

## Outside Counsel

# Action-Snacked Year: Food Labeling Class Actions on the Rise

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The frequency of consumer class action lawsuits targeting some of America's favorite foods for alleged false and misleading labeling has risen sharply over the last year. In 2020, new filings of these "misleading" labeling class actions rose by more than 30% nationwide compared to 2019. Filings in New York federal courts alone accounted for much of this increase. Although this trend may appear to threaten the food and beverage industry with the prospect of endless court entanglements and expensive nationwide discovery, the reality is that, in the New York federal courts, these cases are increasingly being dismissed early before gaining any traction.

In this article, we will examine recent decisions from New York

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federal courts at the motion to dismiss stage and explain how companies can defeat these cases quickly as they face this increasing onslaught of class action cases. In short, New York federal courts have been dismissing these class actions due to insufficient allegations that a "reasonable consumer" would be duped by the labeling at issue, demonstrating that the courts hold the "reasonable consumer" in higher regard than the plaintiffs' bar. Although there are some conflicting decisions denying motions to dismiss, this favorable trend in rulings provides an avenue for companies to successfully challenge these labeling claims with a threshold motion despite the application of the fact-intensive "reasonable consumer" standard. If faced with one of these consumer class action lawsuits in New York, companies should evaluate the food label at issue in the context of these favorable decisions and consider the potential success and long-term utility of filing an early threshold motion to defeat the case, rather than taking the (often easier) option of an early low value settlement.



Nutritional food label on a box of sugar packets. May 30, 2014.

Photo by Diego M. Radzinschi

## The Trend

These food-related class actions typically allege that a company's food product labeling is false or misleading because the product does not contain the amount, type, or percentage of natural flavoring or health benefits that a reasonable consumer would expect based on the labeling. Plaintiffs then allege that, because of the company's supposed false and misleading labeling, plaintiffs paid a premium for the company's food product. This "price premium" theory, it is typically alleged, caused harm to all purchasers in a similar way and thus gives rise to claims deserving of class treatment under New York's

consumer protection statute, New York General Business Law §§349 & 350, the Magnuson Moss Warranty Act, and the all-too-familiar panoply of state common law theories including negligent misrepresentation, breach of warranty of merchantability, fraud, and unjust enrichment.

Plaintiffs' allegations often badly underestimate the intellect and savvy of the "reasonable consumer"—a hypothetical character that the law describes as being "representative" of "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances." *Jesani v. Monini N. Am.*, 744 F. App'x 18, 19 (2d Cir. 2018) (quoting *Ebner v. Fresh*, 838 F.3d 958, 965 (9th Cir. 2016)). Plaintiffs all too often allege that the label on a company's food product is misleading because the label causes reasonable consumers to make certain assumptions about the product that range from the fanciful to the truly absurd. Think of the case that famously alleged that consumers nationwide were buying the Cap'n's "Crunchberry" cereal for the powerful health benefits of the Crunchberry. *Sugawara v. Pepsico*, No. 08-CV-1335, 2009 WL 1439115, at \*3 (E.D. Cal. May 21, 2009) (dismissing plaintiffs' claims that "Cap'n Crunch with Crunchberries" cereal deceived customers into believing the cereal contained real fruit).

Many of the cases that continue to add to the federal dockets in New York are in the Crunchberry spirit. For example, a plaintiff sued Dietz & Watson and alleged that the

"Smoked Provolone Cheese" label on its cheese is misleading because the "smoked" flavor is from "smoke flavor," as listed on its ingredient list, and not from "being smoked over wood chips." *Jones v. Dietz & Watson*, No. 20-cv-6018 (E.D.N.Y. 2020). Does anyone truly believe that the hypothetical "reasonable consumer" pictures a giant Dietz & Watson coal smoking operation filled with little provolone cheeses

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when they see "smoke flavor" plainly stated in the product's ingredients? Similarly, a plaintiff alleged that the packaging on Sara Lee Frozen Bakery's All Butter Pound Cake is misleading because the cake contains, as the ingredients panel states clearly, butter *and* soybean oil, and not butter alone. *Briley v. Sara Lee Frozen Bakery*, No. 20-cv-7276 (S.D.N.Y. 2020). Like many food labeling class actions filed in New York in 2020, these cases settled quickly and were voluntarily dismissed before a court considered the sufficiency of plaintiffs' allegations, much less the viability of the class allegations.

