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### Recommended Citation

Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. Cin. L. Rev. 1  
( )  
Available at: <https://scholarship.law.uc.edu/uclr/vol86/iss1/1>

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## IN SEARCH OF THE REASONABLE CONSUMER: WHEN COURTS FIND FOOD CLASS ACTION LITIGATION GOES TOO FAR

*Cary Silverman*\*

Do parents who serve Cocoa Puffs, Lucky Charms, and Trix view these cereals as nutritious breakfast choices for their kids since the boxes tout that they are made with whole grain?<sup>1</sup> When they pour soy milk in the bowl, do they believe it came from a cow?<sup>2</sup> Are dreary-eyed consumers skimmed out of the amount of coffee they paid for when a Starbucks barista includes ice in iced coffee<sup>3</sup> or foam in a hot latte?<sup>4</sup> On their lunch break, are workers duped to believe that Subway's "Footlong" sandwiches are precisely twelve inches?<sup>5</sup> At the supermarket, are shoppers buying "natural" sour cream because they believe the cows that produce the milk for the cream only eat feed that is free of genetically-modified corn or soy?<sup>6</sup> For a treat, do consumers buy glazed "raspberry-filled" or "blueberry cake" donuts for the cancer-fighting benefits of real fruit?<sup>7</sup> And, when winding down at the end of a long day, are people buying Leffe Beer because they think it was brewed by Belgian monks in an abbey, just as it was in the year 1240?<sup>8</sup>

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1. See Complaint at 90-98, *Truxel v. General Mills Sales, Inc.*, No. 3:16-cv-0957 (N.D. Cal. filed Aug. 29, 2016).

2. See *Ang v. Whitewave Foods Co.*, No. 12-cv-6492353, 2013 WL 6492353 (N.D. Cal. Dec. 10, 2013); *Gitson v. Trader Joe's Co.*, No. 13-cv-01333, 2013 WL 5513711 (N.D. Cal. Oct. 4, 2013).

3. See Complaint, *Pincus v. Starbucks Corp.* (N.D. Ill. Apr. 27, 2016) (No. 1:16-cv-4705); Complaint, *Forouzes v. Starbucks Corp.* (C.D. Cal. June 1, 2016) (No. 2:16-cv-3830).

4. See Complaint, *Crittenden v. Starbucks Corp.* (S.D.N.Y. May 1, 2016) (No. 1:16-03496); Complaint, *Strumlauf v. Starbucks Corp.* (N.D. Cal. Mar. 16, 2016) (No. 3:16-cv-1306).

5. See *In re: Subway Footlong Sandwich Marketing & Sales Practices Litig.*, 316 F.R.D. 240 (E.D. Wis. 2016), rev'd, 869 F.3d 551 (7th Cir. 2017) (discussed *infra* notes 199 to 210 and accompanying text).

6. See Complaint, *Newton v. Kraft Heinz Foods Co.* (E.D.N.Y. Aug. 17, 2016) (No. 1:16-cv-04578).

7. See Complaint at 9, *Saidian v. Krispy Kreme Doughnuts, Inc.* (C.D. Cal. Nov. 9, 2016) (No. 2:16-cv-08338) (discussed *infra* notes 172 to 177 and accompanying text).

8. See Complaint, *Vazquez v. Anheuser-Busch Cos.* (S.D. Fla. Apr. 1, 2016) (No. 1:16-cv-

These are just a few of hundreds of similar consumer class actions targeting food and beverage manufacturers filed in recent years. Many readers will recall earlier lawsuits alleging consumers were led to believe Froot Loops contained real, nutritious fruit,<sup>9</sup> and that Cap'n Crunch's Crunch Berries are real berries.<sup>10</sup> Those cases were dismissed as “nonsense,”<sup>11</sup> but many of today's lawsuits, while more sophisticated, are no less laughable.

There are signs that some judges are losing their patience with these types of claims. After briefly discussing the surge of food and beverage marketing class actions, this Article examines a growing body of case law finding no reasonable consumer would be deceived by the labeling, packaging, or advertising at issue. From these rulings, this Article draws a set of principles that courts can apply in addressing these actions. This Article observes, however, that courts have inconsistently applied the reasonable consumer standard, allowing many absurd claims to survive a motion to dismiss and ultimately settle. This Article concludes that unless courts consistently dispose of these types of claims at an early stage, shopping for lawsuits will continue and state legislatures, and possibly Congress, may rein in this litigation.

## I. THE SURGE OF FOOD MARKETING CLASS ACTIONS

In 2008, 19 consumer class actions were reportedly brought against food and beverage makers in federal courts.<sup>12</sup> That number hit 102 by 2012.<sup>13</sup> Some predicted that the food litigation wave would “peter out.”<sup>14</sup> A review of court dockets and other resources, however, revealed 118 new class actions targeting the marketing of food and beverages filed in or removed to federal courts in 2015.<sup>15</sup> The pace of filings continued to increase in 2016, with at least 171 more of these cases.<sup>16</sup> Overall, we identified over 425 active food marketing class action lawsuits in the

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9. *See, e.g.*, *Videtto v. Kellogg USA*, 2009 WL 1439086 (E.D. Cal. 2009); *McKinnis v. Kellogg USA*, 2007 WL 4766060 (C.D. Cal. Sept. 19, 2007).

10. *See Werberl v. Pepsico, Inc.*, 2010 WL 2673860 (N.D. Cal. July 2, 2010); *Sugawara v. Pepsico, Inc.*, 2009 WL 1439115 (E.D. Cal. May 21, 2009).

11. *Werberl*, 2010 WL 2673860, at \*3.

12. Jessica Dye, *Food Companies Confront Spike in Consumer Fraud Lawsuits*, REUTERS, June 13, 2013 (citing data compiled by food litigation department of Perkins Coie).

13. *See id.*

14. *Id.*

15. Cary Silverman & James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation 5* (U.S. Chamber Inst. for Legal Reform 2017), available at [http://www.instituteforlegalreform.com/uploads/sites/1/TheFoodCourtPaper\\_Pages.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TheFoodCourtPaper_Pages.pdf) [hereinafter “Food Court”]. A database of these cases is on file with the author.

16. *See id.*

federal courts during this two-year period.<sup>17</sup> Many more cases are pending in state courts, for which it is not possible to get a precise count.

### A. *Targeted Products and Common Claims*

Food marketing class action litigation spans the gamut of products found in the supermarket, from jarred cucumbers to tater tots. Orange juice, cereal, frozen breakfast foods, instant oatmeal, pasta, Parmesan cheese, yogurt, soup, tuna fish, hummus, salad dressing, bread crumbs, olive oil, iced tea, and alcoholic beverages are among the items targeted. Snack foods, such as protein and granola bars, chips, and brownie mix, are particularly popular for lawsuits.<sup>18</sup>

While the precise allegations in the lawsuits vary from case to case, claims can be grouped in a few categories. Lawsuits challenging products marketed as “natural” make up the largest category, consisting of approximately one third of the food litigation.<sup>19</sup> These lawsuits allege that a product does not qualify as natural for reasons such as the presence of ingredients such as citric acid or the leavening agent sodium acid pyrophosphate, genetically modified corn or soy, or the product’s processing.<sup>20</sup>

The evolution of “natural” claims are lawsuits challenging products marketed as healthy. There are several varieties of healthy claims. Some lawsuits assert that a manufacturer made specific representations regarding a product’s health benefits that are overstated, lack support, or are offset by other factors.<sup>21</sup> Others allege that a product labeled “healthy” includes ingredients that are not sufficiently nutritious.<sup>22</sup> A third type alleges that true statements emphasizing positive aspects of the product or images, such as fruits or vegetables, displayed on a product’s packaging may lead consumers to believe a product is healthier than it is.<sup>23</sup> Another group targets any product that lists “evaporated cane juice”

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17. *See id.* Our counts of federal class actions include cases targeting food and beverage labeling or marketing filed in or removed to federal court in 2015 and 2016, or, if filed earlier, were actively litigated or settled during this two-year period. It does not include class actions stemming from contaminated food, worker classification suits, or anti-competition claims brought by other businesses. It also does not include scores of lawsuits brought under California’s Proposition 65, which are brought as private attorney general actions, rather than class actions.

18. *See Food Court, supra* note 15, at 5, 7.

19. *See id.* at 7, 17-18.

20. *See id.* at 17; *see also* Brazil v. Dole Packaged Foods, Inc., No. 14-17480, 2016 WL 5539863 (9th Cir. Sept. 30, 2016) (unpublished) (finding reasonable consumers could be misled when fruit is labeled “all natural” but contains synthetic citric acid or ascorbic acid, but holding district court properly denied certification of damages class, allowing plaintiffs to seek only injunctive relief).

21. *See Food Court, supra* note 15, at 7, 30-31.

22. *See id.* at 19.

23. *See id.* at 19-20.

among the ingredients, alleging that this term disguises sugar content, even as the same labeling lists the total grams of sugar.<sup>24</sup> In addition, some firms have focused litigation on any product that contains partially hydrogenated oils, known as trans-fat, claiming that any amount renders a product unfit for consumption.<sup>25</sup>

“Slack fill” claims are also increasingly popular.<sup>26</sup> These lawsuits typically allege that a product’s packaging includes nonfunctional extra space that might lead a consumer to believe he or she will receive more of the product than the package actually contains. Any product that rattles is a potential target of these “shake-the-box and sue” claims.<sup>27</sup>

Other lawsuits allege that consumers would be misled as to where the product is made because of how it is marketed. For example, many beer manufacturers have faced claims that consumers would be misled to believe that their products are imported when they are brewed in the United States.<sup>28</sup> Some lawsuits have even alleged that consumers believe “Greek yogurt” comes from Greece.<sup>29</sup>

Finally, lawsuits occasionally challenge specific representations on a product as potentially misleading or untrue. For example, lawsuits have alleged that cheese sold as “100% grated Parmesan” is not actually 100% cheese because it includes an additive that stops it from clumping,<sup>30</sup> that bread is not “baked in store” when it arrives frozen and is then baked,<sup>31</sup> or that liquor is not “handmade.”<sup>32</sup>

Nearly every major food and beverage manufacturer is facing consumer class actions. One would be mistaken, however, to believe that the surge of litigation targets only large food companies viewed as having “deep pockets.” Family-owned business and startup companies, particularly those that specialize in offering healthy snacks, are increasingly named in lawsuits alleging trivial infractions.<sup>33</sup>

24. *See id.* at 18-19.

25. *See id.* at 25-27.

26. *See id.* at 21-22.

27. *See* Joyce Hanson, Slack-Fill Suits See Boom Despite Few Class Wins, LAW360, Apr. 17, 2017, <https://www.law360.com/articles/912004/slack-fill-suits-see-boom-despite-few-class-wins>.

28. *See infra* notes 116 to 119 and accompanying text.

29. *See* Jonathan H. Adler, *Must “Greek Yogurt” be from Greece?*, WASH. POST, June 21, 2014, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/21/must-greek-yogurt-be-from-greece/?utm\\_term=.c8907323ebdc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/21/must-greek-yogurt-be-from-greece/?utm_term=.c8907323ebdc) (reporting lawsuit against Chobani).

30. *In re: 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 201 F. Supp.3d 1375 (J.P.M.L. 2016).

31. *See, e.g.,* Mladenov v. Whole Foods Inc., 124 F. Supp.3d 360 (D. N.J. 2015) (granting motion to dismiss because plaintiffs provided insufficient detail to support fraud claims and did not show an ascertainable loss).

32. *See infra* note 101 to 104, 167 and accompanying text.

