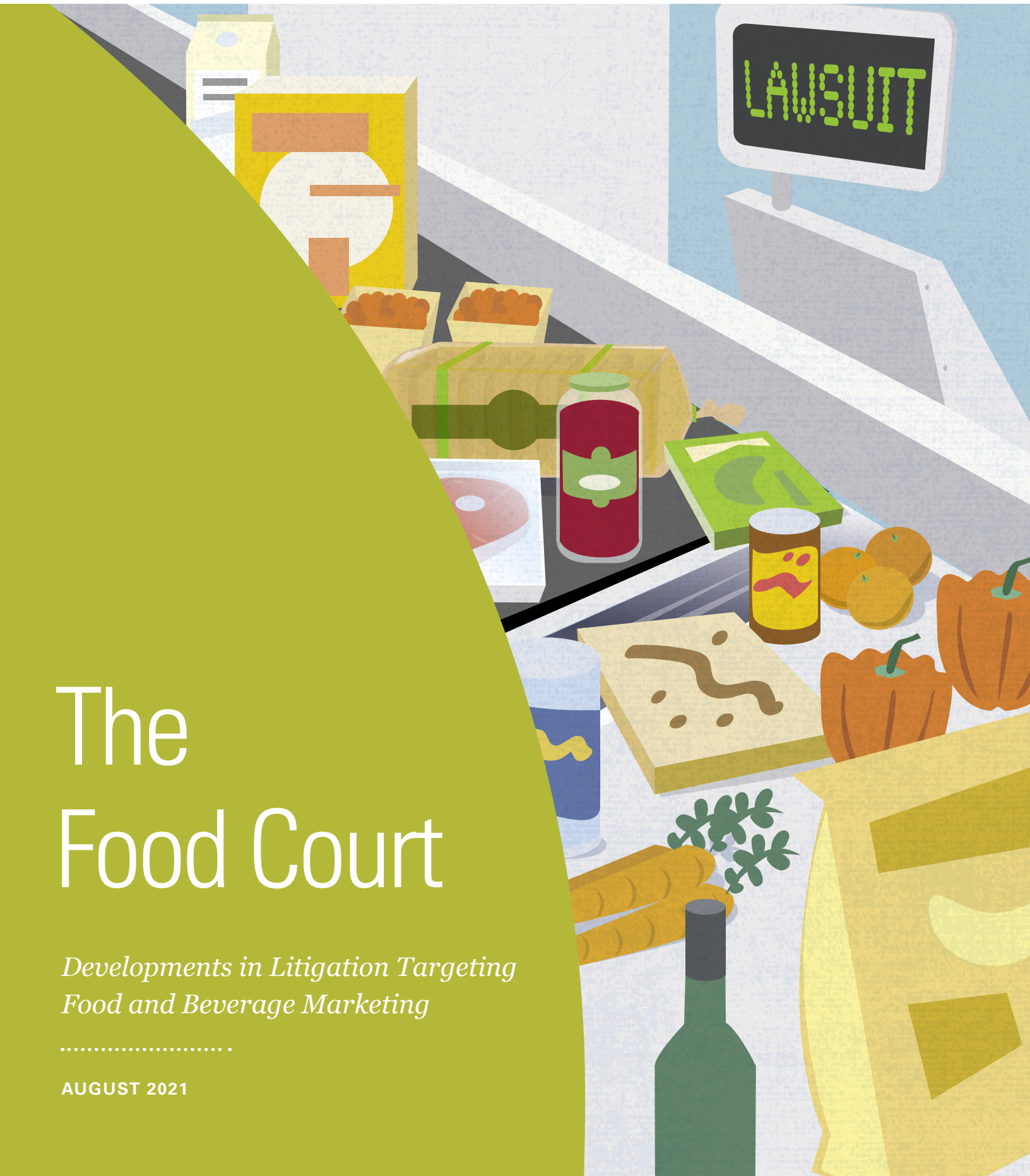


U.S. CHAMBER
Institute for Legal Reform

The Food Court

*Developments in Litigation Targeting
Food and Beverage Marketing*

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AUGUST 2021





U.S. CHAMBER
Institute for Legal Reform

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Table of Contents

Executive Summary.....	1
The Top “Food Courts”: New York Overtakes California	3
Emerging Litigation Trends.....	5
Lessons from the Appellate Courts.....	16
Legislative Developments	21
Conclusion.....	22

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Executive Summary

Lawsuits targeting food and beverage labeling have reached record levels. The unrelenting surge of class actions results from imaginative, shakedown lawsuits generated by a relatively small group of attorneys.

Four years ago, the U.S. Chamber Institute for Legal Reform (ILR) documented a dramatic rise in food and beverage marketing litigation.¹ Since that time, the number of food class actions has continued to rise, and the COVID-19 pandemic did nothing to slow them down. This paper explores the latest trends, including the most popular jurisdictions for filing these lawsuits, the types of claims filed, and how courts and state legislatures are responding. It finds:

- The number of consumer class actions targeting food and beverage marketing has increased in each of the last four years and is likely to set another record in 2021.
- New York seized the title from California as the nation's most popular "food court," largely as a result of an extraordinary number of lawsuits filed by a single attorney. Three quarters of the nation's consumer class actions targeting food and beverage marketing are filed in these two states alone.
- Claims targeting product flavoring or ingredients are driving the most recent litigation surge. These lawsuits are part of a larger trend of plaintiffs' lawyers capitalizing on highly technical FDA labeling requirements. Overall, courts have not been receptive to these lawsuits, though some cases have resulted in settlements.
- Lawsuits alleging that products are not pure, natural, or generally safe as advertised because tests allegedly detected traces of chemicals or potentially harmful substances are on the rise, targeting products from baby food to oatmeal. These lawsuits do not claim anyone was actually harmed and may involve background levels of substances that regulators view as safe and that enter the product during the ordinary growing or manufacturing process. Courts have dismissed several of these lawsuits, but many are pending.
- Businesses that communicate to consumers their commitment to sourcing or making products in an environmentally responsible manner expose themselves

to “greenwashing” lawsuits. These lawsuits allege that a company’s marketing of food or beverages as meeting eco-friendly standards or using responsibly-sourced materials are exaggerated, incomplete, or false.

- Advocacy groups are increasingly taking advantage of a unique provision in the District of Columbia’s consumer protection law that gives nonprofit and public interest organizations standing to sue. These groups often bring lawsuits to pursue their own policy agenda, rather than to remedy any actual deception or loss.
- Once popular “slack fill” litigation has nearly ended. Courts did not buy claims that consumers believe—based purely on the size of a product’s packaging—that the item would contain more than the amount accurately stated on the label.
- While it is relatively rare for food class actions to reach the appellate level given that most cases settle, a series of recent appellate court rulings may curb excessive and unwarranted litigation. These decisions recognize that food labeling must be read in context, that lawsuits must allege real, not speculative, losses, and that class action attorneys should not be the primary beneficiaries of the lawsuits they settle. Other appellate decisions, however, further incentivize litigation by not expecting reasonable consumers who are particularly concerned about a product’s content to simply read the ingredients.
- State legislatures are responding to excessive litigation. Missouri made clear that courts can dismiss cases at an early stage when a reasonable consumer would not be misled by the marketing at issue. Arkansas eliminated certain types of consumer class actions. And California offered businesses options for packaging products that provide a safe harbor from slack fill claims. Meanwhile, the New York legislature continues to consider proposals that would dramatically expand liability, despite litigation abuse.
- The paper concludes that food labeling litigation is likely to continue to climb so long as businesses find that it makes more economic sense to settle these lawsuits than fight them in court or until plaintiffs’ lawyers face consequences for bringing frivolous claims. The paper suggests that this lawsuit abuse should be addressed through courts dismissing ridiculous lawsuits before the expenses and risks of litigation mount and state legislatures adopting reforms.

The Top “Food Courts”: New York Overtakes California

For many years, the U.S. District Court for the Northern District of California was considered “the food court.” Since 2019, New York’s Eastern and Southern Districts have held this title.

Since ILR last examined this topic in 2017, the number of consumer class actions targeting food and beverage marketing has set a new record every year, increasing 52 percent over this four-year period.²

At that time, California hosted 36 percent of active food class action cases. New York followed with 22 percent.³ Since then, consumer class action litigation in the Empire State has tripled, according to a recent study by the New York Civil Justice Institute.⁴ Food and beverage lawsuits are behind this surge, making up about 60 percent of these claims. In other words, in New York, there are more class actions alleging deceptive business practices targeting food and beverage labeling than all other products and services combined.

Plaintiffs’ lawyers file most of these lawsuits in New York’s federal courts, particularly the Eastern District (Brooklyn and Long Island) and Southern District (Manhattan).

By 2019, the number of food class actions filed in New York surpassed California. Plaintiffs’ lawyers filed half of the nation’s food litigation in the Empire State in 2020, according to an annual analysis by law firm Perkins Coie.⁵ At the current pace, the number of food class action lawsuits filed in New York alone in 2021 is likely to approach or exceed the total filed across the entire country just a few years ago.⁶

Make no mistake, California continues to host a substantial amount of all food marketing litigation—about 25 percent. Plaintiffs’ lawyers filed three quarters of the nation’s food litigation in these two states alone in 2020. Other hot spots, such as Illinois, Missouri, and the District of Columbia,⁷ tend to host copycat litigation mimicking complaints filed in these states.