These early individual settlements are often sensible and can be a better alternative to significant motion practice or, worse, expensive class discovery. However, challenging plaintiffs' deception allegations by threshold motion is a viable option in New York federal courts, which are not shy in highlighting the absurdity of some of plaintiffs' allegations. This is so even though dismissal in New York based on the reasonable consumer standard has been described, borrowing Ninth Circuit language, as a "rare situation." *Atik v. Welch Foods*, No. 15-cv-5405, 2016 WL 5678474, at \*8 (E.D.N.Y. Sept. 30, 2016) (noting that dismissal on Rule 12(b)(6) for failure to plausibly allege deception under the "reasonable consumer" standard is and should be the "rare situation") (quoting *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015)).

For example, a number of class actions in 2020 targeted foods labeled as "vanilla-flavored," alleging this is misleading because the ingredients were not primarily derived from vanilla beans or vanilla bean extract. See, e.g., *Falborn v. Unilever United States*, No. 20-cv-4138 (S.D.N.Y. 2020); *Sencen v. Froneri US*, No. 20-cv-4024 (S.D.N.Y. 2020); *Sanders v. Trader Joe's Company*, No. 20-cv-496 (S.D.N.Y. 2020). Wegmans Food Markets was one of the first to challenge these "vanilla" lawsuits in defense of its ice cream product labeling—and Wegmans won. *Steele v. Wegmans Food Markets*, 472 F. Supp. 3d 47 (S.D.N.Y. 2020). In *Steele*, the court rejected plaintiffs' allegation that Wegmans' ice cream labelled as "vanilla" was misleading

because the vanilla taste and flavor were not derived from vanilla bean or vanilla bean extract, but rather included “other natural flavors.” The court dismissed plaintiffs’ complaint and found that no reasonable consumer would be misled by the label because the ice cream was ultimately “vanilla flavored” as advertised, and the label made no mention of vanilla beans or bean extract.

Other New York federal courts have followed suit, dismissing “vanilla” cases on similar grounds where the product was simply labeled as “vanilla-flavored,” had a vanilla taste, and did not affirmatively claim that the product was “made with” vanilla beans or bean extract. See, e.g., *Barreto v. Westbrae Nat.*, No. 19-cv-09677, 2021 WL 76331, at \*4 (S.D.N.Y. Jan. 7, 2021) (finding that “Vanilla” on the company’s soymilk label would not mislead a reasonable consumer to believe that the vanilla flavor is predominantly from natural vanilla); *Cosgrove v. Blue Diamond Growers*, No. 19-cv-8993, 2020 WL 7211218, at \*4 (S.D.N.Y. Dec. 7, 2020) (same but for vanilla-flavored almond milk); *Pichardo v. Only What You Need*, No. 20-cv-493, 2020 WL 6323775, at \*6 (S.D.N.Y. Oct. 27, 2020) (finding that a label depicting a vanilla flower and stating “smooth vanilla” would not mislead a reasonable consumer to believe that the product’s vanilla flavor derived exclusively from vanilla beans).

These dismissals in New York federal courts in 2020 have not been limited to “vanilla” complaints. In *Harris v. Mondelez Global*, No. 19-cv-2249, 2020 WL 4336390 (E.D.N.Y. July 28,

2020), the court dismissed a complaint attacking Oreo cookie labeling, which stated that the cookies are “Always Made With Real Cocoa.” The court found that the label was factually accurate because the cookies do in fact contain “Real Cocoa,” and, absent exaggerated language in the label that the cookies were made “only” or “exclusively” with the “Real Cocoa,” the label would not mislead a reasonable consumer as to the nature and extent of the real cocoa content.

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On their face, these cases seem to underscore that accuracy matters and that it pays to steer clear of any hint of overstatement in describing popular food ingredients. Labels that emphasize the defensible fact of content alone are better suited to defeat a claim of deception at the early threshold motion stage. Indeed, in *Sharpe v. A&W Concentrate Co.*, 481 F. Supp. 3d 94, 103 (E.D.N.Y. 2020), the court denied the defendant’s threshold motion to dismiss where the company’s vanilla-flavored soda label included the bolded, all-caps statement “MADE WITH AGED VANILLA.” How does this square with the other vanilla cases that were dismissed? This label goes beyond what the other vanilla labels stated by specifically stating the type of vanilla—“Aged Vanilla.” The court interpreted “Aged Vanilla” to mean

natural vanilla, and when coupled with a study submitted by plaintiff indicating that the vanilla flavor in the soda came predominately from an artificial or synthetic ingredient rather than natural vanilla sources, the court held this label could mislead the reasonable consumer. The lesson? Any hint of overstatement can get the plaintiff by a motion to dismiss.