33. A review of Missouri court dockets provides many examples of small businesses embroiled in this litigation. *See, e.g.,* Complaint, Hensel v. Andrea’s Fine Foods, Inc., No. 1722-CC01421 (Cir. Ct.,

### B. Top Jurisdictions for Food Class Actions

As food litigation began to surge, the Northern District of California earned a reputation as the nation's "food court."<sup>34</sup> By 2014, even judges within the Northern District acknowledged "the flood" of such cases inundating the court.<sup>35</sup> Our study of court dockets revealed that California's federal courts remain a hub of food litigation, hosting about one-third of food class actions in the federal system, even as lawyers increasingly bring cases in other areas of the country. New York has emerged as a rival to California as a frequent jurisdiction for filing food class actions. Federal courts in New York now host over 20% of the nation's food litigation.<sup>36</sup> Other top jurisdictions include federal courts in Florida, particularly the Southern District, and Illinois, especially the Northern District.<sup>37</sup>

Taken together, U.S. district courts in California, New York, Florida, and Illinois host more than three quarters of the food class action lawsuits in the federal court system.<sup>38</sup> There are also a significant number of food class actions pending in federal courts in Missouri, Pennsylvania, and New Jersey.<sup>39</sup> Together, federal courts in these seven states account for about 90% of the federal total.<sup>40</sup> No other federal district court appears to have more than a handful of active class actions targeting food and beverage marketing practices.<sup>41</sup>

Class action law firms may choose to file in these jurisdictions due to a combination of factors, such as a state consumer protection law viewed as friendly to plaintiffs because of relaxed standards for liability, statutory

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City of St. Louis, Mo., filed May 26, 2017); Complaint, George v. Think.Eat.Live.Foods, LLC, No. 1722-CC01417 (Cir. Ct., City of St. Louis, Mo., filed May 26, 2017); Complaint, Dougherty v. Wow Baking Company LLC, No. 1722-CC00619 (Cir. Ct., City of St. Louis, Mo., filed Feb. 27, 2017); Complaint, Row v. Ever Better Eating Inc., No. 1722-CC00351 (Cir. Ct. City of St. Louis, Mo., filed Jan. 27, 2017); Complaint, Harmon v. Cuddletime Inc., No. 1622-CC-11322 (d/b/a Laura's Wholesome Junk Food) (Cir. Ct., City of St. Louis, Mo., filed Nov. 16, 2016); Complaint, Allen v. Taos Mountain Energy Foods LLC, No. 1622-CC11308 (Cir. Ct., City of St. Louis, Mo., filed Nov. 16, 2016); Complaint, Allen v. EN-R-G Foods LLC, No. 1622-CC11306 (Cir. Ct., City of St. Louis, Mo., filed Nov. 16, 2016); Complaint, Thorton v. Red Mill Farms LLC, No. 1622-CC11274 (Cir. Ct., City of St. Louis, Mo., filed Nov. 13, 2016).

34. See Nicole E. Negowetti, *Defining Natural Foods: The Search for a Natural Law*, 26 REGENT U. L. REV. 329, 333 (2014).

35. Jones v. ConAgra Foods, Inc., No. C 12-01633 CRB, 2014 WL 2702726, at \*1 (N.D. Cal. June 13, 2014).

36. See Food Court, *supra* note 15, at 8. The Eastern District of New York has experienced a surge of lawsuits targeting food products. The Southern District of New York is not far behind. See *id.*

37. See *id.*

38. See *id.*

39. See *id.* at 8-9.

40. See *id.*

41. See *id.* at 10.

or treble damages, mandatory attorney's fee awards, or lengthy statutes of limitations.<sup>42</sup> Plaintiffs' attorneys may perceive a district's judges as disfavoring motions to dismiss or prone to certify class actions. Lawyers likely also file in these states because of their large populations, from which they can draw larger classes and settlements. These districts are often home to one or more plaintiffs' law firms that are members of the "food bar."<sup>43</sup>

The Class Action Fairness Act (CAFA) results in the transfer of many multistate class actions filed in state courts to the federal judiciary. Approximately 130 food and beverage marketing class action lawsuits in the federal courts have been consolidated for pre-trial purposes in multidistrict litigation (MDL).<sup>44</sup> There are also many class actions pending in state courts. These lawsuits may attempt to avoid federal jurisdiction by seeking less than \$75,000 per plaintiff and no more than \$5 million in the aggregate, which are the amounts necessary to trigger federal jurisdiction under CAFA. For example, the City of St. Louis Circuit Court in Missouri, which has a reputation for "fast trials, favorable rulings, and big awards,"<sup>45</sup> has become a hot spot for food class actions.<sup>46</sup> The District of Columbia, which uniquely authorizes individuals and advocacy groups to sue as private attorneys general with fulfilling class certification requirements,<sup>47</sup> is also increasingly hosting food marketing litigation.<sup>48</sup>

### C. Frequent Filers and Class Representatives

A relatively small cadre of lawyers generates most of the class action lawsuits targeting food and beverage marketing.<sup>49</sup> Some law firms

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42. *See id.* at 9-10.

43. *See id.* at 13.

44. *See* U.S. Judicial Panel on Multidistrict Litigation, MDL Statistics Report - Distribution of Pending MDL Dockets by District (Jan. 16, 2018) (including lawsuits targeting 5-Hour Energy, Coca-Cola, Pom Wonderful, McCormick & Company, Simply Orange and Tropicana orange juice, KIND LLC, and companies that make and sell grated parmesan cheese).

45. Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, BLOOMBERG BUSINESSWEEK, Sept. 29, 2016, <https://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis>.

46. *See Food Court*, *supra* note 15, at 10; *see also* JOANNA SHEPHERD, THE EXPANDING MISSOURI MERCHANDIZING PRACTICES ACT (Am. Tort Reform Found. 2015) (finding that the Missouri Merchandising Practices Act (MMPA), under which these suits are brought, "invites potential abuses through socially valueless lawsuits and unnecessary consumer litigation").

47. D.C. CODE ANN. § 28-3905(k)(1).

48. *See* Cogan Schneier, *Is Washington, DC, the Nation's Next 'Food Court'?*, NAT'L L.J., July 20, 2017.

49. *See Food Court*, *supra* note 15, at 13 (listing thirteen law firms that are among the most frequent filers, the primary jurisdiction in which they file, and their common claims and targets).

specialize in bringing a particular type of claim. For example, an attorney in St. Louis has alleged products ranging from candy to bread and cupcake mixes do not qualify as natural,<sup>50</sup> and combed the shelves for products that list “evaporated cane juice.”<sup>51</sup> Other law firms specialize in bringing slack fill claims. For instance, on a single day, a firm filed nine class action lawsuits alleging that boxes of various brands of fruit snacks, Reese’s Pieces, Skittles, Junior Mints, Bit-O-Honey candy, and pancake and waffle mixes are under-filled,<sup>52</sup> and it continues to file more of these claims.<sup>53</sup> Although these lawsuits are brought against different businesses and involve different products, it is common for a substantial portion of each complaint to be identical.

Cut-and-paste lawsuits have occasionally drawn scrutiny. In a motion to dismiss a class action alleging that boxes of Sour Patch Kids Watermelon candy were under-filled, Mondelez International indicated that the lawsuit was, at the time, the latest of fourteen cut-and-paste slack

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50. A sample of “all natural” lawsuits filed by the Armstrong Law Firm LLC in the St. Louis City Circuit Court includes *Garner v. Bahlsen N. Am. Inc.*, No. 1622-CC11327 (Cir. Ct. St. Louis, filed Nov. 17, 2016); *Kreider v. Dover Foods, Inc.*, No. 1622-CC10011 (Cir. Ct. St. Louis, filed Sept. 1, 2016); *Johnson v. Richardson Brands Co.*, No. 1622-CC00271 (Cir. Ct. St. Louis, filed Feb. 5, 2016); *Thornton v. Katz Gluten Free Bake Shoppe Inc.*, No. 1522-CC10713 (Cir. Ct. St. Louis, filed Sept. 25, 2015); *Zieroff v. New Hope Mills Mnf’g*, No. 1522-CC10185 (Cir. Ct. St. Louis, filed July 22, 2015); *Row v. Conifer Specialties Inc.*, No. 1522-CC09720 (Cir. Ct. St. Louis, filed May 21, 2015); *Teachout v. Am. Naturals Co. LLC*, No. 1522-CC00505, at 2 (Cir. Ct. St. Louis, filed Mar. 4, 2015); *Murphy v. Stonewall Kitchen, LLC*, No. 1522-CC00481 (Cir. Ct. St. Louis, filed Feb. 27, 2015).

51. A sample of ECF claims filed by the Armstrong Law Firm in the St. Louis City Circuit Court includes *Grindel v. Mondelez Int’l Inc.*, No. 1622-CC11518 (Cir. Ct. St. Louis, Mo. filed Nov. 16, 2016); *Harmon v. Cuddletime Inc.*, No. 1622-CC-11322 (Cir. Ct. St. Louis, Mo. filed Nov. 16, 2016); *Callahan v. Garden of Light Inc.*, No. 1622-CC11313 (Cir. Ct. St. Louis, Mo. filed Nov. 15, 2016); *Allen v. Taos Mountain Energy Foods LLC*, No. 1622-CC11308 (Cir. Ct. St. Louis, Mo. filed Nov. 15, 2016); *Collier v. Love Grown Foods LLC*, No. 1622-CC11307 (Cir. Ct. St. Louis, Mo. filed Nov. 15, 2016); *Allen v. EN-R-G Foods LLC*, No. 1622-CC11306 (Cir. Ct. St. Louis, Mo. filed Nov. 15, 2016); *Bryant v. BB Holdings Inc.*, No. 1622-CC11280 (Cir. Ct. St. Louis, Mo. filed Nov. 14, 2016); *Blair v. Eco Heaven LLC*, No. 1622-CC11279 (Cir. Ct. St. Louis filed Nov. 14, 2016); *Johnson v. Dave’s Gourmet Inc.*, No. 1622-CC11276 (Cir. Ct. St. Louis, Mo. filed Nov. 14, 2016); *Blair v. Inventure Foods Inc.*, No. 1622-CC11275 (Cir. Ct. St. Louis, Mo. filed Nov. 14, 2016); *Thornton v. Red Mill Farms LLC*, No. 1622-CC11274 (Cir. Ct. St. Louis, Mo. filed Nov. 14, 2016); *McNamee v. Edward & Sons Trading Co.*, No. 1622-CC11261 (Cir. Ct. St. Louis, Mo. filed Nov. 10, 2016).

52. Steelman, Gaunt & Horsefield filed the following slack-fill complaints: *Trentham v. Continental Mills, Inc.*, No. 16PH-CV01563 (Mo. Cir. Ct., Phelps County, filed Oct. 25, 2016); *Skornia v. General Mills, Inc.*, No. 16AC-CC00452 (Mo. Cir. Ct., Cole County, filed Oct. 25, 2016); *Bratton v. The Hershey Co.*, No. 16AC-CC00451 (Mo. Cir. Ct., Cole County, filed Oct. 25, 2016); *Melton v. Kellogg Co.*, No. 16PH-CV01564 (Mo. Cir. Ct., Phelps County, filed Oct. 25, 2016); *Grisham v. The Kroger Co.*, No. 16PH-CV01562 (Mo. Cir. Ct., Phelps County, filed Oct. 25, 2016); *Skornia v. Mars, Inc.*, No. 16AC-CC00453 (Mo. Cir. Ct., Cole County, filed Oct. 25, 2016); *White v. Mott’s LLP*, No. 16PH-CV01566 (Mo. Cir. Ct., Phelps County, filed Oct. 25, 2016); *Hawkins v. Pearson Candy Co.*, No. 16PH-CV01565 (Mo. Cir. Ct., Phelps County filed Oct. 25, 2016); *Bratton v. Tootsie Roll Indus., Inc.*, No. 16AC-CC00454, Mo. Cir. Ct., Cole County, filed Oct. 25, 2016).

53. See, e.g., Second Amended Complaint, *Bratton v. The Hershey Co.*, No. 2:16-cv-4322 (W.D. Mo. filed Feb. 15, 2017); Complaint, *Hawkins v. Nestle USA, Inc.*, No. 16PH-CV01725 (Mo. Cir. Ct., Phelps County, filed Nov. 18, 2016).



fill class actions filed by Lee Litigation Group, PLLC.<sup>54</sup> In fact, the complaint targeting Sour Patch Kids contained references to “chewing gum” and “sugar-free gum,”<sup>55</sup> remnants from similar lawsuits filed by the firm. Some firms defending manufacturers against actions “employing a band of repeat plaintiffs and recycled complaints” call them “strike suits,” lawsuits intended to force a quick settlement on the theory that defendants will make the rational decision that the cost of settlement is less than the legal costs of a full defense.<sup>56</sup>

In some instances, attorneys who bring food class actions draft the complaints and only later find an individual to serve as a class representative.<sup>57</sup> As a candid veteran class action lawyer observed, “The least likely way for a case to start is for a consumer to contact us out of the blue and say ‘Hey we’ve been ripped off.’”<sup>58</sup> In some food and beverage marketing class actions, the named plaintiffs are employees, family members, or have some other close tie to the network of lawyers and law firms that file the complaints.<sup>59</sup> Evidence indicates that some class action lawyers help each other identify plaintiffs and that some lawyers even develop lists of potential cases, waiting until they find a willing person in the right jurisdiction to file a lawsuit.<sup>60</sup> In fact, some law firms use the same individuals repeatedly as class representatives in consumer lawsuits against different companies and products. Attorneys who follow food class action litigation have become familiar with names

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54. See Memorandum of Law in Support of Defendants’ Motion to Dismiss Class Action Complaint, at 1, *Izquierdo v. Mondelez Int’l, Inc.*, No. 1:16-cv-04697 (E.D.N.Y. filed Aug. 29, 2016).

55. See Class Action Complaint at ¶¶ 29, 52, *Izquierdo v. Mondelez Int’l, Inc.*, No. 1:16-cv-04697 (E.D.N.Y. filed June 20, 2016).