Why did New York overtake California? Every “food court” jurisdiction has a handful of local attorneys behind most of the food class action lawsuits. New York

has Spencer Sheehan, who appears to have entered the fray with a December 2017 lawsuit asserting that Mrs. Smith’s misled consumers by representing that the crust in its frozen pies are “made with real butter” when the ingredients list indicated that it used a butter blend including shortening.⁸ Mr. Sheehan filed half of New York’s consumer class actions in 2019 and nearly two thirds of these lawsuits in 2020, according to federal court filing data.⁹ He is notorious for lawsuits targeting vanilla-flavored products, filing

over 100 class actions on this issue alone.¹⁰ But Mr. Sheehan has also branched out into lawsuits challenging whether carrot cake donuts mislead consumers if they do not contain actual carrots¹¹ or “Yumions” chips deceive snackers because they lack the health benefits of fresh onions.¹² While his litigation is centered in New York, Mr. Sheehan is increasingly filing class actions in Illinois in 2021,¹³ and he has also brought claims in California, Wisconsin, and other states.



* Based on *Courthouse News* and *Law360* database searches of New York class actions categorized as “370-other fraud” and limited to food and beverage cases. The 2021 projection is based on 77 food marketing class actions filed in New York as of June 30, 2021. These figures do not include similar lawsuits targeting vitamins and supplements, pet food, or cosmetics.

Emerging Litigation Trends

The history of food class action litigation is replete with certain types of claims suddenly becoming hot, while others just as abruptly fizzle out. These surges of litigation are not sparked by food and beverage manufacturers, supermarkets, or restaurants adopting new, questionable marketing practices. Rather, the lawsuits take on a life of their own when one or a handful of attorneys develop a template that they can use to target many companies and products.

Once they have developed a template for complaints, plaintiffs' lawyers need only take the time to cut-and-paste the next business or product that fits. The attorneys who bring these suits understand that there is a significant chance that at least some of the companies named as defendants will settle simply to avoid the cost and intrusiveness of litigation and potential harm to their brands.

Since ILR's 2017 Food Court paper, new trends include a surge of claims targeting flavoring and ingredients, an uptick in lawsuits premised on traces of chemicals in food, more frequent use of a private attorney general provision under D.C. law to target food makers that market themselves or their products as socially or environmentally responsible, and the near disappearance of slack fill litigation.

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A Surge of Claims Target Flavoring and Ingredients

Since 2019, litigation targeting the source of flavoring in products and the type or amount of advertised ingredients has exploded. Plaintiffs' lawyers have filed over 100 lawsuits in New York's federal courts alone asserting that consumers are misled to believe that vanilla-flavored products—from ice cream to almond milk—contain pure vanilla or vanilla beans. Attorneys in other magnet jurisdictions have filed similar lawsuits.

These lawsuits have expanded to attack other flavors, such as whether the flavoring in sparkling water comes from fruit,¹⁴ "smoked" Gouda is actually cooked over a fire with wood chips,¹⁵ Limone Biscotti are flavored by lemons,¹⁶ or tortilla chips with a "Hint of Lime" have enough juice.¹⁷

Other lawsuits challenge whether consumers are led to believe that a certain ingredient is the primary ingredient when it is not. For example, lawsuits allege that Strawberry Pop Tarts mislead consumers because they contain fruits aside from strawberries¹⁸ and that graham crackers do not have enough graham flour¹⁹ or honey.²⁰ Some lawsuits challenge the quality or processing of ingredients, such as the "real cocoa" in cookies²¹ or in Cocoa Puffs and Count Chocula breakfast cereals.²² Another recent suit challenges whether candy contains sufficient dairy to qualify as "fudge."²³

Some of these lawsuits have resulted in private individual settlements, and, in May 2021, a federal court preliminarily approved a \$2.6 million class settlement of

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a vanilla yogurt lawsuit. In that case, the plaintiffs' lawyers are slated to receive up to \$550,000 for their fees and costs, the named plaintiffs will share \$25,000, and consumers are eligible to request 50 cents per purchase without a receipt for up to ten products.²⁴

Lawsuits over a product's flavoring or ingredients are part of a larger trend of plaintiffs' attorneys capitalizing on highly technical FDA labeling requirements. There is no private right of action to sue under these regulations, but overlooking any requirement, such as a needed disclaimer, can give a plaintiffs' lawyer an opportunity to assert that a product's marketing is misleading under a state consumer protection statute. Plaintiffs' lawyers are scrutinizing every label. As one defense lawyer recently observed, "In the last six months, I've seen more cases really focusing on the nitty-gritty, going through the regs, and going through the labels ... I've seen more [demand letters] in the last six months than my entire career."²⁵

When these cases have reached a decision on the merits, most trial courts have not been receptive to these claims. Courts have dismissed vanilla lawsuits in cases targeting ice cream, granola bars, almond milk, soy milk, protein drinks, and cereal, among other products.²⁶ These courts have generally recognized that when a consumer is looking for a vanilla-flavored product and they get a vanilla-flavored product, there is no misrepresentation.²⁷ After a series of defeats in New York's federal courts, it appears that the lawyers who file the vanilla lawsuits are more frequently bringing them in California and elsewhere.²⁸

Courts have shown a similar lack of appetite for claims that focus on other flavoring or ingredients. They have dismissed lawsuits asserting that reasonable consumers would be misled to believe that Oreos contain unprocessed cocoa,²⁹ that "white" Kit Kat or Reese's means the candy is white chocolate,³⁰ or that mashed potatoes made with real butter would not also contain canola oil.³¹

Scaring the Public by Asserting Products are Contaminated with Harmful Chemicals

Plaintiffs' lawyers are increasingly testing products, or taking advantage of tests performed by others or media reports, to file consumer lawsuits alleging that food products contain minimal traces of chemicals. These are typically substances that are present in the environment or the manufacturing process. Unlike product liability or other tort claims, these types of actions do not need to show that the product is adulterated or that eating the product has actually harmed a single

person. Rather, these lawsuits typically allege that selling the product with traces of the chemical is contrary to the product's marketing. Products labeled "natural," "pure," or "100%," products generally marketed as safe or healthy, or products sold by businesses that pride themselves on following environmentally responsible practices are most susceptible to these claims.

These lawsuits scare consumers to believe that food or beverages are dangerous to consume, even if the amount of the substance involved is at background levels, at which it is present in the broader environment, or well within the range that government agencies charged with regulating food view as safe.

For example, over the past three years, plaintiffs' lawyers have filed lawsuits against businesses that sell ice cream, oatmeal, orange juice, sandwiches, honey, and even dog food alleging the products are deceptively marketed due to the presence of glyphosate. Glyphosate, commonly known as "Roundup," is the world's most widely produced herbicide and has been federally approved since the 1970s to control weeds and grasses and for application to a wide range of crops. The EPA has repeatedly found that glyphosate does not pose a risk to human or environmental health³² and it has explicitly approved the presence of glyphosate residues in a wide range of agricultural commodities that are in the food supply at levels far exceeding those alleged in many of the lawsuits.³³ In fact, federal law explicitly recognizes that, as a result of "unavoidable residual environmental contamination," trace levels

of pesticides may be present in food, including organic products.³⁴

Federal courts have dismissed several of the glyphosate cases, either because a reasonable consumer would not expect a product to have no trace of a synthetic molecule or by finding these claims preempted by federal law regulating glyphosate.³⁵

A second example is a recent cascade of lawsuits filed early in 2021 against all major baby food manufacturers. About 50 class actions followed a report issued by a subcommittee of the U.S. House of Representatives Committee on Oversight and Reform that found baby food contains heavy metals that can cause serious and often irreversible damage to brain development.³⁶ The companies dispute the subcommittee's findings, maintaining that their products are safe, properly labeled, and there is no scientific or regulatory basis for the claims.

The FDA has questioned the findings. According to the food safety agency, heavy metals occur in the environment and cannot be completely avoided in the fruits, vegetables, or grains that are the basis for baby foods, juices, and infant cereals. Responding to the report, the FDA indicated that it routinely monitors levels of toxic elements in baby foods and recognized that manufacturers have made "significant progress" in reducing heavy metals from infant rice cereal.³⁷

Yet, within one day of publication of the Congressional subcommittee's report, plaintiffs' lawyers filed the first class action lawsuits in New York and New Jersey.³⁸

In June, the federal judiciary denied a request to transfer the cases to a single judge for multidistrict litigation (MDL). The Panel on Multidistrict Litigation observed that while the lawsuits were prompted by the same Congressional investigation and the complaints are similar, each company has different manufacturing, marketing, and quality control practices. Centralization of claims involving multiple companies would add complexity to the litigation, rather than promote efficiency, the panel found.³⁹

A third example arrived in April 2021 when plaintiffs' attorneys filed lawsuits alleging Annie's macaroni and cheese products contain phthalates, which have been linked to conditions like asthma, breast cancer, and diabetes, without warning consumers about the chemicals. The products are marketed as organic and "Made with Goodness!" In this instance, class action lawyers pounced on Annie's own efforts to prevent chemicals from entering its mac and cheese products.