Other New York federal court decisions suggest that a disclaimer or clarifying language may be necessary, and helpful in defeating a deception claim. For example, in *Hesse v. Godiva Chocolatier*, 463 F. Supp. 3d 453 (S.D.N.Y. 2020), the court found that a reasonable consumer could be misled by the “Belgium 1926 label” on Godiva’s chocolates to believe that the chocolates were made in Belgium, when they are in fact made in the United States. The court in *Hesse* emphasized that the rest of the product packaging and other representations regarding Godiva’s chocolate products beyond the product packaging specifically at issue did not include any disclosures stating where the chocolate was actually made. Had Godiva included a simple reference to the chocolates being made in the United States on its product packaging, Godiva may have fared better on its motion to dismiss.

By contrast, in *Melendez v. One Brands*, No. 18-cv-06650, 2020 WL 1283793 (E.D.N.Y. March 16, 2020), Judge Amon in the Eastern District dismissed a complaint challenging One Brands’ “ONE Bar” and “One Basix” lines of nutrition bars labeled

with the brand name “ONE”, referring to the bars’ one gram of sugar, and the phrases “1g sugar” and “20g protein” on the wrappers. The complaint alleged that “independent laboratory testing” showed the One Bar has more than one gram of sugar, and thus more calories and carbohydrates than “reasonable consumers” would expect from a nutrition bar marketed as such. *Id.* at \*3. Adopting a broad view of FDA preemption in this important area, the court first ruled that plaintiff’s claims of deception based on “laboratory testing” were preempted by federal Nutrition Labeling and Education Act (the NLEA), codified as amended at 21 U.S.C. §§301, 321, 337, 343, 371. The court reasoned that, absent an allegation that the “laboratory testing” conformed to FDA guidelines, the claim would effectively impose a labeling requirement different from, and thus preempted by, the NLEA. Moreover, applying a muscular view of the “reasonable consumer” test, the court dismissed plaintiff’s claim that the “one gram” affirmation would lead a reasonable consumer to be misled as to the overall caloric and carbohydrate content of the One Bar because the product’s nutrition facts panel clearly disclosed the *actual* caloric and carbohydrate content.

In applying the “reasonable consumer” test, New York federal courts also consider the dominant message set forth in the label at issue and how it relates to the product as a whole. This focus stems from the Second Circuit’s reversal of a district court’s dismissal of a complaint

alleging Cheez-Its cracker labels were misleading. *Mantikas v. Kellogg Co.*, 910 F.3d 633, 637 (2d Cir. 2018). *Mantikas* involved Cheez-Its’ “WHOLE GRAIN” crackers, labeled prominently as such combined with the statement “MADE WITH WHOLE GRAIN.” The *Mantikas* panel held that such a label could plausibly mislead a reasonable consumer to believe that the crackers are made predominately with whole grain, as opposed to other types of grain, despite that the ingredient panel made clear the actual mix of whole grain and enriched flour content. *Id.* at 636-38. The lesson from the *Mantikas* decision is that prominent messaging emphasizing that a product consists of a particular healthful ingredient will receive careful scrutiny. According to district courts dismissing deceptive food labeling claims, *Mantikas* speaks to representations regarding ingredients central to the product and its health benefits. See, e.g., *Harris*, 2020 WL 4336390, at \*2-3; *Cosgrove*, 2020 WL 7211218, at \*4. Consequently, healthful ingredient representations, especially those that relate to the main ingredients of a product, may be held to a higher standard on a motion to dismiss.

On balance, these cases reinforce that the “Reasonable consumer” inquiry is context-specific, but also that dismissal at the 12(b)(6) stage may not be such a “rare situation” after all. Indeed, courts in New York are viewing “reasonable consumers” as less vulnerable and more savvy than plaintiffs’ allegations often suggest. So when companies choose to

litigate, they know that New York federal courts will view claims of deceptive labeling with a refreshingly real world perspective.

### What’s Next?

Food-related class actions based on misleading and deceptive labeling may continue to trend upward as health and related product claims proliferate in the market. Settling these cases early and on the cheap will often be an option, and can be particularly tempting in the most marginal cases where the cost to settle is often nominal. Companies should not underestimate, however, the long term benefits of defending these actions aggressively with threshold motions. The “reasonable consumer” is alive and well in New York, and its federal courts are channeling her sound judgment.