56. See Mars Incorporated’s Memorandum of Law in Support of its Motion to Dismiss, *Godsonov v. Does 1-100*, at 1-4, No. 1:16-cv-01745 (E.D.N.Y. filed June 3, 2016) (documenting use of repeat plaintiffs and nearly identical complaints to bring slack fill actions filed in New York’s federal courts). Ironically, this lawsuit alleging M&M’s Mini tubes contain extra space appears to have privately settled six months after it was filed. See *Godsonov v. Does 1-100*, No. 1:16-cv-01745 (E.D.N.Y. dismissed Oct. 27, 2016).

57. See Daniel Fisher, *Collapse of 5-Hour Energy Case Reveals the Secrets of Class Action Lawyers*, FORBES, Nov. 17, 2015, <https://www.forbes.com/sites/danielfisher/2015/11/17/collapse-of-5-hour-energy-case-reveals-secrets/>.

58. *Id.* (quoting Kevin Roddy).

59. See *id.* (discussing how the class representative in 5-Hour Energy litigation, Vi Nguyen, was recruited to serve as a plaintiff by her cousin, who worked for the Texas lawyer who filed the class action).

60. *Id.* (quoting correspondence by lawyers in Rubenstein’s firm revealed in the 5-Hour Energy lawsuit).

such as Skye Astiana,<sup>61</sup> Troy Backus,<sup>62</sup> Kimberly S. Sethavanish,<sup>63</sup> Mary Swearingen,<sup>64</sup> and Victor Guttman in California;<sup>65</sup> Mario Aliano in Illinois;<sup>66</sup> Jason Allen,<sup>67</sup> Erika Thornton,<sup>68</sup> Lois Bryant,<sup>69</sup> Julie George,<sup>70</sup> and Tonya Kelly<sup>71</sup> in Missouri; and Michelle Hu<sup>72</sup> and Adam and Barry Stoltz in New York.<sup>73</sup> In the District of Columbia, over just three years, Gloria Hackman has filed nineteen private attorney general claims and

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61. *See, e.g.*, *Astiana v. Ben & Jerry's Homemade, Inc.*, No. 4:10-cv-04387 (N.D. Cal. filed Sept. 29, 2010); *Astiana v. Dreyer's Grand Ice Cream, Inc.*, No. 3:11-cv-02910 (N.D. Cal. filed June 14, 2011); *Astiana v. The Hain Celestial Group, Inc.*, No. 4:11-cv-06342 (N.D. Cal. filed Dec. 15, 2011).

62. *See, e.g.*, *Backus v. H.J. Heinz*, No. 3:15-cv-02738 (N.D. Cal. filed June 18, 2015); *Backus v. Biscamerica Corp.*, No. 4:16-cv-3916 (N.D. Cal. filed July 12, 2016); *Backus v. ConAgra Inc.*, No. 3:16-cv-454 (N.D. Cal. filed Jan. 26, 2016); *Backus v. General Mills Inc.*, No. 3:15-cv-1964 (N.D. Cal. filed Apr. 30, 2015); *Backus v. Nestle USA Inc.*, No. 3:15-cv-1963 (N.D. Cal. filed Apr. 30, 2015).

63. *See, e.g.*, *Sethavanish v. Kashi Co.*, No. 4:11-cv-04453 (N.D. Cal. filed Sept. 7, 2011); *Sethavanish v. Balance Bar Co.*, No. 4:11-cv-04547 (N.D. Cal. filed Sept. 13, 2011).

64. *See, e.g.*, *Swearingen v. Santa Cruz Natural Inc.*, No. 3:13-cv-04291 (N.D. Cal. filed Sept. 16, 2013); *Swearingen v. Late July Snacks, LLC*, No. 3:13-cv-04324 (N.D. Cal. filed Sept. 18, 2013); *Swearingen v. Yucatan Foods, L.P.*, No. 3:13-cv-03544 (N.D. Cal. filed July 31, 2013); *Swearingen v. Healthy Beverage, LLC*, No. 3:13-cv-04385 (N.D. Cal. filed Sept. 20, 2013).

65. *See Guttman v. Nissin Foods (U.S.A.) Co.*, No. C 16-00567, 2015 WL 4881073, at \*1 (N.D. Cal. 2015) (observing plaintiff filed three prior lawsuits regarding artificial trans-fat and food labeling).

66. *See, e.g.*, *Aliano v. The Quaker Oats Co.*, No. 1:16-cv-3087 (N.D. Ill. filed Mar. 11, 2016); *Aliano v. WhistlePig LLC*, No. 1:14-cv-10148 (N.D. Ill. filed Dec. 18, 2014); *Aliano v. Mom Brands Co. LLC*, No. 2016CH03879 (Ill. Cir. Ct., Cook County filed Apr. 12, 2016).

67. *See, e.g.*, *Allen v. Jelly Belly Candy Co.*, No. 4:17-cv-00588 (E.D. Mo. filed Feb. 10, 2017); *Allen v. EN-R-G Holdings, Inc.*, No. 1622-CC11306 (Cir. Ct., City of St. Louis, Mo. filed Nov. 16, 2016); *Allen v. Taos Mountain Energy Foods, LLC*, No. 1622-CC11308 (Cir. Ct., City of St. Louis, Mo. filed Nov. 16, 2016).

68. *See, e.g.*, *Thornton v. Red Mill Farms LLC*, No. 1622-CC11274 (Cir. Ct., City of St. Louis, Mo. filed Nov. 14, 2016); *Thornton v. Pinnacle Foods Group LLC*, No. 4:16-cv-00158 (E.D. Mo. filed Feb. 5, 2016); *Thornton v. Katz Gluten Free Bake Shoppe Inc.*, No. 1522-CC10713 (Cir. Ct., City of St. Louis, Mo. filed Sept. 25, 2015); *Thornton v. YZ Enterprises, Inc.*, No. 1522-CC00482 (Cir. Ct., City of St. Louis, Mo. filed Feb. 27, 2015).

69. *See, e.g.*, *Bryant v. Just Born, Inc.*, No. 1622-CC11494 (Cir. Ct., City of St. Louis, Mo. filed Dec. 8, 2016); *Bryant v. BB Holdings Inc.*, No. 1622-CC11280 (Cir. Ct., City of St. Louis, Mo. filed Nov. 14, 2016); *Bryant v. Whole Foods Market Group Inc.*, No. 4:15-cv-01001 (E.D. Mo. filed June 25, 2015).

70. *See, e.g.*, *George v. Kellogg Co.*, No. 4:16-cv-01887 (E.D. Mo. filed Dec. 1, 2016) (removed from state court); *George v. Think.Eat.Live.Foods, LLC*, No. 1722-CC01417 (Cir. Ct., City of St. Louis, Mo. filed May 26, 2017); *George v. Smart Flour Foods LLC*, No. 1522-CC10486 (Cir. Ct., City of St. Louis, Mo. filed Aug. 28, 2015); *George v. Urban Accents, Inc.*, No. 1522-CC00479 (Cir. Ct., City of St. Louis, Mo. filed Feb. 27, 2015).

71. *See, e.g.*, *Kelly v. Cape Cod Potato Chip Co., Inc.*, No. 4:14-cv-00119 (W.D. Mo. filed Feb. 6, 2014) (removed from state court); *Kelly v. Cameron's Coffee & Distribution Co.*, No. 1816-CV00470 (Cir. Ct., Jackson County, Mo. filed Jan. 4, 2018); *Kelly v. Popchips Inc.*, No. 1316-CV11037 (Cir. Ct., Jackson County, Mo. filed Apr. 30, 2013).

72. *See, e.g.*, *Hu v. Herr Foods Inc.*, No. 1:16-cv-03313 (E.D.N.Y. filed June 20, 2016); *Hu v. Perfetti Van Melle USA Inc.*, No. 1:15-cv-03742 (E.D.N.Y. filed June 26, 2015); *Hu v. The Hershey Co.*, No. 1:15-cv-3741 (E.D.N.Y. filed June 26, 2015).

73. *See, e.g.*, *Stoltz v. ConAgra Foods, Inc.*, No. 1:14-cv-05546 (E.D.N.Y. filed Sept. 22, 2014); *Stoltz v. Henkel Corp.*, No. 1:14-cv-05547 (E.D.N.Y. filed Sept. 22, 2014); *Stoltz v. Chobani LLC*, No. 1:14-cv-03827 (E.D.N.Y. filed June 19, 2014); *Stoltz v. Fage Dairy Processing SA*, No. 1:14-cv-03826 (E.D.N.Y. filed June 19, 2014).

class action complaints alleging boxes of rice, couscous, quinoa, risotto, protein powder and bottles of Aspirin and flax seed oil pills are under-filled,<sup>74</sup> cheese is not 100% grated parmesan,<sup>75</sup> and honey and oatmeal are not “pure” or “100% natural” as advertised.<sup>76</sup>

## II. IN SEARCH OF THE REASONABLE SHOPPER

While class actions targeting the marketing of food and beverages may assert several theories of liability, their core allegation is typically that a product’s labeling, packaging, or advertising violates a state consumer protection law. Although the provisions of these laws vary, most broadly prohibit unfair or deceptive conduct, all provide a private right of action, and most allow for class actions.<sup>77</sup> A threshold question<sup>78</sup> under state unfair and deceptive trade practices acts is whether the product’s labeling, packaging, or other marketing is likely to deceive the public.<sup>79</sup> This objective standard requires more than the mere possibility that some gullible consumer might be misled by advertising or misunderstand a labeling term. Rather, the reasonable consumer standard requires a probability “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be

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74. Hackman v. Goya Food, Inc., No. 2018 CA 003559 B (D.C. Super. Ct. filed May 18, 2018); Hackman v. Lundberg Family Farms, No. 2018 CA 000793 B (D.C. Super. Ct. filed Jan. 31, 2018); Hackman v. Whole Foods Market Group Inc., No. 2018 CA 000450 B (D.C. Super. Ct. filed Jan. 19, 2018); Hackman v. United States Nutrition, Inc., No. 2017 CA 004213 B (D.C. Super. Ct. filed June 16, 2017); Hackman v. Mars, Inc., No. 2016 CA 008970 B (D.C. Super. Ct. filed Dec. 12, 2016); Hackman v. Quaker Oats Co., No. 2016 CA 008790 B (D.C. Super. Ct. filed Dec. 6, 2016); Hackman v. Golden Grain Co., No. 2016 CA 007962 (D.C. Super. Ct. filed Oct. 21, 2016); Hackman v. United States Nutrition, Inc., No. 2016 CA 000867 B (D.C. Super. Ct. filed Feb. 4, 2016); Hackman v. Bayer Corp., No. 2015 CA 009147 B (D.C. Super. Ct. filed Nov. 23, 2015); Hackman v. Nature’s Products, Inc., No. 2015 CA 009148 B (D.C. Super. Ct. filed Nov. 23, 2015).

75. Hackman v. Ahold USA, Inc., No. 2016 CA 005129 B (D.C. Super. Ct. filed July 14, 2016); Hackman v. Aldi, Inc., No. 2016 CA 004723 B (D.C. Super. Ct. filed June 28, 2016); Hackman v. Save-A-Lot, Ltd., No. 2016 CA 003174 B (D.C. Super. Ct. filed Apr. 27, 2016); Jain v. Ahold USA Inc., No. 2016 CA 002557 B (D.C. Super. Ct. filed Apr. 7, 2016) (Hackman co-plaintiff); Hackman v. Colonna Brothers Inc., No. 2016 CA 002404 B (D.C. Super. Ct. filed Mar. 31, 2016); Hackman v. Aldi, Inc., No. 2016 CA 002169 B (D.C. Super. Ct. filed Mar. 23, 2016); Hackman v. Walmart Stores Inc., No. 2016 CA 002170 B (D.C. Super. Ct. filed Mar. 23, 2016).

76. Hackman v. Gunter’s Honey, No. 2017 CA 000655 B (D.C. Super. Ct. filed Feb. 1, 2017); Hackman v. Ahold USA, Inc., No. 2017 CA 000656 B (D.C. Super. Ct. filed Feb. 1, 2017).

77. See generally Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 15-16 (2006). Iowa was the final state to authorize private enforcement of its Consumer Fraud Act in 2011. See H.F. 712 (Iowa 2011) (codified at IOWA CODE § 714.16).

78. Other initial hurdles for food and beverage class actions are whether the plaintiff alleges a sufficient injury to satisfy Article III standing, potential preemption of the claim by federal regulations, and the ability of the claim to satisfy class certification requirements.

79. See, e.g., *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (interpreting California law).

misled.”<sup>80</sup> Courts have found that it is a “rare situation” in which granting a motion to dismiss a deceptive labeling claim is appropriate.<sup>81</sup> The frequency at which these types of claims are filed and the increasingly far-fetched nature of the allegations, however, has made dismissal as a matter of law more common and warranted. This Article draws several principles from this developing case law that define the reasonable consumer (or the reasonable food shopper).