About six weeks earlier, Annie's had added a statement to its website indicating that it was concerned about recent reports of phthalates found in dairy ingredients of

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macaroni and cheese.⁴⁰ The company was likely referring to an advocacy group's report, which was not specific to Annie's products, that found nearly every cheese product it tested contained phthalates and that macaroni and cheese powder had a higher level than other cheese products.⁴¹ In response, Annie's pledged to work with its suppliers to eliminate phthalates in the supply chain, including in packaging materials and food processing equipment, and to work closely with trade associations to understand and resolve the issue. Health advocates applauded the step.⁴² As a reward for its efforts, plaintiffs' lawyers filed class actions against the company in California and New York that rely on its statement as an admission that its products contain a harmful chemical.⁴³

"Greenwashing" Lawsuits Are Becoming More Common

Food and beverage makers are increasingly trying to source and manufacture their products in an environmentally responsible manner. Doing so may advance the values of the company and its employees, and also meet the demands of customers who seek products that are green, fair-trade, organic, or any other adjective indicating a "better" product. Businesses that attempt to share with consumers the steps they are taking to contribute to a better world face a serious conundrum. On one hand, they feel pressure to offer this information to consumers. On the other hand, they face uncertainty about what exactly constitutes a product that is environmentally friendly. The unfortunate result is that businesses that aspire to do better expose themselves to lawsuits.

“ [B]usinesses that aspire to do better expose themselves to lawsuits. ”

"Greenwashing" lawsuits allege that a company's marketing of products as meeting eco-friendly standards are exaggerated, incomplete, or false. These types of claims have been on the rise against food and beverage manufacturers as well as other companies that label their products as "clean" or that affix certifications indicating that a product is environmentally friendly.

Some plaintiffs' law firms use Green Guides published by the Federal Trade Commission (FTC) as a vehicle for bringing state law-based unfair or deceptive practices lawsuits against companies. The FTC initially issued its Green Guides in 1992 in order to "help marketers avoid making environmental claims that mislead consumers."⁴⁴ The Green Guides, which were most recently amended in 2012, focus on four general principles for companies: (1) using appropriate disclosures regarding environmental claims; (2) indicating whether the environmental label pertains to the whole product or one component of it; (3) avoiding overstating the environmental benefits of the product; and (4) clarifying and substantiating any claims comparing the environmental attributes of the product to another product (such as a competitor's product or a prior version of the same product).⁴⁵

Although the Green Guides contain helpful guidance on how to label a product, they do not substantively define a “green” or eco-friendly product. Indeed, the Green Guides caution that whether or not an environmental claim can be supported turns on the scientific evidence regarding the particular claim or environmental feature: “In the context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence. Such evidence consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.”⁴⁶

The Green Guides are administrative in nature and thus not independently enforceable,⁴⁷ but plaintiffs’ law firms use them as the basis for consumer litigation. Some state legislatures have incorporated the Green Guides by reference into their own state laws. For instance, California law specifically states that “any environmental marketing claim” listed as an example in the Green Guides can form the basis for an untruthful, deceptive, or misleading marketing lawsuit.⁴⁸

Conversely, the California law provides that “[i]t shall be a defense to any suit or complaint brought under this section that the person’s environmental marketing claims conform to the standards or are consistent with the examples contained in the [Green Guides] published by the Federal Trade Commission.”⁴⁹

The increase in greenwashing lawsuits can be attributed to the willingness of certain courts to entertain these claims, as well as growing pressure on companies to

verbalize their commitments to furthering environmental, social, and governance (ESG) issues.⁵⁰

Food companies face greenwashing lawsuits based not only on the labeling of their products, but also based on “commitments” stated on their websites and social media platforms. For example, Florida-based restaurant chain Red Lobster was sued in California federal court over allegations that its “Seafood with Standards” program amounts to deceptive marketing practices due to its lack of sustainable or humane lobster and shrimp farming.⁵¹ The June 2021 complaint cites the Green Guides as support for the allegation that the use of unqualified “sustainability” statements renders it “highly unlikely that marketers can substantiate all reasonable interpretations of these claims.”⁵²

Plaintiffs’ lawyers also recently hit pasture-raised egg manufacturer Vital Farms with a lawsuit⁵³ alleging consumers were misled by

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the company’s claims regarding the treatment of its chickens.⁵⁴ The company maintains that it is transparent about how it raises its chicks and its efforts to provide the animals with a better quality of life.⁵⁵ In fact, one early-stage Vital Farms investor questioned the tactics behind attacking a company that is trying to be environmentally friendly and transparent in its efforts as opposed to targeting companies that are not even making such efforts.⁵⁶

Some courts have dismissed claims, finding reasonable consumers are not misled by a company’s truthful or aspirational statements, or that statements plaintiffs’ lawyers cherry-pick from a website are not material to a decision to purchase a product. For example, a federal court in Vermont recently dismissed a class action challenging whether Ben & Jerry’s lived up to its environmental goals. The lawsuit relied on a “happy cow” that appeared on cartons along with a webpage describing the company’s “Caring Dairy Standards” to assert that consumers would have the impression that milk and cream used in its ice cream is exclusively sourced from farms participating in the special program. The court, however, found that program

“indisputably encourages the humane treatment of animals” and that the website “discloses to consumers that participation in the program is voluntary.”⁵⁷ As Judge Christina Reiss aptly put it in dismissing the complaint, “Plaintiff does not plausibly allege that reasonable consumers would make their purchasing decisions exclusively based on a single phrase in a single webpage heading contained in a website that a consumer would need to access in advance of or contemporaneously with his or her purchasing decision.”⁵⁸

The threat of litigation should not discourage businesses from truthfully communicating their environmental and social values, detailing the steps they have taken to advance those goals, and sharing their aspirations with consumers. When faced with greenwashing lawsuits, courts should carefully examine the context in which the statements are made, whether such statements are truthful representations of a company’s values, and whether the statement at issue would be material to a consumer’s decision to purchase the product.

A Rise in Private Attorney General Litigation in D.C.

A handful of attorneys and advocacy groups are increasingly taking advantage of a unique provision of the District of Columbia's Consumer Protection Procedures Act (CPPA) to pursue their own policy interests.

The CPPA allows individuals and organizations to bring lawsuits as private attorneys general,⁵⁹ sidestepping class certification requirements. These provisions have been abused by attorneys to file lawsuits on behalf of serial litigants. For example, one District resident, Gloria Hackman, was named as the plaintiff in at least 28 CPPA lawsuits between 2015 and 2020, half of which were slack fill claims. Many of these cases appear to have settled, though in one instance the Superior Court dismissed a claim, characterizing the complaint alleging a box did not have enough rice as a "'copy and paste' document that provides no actual information about how the Defendant actually harmed, deceived or misled the Plaintiff and the public."⁶⁰ Another frequent filer, Virginia resident Kevin Fahey, has served as a plaintiff in at least 16 CPPA private attorney general actions since 2017. The court dismissed a recent lawsuit in which he asserted consumers would have paid less or not purchased Bigelow Tea if they knew the products' ingredients are grown outside the United States, finding the complaint's conclusory and vague allegations did not sufficiently allege that he, or the general public, experienced an injury.⁶¹

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More recently, advocacy groups are increasingly filing CPPA claims, relying on a provision in the D.C. law that allows a public interest or nonprofit organization to bring lawsuits on behalf of itself, its members, and the general public.⁶² The statute also provides that an organization may purchase a product to test or evaluate it, simply for the purpose of bringing a lawsuit.⁶³ These groups have filed more than 30 lawsuits targeting food marketing since 2019.⁶⁴ By taking this approach, plaintiffs' lawyers do not even need to find a local consumer to serve as a plaintiff in the lawsuit who claims to have been misled by a company's marketing. They can just sue over and over on behalf of an advocacy group that deputizes itself as the food labeling police.

The lawsuits by advocacy groups generally fall in two categories. The first targets meat, chicken, seafood, and dairy products that are marketed as being sourced from humanely treated animals or environmentally sustainable practices.⁶⁵ These greenwashing-type lawsuits assert the company's practices are insufficient and they should be required to adopt higher standards. The Organic Consumers Association routinely files these claims, sometimes joined by organizations such as Food & Water Watch, among other groups. A June 2021 lawsuit filed by Food & Water Watch uses the D.C. Superior Court to take pork-producer Smithfield to task for workplace conditions during the COVID-19 pandemic in plants located in South Dakota and several other states (but not the District of Columbia).⁶⁶ Another lawsuit filed that month, by the Berkeley, California-based Earth Island Institute, alleges that Coca-Cola cannot represent itself as an environmentally friendly company until it completely stops selling single-use plastic bottles.⁶⁷

The second category, similar to those discussed earlier in this paper, aims at products marketed as "pure," "natural," "clean," or just generally safe, alleging that tests detected traces of a harmful chemical or other substance. These lawsuits have involved decaffeinated coffee,⁶⁸ tea,⁶⁹ prenatal vitamins,⁷⁰ infant formula,⁷¹ sandwiches,⁷² honey,⁷³ pet food,⁷⁴ and other products.⁷⁵ The Clean Label Product Foundation and GMO Free USA / Toxin Free USA have brought most of these cases.⁷⁶

There are constraints courts could use to curtail this litigation. One constraint is the statute itself. The CPPA requires courts to dismiss a private attorney general action if there is not a "sufficient nexus" between the organization's mission and the consumer interests involved in the lawsuit.⁷⁷ This nexus is dubious in some cases, such as when a group whose mission is to promote organic agriculture brings lawsuits attacking products that are not marketed as organic.