#### A. *A Reasonable Consumer Reads Words in Context*

Courts recognize that reasonable consumers do not read words on a label in isolation, but place them in context of the words surrounding them and the label as a whole.

For example, a court dismissed a claim alleging that Silk products labeled as “soymilk,” “almond milk,” and “coconut milk” violated the FDA’s “standard of identity for milk” by incorporating that term and could mislead consumers to believe the products came from a cow.<sup>82</sup> In response, the court found,

[I]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow . . . . Under the Plaintiffs’ logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.<sup>83</sup>

As the soymilk case shows, terms used on labels must be read in context. The word “orange” suggests the use of actual fruit when the product is “orange juice” or “mandarin oranges,” but a reasonable consumer would not have the same expectation of an orange lollipop.

This principle came into play in a consumer class action alleging that Pepsi, by naming its soda “diet,” misleads consumers to believe the beverage’s consumption would assist in weight loss.<sup>84</sup> In dismissing the claim, the court found that reasonable consumers understand that diet sodas are lower calorie versions of their regular counterparts and that “Diet Pepsi assists in weight management *relative to* regular Pepsi.”<sup>85</sup>

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80. See *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 508 (Cal. Ct. App. 2003).

81. See *Williams*, 552 F.3d at 939.

82. *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at \*1 (N.D. Cal. Dec. 10, 2013).

83. *Id.* at \*4.

84. See *Manuel v. Pepsi-Cola Co.*, No. 17-cv-7955, 2018 WL 2269247, at \*8 (S.D.N.Y. May 17, 2018).

85. *Id.* (emphasis in original).

“[C]ontext is crucial,” the court found, and whether a reasonable consumer would be misled must be evaluated based on the entire label.<sup>86</sup> While “diet” may indicate a weight-loss product when placed alongside “pill” or products found in a pharmaceutical aisle, the word does not convey this meaning when it qualifies “soda.”<sup>87</sup>

*B. A Reasonable Consumer Would Not Be Misled  
When a Plaintiff Implausibly Defines or Interprets a Term*

Courts apply the reasonable consumer test to dismiss claims where a plaintiff defines or interprets an allegedly misleading term in a manner that is simply not plausible or where the plaintiff fails to offer an objective or plausible definition of that term. One could call this the “Crunch Berries defense.”<sup>88</sup>

In some instances, a plaintiff’s alleged understanding of a product’s marketing is simply contrary to nature or reality. For instance, courts have dismissed claims alleging that a product’s label might lead consumers to believe it was wholly unprocessed. A classic case is one in which the plaintiff alleged she purchased “Sugar in the Raw” because the label led her to believe the sweetener was unprocessed and unrefined, literally “raw.”<sup>89</sup> The court found, however, that no reasonable consumer would be deceived because the product’s packaging described the product as turbinado sugar, which is commonly marketed as raw sugar.<sup>90</sup> More recently, a class action targeted Kind’s Vanilla Blueberry Clusters, which were labeled “no refined sugars.”<sup>91</sup> Listed among the ingredients were evaporated cane juice and molasses, which do not go through the final refining process of white sugar. There, the plaintiff interpreted “unrefined” to mean “naturally occurring.”<sup>92</sup> This definition, the court found, was not plausible. The court included in its opinion photographs of sugar cane, which “in its natural state is a grass that contains joined stalks resembling bamboo . . . surrounded by bark.”<sup>93</sup> Thus, “a reasonable consumer would know that all sugar cane-derived sweeteners suitable for

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86. *Id.*

87. *Id.*

88. *Sugawara v. Pepsico, Inc.*, No. 08-cv-1335, 2009 WL 1439115 (E.D. Cal. May 21, 2009) (“[A] reasonable consumer would not be deceived into believing that the Product in the instant case contained a fruit that does not exist.”); *see also Werbel ex rel. v. Pepsico, Inc.*, C 09-04456 SBA, 2010 WL 2673860, at \*3 (N.D. Cal. July 2, 2010) (dismissing identical claim).

89. *Rooney v. Cumberland Packing Corp.*, No. 12-cv-0033-H DHB, 2012 WL 1512106, at \*4 (S.D. Cal. Apr. 16, 2012).

90. *See id.*

91. *Ibarrola v. Kind, LLC*, 83 F. Supp.3d 751, 754 (N.D. Ill. 2015).

92. *Id.*

93. *Id.* at 757.

human consumption must be at least partially refined.”<sup>94</sup>

Courts have also found some claims challenging whether a product was “non-GMO” as advertised were not plausible because of how plaintiffs alleged consumers would understand the phrase. These lawsuits did not allege that a product—such as canned corn—advertised as GMO-free was genetically modified. Rather, these claims alleged that products advertised as GMO-free or natural were derived from animals whose feed may have contained genetically-modified corn or soy. For example, burrito-maker Chipotle faced such a claim after its advertising said “[w]hen it comes to our food, genetically modified ingredients don’t make the cut.”<sup>95</sup> There, the court rejected the plaintiff’s contention that “the reasonable consumer would interpret ‘non-GMO ingredients’ to mean meat and dairy ingredients produced from animals that never consumed any genetically modified substances.”<sup>96</sup> There was “no dispute that the meat and dairy ingredients used by Defendant are not themselves genetically engineered in any fashion.”<sup>97</sup>

Likewise, a court has found that reasonable consumers would not be misled to believe that crackers contain a significant amount of vegetables when a product is truthfully marketed as “made with real vegetables” and includes images of vegetables on the box.<sup>98</sup> “The fact remains that the product is a box of crackers, and a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables.”<sup>99</sup> Similarly, in a case in which the plaintiff purchased cookies labeled “made with real fruit” that contained, as the plaintiff described it, “mechanically processed fruit puree,” a court found it would be “ridiculous to say that consumers would expect snack food ‘made with real fruit’ to contain only ‘actual strawberries or raspberries,’ rather than these fruits in a form amenable to being squeezed inside a Newton.”<sup>100</sup>

Courts have applied this approach when assessing lawsuits challenging businesses that advertise spirits as “handmade” or “handcrafted,” finding that the complaints did not offer a “consistent, plausible explanation” of

94. *Id.* at 758.

95. *Gallagher v. Chipotle Mexican Grill*, No. 15-cv-03952, 2016 WL 454083, at \*1 (N.D. Cal. Feb. 5, 2016).

96. *Id.* at \*4.

97. *Id.*; *Reilly v. Chipotle Mexican Grill, Inc.*, No. 1:15-cv-23425 (S.D. Fla. Nov. 17, 2016) (Doc. 180) (granting summary judgment in case premised on same statements without opinion); *see also Podpeskar v. Dannon Co.*, No. 16-cv-8487, 2017 WL 6001845 (S.D.N.Y. Dec. 3, 2017) (dismissing claim as implausible when it alleged consumers were misled by yogurt labeled “natural” when cows that produced milk used for yogurt may have eaten feed containing genetically-modified corn).

98. *Red v. Kraft Foods, Inc.*, No. 10-cv-1028, 2012 WL 5504011, at \*3 (C.D. Cal. Oct. 25, 2012).

99. *Id.*

100. *Manchouck v. Mondelez Int’l Inc.*, No. 13-cv-2148, 2013 WL 5400285, at \*1-3 (N.D. Cal. Sept. 26, 2013), *aff’d*, 603 F. App’x 632 (9th Cir. 2015).

what consumers would understand that term to mean.<sup>101</sup> Most courts have dismissed such lawsuits, finding a reasonable consumer would not take such terms literally and would understand machinery played a role in the distilling process.<sup>102</sup> As U.S. District Judge Robert Hinkle of the Northern District of Florida found in a case targeting the marketing of Maker's Mark whiskey, "nobody could believe a bourbon marketed this widely at this volume is made entirely or predominantly by hand."<sup>103</sup> Obviously, the court observed, bourbon "cannot be grown in the wild," like coffee or orange juice.<sup>104</sup>

Courts have taken a similar approach in cases asserting that products were not "natural" as advertised. It is especially essential in natural cases that the plaintiffs offer a plausible definition of how a reasonable consumer would view the term because "natural" can convey different meanings in different contexts.<sup>105</sup> For example, in dismissing a claim in which the plaintiff defined natural as "produced or existing in nature," a court found that "the reasonable consumer is aware that Buitoni Pastas are not 'springing fully-formed from Ravioli trees and Tortellini bushes.'"<sup>106</sup> Similarly, in a case targeting potato chips, the court found a similar definition "not plausible because the Chips are processed foods, which of course do not exist or occur in nature."<sup>107</sup> "[N]o reasonable consumer could possibly believe that this definition could apply to the Chips since they are a product manufactured in mass."<sup>108</sup>

A court also dismissed a claim alleging that Nature Valley deceptively labeled granola bars "100% Natural Whole Grain Oats," when testing indicated trace amounts of an herbicide commonly sprayed on crops, glyphosate.<sup>109</sup> There, the court found it is implausible that reasonable

101. *Salters v. Beam Suntory Inc.*, No. 4:14-cv-00659, 2015 WL 2124939, at \*1 (N.D. Fla. May 1, 2015).

102. *See id.*; *see also Welk v. Beam Suntory Import Co.*, 124 F. Supp.3d 1039, 1044 (S.D. Cal. 2015) ("Machines, including stills and other equipment, have always been necessary to make bourbon."); *Nowrouzi v. Maker's Mark Distillery, Inc.*, No. 14-cv-2885, 2015 WL 4523551, at \*7 (S.D. Cal. July 27, 2015) ("This Court finds that 'handmade' cannot reasonably be interpreted as meaning literally by hand nor that a reasonable consumer would understand the term to mean no equipment or automated process was used to manufacture the whisky.").

103. *Salters*, 2015 WL 2124939, at \*1.

104. *Id.* at \*2.

105. *Pelayo v. Nestle USA, Inc.*, 989 F. Supp.2d 973, 979 (C.D. Cal. 2013) (citing 75 Fed. Reg. 63552-01). To date, both the FTC and FDA have declined to define the term. *Id.* The FDA opened a public comment period on how it might define "natural" in November 2015. *See* FDA Request for Comments re the "Use of the Term 'Natural' in the Labeling of Human Food Products," 21 C.F.R. 101 (2015). This period closed on February 10, 2016 with the public submitting 7,690 comments.

106. *Pelayo*, 989 F. Supp.2d at 978 (quoting opposition).

107. *Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp.3d 754, 760 (W.D. Mo. 2015) (internal citation and quotations omitted).

108. *Id.*

109. *See In re: General Mills Glyphosate Litig.*, No. 16-cv-2869, 2017 WL 2983877, at \*1 (D.

consumers would interpret this phrase to mean there is absolutely no trace of glyphosate, which would be a significantly higher standard than federal regulations demand for organic products.<sup>110</sup> “It would be nearly impossible to produce a processed food with no trace of any synthetic substance,” the court observed.<sup>111</sup>

Lawsuits alleging that coffee drinkers frequenting Starbucks received less than the amount they paid for suffered a similar fate. Two of these lawsuits alleged that consumers would be misled when the menu advertised drinks as containing a certain number of ounces, but consumers received less than this amount because of ice in the cup. Both were dismissed. U.S. District Court Judge Percy Anderson of the Central District of California dismissed one such claim with a stern rebuke: “If children have figured out that including ice in a cold beverage decreases the amount of liquid they will receive, the court has no difficulty concluding that a reasonable consumer would not be deceived into thinking that when they order an iced tea, that the drink they receive will include both ice and tea and that for a given size cup, some portion of the drink will be ice rather than whatever liquid beverage the consumer ordered.”<sup>112</sup> A federal court in Illinois reached the same conclusion.<sup>113</sup>

A lawsuit alleging that Starbucks under-fills its hot lattes purportedly to “save on the cost of milk,” was similarly dismissed.<sup>114</sup> As Judge Yvonne Gonzalez Rogers recognized, “just as a reasonable consumer would not be deceived into believing cold drinks contain the Promised Beverage Volume excluding ice, no reasonable consumer would be deceived into believing that Lattes which are made up of espresso, steamed milk, and *milk foam* contain the Promised Beverage Volume *excluding milk foam*.”<sup>115</sup>

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Minn. July 12, 2017).

110. *Id.* at \*6.

111. *Id.*

112. *Forouzes v. Starbucks Corp.*, No. 2:16-cv-3830, 2016 WL 4443203, at \*3 (C.D. Cal. Aug. 19, 2016), *aff’d*, 714 F. App’x 776, 777 (9th Cir. 2018) (“The statutory claims fail as a matter of law because no reasonable consumer would think (for example) that a 12-ounce “iced” drink, such as iced coffee or iced tea, contains 12 ounces of coffee or tea and no ice.”).