Another constraint, at least for cases premised on an organization buying a product to test it, is that there must be some actual testing involved. For example, in 2019, the D.C. Superior Court considered a CPPA action alleging that Coca-Cola misled the public about the sugar content of its beverages and their health effects. In that instance, a nonprofit organization asserted that it had standing to bring the lawsuit because it purchased the products to "evaluate and test their purported qualities and characteristics." The court, however, found that the organization lacked standing on this basis, as it had done nothing more than read the nutritional information printed on the label, and had not conducted any scientific or physical testing of the product.⁷⁸

Finally, constitutional principles of standing allow courts to only consider cases in which a plaintiff alleges a concrete harm caused by the defendant's conduct for which the court can provide redress. When an organization sues, it too must show an actual injury, such as that it had to divert significant resources from its programs to

respond to the practice at issue.⁷⁹ While D.C.'s courts are not bound by the U.S. Constitution's Article III standing requirements, the D.C. Court of Appeals has specifically ruled in the context of the CPPA that "this court has followed consistently the constitutional standing requirement embodied in Article III."⁸⁰ The District's highest court has reaffirmed that principle at least three times since 2015.⁸¹ The D.C. Council did not intend otherwise. When the District's legislature amended the CPPA in 2012, it indicated that it intended only to "clarify that the CPPA allows for non-profit organizational standing to the fullest extent recognized by the D.C. Court of Appeals in its past and future decisions addressing the limits of constitutional standing under Article III."⁸²

While some D.C. Superior Court judges have adhered to these requirements,⁸³ others have taken a more relaxed approach to standing than federal courts or found that violation of a statutory right under the CPPA is sufficient to confer standing on an organization.⁸⁴

It remains to be seen whether a recent U.S. Supreme Court ruling will alter this course. In June 2021, the Supreme Court reaffirmed that alleging a statutory violation, without showing concrete harm, is insufficient to provide a plaintiff with standing.⁸⁵ If the District's courts follow this ruling, it may curb the ability of individuals and organizations that have experienced no injury to bring CPPA claims. On the other hand, some experts predict that the U.S. Supreme Court's latest decision could push more consumer litigation into state courts

“ The Seventh Circuit affirmed dismissal of a slack fill claim brought by two consumers who ‘upon opening their boxes of candy ... were dismayed to find that the boxes were not brimming with goodies.’ ”

(as well as the District) if those courts allow individuals and organizations that would lack standing in federal court to pursue litigation elsewhere.⁸⁶

Slack Fill Claims Disappeared as Quickly as They Came

Between 2015 and 2018, businesses, one after another, were hit with "slack fill claims." These lawsuits alleged that consumers would believe, purely based on the size of a product's package, that the item would contain more than the amount accurately indicated on the box or container. Slack fill lawsuits often targeted food products, such as candy, rice, pancake mix, and coffee drinks, but sometimes challenged other consumer products and even bottles of over-the-counter painkillers. Some of these lawsuits literally argued over how many Swedish Fish or Junior Mints could fit in a box.

FDA regulations recognize that there are many legitimate reasons why food packages contain empty space. Space may result from the needs of machinery or be included to protect the product from damage (think potato chips), or it can result from unavoidable product settling. It is only nonfunctional space that raises FDA concern.⁸⁷ Slack fill class actions, however, often simply alleged that a percentage of a box or container was not full, included a grainy or manipulated photograph of the product showing the empty space, and asserted that consumers overpaid because they expected the package to be filled to the brim.

While slack fill claims constituted about one in ten food class actions between 2015 and 2016, lawyers have filed only a handful of these lawsuits since 2019. Despite some substantial settlements,⁸⁸ these cases dwindled largely as a result of growing

judicial skepticism. Courts have rejected slack fill complaints as insufficiently pleaded when they contain “bare assertions” that space within a package is nonfunctional.⁸⁹ Other courts have “easily conclude[d]” that reasonable consumers are not misled when the package accurately informs consumers of the amount of food inside and that no reasonable consumer solely relies on the size of a package in making purchasing decisions.⁹⁰ Plaintiffs also face a challenge in showing damages. For example, the Seventh Circuit affirmed dismissal of a slack fill claim brought by two consumers who “upon opening their boxes of candy ... were dismayed to find that the boxes were not brimming with goodies.” The plaintiffs had not shown any actual loss, the court found. They paid for seven ounces of Mint Meltaways and Pixies and that is precisely what they received.⁹¹

Lessons from the Appellate Courts

Since most food class actions settle without reaching a ruling on the merits, and these cases never go to trial, appellate court rulings are relatively rare. When cases do occasionally reach an appellate court, the decision has the potential to quash or further incentivize the litigation. Here are five messages recently sent by federal appellate courts.

Context is Crucial

Federal appellate courts overseeing three quarters of the nation's food class action litigation—the Second and Ninth Circuits—have rejected lawsuits alleging that consumers would be misled to believe that “diet” sodas assist in weight loss.⁹² “[I]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial.”⁹³ In the soft drink context, the Second Circuit observed that “diet” is understood as meaning “reduced in or free from calories” not a “more general weight loss promise.”⁹⁴

The Second Circuit later applied this principle when it affirmed the dismissal of a class action alleging that consumers would be misled to expect Dunkin' Donuts breakfast sandwiches to contain the type of “steak” they would order at a sit-down restaurant. The sandwiches, advertised as containing Angus steak, were made of

Angus beef patties and, as the court observed, the TV ads themselves marketed them as “grab-and-go products that can be consumed in-hand, without the need for a fork and knife.” “A reasonable consumer purchasing one of the products from Dunkin Donuts in that context would not be misled into thinking she was purchasing an ‘unadulterated piece of meat.’”⁹⁵

District courts are now applying the “context is crucial” principle to dismiss cases in which a plaintiff misleadingly excerpts language from a company's website or product's packaging to assert that statement misleads consumers.⁹⁶

Speculative Harms or Losses Are Not Enough

An Eleventh Circuit ruling is particularly significant for lawsuits alleging that food products are deceptively marketed due to the presence of traces of chemicals. In May 2020, a unanimous three-judge panel

affirmed a trial court's dismissal of a Florida lawsuit alleging that the detection of "ultra-low levels" of glyphosate in Cheerios rendered the breakfast cereal unsafe to eat and worthless. The court reasoned that the plaintiff failed to show any injury because she had not alleged that any box she purchased actually contained any glyphosate, let alone an unsafe level. She had alleged only "hypothetical" harm.⁹⁷

The Eleventh Circuit had earlier applied this principle to affirm dismissal of a food class action that failed to show how consumers lost money as a result of allegedly misleading marketing. The Florida lawsuit accused Chipotle of misleading consumers by advertising that it had eliminated GMOs from its menu. The plaintiff claimed the restaurant had not fully done so because animals used in its products may have eaten feed that included genetically modified corn and soy. But Chipotle charged the same amount for the chicken burrito she ordered before and after the GMO-free ads, and the plaintiff paid more for a comparable meal at a similar restaurant that did not use such marketing. Putting aside the question of whether the plaintiff was misled, the appellate court found that she had alleged no more than a speculative loss.⁹⁸

Class Action Settlements Should Not Benefit Lawyers Over Consumers

Courts are increasingly skeptical of proposed class settlement agreements in which lawyers request hundreds of thousands or millions of dollars, while

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In 2017, in the infamous Subway "footlong" sandwich class action, the Seventh Circuit rejected a proposed settlement as "no better than a racket," finding that it should have been "dismissed out of hand" because it provided only "worthless benefits" to the class while "enrich[ing] only class counsel."⁹⁹ In that instance, the attorneys were slated to receive \$520,000 in fees and the class representatives would get a total of \$5,000. Consumers who bought a footlong sandwich that may, in some instances, have been less than precisely 12 inches would have won enhanced quality-control measures and a poster at each location and text on the company's website warning them that "[d]ue to natural variations in the bread baking process, the size and shape of bread may vary."

The Second Circuit similarly rejected a proposed settlement of a lawsuit alleging that consumers thought they would receive more pasta in Barilla's boxes. In July 2020, the appellate court threw out a proposed settlement that would have awarded \$450,000 to attorneys. Those who were purportedly shortchanged on their spaghetti would not have been eligible for any compensation. Rather, the pasta-maker planned to change the packaging to add a fill line showing how much pasta is inside and language explaining that pasta is sold by weight and not by volume. These changes, the appellate court found, would provide no remedy to past purchasers, who now should know precisely how much pasta to expect if buying the product again. The court vacated certification of an injunctive class and, along with it, the settlement.¹⁰⁰

Most recently, the Ninth Circuit rejected a proposed class settlement in a lawsuit alleging that Wesson Oil did not qualify as "100% Natural" because the product contains GMOs. The attorneys who brought that case were slated to receive seven times more money than the class members. The court's June 2021 ruling found that the "gross disparity" in awarding the attorneys \$5.85 million in fees and \$978,671 in expenses, while 15 million consumers would divide \$1 million among them, rendered the settlement not fair,

reasonable, or adequate. The plaintiffs' attorneys had attempted to justify their fee request in significant part on ConAgra's agreement to stop using the "100% Natural" label on the product. The Ninth Circuit found this injunctive relief "virtually worthless," however, since ConAgra had abandoned that label two years earlier and no longer owned the Wesson brand.¹⁰¹

Given these types of rulings, trial courts are expected to closely scrutinize class settlements, particularly those that provide consumers with no more than injunctive relief or where the compensation provided to attorneys dwarfs the amount available to consumers.¹⁰²

Advocacy Groups Cannot Bring Lawsuits Simply to Achieve Their Political Agenda

Courts are a forum to resolve actual disputes and remedy actual injuries, not the place for advocacy groups to simply seek to advance their political agenda. For this reason, constitutional law requires organizations that bring consumer protection lawsuits to establish an injury in fact. That means an organization must show that the challenged conduct frustrated its mission and led it to divert resources to combat that conduct aside from litigation expenses and publicity associated with the suit.

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“Two federal appellate court rulings have rejected the commonsense principle that reasonable consumers would check the ingredients list if they have a question about a representation on the front of a package that is key to their decision to purchase the product.”

In a recent case, the Center for Food Safety and Friends of the Earth sued Sanderson Farms, alleging that the company’s chicken is not “100% natural” as advertised because it contains antibiotics. The Ninth Circuit found that the advocacy groups did not fulfill organizational standing requirements because the groups had long undertaken initiatives to reduce routine antibiotic use in animal agriculture. During Sanderson’s advertising campaign, the organization “simply continued doing what they were already doing—publishing reports on and informing the public of various companies’ antibiotic practices.” The groups took no specific action in response to the Sanderson ads until they sued.

In March 2021, the Ninth Circuit found that “[a]fter nearly two years and mountains of discovery, the Advocacy Groups could meaningfully offer only a single conclusory, contradictory, and uncorroborated

statement as evidence of diverted resources,” which was contradicted by the deposition testimony of the organizations’ own representatives.¹⁰³

As advocacy groups attempt to take advantage of a provision in the District of Columbia’s expansive CPPA that authorizes advocacy groups to sue, and New York considers adopting a similar law, this Ninth Circuit decision is a reminder that there are constitutional constraints on organizational standing.

Courts Do Not Necessarily Expect Consumers to Read the Ingredients

Not all recent appellate decisions have rebuffed excessive or meritless litigation. Two federal appellate court rulings have rejected the commonsense principle that reasonable consumers would check the ingredients list if they have a question about a representation on the front of a package that is key to their decision to purchase the product.

A 2018 ruling by the Second Circuit in a case involving the labeling of Cheez-It crackers may be contributing to the proliferation of food litigation targeting flavoring and ingredients in New York’s federal courts. In that case, Cheez-It boxes were labeled “whole grain” or “made with whole grain.” A class action alleged that this marketing misled consumers because the crackers’ primary grain content is enriched white flour.

The district court dismissed the case, observing that the boxes accurately displayed on the front panel the precise

number of grams of whole grain per serving and that the ingredients list indicated the product contained more white flour than whole grain.¹⁰⁴ The Second Circuit revived the lawsuit, however, finding that the label could “communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, whole grain.”¹⁰⁵ Consumers cannot be expected, the court said, to read additional information on the front and side of the package, which would have clarified the ingredients.¹⁰⁶

A more recent Seventh Circuit decision applies this principle. In that instance, a class action claimed that a product labeled “100% Grated Parmesan Cheese” misleads consumers when it contains an anti-caking ingredient that keeps the cheese from sticking together, as the FDA permits.¹⁰⁷ One might think that a consumer for whom it is important to buy a product that is nothing-but-cheese might glance at the ingredients list, which would

have indicated the anti-caking agent. The trial court thought so. It dismissed the case, finding 100% Grated Parmesan Cheese could mean the cheese is 100% grated, that the cheese is 100% parmesan, or that the product is 100% grated parmesan cheese as the FDA defines it. A reasonable consumer seeking clarity would read the ingredient label.¹⁰⁸

The Seventh Circuit, however, ruled that “[c]onsumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities, especially in the seconds usually spent picking a low-cost product.”¹⁰⁹ In other words, according to the Seventh Circuit’s ruling, if there is ambiguity regarding a food product’s contents, consumers are not expected to simply read the FDA-compliant ingredients list on the back of the package for the answer to their question.

Legislative Developments

State legislatures can take action that reduces unwarranted food litigation or encourages more of these types of meritless claims. In recent years, states have considered both approaches.

For example, two food litigation hot spots, California and Missouri, have attempted to rein in lawsuits. In 2018, California responded to slack fill litigation by offering manufacturers options for packaging food products that provide a safe harbor from litigation.¹¹⁰

Even more significant are changes to the Missouri Merchandising Practice Act (MMPA), which empower courts to dismiss claims when reasonable consumers would not be misled by the advertising or practice at issue.¹¹¹ Missouri's 2020 legislation should at least give businesses a fighting chance of getting laughable claims dismissed at an early stage, reducing the pressure to settle meritless cases. Thus far, Missouri's frequent lawsuit filers appear undeterred. It remains to be seen whether courts will properly apply the new law.¹¹²

In addition, Arkansas amended its Deceptive Trade Practices Act in 2017 to

permit only individual actions, require proof that relying on an allegedly deceptive practice caused a person's damages, and better define an actual financial loss.¹¹³

On the other hand, New York seems intent on maintaining its status as a magnet for food and other consumer class action litigation. In recent years, legislators have introduced a series of bills to purportedly "modernize" or "update" the state's General Business Law, which serves as the basis for these claims. The most recent iteration would add vague new prohibitions to the law, increase minimum statutory damages 20 fold from \$50 to \$1,000 per violation, and explicitly authorize statutory damages in class actions. The bill also proposes eliminating the need for conduct covered by the law to be consumer-oriented and have a public impact, as New York courts have long required, and would extend standing to file lawsuits to advocacy groups.¹¹⁴

“ Missouri's 2020 legislation should at least give businesses a fighting chance of getting laughable claims dismissed at an early stage, reducing the pressure to settle meritless cases. ”

Conclusion

While courts are taking an increasingly skeptical view of class actions targeting food and beverage labels, the number of these lawsuits keeps climbing. Courts and legislatures each have a role in addressing this excessive litigation.

Although these lawsuits often make absurd claims, businesses make the understandable judgment that it makes financial sense to settle cases quickly.¹¹⁵ Courts are often hesitant at an early stage to dismiss even the most ridiculous assertions that food labels or marketing mislead consumers. As a result, the alternative to a prompt settlement is to pay far more on filing motions to dismiss, intrusive production of records, and distracting depositions of company executives.

Court dockets reflect this reality. For every case in which a court grants a defendant's motion to dismiss, about ten cases are "voluntarily dismissed with prejudice upon stipulation of the parties." This action typically indicates that the parties entered a confidential, individual settlement. When there is a private settlement, the attorneys who filed the case are paid several thousand dollars, the person whose name appeared on the complaint as the class representative receives a smaller sum, and the consumers who were purportedly misled get nothing.

Continuing to litigate these claims also runs the risk of class certification, which transforms an individual lawsuit that would cost in the tens of thousands of dollars to settle into a statewide or nationwide class action that will require hundreds of thousands or millions of dollars to resolve.

As long as businesses feel compelled to settle these cases, the small cadre of lawyers who file them will continue to shop for more cases and recycle meritless complaints. This system enriches the attorneys and law firms that file the cases,

“As long as businesses feel compelled to settle these cases, the small cadre of lawyers who file them will continue to shop for more cases and recycle meritless complaints.”

but it wastes judicial resources, imposes unnecessary costs on employers (putting upward pressure on prices), and often provides no benefit to the public.

Recommendations

There are two ways to address the excessive litigation discussed in this paper. The first route is for the judiciary to dismiss claims that strain plausibility before the expense and risks of litigation pressure a company to settle it.¹¹⁶ Plaintiffs' lawyers often contend that whether a product's labeling or marketing would mislead a reasonable consumer is a question of fact that only a jury can decide. How a rational consumer would act, however, is an objective determination that a judge can decide as a matter of law in many instances.¹¹⁷ Cases asserting that consumers are duped into buying diet soda to lose weight, carrot cake donuts for the health benefits of vegetables, or ice cream for its vanilla beans, for example, should not survive a motion to dismiss.

Courts can facilitate dismissal of meritless litigation by articulating meaningful principles that define the reasonable consumer of food and beverages. A good start, for instance, is to recognize that a reasonable consumer who is particularly concerned about a product's contents will take a moment to skim the accurate, FDA-compliant ingredients list. Courts should also consistently apply the principle that consumers do not read words describing a product in isolation. Rather, they read statements in the context of the label, advertisement, or website as a whole, and with an understanding of food they are purchasing.

Another approach is for state legislatures to amend consumer protection laws to reduce the potential for abusive private litigation. As in Missouri, this alternative will likely gain momentum if the level of extortionate litigation continues to rise.