113. *See Galanis v. Starbucks Corp.*, No. 16-cv-4705, 2016 WL 6037962, at \*3 (N.D. Ill. Oct. 14, 2016).

114. *Strumlauf v. Starbucks Corp.*, No. 16-cv-01306, 2018 WL 306715, at \*2 (N.D. Cal. Jan. 5, 2018).

115. *Id.* at \*6 (emphasis in original).



*C. A Reasonable Consumer Would Not Be Misled by a Product's Marketing When Clear Text on the Package Would Resolve Any Potential Misunderstanding*

Some courts have dismissed claims where a plaintiff's assertion that reasonable consumers would be misled by a product's marketing is undermined by other aspects of the package or label.

The labeling of products may, for example, defeat claims that consumers were misled to believe that beer was imported when it was brewed in the United States. In one case, for example, Sapporo beer was advertised as "The Original Japanese Beer," but every can or bottle accurately indicated that it was brewed and bottled in Canada or Wisconsin for distribution by "Sapporo, U.S.A., New York NY."<sup>116</sup> A court found that "allusion to the company's historic roots in Japan [was] eclipsed by the accurate disclosure statement," which appeared in clear language in contrasting, visible font.<sup>117</sup> "[C]lear disclaimers inform the inquiry into whether a reasonable consumer would be misled by the defendant's conduct."<sup>118</sup> A federal court in California similarly dismissed a lawsuit alleging reasonable consumers would believe Red Stripe was made in Jamaica, when the labeling clearly indicated it was produced in Pennsylvania.<sup>119</sup>

Labeling can also undercut claims that a reasonable consumer would believe a package contains more of the product than is actually inside. For example, a plaintiff alleged that the packaging of travel-sized snack products, such as Mini Chips Ahoy, Mini Oreo, and Ritz Bitz, led him to think it would contain more cookies or crackers.<sup>120</sup> In dismissing the claim, the court recognized "it is not plausible that 'a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled' into thinking the container would be packed to the brim with snack" when the label accurately discloses the net weight of the product as well as the exact

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116. *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp.3d 386, 388 (E.D.N.Y. 2017).

117. *Id.* at 391.

118. *Id.* at 390.

119. *See Dumas v. Diageo PLC*, No 15-cv-1681, 2016 WL 1367511, at \*3, 5 (S.D. Cal. Apr. 6, 2016) (finding reasonable consumer would not be misled to believe Red Stripe beer advertised as a "Jamaican Style Lager" and touting its historic Jamaican roots when labeling disclosed it was "Brewed & bottled by Red Stripe Beer Company Latrobe, PA"). *Cf. Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp.3d 1333, 1340-41 (S.D. Fla. 2014) (finding reasonable consumers could be misled to believe Beck's beer was brewed in Germany where disclaimer "Product of USA" on bottles was difficult to read and blocked by carton, and where notation "St. Louis, MO" did not indicate it is referred to the product was brewed).

120. *See Bush v. Mondelez Int'l, Inc.*, No. 16-cv-02460, 2016 WL 5886886, at \*1 (N.D. Cal. Oct. 7, 2016).

number of cookies per container.<sup>121</sup> “No reasonable consumer expects the overall size of the packaging to reflect precisely the quantity of product contained therein,” particularly where the packaging indicated the precise number of cookies or crackers inside.<sup>122</sup>

*D. When a Statement or Image on a Product’s Packaging Leaves Ambiguity as to its Content, a Reasonable Consumer Would Read the Ingredient List*

Along similar lines, courts have held that where a product’s marketing leaves some ambiguity as to its ingredients, reasonable consumers would read the label.

The U.S. District Court for the Northern District of Illinois applied this principle to dismiss all of the actions in the federal MDL alleging that cheese is deceptively labeled “100% Grated Parmesan” when it contains cellulose, which keeps the cheese from clumping together in the package.<sup>123</sup> Each of the products targeted in the lawsuits fully disclosed the presence of cellulose, as well as its purpose, in the ingredient list.<sup>124</sup> While the claims were brought under the consumer protection laws of several different states, the court overseeing the MDL found that “all share a common requirement: to state a claim, a plaintiff must allege conduct that plausibly could deceive a reasonable consumer.”<sup>125</sup> The rule articulated by the court is one that other courts might carefully consider in evaluating food marketing class actions:

[W]hile a reasonable consumer, lulled into a false sense of security by an unavoidable interpretation of an allegedly deceptive statement, may rely upon it without further investigation, consumers who interpret ambiguous statements in an unnatural or debatable manner do so unreasonably if an ingredient label would set them straight.<sup>126</sup>

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121. *See id.* at \*3 (quoting complaint); *see also* *Fermin v. Pfizer, Inc.*, 15 F.Supp.3d 209, 212 (E.D.N.Y. 2016) (in context of Advil, holding “it is not probable or even possible that Pfizer’s packaging could have misled a reasonable consumer” when the container displayed the total pill count and finding the claim “does not pass the proverbial laugh test”); *Hackman v. Nature’s Prods., Inc.*, No. 2015 CA 009148 B, at 4 (D.C. Super. Ct. Apr. 11, 2016) (unreported) (granting motion to dismiss, finding “no reasonable, or even an unsophisticated consumer, would reasonably believe that Nature Made’s bottle of 1000 milligrams flax oil pills would have more pills in the bottle than the label states because of the size of the bottle”).

122. *Bush*, 2016 WL 5886886, at \*3.

123. *See In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 275 F.Supp.3d 910 (N.D. Ill. 2017).

124. *Id.* at 915 (examining images on each label and ingredient list).

125. *Id.* at 920 (citing cases).

126. *Id.* at 922 (internal citations omitted).

The court found that the statement “100% Grated Parmesan” was ambiguous. It could mean the product is 100% cheese and nothing else, 100% of the cheese is Parmesan cheese, or the cheese is 100% grated.<sup>127</sup> The court found that reasonable consumers “would know exactly where to look to investigate—the ingredients list,” a “quick skim” of which would provide an answer.<sup>128</sup>

This principle has also come into play in lawsuits alleging that images of fruits or vegetables on a package may mislead consumers to think the product contains those actual fruits or vegetables, rather than indicating the flavor of the product, or that consumers might believe the product has a substantial amount of fruit and vegetable content when it actually contains a small amount. For example, lawsuits have alleged that images on Gerber’s “Puffs” may lead shoppers to assume the toddler food included fruits and vegetables. The product, however, was explicitly labeled a “cereal snack,” did not include any fruits or vegetables on the ingredient list, and was described as “made with whole grains” and “specifically designed to dissolve quickly.”<sup>129</sup> Courts dismissed two such cases on the basis that FDA regulations permit manufacturers to use the name and image of fruits or vegetables on a product’s packaging to characterize its flavor, even if the product did not contain fruit or vegetables, preempted the claims.<sup>130</sup> While not ruling on the issue, the Southern District of Florida also expressed “serious doubts” about the plausibility of the claim.<sup>131</sup> Rather than rely on images on packages, “to understand what they are purchasing, reasonable consumers should—well, read the label.”<sup>132</sup>

A similar class action targeted another toddler food, Plum Organics Mighty 4 puree pouches. There, a court applied the reasonable consumer standard to dismiss the claim as implausible.<sup>133</sup> Unlike the Puffs suit, Plum Organics’ pouches contained the fruits and vegetables pictured on its packages. Nevertheless, the plaintiff claimed that the package misled consumers by showing ingredients such as pumpkin and pomegranates

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127. *Id.* at 923.

128. *Id.* at 924. The court also found the plaintiffs’ “nothing-but-cheese” reading the weakest of the three interpretations since reasonable consumers would expect packaged, non-refrigerated cheese to include something other than cheese. *Id.* at 923.

129. *Savalli v. Gerber Prods. Co.*, No. 15-cv-61554, 2016 WL 5390223, at \*2 (S.D. Fla. Sept. 20, 2016).

130. *See Savalli*, 2016 WL 5390223, at \*1; *Henry v. Gerber Prods. Co.*, No. 15-cv-02201, 2016 WL 1589900 (D. Or. Apr. 18, 2016).

131. *Savalli*, 2016 WL 5390223, at \*1.

132. *Id.*

133. *Workman v. Plum Inc.*, 141 F. Supp.3d 1032, 1035 (N.D. Cal. 2015).

when the product was primarily apple, pear, or banana puree.<sup>134</sup> No reasonable consumer, the court found, would assume the size of ingredients pictured on the packaging correlates to their predominance in the blend of ingredients.<sup>135</sup> “Any potential ambiguity could be resolved by reading the back panel of the products, which listed all ingredients in order of predominance, as required by the FDA.”<sup>136</sup>

Text on the package can resolve any potential confusion arising from an image on a product. For instance, two consumers who bought Optimum Cinnamon Blueberry cereal alleged that because the box had a large photo of a bowl of cereal including fresh strawberries, they believed the product included dried strawberries.<sup>137</sup> The court held that no reasonable consumer would be deceived in this way because (1) the name of the cereal referred only to blueberries; (2) the packaging described the cereal as containing “wild blueberries and cinnamon;” (3) while in small font, the front of the package stated “strawberries shown as a serving suggestion,” and (4) the ingredient list would confirm these representations.<sup>138</sup> Given these facts, the court found it no more reasonable that a consumer would think the cereal included strawberries than that it would come with milk, a bowl and a spoon, as also shown in the photo.<sup>139</sup>

*E. A Reasonable Consumer Would Not Buy a Product Simply Because an Aspect of Its Labeling Does Not Conform to FDA Regulations or Guidance*

Some food marketing claims are primarily rooted in allegations that a product is misbranded under FDA regulations, commits some other technical regulatory violation, or runs afoul of nonbinding agency guidance. Some courts “will not presume that a reasonable person would not have purchased the products at issue had the person known of the alleged mislabeling.”<sup>140</sup>

For instance, as discussed earlier, consumer class actions have claimed that soy milk products were deceptively marketed because they did not satisfy the FDA’s standardized definition of “milk,” which is “the lacteal secretion, practically free from colostrum, obtained by the complete

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134. *Id.* at 1034.

135. *Id.* at 1036.

136. *Id.* at 1035.

137. *See Shaker v. Nature’s Path Foods, Inc.*, No. 12-cv-1138, 2013 WL 6729802 (C.D. Cal. 2013).

138. *See id.* at \*4-5.

139. *Id.* at \*5.

140. *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333, 2013 WL 5513711, at \*6 (N.D. Cal. 2013).

milking of one or more healthy cows.”<sup>141</sup> The FDA has also sent warning letters advising companies against using the term “soy milk.”<sup>142</sup> Nevertheless, a court recognized that the term “soy milk” is so common and well established that a reasonable consumer could not be misled to believe it was cow’s milk and any confusion would be resolved by labeling on the product indicating it was an “alternative to dairy milk” and “dairy free.”<sup>143</sup> Similarly, even if representing Hershey’s Special Dark Kisses as a “natural source of flavanol antioxidants” is inconsistent with FDA regulations, reasonable consumers are not likely to be misled that candy is a health food.<sup>144</sup> “Not every regulatory violation amounts to an act of consumer fraud.”<sup>145</sup>

The surge of lawsuits alleging product labels that list “evaporated cane juice” as an ingredient mislead consumers into believing a product does not contain sugar presents a similar situation. While FDA guidance recommends that food makers use “cane sugar” or simply “sugar,” on the label,<sup>146</sup> a reasonable consumer would not be misled by use of evaporated cane juice in the ingredient list to believe the product is free of sugar since the same label also explicitly states the product’s total grams of sugar. Given this disclosure, it cannot be presumed that a reasonable consumer would have decided not to purchase the product had the ingredient list used the FDA’s recommended term.<sup>147</sup>

#### *F. A Reasonable Consumer Is Not Misled by Common, Understood Packaging*

Outside the context of food litigation, the Ninth Circuit has ruled that when a product uses a common form of packaging, a reasonable consumer is not likely to be misled.<sup>148</sup> In *Ebner v. Fresh*, the court ruled that consumers would understand that a portion of lip balm would remain in the tube. Such packaging was “commonplace” in the cosmetics market and any “misleading impression” about the amount of product could be

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141. 21 C.F.R. § 131.110 (2017).

142. *Gitson*, 2013 WL 55133711, at \*7.

143. *Id.*

144. *Khasin v. The Hershey Co.*, No. 12-cv-1862, 2015 WL 13307405, at \*4 (N.D. Cal. Mar. 31, 2015).

145. *Id.* at \*5 (quoting *Mason v. Coca-Cola Co.*, 774 F. Supp. 2d 699, 705 n.4 (D. N.J. 2011)).

146. FDA, *Ingredients Declared as Evaporated Cane Juice: Guidance for Industry* (May 2016), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM502679.pdf>. The guidance also suggests use of a descriptor before the word sugar, such as “cane sugar,” is not misleading. *Id.* at 5.

147. *See Gitson*, 2013 WL 55133711, at \*8.

148. *Ebner v. Fresh*, 838 F.3d 958, 965-66 (9th Cir. 2016).

resolved by simply by using his or her eyes.<sup>149</sup> This appellate decision provides a tool to dismiss slack fill claims for district courts in California, which experience the most food class actions. Some courts have relied on *Ebner* to do so.<sup>150</sup> When children understand that requesting “no ice” will result in more of a beverage and have been taught to smuggle candy into movies theaters, it raises the question of whether *Ebner* demands dismissal under the reasonable consumer standard. In addition, when a consumer regularly purchases a product, as one plaintiff acknowledged before a court dismissed his claim, he cannot reasonably “expect the box to be miraculously filled the next time he [buys] it.”<sup>151</sup>

*G. A Reasonable Consumer Would Not Be Misled by Statements That Are Wholly Truthful and Accurate Absent Some Additional Factor*

A principle that influences courts, even if not dispositive, is whether the statements or marketing methods alleged to mislead a reasonable consumer are truthful and accurate. For example, pending lawsuits attack manufacturers of breakfast cereals that truthfully emphasize that their products contain whole grain as misleading consumers to believe the cereals are healthy, despite the product’s disclosed (and obvious) sugar content.

Courts have found that reasonable consumers would not be misled absent some potentially misleading image or an affirmative misrepresentation. This comes into play in cases including slack fill,<sup>152</sup> images of fruit actually contained in the product,<sup>153</sup> the origin of products,<sup>154</sup> among others. For instance, a court found the true statement

149. *Id.* (“A rational consumer would not simply assume that the tube contains no further product when he or she can plainly see” the amount left in the tube).

150. *See, e.g.,* *Bush v. Mondelez Int’l, Inc.*, No. 16-cv-02460, 2016 WL 5886886, at \*3 (N.D. Cal. Oct. 7, 2016) (citing *Ebner*, 838 F.3d at 965-66) (recognizing opaque containers are common in the snack market, as is some empty space at the top).

151. *Bratton v. Hershey Co.*, No. 2:16-CV-4322-C-NKL, 2018 WL 934899, at \*1 (W.D. Mo. Feb. 16, 2018) (granting summary judgment).

152. *See, e.g.,* *Bush*, 2016 WL 5886886, at \*3 (finding nothing on the label would lead a reasonable consumer to believe there was more snack food in the container than indicated on the product’s accurately stated weight label and nutrition facts).

153. *See Workman*, 141 F. Supp.3d at 1035-36 (observing that all the products at issue contained no affirmative misrepresentations, as the ingredients pictured on the product’s packaging are present in the product); *Red v. Kraft Foods, Inc.*, No. 10-cv-1028, 2012 WL 5504011, at \*4 (C.D. Cal. Oct. 25, 2012) (“[I]t strains credulity to imagine that a reasonable consumer will be deceived into thinking a box of crackers is healthful or contains huge amounts of vegetables simply because there are pictures of vegetables and the true phrase “Made with Real Vegetables” on the box.”).

154. *See* *Evan v. MillerCoors LLC*, No. 3:15-cv-1204, 2016 WL 3348818, at \*6 (S.D. Cal. June 16, 2016) (dismissing claim alleging consumers might be misled by internet advertising telling the history of Blue Moon beer to believe it is made by an independent craft brewery; plaintiffs could point to no false or misleading statement made to support their claims and the MillerCoors website prominently displayed

“No Sugar Added” on Mott’s 100% Apple Juice was insufficient to show that a reasonable consumer would believe the product was less-sugared and healthier than competing products without some additional evidence.<sup>155</sup> Similarly, a court found that reasonable consumers could not be misled to believe fruit snacks are healthful due to images of fruits or vegetables on the package and the statement “made with real fruit and vegetable juice.”<sup>156</sup> There, the products actually included each of the fruits and vegetables depicted on the package and the ingredient list clearly disclosed the sugar content.<sup>157</sup>

*H. A Plaintiff May Not Reflect a Reasonable Consumer When the Action Has the Hallmarks of Attorney-Generated Litigation*

As discussed earlier, food marketing class actions are filed by a relatively small group of law firms that prepare cut-and-paste complaints alleging the same claims but swapping in different products, and even repeatedly use the same individuals as the class representative. While courts have found that an individual’s status as a “professional plaintiff . . . should not itself undermine the ability to seek redress for injuries suffered,”<sup>158</sup> courts should closely consider whether such practices suggest that the plaintiff may not share the views of a reasonable consumer, but has brought the lawsuit because he, or his law firm, is on a mission to attack a particular marketing practice, packaging style, or ingredient. When it is apparent that a lawsuit bears all or many of the hallmarks of attorney-generated litigation or is driven by views about health policy rather than consumer deception, the court should subject it to increased scrutiny.

For example, some law firms have repeatedly filed lawsuits attacking products that include artificial trans fats, also known as partially hydrated oils, viewing such ingredients as inherently dangerous. The FDA, however, had historically permitted trans fats in foods and, in June 2015, initiated a three-year period for companies to phase them out.<sup>159</sup> Nevertheless, the Weston Firm, through serial plaintiffs such as Victor Guttman and Troy Backus, filed at least a dozen lawsuits targeting products with trans fats long before that period expired. In an August 2015

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Blue Moon products).

155. *Rahman v. Mott’s LLP*, No. 13-cv-3482, 2014 WL 5282106, at \*9 (N.D. Cal. Oct. 14, 2014) (granting summary judgment for defendant).

156. *See Chuang v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-01875, 2017 WL 4286577, at \*1 (C.D. Cal. Sept. 20, 2017).

157. *Id.* at \*5.

158. *See Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1056 (9th Cir. 2009).

159. *See* 80 Fed. Reg. 34,650 (June 18, 2015).

order, Judge William Alsup of the U.S. District Court for the Northern District of California found that “Guttman is not a typical consumer but is a self-appointed inspector general roving the aisles of our supermarkets.”<sup>160</sup> The court dismissed his lawsuit against a manufacturer of noodle products, recognizing that Guttman was certainly aware of the dangers of trans fats given his “five-year litigation campaign against artificial trans-fat and partially-hydrogenated oil.”<sup>161</sup>

### III. THE NOT-SO-REASONABLE CONSUMER MAY PREVAIL

While these rulings suggest that courts are trending toward dismissing laughable food and beverage marketing class actions, other courts, hearing similar cases, have denied dismissal of equally nonsensical lawsuits. Courts have certified classes in even some of the most outlandish of cases. Such actions have led to nuisance settlements and, when certified, thousands or millions of dollars in attorneys’ fees.<sup>162</sup> The potential for such a settlement continues to feed the litigation.

#### A. *The Reasonable Consumer Is for the Jury to Decide*

For most of the common-sense rulings discussed above, there is a similar claim in which a court has declined to rule that the marketing at issue would not mislead a reasonable consumer, allowing the lawsuit to move into discovery and, often, to settlement. Some courts deciding claims targeting whether a product is natural as advertised have rejected an “ingredients list” defense, finding that a reasonable consumer is not expected to read the label to correct a misunderstanding based on the front of a package.<sup>163</sup> Cases alleging dairy and meat products did not qualify as GMO-free or natural because of what cows eat have continued past the motion to dismiss stage.<sup>164</sup> As discussed earlier, a federal district court in

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160. *Guttman v. Nissin Foods (U.S.A.) Co.*, No. 3:15-cv-567, 2015 WL 4881073, at \*3 (N.D. Cal. Aug. 14, 2015).

161. *Id.*

162. A 2017 survey conducted by Carlton Fields, a legal consulting service, found that a business’s liability exposure in a “routine” class action is between \$2.1 million and \$19.6 million. *See* CARLTON FIELDS, THE 2017 CARLTON FIELDS CLASS ACTION SURVEY 16 (Mar. 2017). Given this risk, companies have a strong incentive to settle a class action that survives a motion to dismiss. Companies settle two-thirds of class actions with most settlements occurring before class certification. *See id.* at 25.

163. *See* *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 312-13 (Mo. Ct. App. 2016) (reversing dismissal of claim alleging cupcake mix was not natural because it contained sodium acid pyrophosphate, a common leavening agent disclosed on the ingredient list).

164. Order on Defendant’s Motion to Dismiss Complaint, *Reilly v. Chipotle Mexican Grill, Inc.*, No. 1:15-cv-23425 (S.D. Fla. Apr. 20, 2016) (denying motion to dismiss), *appeal pending*, No. 16-17461 (11th Cir.); *see also* Rachel Graf, Kraft Seeks to End ‘All Natural’ Sour Cream Labeling Suit, LAW360, May 31, 2017, <https://www.law360.com/articles/929615/kraft-seeks-to-end-all-natural-sour-cream->



Minnesota dismissed a claim that detection of trace amounts of glyphosate renders granola bars not “100% Natural Whole Grain Oats”;<sup>165</sup> days earlier, a District of Columbia court denied a motion to dismiss a lawsuit making identical allegations, recognizing that while “thorny issues” lay ahead, a reasonable finder of fact could conclude consumers seeking “natural” foods would be misled by the label.<sup>166</sup> While some courts have concluded that reasonable consumers would not believe that “handmade” liquor involves no machinery, other courts have denied motions to dismiss and for summary judgment in such cases.<sup>167</sup>

In slack fill litigation, some courts have found packages that include not only the number of ounces of candy inside but even the precise number of candies may still mislead a reasonable consumer, allowing litigation to resolve the number of Sour Patch Kids that can fit in a box.<sup>168</sup> Whether a consumer can “plainly feel and hear” the existence of empty space in the box given the rattling of its contents was considered a jury question.<sup>169</sup> Courts dismissed the Gerber Puffs and Plum Organics lawsuits, but another court found that reasonable consumers might be misled to believe Welch’s “Fruit Snacks,” labeled as “Made With REAL Fruit,” contain more fruit and are more nutritious and healthful than similar products.<sup>170</sup>

Some of the most outlandish claims have survived motions to dismiss. A lawsuit against Krispy Kreme alleged that consumers were misled to believe that “raspberry-filled” donuts contain real raspberries, “blueberry cake” donuts contain real blueberries, and “maple” donuts are made with

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labeling-suit (discussing *Newton v. Kraft Heinz Foods Co.*, No. 1:16-cv-04578 (E.D.N.Y. filed Aug. 17, 2016)).

165. *See In re: General Mills Glyphosate Litig.*, No. 16-cv-2869, 2017 WL 2983877, at \*1 (D. Minn. July 12, 2017) (discussed *supra* notes 109 to 111 and accompanying text).

166. *See Organic Consumers Ass’n v. General Mills, Inc.*, No. 2016 CA 6309 B, at 1, 18 (D.C. Super. Ct., July 6, 2017).

167. *See, e.g., Hofmann v. Fifth Generation Inc.*, No. 3:14-cv-02569 (S.D. Cal.) (dismissed on joint motion May 3, 2016); *Cabrera v. Fifth Generation Inc.*, No. 3:14-cv-02990 (S.D. Cal.) (same); *Singleton v. Fifth Generation Inc.*, No. 5:15-cv-00474, 2016 WL 406295 (N.D.N.Y. Jan. 12, 2016) (dismissing claims for breach of express warranty and negligent misrepresentation, but finding Tito’s labels could plausibly mislead a reasonable consumer); *see also* Steven Trader, *Vodka Drinkers Seek Cert. in Tito’s ‘Handmade’ False Ad Suits*, Law360, Jan. 11, 2016, <https://www.law360.com/articles/745073/vodka-drinkers-seek-cert-in-tito-s-handmade-false-ad-suits> (discussing *Hofmann* and *Cabrera* cases).

168. *Izquierdo v. Mondelez Int’l, Inc.*, No. 16-cv-04697, 2016 WL 6459832, at \*7 (S.D.N.Y. Oct. 26, 2016) (rejecting dismissal of Sour Patch Kids slack-fill claim on basis of reasonable consumer standard, but dismissing claim for failure to plausibly allege that consumers overpaid for the product).