Endnotes

- 1 Cary Silverman & James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* 5, 8 (Inst. for Legal Reform Feb. 2017) (hereinafter “ILR Food Court 2017”).
- 2 Perkins Coie LLP, *2020 Food & Consumer Packaged Goods Litigation Year in Review* 4 (Feb. 2021) (“2020 Year in Review”) (documenting a rise in food and beverage class actions from 145 in 2017 to 220 in 2020).
- 3 ILR Food Court 2017 at 8.
- 4 Cary Silverman, *Class Action Chaos: The Rise of Extortionate Consumer Class Action Lawsuits in New York* (New York Civil Justice Inst. May 2021).
- 5 *2020 Year in Review*, *supra*, at 4.
- 6 According to a search of court dockets through Courthouse News (CNS), plaintiffs’ lawyers had filed 61 class actions alleging deceptive practices against food and beverage companies in New York’s federal courts through May 6, 2021.
- 7 The Perkin Coie report found that in 2020, the top states for consumer class actions targeting food and beverage marketing were New York (107), California (58), Missouri (13), and Washington, D.C. (10). *2020 Year in Review*, *supra*, at 4. These statistics likely do not account for the substantial number of private attorney general actions filed in the District of Columbia (which are not class actions) and may not fully capture class actions filed in Missouri state courts.
- 8 *Leguette v. Schwan’s Co.*, No. 1:17-cv-07599 (E.D.N.Y. filed Dec. 31, 2017).
- 9 *Class Action Chaos* at 8-9.
- 10 See Corinne Ramey, *The Case for Plain Vanilla Gets Its Day in Court*, Wall St. J., Feb. 7, 2021; *Meet the Long Island Lawyer Pursuing Nearly 100 Lawsuits Over Products Labeled as ‘Vanilla’*, Inside Edition, Nov. 30, 2020.
- 11 *James v. Hostess Brands LLC*, No. 1:20cv6259 (S.D.N.Y. filed Aug. 9, 2020).
- 12 *Socol v. 7-Eleven Inc.*, No. 7:21-cv-00194 (S.D.N.Y. filed Jan. 11, 2021).
- 13 For example, similar to a lawsuit he filed in the Southern District of New York in 2020, Mr. Sheehan recently filed a complaint in the Northern District of Illinois alleging that the name “Unfrosted Strawberry Pop Tarts” misleads consumers to believe that the fruit filling contains only strawberries when it also contains pears and apples. See *Chiappetta v. Kellogg Sales Co.*, No. 1:21cv3545 (N.D. Ill. filed July 1, 2021).
- 14 *Kelly v. Whole Foods Market Group Inc.*, No. 1:21-cv-03124 (E.D.N.Y. filed Apr. 11, 2021).
- 15 *Watson v. Dietz Watson Inc.*, No. 1:20-cv-06550 (S.D.N.Y. filed Aug. 17, 2020).
- 16 *Bardsley v. Nonni’s Foods LLC*, No. 7:20-cv-02979 (S.D.N.Y. filed Apr. 11, 2020).
- 17 *Barnett v. Frito-Lay N. Am., Inc.*, No. 3:21-cv-00470 (S.D. Ill. filed May 11, 2021).
- 18 *Brown v. Kellogg Sales Co.*, No. 1:20-cv-07283 (S.D.N.Y. filed Sept. 5, 2020).
- 19 *Kennedy v. Mondelez Global LLC*, No. 1:19-cv-00302 (E.D.N.Y. filed Jan. 15, 2019).
- 20 *Campbell v. Whole Foods Market Group Inc.*, No. 1:20-cv-01291 (S.D.N.Y. filed Feb. 13, 2020); *Warren v. The Stop Shop Supermarket Co.*, No. 7:20-cv-08718 (S.D.N.Y. filed Oct. 19, 2020).
- 21 *Harris v. Mondelez Global LLC*, No. 1:19-cv-02249 (E.D.N.Y. filed Apr. 17, 2019) (Oreos); *Lopez v. SPC Mgmt. Co.*, No. 2:19-cv-01875 (E.D.N.Y. filed Apr. 1, 2019) (Voortman Cookies).
- 22 *Lopez v. General Mills Sales Inc.*, No. 2:19-cv-01841 (E.D.N.Y. filed Mar. 31, 2019); see also *Copeland v. Post Consumer Brands LLC*, No. 2:19-cv-02488 (E.D.N.Y. filed Apr. 26, 2019) (Cocoa Pebbles).
- 23 See *Spurck v. Demet’s Candy Co.*, No. 7:21-cv-05506 (S.D.N.Y. filed June 23, 2021).
- 24 Order Granting Preliminary Approval of Settlement, Approval of Form Notice, and

- Scheduling of Final Approval Hearing, *Biegel v. Blue Diamond Growers*, No. 7:20-cv-03032 (S.D.N.Y. May 17, 2021); *see also* Mike Curley, *Blue Diamond's \$2.6 Million Deal Over Vanilla Gets Court's OK*, Law360, May 18, 2021.
- 25 Amanda Bronstad, *'The Plaintiffs' Bar Is Definitely Not Sleeping.'* Naoki Kaneko Sees a Rise in Labeling Demands, Law.com, June 30, 2021 (quoting Shook, Hardy & Bacon partner Naoki Kaneko).
- 26 *See, e.g., Fahey v. Whole Foods Market, Inc.*, No. 20-cv-06737 (N.D. Cal. June 30, 2021); *Robie v. Trader Joe's Co.*, No. 4:20-cv-07355 (N.D. Cal. June 14, 2021); *Harris v. McDonald's Corp.*, 2021 WL 2172833 (N.D. Cal. Mar. 24, 2021); *Twohig v. Shop-Rite Supermarkets, Inc.*, 2021 WL 518021, at *3 (S.D.N.Y. Feb. 11, 2021); *Wynn v. Topco Assocs., Inc.*, 2021 WL 168541, at *2 (S.D.N.Y. Jan 19, 2021); *Barreto v. Westbrae Natural, Inc.*, 2021 WL 76331, at *4 (S.D.N.Y. Jan. 7, 2021); *Zaback v. Kellogg Sales Co.*, 2020 WL 6381987, at *4 (S.D. Cal. Oct. 29, 2020); *Steele v. Wegmans Food Mkts., Inc.*, 472 F. Supp. 3d 47, 50 (S.D.N.Y. 2020); *Cosgrove v. Blue Diamond Growers*, 2020 WL 7211218, at *4 (S.D.N.Y. Dec. 7, 2020); *Pichardo v. Only What You Need, Inc.*, 2020 WL 6323775, at *5 (S.D.N.Y. Oct. 27, 2020).
- 27 *See, e.g.,* Memorandum & Order, *Garadi v. Mars Wrigley Confectionary US, LLC*, No. 1:19-cv-03209, at 8 (E.D.N.Y. July 6, 2021) (dismissing claim, finding "Defendant's Dove vanilla ice cream bars taste like vanilla" and "[t]he amended complaints do not allege otherwise").
- 28 *See* Dave Simpson, *Trader Joe's Dodges Suit Over Vanilla Flavoring*, Law360, June 16, 2021.
- 29 *See Harris v. Mondelez Global LLC*, 2020 WL 4336390 (E.D.N.Y. July 28, 2020).
- 30 *See Winston v. Hershey Co.*, 2020 WL 8025385 (E.D.N.Y. Oct. 26, 2020); *Rivas v. Hershey Co.*, 2020 WL 4287272 (E.D.N.Y. July, 27 2020); *see also Cheslow v. Ghirardelli Chocolate Co.*, 445 F. Supp.3d 8, 20 (N.D. Cal. 2020) (finding Ghirardelli's use of the word "white" on its "Premium Baking Chips" indicates the color of the chips and that absent an affirmative misrepresentation on the product's label, "[p]laintiffs and the general consuming public are not free to ignore the ingredient list that does not include the words chocolate or cocoa").
- 31 *Sarr v. BEF Foods Inc.*, 2020 WL 729883 (E.D.N.Y. Feb. 13, 2020).
- 32 *See* U.S. Env't'l Protection Agency, 2017 Revised Glyphosate Evaluation at 12-13 (providing history of review of scientific studies regarding glyphosate by several EPA scientific panels and committees in 1985, 1986, 1991, and 2015).
- 33 *See* 40 C.F.R. § 180.364.
- 34 7 U.S.C. § 6518(k)(5).
- 35 *Axon v. Florida's Natural Growers, Inc.*, 813 Fed. App'x 701, 705 (2d Cir. 2020) (ruling use of the word "natural" in orange juice name would not lead reasonable consumers to believe that the product would be free of any trace of glyphosate); *Tran v. Sioux Honey Ass'n Coop.*, 471 F. Supp. 3d 1019, 1025-29 (C.D. Cal. July 13, 2020) (granting summary judgment where plaintiff failed to produce sufficient evidence that consumers would view honey as not "pure" based on 41 parts per billion of glyphosate from the natural process of foraging bees); *Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 248 (S.D.N.Y. Apr. 18, 2019) (dog food labeled "natural" not misleading, despite detection of trace amounts of glyphosate); *Gibson v. Quaker Oats Co.*, 2017 WL 3508724, at *4 (N.D. Ill. Aug. 14, 2017) (finding plaintiff could not state a claim alleging oatmeal was not 100% natural or "part of a healthy diet" when it contained glyphosate levels far below the EPA tolerance for oats "because Congress has preempted the field of food labeling and because the presence of pesticides and chemical residues is governed by federal statute"); *In re General Mills Glyphosate Litig.*, 2017 WL 2983877, at *6 (D. Minn. July 12, 2017) (finding it not plausible that the statement 'Made with 100% Natural Whole Grain Oats' means that there is no trace glyphosate in [the defendant's products] or that a reasonable consumer would so interpret the label as "[i]t would be nearly impossible to produce a processed food with no trace of any synthetic molecule").
- 36 Staff Report, Subcommittee on Economic and Consumer Policy Committee on Oversight and Reform, U.S. House of Representatives, *Baby Foods Are Tainted with Dangerous Levels of Arsenic, Lead, Cadmium, and Mercury* (Feb. 4, 2021).

- 37 U.S. Food & Drug Admin., Constituent Update, FDA Response to Questions About Levels of Toxic Elements in Baby Food, Following Congressional Report, Feb. 16, 2021.
- 38 *Thomas v. Beech-Nut Nutrition Co.*, No. 1:21-cv-00133 (N.D.N.Y. filed Feb. 5, 2021); *Shepard v. Gerber Prods. Co.*, No. 2:21-cv-01977 (D. N.J. filed Feb. 5, 2021).
- 39 Order Denying Transfer, *In re: Baby Food Marketing, Sales Practices & Prods. Liab. Litig.*, MDL No. 2997 (J.P.M.L. June 7, 2021).
- 40 Annie's, Frequently Asked Questions, Does Annie's mac and cheese contain phthalates?, <https://www.annies.com/faq/> (last visited May 24, 2021).
- 41 See Coalition for Safer Food Processing and Packaging, Testing Finds Industrial Chemical Phthalates in Cheese, <http://kleanupkraft.org/data-summary.pdf>.
- 42 Michael Corkery, *Annie's Pledges to Purge a Class of Chemicals From Its Mac and Cheese*, N.Y. Times, Feb. 19, 2021.
- 43 *Lavalle v. General Mills Inc.*, No. 7:21-cv-03103 (S.D.N.Y. filed Apr. 9, 2021); *deVera v. General Mills, Inc.*, No. 4:21-cv-02418 (N.D. Cal. filed Apr. 2, 2021); *Franklin v. General Mills Inc.*, No. 2:21-cv-1781 (E.D.N.Y. filed Apr. 1, 2021); see also Dave Simpson, *Annie's Mac and Cheese Uses Harmful Chemical, Suit Says*, Law360, Apr. 1, 2021.
- 44 See FTC Green Guides, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides>.
- 45 See Robin M. Rotman, Chloe J. Gossett & Hope D. Goldman, *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72:3 Mo. Admin. L. Rev. 418, 425-26 (2020).
- 46 16 C.F.R. § 260.2.
- 47 The FTC itself can pursue enforcement actions under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, to either seek a cease-and-desist order or to impose other penalties for deceptive marketing. See *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 761 (D.C. Cir. 1977).
- 48 See Cal. Bus. & Prof. Code § 17580.5(a).
- 49 *Id.* at § 17580.5(b).
- 50 See Halsey Schreier, *After the Pandemic: ESG Investing Trends for 2021 and Beyond*, Forbes, May 12, 2021.
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- 52 *Id.* at 11 & n.4.
- 53 *Usler v. Vital Farms, et al.*, No. 1:21-cv-00447 (W.D. Tex. May 20, 2021).
- 54 See Paul Sullivan, *How to Tell if a Company's Claim of Ethical Practices Is True*, N.Y. Times, May 28, 2021.
- 55 *Id.*
- 56 *Id.*
- 57 *Ehlers v. Ben & Jerry's Homemade Inc.*, 2020 WL 2218858, at *7 (D. Vt. May 5, 2020).
- 58 *Id.* at *8.
- 59 See D.C. Code Ann. § 28-3905(k)(1)(B).
- 60 *Hackman v. Goya Foods, Inc.*, No. 2018 CA 003559 B, 2018 WL 6419943, at *3 (D.C. Super. Ct. Oct. 2, 2018), *reconsideration denied*, 2018 WL 6448569 (Dec. 3, 2018).
- 61 See Order Granting Motion to Dismiss, *Fahey v. The Bigelow Tea Co.*, No. 2020 CA 004563 B (D.C. Super. Ct. Mar. 18, 2021).
- 62 See D.C. Code Ann. § 28-3905(k)(1)(C), (D).
- 63 See *id.*
- 64 Organizations have also filed CCPA actions involving non-food products. For example, the Institute for Truth and Marketing has filed at least eleven lawsuits in the first half of 2021 alone, mostly targeting product pricing.
- 65 See, e.g., *GMO Free USA d/b/a Toxin Free USA v. Aldi Inc.*, No. 2021 CA 001694 (D.C. Super. Ct. filed May 21, 2021) (sustainable salmon); *Organic Consumers Ass'n v. D'Artagnan, Inc.*, No. 2020 CA 003559 B (D.C. Super. Ct. filed Aug. 12, 2020) (foie gras); *Organic Consumers Ass'n v. Champion Petfoods USA Inc.*, No. 2020 CA 003515 B (D.C. Super. Ct. filed Aug 10, 2020) (free-run poultry); *Organic Consumers Ass'n v. Mowi ASA*, No. 2020 CA 003368 B (D.C. Super. Ct. filed July 30, 2020) (sustainable salmon); *Animal Equality v. Champion Petfoods USA, Inc.*, No. 2020 CA 003279 B (D.C. Super. Ct. filed July 24, 2020) ("wild-caught" fish); *Animal Outlook v. Cooke Aquaculture, Inc.*,

- No. 2020 CA 002908 B (D.C. Super. Ct. filed June 26, 2020) (sustainable salmon); *Organic Consumers Ass'n v. Smithfield Foods, Inc.*, No. 2020 CA 002566 B (D.C. Super. Ct. filed May 20, 2020) ("safest" pork); *Organic Consumers Ass'n v. Noble Foods, Inc. d/b/a The Happy Egg Co. USA*, No. 2020 CA 002009 B (D.C. Super. Ct. filed Mar. 24, 2020) (free-range hens); *Food & Water Watch, Inc. v. Tyson Foods, Inc.*, No. 2019 CA 004547 B (D.C. Super. Ct. filed July 10, 2019) (environmentally responsible chickens); *Food & Water Watch, Inc. v. Pilgrim's Pride Corp.*, No. 2019 CA 000730 B (D.C. Super. Ct. filed Feb. 4, 2019) (same).
- 66 *Food & Water Watch v. Smithfield Foods, Inc.*, No. 2021 CA 002020 B (D.C. Super. Ct. filed June 16, 2021).
- 67 *See Earth Island Inst. v. The Coca-Cola Co.*, No. 2021 CA 001846 B (D.C. Super. Ct. filed June 4, 2021).
- 68 Several lawsuits are premised on tests detecting methylene chloride in decaffeinated coffee. *See, e.g., Clean Label Project Found. v. Peets Coffee, Inc.*, No. 2020 CA 004565 B (filed Oct. 30, 2020); *Clean Label Project Found. v. The Kraft Heinz Co.*, No. 2020 CA 003806 (D.C. Super. Ct. filed Aug. 28, 2020); *Clean Label Project Found. v. Keurig Green Mountain Inc.*, No. 2020 CA 003566 B (D.C. Super. Ct. filed Aug. 12, 2020); *Clean Label Project Found. v. Peets Coffee & Tea Holdco, Inc.*, No. 2020 CA 003199 B (D.C. Super. Ct. filed July 20, 2020); *Clean Label Project Found. v. Amazon.com, Inc.*, No. 2020 CA 003197 B (D.C. Super. Ct. filed July 20, 2020); *Clean Label Project Found. v. Rowland Coffee Roasters, Inc.*, No. 2020 CA 003191 B (D.C. Super. Ct. filed July 20, 2020).
- 69 *See, e.g., Organic Consumers Ass'n v. Associated British Foods PLC*, No. 2019 CA 004412 B (D.C. Super. Ct. filed July 3, 2020) (alleging tests detected glyphosate in "pure" tea).
- 70 These lawsuits allege tests detected "quantifiable amounts" of heavy metals in prenatal vitamins. *See, e.g., Clean Label Project Found. v. Now Health Group, Inc.*, No. 2020 CA 004013 B (D.C. Super. Ct. filed Sept. 16, 2020); *Clean Label Project Found. v. Pharmavite, LLC*, No. 2020 CA 003912 B (D.C. Super. Ct. filed Sept. 4, 2020); *Clean Label Project Found. v. Ortho Molecular Products, Inc.*, No. 2020 CA 003495 B (D.C. Super. Ct. filed Aug. 7, 2020).
- 71 *See, e.g., Clean Label Project Found. v. Mead Johnson & Co.*, No. 2020 CA 003713 B (D.C. Super. Ct. filed Aug. 21, 2020); *Clean Label Project Found. v. The Hain Celestial Group Inc.*, No. 2020 CA 003607 B (D.C. Super. Ct. filed Aug. 14, 2020).
- 72 *See, e.g., Clean Label Project Found. v. Panera, LLC*, No. 2019 CA 001898 B (D.C. Super. Ct. filed May 22, 2019) (alleging testing detected glyphosate and other pesticide and fungicide residue in bread, sandwiches, cookies, and other goods marketed as "100% clean").
- 73 *See Clean Label Project Found. v. Whole Foods Market Inc.*, No. 2020 CA 003196 B (D.C. Super. Ct. filed July 20, 2020) (alleging detection of 9% non-sugar honey and a quantifiable amount of lead in "100% pure" honey).
- 74 *See, e.g., GMO Free USA v. Nestle Purina Petcare Co.*, No. 2020 CA 002775 B (D.C. Super. Ct. filed June 12, 2020); *Toxin Free USA v. J.M Smucker Co.*, No. 2019 CA 003192 B (D.C. Super. Ct. filed May 14, 2020).
- 75 *See, e.g., GMO Free USA d/b/a Toxin Free USA v. Target Corp.*, No. 2020 CA 004463 B (filed D.C. Super Ct. filed Oct. 23, 2020) (alleges "all natural" raisins contain traces of insecticides and fungicides).
- 76 A few attorneys have made these types of lawsuits part of their practice, such as Kim Richman and Jay Shooster of The Richman Law Group in New York; Rayik Samara of Rae, PLLC in Virginia; and Kyle Wallace and Kristen Ross of Davitt, Lalley, Dey & McHale, PC in Michigan.
- 77 D.C. Code Ann. § 28-3905(k)(1)(D).
- 78 *Praxis Project v. Coca-Cola Co.*, 2019 D.C. Super. LEXIS 17 (Oct. 1, 2019); *see also* Order Granting Motion to Dismiss, *Fahey v. The Bigelow Tea Co.*, No. 2020 CA 004563 B, at 10 (D.C. Super. Ct. Mar. 18, 2021) (finding individual plaintiff who sought to represent the general public under the CPPA did not establish standing as a tester because he "fails to articulate in his Complaint at any point what specific testing, investigating, or evaluating Plaintiff performed").
- 79 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also D.C. Appleseed Ctr. for Law and Justice, Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1206-09 (D.C. 2012) (requiring a "direct conflict" between