169. *See id.*

170. *See Atik v. Welch Foods, Inc.*, No. 15-cv-5405, 2016 WL 5678474 (E.D.N.Y. Sept. 30, 2016) (denying motion to dismiss, finding that “[w]hile Defendants may ultimately prevail on their argument that based on the Products’ labeling, a reasonable consumer would not assume that the Products contain significant amounts of the fruit depicted on the label, the allegations in the Complaint do not present the type of patently implausible claim that warrants dismissal as a matter of law based on the reasonable consumer prong.”) (internal quotation omitted).

real maple syrup or real maple sugar.<sup>171</sup> The complaint then described in depth the health benefits of these ingredients, ranging from fighting cancer to avoiding neurodegenerative diseases of aging.<sup>172</sup> In response, Krispy Kreme argued that a reasonable consumer would not read a placard providing a shorthand name for a donut—“Raspberry,” “Blueberry,” and “Maple”—and believe they describe the ingredients. “Consumers also understand that doughnuts are desserts, and contain flavoring.”<sup>173</sup> The court, however, denied a motion to dismiss, finding that “[w]hether a reasonable consumer would be deceived by a particular statement is generally a factual question” and that it was plausible that the plaintiff will be able to show a reasonable consumer would be misled by the donut names.<sup>174</sup> After this ruling, and just before the deadline for the plaintiff’s motion for class certification, the parties filed a stipulation of voluntary dismissal,<sup>175</sup> likely indicating a private settlement. Soon after, lawyers filed copycat class actions against Dunkin’ Donuts.<sup>176</sup>

### B. Significant Settlements Feed the Litigation

Some cases in which it seems that a reasonable consumer would not be misled have led to class certification and significant settlements.

Ferrero USA—the maker of Nutella—was hit with class action lawsuits after a mother of a four-year-old was “shocked” to learn that Nutella is not a healthy, nutritious food.<sup>177</sup> In 2012, the family-run business settled the litigation.<sup>178</sup> There were two settlements—one settling

171. Complaint at 9, *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 2:16-cv-08338 (C.D. Cal. Nov. 9, 2016).

172. *Id.* at 10.

173. Notice of Motion and Motion; Memorandum of Points and Authorities in Support of Defendant Krispy Kreme Doughnut Corporation’s Motion to Dismiss or Stay Complaint and Motion to Strike, *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 2:16-cv-08338, at 11 (C.D. Cal. Jan. 4, 2017).

174. *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 2:16-cv-08338, 2017 WL 945083, at \*3 (C.D. Cal. Feb. 27, 2017).

175. *See* Stipulation of Voluntary Dismissal as to Plaintiff Jason Saidian With Prejudice Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 2:16-cv-08338 (C.D. Cal. filed Apr. 26, 2017).

176. *See* Class Action Complaint, *Grabowski v. Dunkin’ Brands, Inc.*, No. 1:17-cv-5069 (N.D. Ill. filed July 9, 2017) (alleging Dunkin’ Donuts marketed and sold its “Glazed Blueberry” donuts and munchkins, “Blueberry Butternut” donuts, and “Blueberry Crumb Cake” donuts as containing actual blueberries due to their descriptive names, but in fact, the foods only contain imitation blueberries); Complaint at 10-11, *Babaian v. Dunkin’ Brands Group, Inc.*, No. 2:17-cv-04890 (N.D. Cal. filed July 3, 2017) (asserting similar claims and touting the “unique health benefits” of blueberries and compounds in maple syrup that are “linked to human health”).

177. Complaint at 3, *Hohenberg v Ferrero U.S.A., Inc.*, No. 11-cv-0205 (S.D. Cal. Feb. 1, 2011).

178. *See* Laurent Belsie, *Nutella Settles Lawsuit. You Can Get \$20*, CHRISTIAN SCI. MONITOR, Apr. 27, 2012, <https://www.csmonitor.com/Business/new-economy/2012/0427/Nutella-settles-lawsuit.-You-can-get-20>.

two class actions brought and consolidated in New Jersey that brought claims on behalf of a nationwide class of consumers,<sup>179</sup> and the other settling a class action brought in California and limited to California residents.<sup>180</sup> The nationwide settlement established a \$2.5 million fund, \$625,000 of which was allocated to attorneys' fees, \$80,000 went towards class counsel costs, \$498,000 went towards the administrative expenses in managing the claims process, and \$2,000 went to each of two class representatives—leaving just \$1.3 million available for class members.<sup>181</sup> Class counsel also received an additional \$500,000 award to reflect agreed-upon labeling and advertising changes. The Third Circuit affirmed the court's order approving the settlement.<sup>182</sup> The California litigation settled for \$1.5 million with class counsel receiving \$985,920, nearly two-thirds of the amount, and \$550,000 earmarked for California consumers.<sup>183</sup> Under each settlement, consumers were eligible to receive \$4 per jar of Nutella they purchased, but no more than \$20.

Red Bull agreed to establish a \$13 million fund to settle a 2013 class action alleging that reasonable consumers would believe the slogan “Red Bull gives you wings” meant that its products provided significant benefits over a cup of coffee or caffeine pill.<sup>184</sup> Anyone who had purchased the energy drinks in the previous twelve years was eligible to receive up to \$10 cash (depending on the number of claimants) or two free Red Bull products valued at \$15—no proof of purchase (or actual deception) required.<sup>185</sup> Ultimately, 40% of claimants took the free Red Bull. The rest received only \$4.23 cash as the available funds were divided among those who filed claims.<sup>186</sup> The court approved payment of

179. *In re: Nutella Mktg. & Sales Practices Litig.*, No. 3:11-cv-01086, 2012 WL 6013276 (D. N.J. Nov. 29, 2012, *aff'd*, 589 F. App'x 53 (3d Cir. 2014).

180. Final Judgment and Order Approving Settlement and Dismissing Claims of Class Members with Prejudice and Granting Plaintiffs' Motion for Attorney's Fees, *In re Ferrero Litig.*, No. 3:11-cv-00205-H-KSC, 2012 WL 2802051 (S.D. Cal. July 9, 2012).

181. See Sindhu Sundar, \$3M Nutella Settlement Goes Through After Atty Award Slashed, Law360, July 31, 2012, <https://www.law360.com/articles/365499>.

182. *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53 (3d Cir. 2014).

183. The Ninth Circuit upheld the agreement, including the fee award, over class member objections. See *In re Ferrero Litig.*, 583 F. App'x 665 (9th Cir. 2014).

184. Class Action Complaint at 2, *Careathers v. Red Bull N. Am. Inc.*, No. 1:13-cv-00369 (S.D.N.Y. Jan. 16, 2013).

185. See generally Plaintiffs' Memorandum of Law in Support of the Joint Motion for Preliminary Approval of Class Action Settlement, *Careathers v. Red Bull N. Am. Inc.*, No. 1:13-cv-0369 (S.D.N.Y. July 14, 2014); Plaintiffs' Memorandum of Law in Support of the Joint Motion for Preliminary Approval of Class Action Settlement, *Wolf v. Red Bull GmbH*, No. 1:13-cv-08008 (KPF) (S.D.N.Y. July 14, 2014) (July 31, 2014).

186. Pete Brush, *Red Bull for Everybody! Judge OKs \$13M False Ad Settlement*, Law360, May 1, 2015, <https://www.law360.com/articles/650701/red-bull-for-everybody-judge-oks-13m-false-ad-settlement>.

\$3.4 million in attorneys' fees.<sup>187</sup> Red Bull's counsel said the company viewed this as a nuisance settlement with "a gift" to consumers.<sup>188</sup>

Coca-Cola agreed to settle claims that consumers were led to believe Vitaminwater was a healthy beverage, despite its sugar content, because of marketing statements such as "vitamins + water = all you need."<sup>189</sup> After six years of litigation, the company agreed to no longer advertise the drinks with such statements, add "with sweeteners" on two panels of the product's labeling, and more prominently place the number of calories on the bottle.<sup>190</sup> Under the settlement, class counsel is slated to receive \$2.73 million in attorneys' fees and litigation expenses.<sup>191</sup> Class representatives will receive \$5,000 each, but consumers receive no recovery.<sup>192</sup> Likewise, a class action claiming Krusteaz Pancake and Waffle Mixes boxes were under-filled provided \$460,000 in attorneys' fees, \$3,000 to the class representative, and nothing for class members other than a commitment by the company to work with an expert to evaluate its products for slack fill and implement any recommended changes.<sup>193</sup>

Most recently, Ferrara Candy Company agreed to settle a lawsuit alleging that boxes of Jujufruits and other candies sold in movie theaters are under-filled.<sup>194</sup> Under the settlement, consumers are eligible for a refund of fifty cents per purchase up to \$7.50 without a receipt.<sup>195</sup> It is uncertain whether consumers will see a meaningful benefit from the settlement's injunctive relief, in which the company agrees to implement quality control practices with a target of selling bag-in-box products that

187. See Order for Awarding Attorneys' Fees, Expenses and Service Awards for Named Plaintiff, *Careathers v. Red Bull N. Am. Inc.*, No. 1:13-cv-0369 (S.D.N.Y. May 12, 2015).

188. Pete Brush, *supra* note 186 (quoting Jason Russell of Skadden Arps Slate Meagher & Flom LLP).

189. See Jonathan Stempel, *Coke to Change Vitaminwater Labels to Settle U.S. Consumer Lawsuit*, REUTERS, Oct. 1, 2015, <https://www.reuters.com/article/coca-cola-vitaminwater-settlement/coke-to-change-vitaminwater-labels-to-settle-u-s-consumer-lawsuit-idUSL1N1211HX20151001>; see also *Ackerman v. Coca-Cola Co.*, No. 09-cv-0395, 2010 WL 2925955, at \*16 (E.D.N.Y. July 21, 2010) (finding marketing drink as "Vitaminwater" could mislead consumers into believing drink contained *only* vitamins and water).

190. Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan at 3-4, In re: Glaceau Vitaminwater Marketing & Sales Practices Litig. (No. II), No. 1:11-md-02215 (E.D.N.Y. Sept. 30, 2015).

191. *Id.* at 6.

192. *Id.*

193. Final Approval of Class Settlement and Final Judgment and Order of Dismissal with Prejudice, *Trentham v. Continental Mills, Inc.*, No. 16PH-CV01563 (Cir. Ct., Phelps County, Mo., Aug 16, 2017).

194. See Motion for Preliminary Approval of Class Action Settlement, at 1, *Iglesias v. Ferrara Candy Co.*, No. 3:17-cv-00849-VC (N.D. Cal. May 10, 2018).

195. *Id.* at 1. Over \$500,000 of the proposed \$2.5 million claim fund will go toward administering the claims process, rather than to consumers. See *id.* at 5.

are at least half full and other products that are at least three-quarters full.<sup>196</sup> Whether this will mean smaller boxes with the same amount of candy or identical boxes with less candy, and whether consumers will pay more, less, or the same price per box is unclear. The plaintiffs' attorneys, who spent 1,500 hours and \$365,000 in expenses to protect the right of consumers to get their due share of candy, have requested \$750,000 in attorneys' fees, \$520,000 to administer the claims process, and a \$5,000 incentive award for the class representative.<sup>197</sup> If the court approves paying each of these costs from the \$2.5 million claim fund, then two thirds of the settlement will benefit the lawyers, class representative, and claims administrator.

The days of these types of class settlements may be numbered. In what may prove to be a game-changer, the Seventh Circuit rejected a settlement of nine consolidated class actions claiming that reasonable consumers would believe that Subway's Footlong sandwiches will always measure precisely twelve inches.<sup>198</sup> Those actions had settled for \$525,000 with \$520,000 slated for attorneys' fees and the remainder set aside for payments to ten class representatives.<sup>199</sup> During the litigation, it became apparent that, in the words of Judge Lynn Adelman, who presided over the multi-district litigation, the plaintiffs' claims were "quite weak."<sup>200</sup> The "vast majority" of the bread sold in Subway stores was indeed twelve inches, and, when loaves were shorter, they were typically just a quarter-inch off as a result of natural variability in the shape of the bread, which did not affect the amount of food customers received.<sup>201</sup> And most consumers had suffered no injury. Many were perfectly happy with the sandwiches they received and, had they known the sandwiches might be slightly shorter than twelve inches, would have purchased them anyway.<sup>202</sup> Nevertheless, Subway settled the lawsuits in the midst of the "media frenzy,"<sup>203</sup> offering consumers quality-control measures and disclaimers, while it paid the class action lawyers to go away.<sup>204</sup>

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196. *See id.* at 5.

197. *Id.* at 5-6.

198. *In re Subway Footlong Sandwich Marketing & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017).

199. *Id.* at 554-55.

200. *In re Subway Footlong Sandwich Marketing & Sales Practices Litig.*, 316 F.R.D. 240, 242 (E.D. Wis. Feb. 25, 2016).

201. *Id.*

202. *See id.* at 243.

203. Jonathan Stempel, *Subway 'Footlong' Settlement Gets Appeals Court Grilling*, REUTERS, Sept. 8, 2016, <https://www.reuters.com/article/subway-settlement-idUSL1N1BK25H> (quoting Jeffrey Babbin, a lawyer for Subway); *see also* Bruce Vielmetti, *Size Does Matter — Judge Oks Preliminary Deal on Subway Case*, THE SEATTLE TIMES, Oct. 20, 2015, <https://www.seattletimes.com/nation-world/size-does-matter-judge-oks-preliminary-deal-on-subway-case/>.