- the defendant's conduct and the organization's mission to establish Article III standing).
- 80 *Grayson v. AT&T Corp.*, 15 A.3d 219, 224 (D.C. 2011).
- 81 *See Little v. SunTrust Bank*, 204 A.3d 1272, 1273-74 (D.C. 2019); *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980, 987 (D.C. 2015); *Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1289 (D.C. 2015); *see also Vining v. Executive Bd. of Dist of Columbia Health Benefit Exch. Auth.*, 174 A.3d 272, 278 (D.C. 2017).
- 82 Report on Bill 19-0581 of the Committee on Public Service and Consumer Affairs, at 5 (Nov. 28, 2012).
- 83 *See, e.g., Praxis Project*, 2019 D.C. Super. LEXIS 17, at *27-28; *Animal Legal Def. Fund v. Hormel Foods Corp.*, 2019 D.C. Super. LEXIS 7, at *15-18 (Apr. 8, 2019).
- 84 *See, e.g., Organic Consumers Ass'n v. Tysons Foods, Inc.*, 2021 D.C. Super. LEXIS 7, at *7-8 (Mar. 31, 2021); *Organic Consumers Ass'n v. Smithfield Foods, Inc.*, 2020 D.C. Super. LEXIS 28, at *12-13 (Dec. 14, 2020); *Toxin Free USA v. J.M. Smucker Co.*, 2019 D.C. Super. LEXIS 15, at *9 (Nov. 6, 2019); *Organic Consumers Ass'n v. Noble Foods, Inc.*, 2020 D.C. Super. LEXIS 13, at *5-6 (Aug. 25, 2020); *Clean Label Project Found. v. Panera, LLC*, 2019 D.C. Super. LEXIS 14, at *5-8 (Oct. 11, 2019).
- 85 *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2213-14 (2021).
- 86 *See* Alison Frankel, *State Court Will be Next Frontier for Consumer Class Actions under Federal Law*, Reuters, June 28, 2021.
- 87 21 C.F.R. § 100.100(a).
- 88 *See, e.g., Rachel Graf, Candy Maker Agrees to Pay \$2.5M to End Slack-Fill Suit*, Law360, May 11, 2018 (reporting Ferrara Candy's settlement of slack fill class action in the Northern District of California that included anyone who purchased Jujyfruits, Jujubes, Now and Later, Lemonhead, Applehead, Cherryhead, Grapehead, RedHots, Trolli, Chuckles, Black Forest, Jawbuster, Jawbreaker, Brach's, Boston Baked Beans, Super Bubble, Rainblo and Atomic Fireball candies packaged in opaque cardboard boxes between February 2013 and preliminary approval of the settlement in 2018).
- 89 *See, e.g., Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 187-88 (E.D.N.Y. 2018); *Hackman v. Goya Foods, Inc.*, No. 2018 CA 003559 B, 2018 WL 6419943, at *3 (D.C. Super. Ct. Oct. 2, 2018), reconsideration denied, 2018 WL 6448569 (Dec. 3, 2018).
- 90 *See, e.g., Daniel v. Tootsie Roll Indus.*, 2018 WL 3650015, at *12-13 (S.D.N.Y. Aug. 1, 2018).
- 91 *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 647-48 (7th Cir. 2019); *see also Stemm v. Tootsie Roll Indus.*, 374 F.Supp.3d 734, 742-43 (N.D. Ill. 2019).
- 92 *See Geffner v. Coca-Cola Co.*, 928 F.3d 198 (2d Cir. 2019); *Excevarria v. Dr Pepper Snapple Group, Inc.*, 764 Fed. App'x 108 (2d Cir. 2019); *Manuel v. Pepsi-Cola Co.*, 763 Fed. App'x 108 (2d Cir. 2019).
- 93 *Geffner*, 928 F.3d at 200 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) (internal quotations omitted)).
- 94 *Id.*
- 95 *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 501 (2d Cir. 2020).
- 96 *See, e.g., Ehlers v. Ben & Jerry's Homemade Inc.*, 2020 WL 2218858, at *5-6 (D. Vt. 2020) (citing *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019)).
- 97 *Doss v. General Mills, Inc.*, 816 Fed. App'x 312 (11th Cir. 2020). That month, the Second Circuit dismissed a similar claim against "Florida's Natural" orange juice on different grounds. The court found it implausible to allege that a reasonable consumer would interpret the brand's name as meaning that the product contains no trace of glyphosate as a result of the planting and cultivation of oranges in its product. *See Axon v. Florida's Natural Growers, Inc.*, 813 Fed. App'x 701 (2d Cir. 2020).
- 98 *Reilly v. Chipotle Mexican Grill Inc.*, 711 Fed. App'x 525 (11th Cir. 2017) (per curiam).
- 99 *In re Subway Footlong Sandwich Marketing & Sales Practices Litig.*, 869 F.3d 551, 553, 557 (7th Cir. 2017).
- 100 *Berni v. Barilla S.p.A. v. Schulman*, 964 F.3d 141 (2d Cir. 2020).
- 101 *Briseño v. Henderson*, 998 F.3d 1014, 1028 (9th Cir. 2021).

- 102 For example, a federal court recently rejected a proposed settlement of a class action alleging that labeling fruit-flavored snacks as having “no artificial flavors” and being “naturally flavored” was misleading because the product contained malic acid. Under the agreement, the plaintiffs’ attorneys would have received \$725,000 and four class representatives would have been paid \$5,000 each. Consumers would have obtained nothing other than an asterisk next to “No Artificial Flavors” directing the consumer to the manufacturer’s website for more information. Order Denying Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement and Granting Motion to Intervene, *Hisley v. General Mills, Inc.*, No. 3:18-cv-00395 (S.D. Cal. June 4, 2021).
- 103 *Friends of the Earth v. Sanderson Farms*, 992 F.3d 939, 945 (9th Cir. 2021).
- 104 *Mantikas v. Kellogg*, 2017 WL 2371183, at *4-5 (E.D.N.Y. May 31, 2017).
- 105 *Mantikas v. Kellogg Co.*, 910 F.3d 633, 637 (2d Cir. 2018).
- 106 *Id.* at 637.
- 107 21 C.F.R. § 133.146(c), (d)(3)(i).
- 108 *In re 100% Grated Parmesan Cheese Marketing & Sales Practices Litig.*, 275 F. Supp. 3d 910, 922-23 (N.D. Ill. 2017).
- 109 *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 476 (7th Cir. 2020).
- 110 A.B. 2632 (Cal. 2018) (amending Cal. Bus. & Prof. Code §§ 12606, 12606.2).
- 111 S.B. 591 (Mo. 2020) (applicable to claims filed on or after Aug. 28, 2020). The legislation also requires plaintiffs to prove damages with a reasonable degree of certainty using objective evidence and requires any award of attorneys’ fees to bear a reasonable relationship to the amount of the judgment.
- 112 For example, in a recent case in which plaintiffs alleged consumers would be misled to believe that malt beverage products with the names “Margarita,” “Mojito,” “Sangria,” and “Rosé” contain either tequila, rum, or wine, a federal court continued to follow 2016 case law holding that whether a reasonable consumer would be deceived by a product label is generally a question of fact that cannot be resolved on a motion to dismiss. *See Browning v. Anheuser-Busch, LLC*, 2021 WL 1940645, at *2 (W.D. Mo. May 13, 2021).
- 113 H.B. 1742 (Ark. 2017) (amending Ark. Code §§ 4-88-102(9), -113(f)).
- 114 A.2495 / S.6414 (N.Y. introduced Apr. 21, 2021).
- 115 *See Mars Wrigley Confectionary US, LLC’s Memorandum of Law in Support of its Motion to Dismiss Plaintiffs’ First Amended Complaint, Garadi v. Mars Wrigley Confectionary US, LLC*, No. 1:19-cv-03209, at 1 (E.D.N.Y. Dec. 23, 2020) (characterizing vanilla lawsuit as a “strike suit,” which is a “lawsuit intended to force a quick settlement, on the theory that defendants will make the rational decision to settle where the cost of settlement is less than the legal costs of a full defense” and using plaintiffs’ counsel of “employing a raft of recycled complaints” against food manufacturers).
- 116 *See generally* Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. Cin. L. Rev. 1, 29-32 (2018).
- 117 *See, e.g.*, Opinion & Order, *Mazella v. The Coca-Cola Co.*, No. 7:20-cv-05235, at 5-6 (S.D.N.Y. July 12, 2021) (recognizing “the New York Court of Appeals has adopted an objective definition of ‘misleading’ under which the alleged act must be ‘likely to mislead a reasonable consumer acting reasonably under the circumstances’” (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (quoting *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y. 2d 20, 26 (1995))).



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