204. *See In re Subway Footlong Sandwich Marketing & Sales Practices Litig.*, 869 F.3d at 556-57.

A unanimous three-judge panel of the Seventh Circuit declared the class action “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.”<sup>205</sup> The court’s finding that the injunctive relief provided to consumers was “utterly worthless” was rooted, in part, in the reasonable consumer standard.<sup>206</sup> Among other measures, the settlement required Subway to display a poster at each location and text on its website warning consumers that “[d]ue to natural variations in the break baking process, the size and shape of bread may vary.”<sup>207</sup> “It’s safe to assume that Subway customers know this as a matter of common sense,” the court recognized.<sup>208</sup> In other words, a reasonable consumer understands that bread, no matter how standardized in size, will not bake to be precisely twelve inches every time. The Seventh Circuit concluded that “the class should not have been certified.”<sup>209</sup> It could have gone one step further, however. Had the district court dismissed the claim because no reasonable consumer would be misled by marketing of sandwiches that are approximately twelve inches as “Footlong,” it could have avoided nearly five years of costly litigation that was an embarrassment to the civil justice system.

#### IV. CONCLUSION

Hardly a day goes by without another ridiculous food class action filed in our nation’s courts. One recent suit charged that Jelly Belly leads athletes to think its “Sports Beans” are sugar free because it lists “cane juice” as an ingredient, despite a label that also indicates 17 grams of sugar and the fact that they are, well, jelly beans.<sup>210</sup> These types of lawsuits are widely mocked in the media with headlines such as “Woman Sues Jelly Belly, Claims She Didn’t Know Jelly Beans Contained Sugar”<sup>211</sup> and “A Man is Suing Hershey for ‘Under-filling’ his Box of

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205. *Id.* at 553, 557.

206. *Id.* at 557.

207. *Id.*

208. *Id.*

209. *Id.*

210. *See* Complaint, *Gomez v. Jelly Belly Candy Co.*, No. 17-cv-00575 (S.D. Cal. removed Mar. 24, 2017). Jelly Belly argued that no reasonable consumer would be deceived by its labeling, since they would not have read “evaporated cane juice” without also seeing the product’s sugar content on the label, and there is no indication that athletes would want to avoid sugar rather than seek it to assist them in their workouts. The court, however, summarily rejected the reasonable consumer defense, but granted the motion to dismiss due to the complaint’s lack of basic information regarding the plaintiff’s purchase. *See Gomez v. Jelly Belly Candy Co.*, No. 17-cv-00575, 2017 WL 2598551, at \*2 (S.D. Cal. June 8, 2017). The plaintiff filed an amended complaint on June 30, 2017.

211. Alex Hider, *Woman Sues Jelly Belly, Claims She Didn’t Know Jelly Beans Contained Sugar*, ABC ACTION NEWS, May 25, 2017; *see also* Veronica Rocha, *California Woman Sues Jelly Belly Candy*

Whoppers.”<sup>212</sup> Announcements of companies such as Subway, Nutella, and Red Bull settling these types of claims are similarly ridiculed.<sup>213</sup> These lawsuits make headlines precisely because no reasonable consumer would be deceived, not because a business has engaged in massive fraud.

As these lawsuits continue, there are three options for preserving the public’s respect for the civil justice system. The first route is for the judiciary to dismiss lawsuits with claims that strain believability as a matter of law before the expense or risks of the litigation pressure a company to settle it. In many food and beverage marketing class actions, the reasonable consumer standard provides an appropriate means to tackle ever more absurd cases. As this Article shows, many courts appear headed in this direction. They should continue to develop solid guideposts for how an objective reasonable consumer shops for food and beverages and consistently apply them.<sup>214</sup> As courts dismiss these lawsuits and these rulings are upheld on appeal, the incentive to bring such claims where no reasonable consumer was deceived should fall.<sup>215</sup>

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Claiming Beans Were Full of Sugar, L.A. TIMES, May 26, 2017; Jelly Belly Sued by Woman Claiming She Didn’t Know Jelly Beans Contain Sugar, FOX NEWS, May 25, 2017.

212. Abha Bhattarai, A Man is Suing Hershey for ‘Under-filling’ his Box of Whoppers,” WASH. POST, May 25, 2017; *see also* Kathianne Boniello, Ridiculous Class-Action Lawsuits are Costing You Tons of Money, N.Y. POST, Jan. 6, 2018.

213. *See, e.g.*, Jacob Gershman, *Subway ‘Footlong’ Settlement Short on Dough*, WALL ST. J., Oct. 20, 2015, <https://blogs.wsj.com/law/2015/10/20/subway-footlong-settlement-short-on-dough/>; Jacob Davidson, *Thanks for Ruining the Red Bull Settlement, Internet*, MONEY MAGAZINE, Oct. 9, 2014, <http://time.com/money/3484564/red-bull-settlement-ruined/> (“Yesterday, the world received some truly wonderful news: A group of Red Bull customers took the company’s ‘It Gives You Wings’ slogan a little too literally, sued the drink maker for false advertising, and forced Red Bull to give us all money. . . with no proof of purchase required. Isn’t America great?”); Emily Anne Epstein, *Spread the Wealth! Mum Win \$3 Million in Class-Action Suit Over Nutella’s ‘Misleading’ Health Claims*, DAILY MAIL, Apr. 27, 2012, <http://www.dailymail.co.uk/news/article-2135938/Spread-wealth-Nutella-customers-win-3million-class-action-suit-chocolate-treats-misleading-health-claims.html>; Lindsay Goldwert, *Nutella: It’s Officially Not a ‘Health Food’*, N.Y. DAILY NEWS, Apr. 26, 2012, <http://www.nydailynews.com/life-style/health/maker-nutella-settles-consumers-healthy-food-claims-article-1.1067882>; *see also* Abby Ellin, *Nutella, After Suit, Drops Health Claims*, ABC NEWS via GOOD MORNING AMERICA, WORLD NEWS, Apr. 26, 2012 (“It’s hard to imagine that there are people who might confuse Nutella—a gooey, chocolaty spread laden with sugar, palm oil and hazelnuts - with a health food. . . [But] now consumers can take their winnings, buy more Nutella, and know for sure they’re not eating tofu.”).

214. The theories asserted in these lawsuits are inherently inconsistent. Claims targeting products listing evaporated cane juice as an ingredient are entirely premised on health-conscious consumers reading and deciding to purchase the product based on its label (putting aside that the label also lists total sugar content). Yet, claims asserting that a product does not qualify as natural or looks healthier than it is regularly assert that consumers do not read labels. When a claim is brought on behalf of shoppers who are particularly concerned about eating “natural” or “healthy” products, is it reasonable to presume that a consumer would read the label before buying a new product?

215. Courts should issue precedent-setting decisions to develop a body of law that will facilitate evaluating cases under the reasonable consumer standard, rather than unreported decisions that apply only to the facts of the case. *See, e.g.*, *Cruz v. Anheuser-Busch Cos.*, 682 F. App’x 583 (9th Cir. 2017) (in 2-1 unreported decision, affirming dismissal on the basis that reasonable consumers would not be misled to believe “Bud Light Lime-a-Rita” is a low-calorie, low-carbohydrate beverage or that it contains fewer

Courts might even consider imposing sanctions on lawyers who bring the most preposterous claims, using Rule 11 as it is intended, *i.e.*, to “deter repetition of the conduct or comparable conduct by others similarly situated.”<sup>216</sup> After all, if a child understands that there will be ice in an iced drink, should the courts not expect an attorney to reach this conclusion before filing a lawsuit? Courts in a few states also have broad discretion to award a prevailing defendant its reasonable attorneys’ fees and costs under their consumer laws,<sup>217</sup> providing an alternative to sanctions. The small group of attorneys who bring these cases will continue shopping for lawsuits and generating cut-and-paste complaints so long as there is more than a nominal chance of a settlement and no risk to asserting even the most far-fetched claims.

The surge of consumer class actions, and inconsistent judicial response, has fueled a second approach to addressing the litigation—legislative efforts to tighten the requirements for private rights of action under state consumer protection laws. In 2017, Arkansas eliminated consumer class actions, providing for exclusive enforcement of the state’s Deceptive Trade Practices Act through the state attorney general.<sup>218</sup> In recent years, Arizona, Louisiana, Oklahoma, Tennessee, and West Virginia have also significantly amended their consumer protection or class action law due to concern about abusive litigation.<sup>219</sup> Other states are considering legislative reform.<sup>220</sup> Congress is also considering adopting new safeguards for class action litigation, including requiring disclosure of the circumstances under which a class representative became involved in the

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calories or carbohydrates than regular beer when it is clear from the label that the product is not a normal beer).

216. Fed. R. Civ. P. 11(c)(4). In at least a few cases, courts have reportedly suggested a claim is frivolous in dismissing it, but not imposed sanctions. *See, e.g.*, *Hawkins v. Kellogg Co.*, 224 F. Supp. 3d 1002 (S.D. Cal. 2016) (in dismissing claim, observing this is “one of those frivolous lawsuits that Congress meant to preclude” when it provided manufacturers with three years to remove trans fats”); Beth Winegarner, *Judge Bashes Consumers’ Atty in Kraft ‘Natural’ Capri Sun Suit*, LAW360, Oct. 15, 2015, <https://www.law360.com/articles/714854/judge-bashes-consumers-atty-in-kraft-natural-capri-sun-suit> (quoting court statement that plaintiff “created a Rule 11 problem” by alleging drinks were not “all natural” without investigating source of contain citric acid content in *Osborne v. Kraft Foods Group, Inc.*, No. 3:15-cv-02653 (N.D. Cal.)).

217. *See* 815 ILL. COMP. STAT. ANN. § 505/10a(c); MONT. CODE ANN. § 30-14-133(3); OR. REV. STAT. § 646.638(3). Additional states allow a court to award attorneys’ fees to a prevailing defendant, but limit such awards to cases in which the court finds a lawsuit was groundless, or brought in bad faith or for the purpose of harassment. *See* Schwartz & Silverman, 54 KAN. L. REV. at 26 n.132 (compiling statutes).

218. *See* H.B. 1742, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (amending ARK CODE ANN. §§ 4-88-102, 4-88-113).

219. *See* S.B. 1346, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (codified at ARIZ. REV. STAT. §§ 12-1871 to 12-1873); H.B. 464, Reg. Sess. (La. 2012) (codified at LA. CODE CIV. PROC. §§ 593.1, 593.2); H.B. 472, Reg. Sess. (La. 2013) (codified at LA. CODE CIV. PROC. art. 591, 592); H.B. 2008, §§ 14-20 (Tenn. 2011) (amending TENN. CODE ANN. §§ 47-18-104(b)(27), 47-18-109); S.B. 315 (W. Va. 2015) (amending W. VA. CODE ANN. §§ 46A-6-101, 105, 106).

220. *See, e.g.*, S.B. 832, 99th Gen. Assemb., Reg. Sess. (Mo. 2018).



litigation and tying attorneys' fees to the actual benefits received by consumers.<sup>221</sup> These efforts are likely to gain momentum as the litigation becomes increasingly silly.

A third option is for attorneys to engage in self-regulation. Lawyers specializing in bringing food and beverage marketing class actions can and should show greater "prosecutorial discretion," reserving litigation for false or truly deceptive practices. Many of today's lawsuits do not involve a misled consumer, but individuals prompted by an attorney to serve as class representative for a ready-made claim. Consumer protection claims, and the civil justice system generally, however, are intended to provide a remedy for people who have experienced a loss as a result of someone else's wrongful conduct whole.

Reasonable consumers may not always have grounds for a lawsuit, but they are not without a remedy. They have the power to act with their wallets. Rather than bring a \$20 million lawsuit after finding an eight-piece bucket of KFC's fried chicken does not overflow with chicken as on TV, a customer can ask for her money back or go elsewhere next time.<sup>222</sup> A customer who feels that a latte has too much foam might ask the Barista to fill the cup to the brim or visit another coffee shop in the future. A movie-goer who views candy at the concession stand as overpriced might simply not buy it or, as people have long done, smuggle in a snack from home. When a health-conscious shopper considers buying a new product, she might glance at the label to quickly find if it meets her expectations and, if not, choose another option.

Time will tell whether courts are able to articulate and apply meaningful principles that define the reasonable consumer or the litigation continues to escalate.

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221. See Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. (2017).

222. See Complaint, *Wurtzbarger v. Kentucky Fried Chicken*, No. 1:16-cv-08186 (S.D.N.Y. removed from state court Oct. 19, 2016); see also Kathianne Boniello, "Where's the Chicken?": *Woman Sues KFC for \$20M Over False Advertising*, N.Y. POST, Oct. 22, 2016, <https://nypost.com/2016/10/22/wheres-the-chicken-woman-sues-kfc-for-20m-over-false-advertising/>.