

**2019 IADC ANNUAL MEETING**  
**Food Labeling Litigation**  
**By: Creighton Magid**

**I. Food Labeling Claims Generally Based on Unfair and Deceptive Trade Practices Acts**

**A. California**

1. Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.* (prohibits “any unlawful, unfair or fraudulent business practice”)
2. False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* (prohibits “untrue or misleading” advertising)
3. Consumers’ Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (prohibits “deceptive representations or designations of geographic origin” and representations that goods have “characteristics, ingredients, uses, benefits, or quantities that they do not have”)
4. The UCL, FAL and CLRA “all prohibit unlawful, unfair, or fraudulent business practices.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016)
5. Claims under the UCL, FAL and CLRA are “are governed by the ‘reasonable consumer’ standard, meaning that plaintiffs must ultimately ‘show that members of the public are likely to be deceived.’” *Robinson v. J.M. Smucker Co.*, 2019 U.S. Dist. LEXIS 78069, \*6 (N.D. Cal. May 8, 2019) (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008))
6. The UCL and FAL only provide for injunctive relief; UCL and FAL claims are subject to dismissal if the plaintiff has an adequate remedy at law in a damages claim under the CLRA. *Robinson v. J.M. Smucker Co.*, 2019 U.S. Dist. LEXIS 78069, \*16 (N.D. Cal. May 8, 2019)

**B. New York**

New York General Business Law § 349 (makes unlawful “deceptive acts or practices in the conduct of any business, trade or commerce”)

**C. District of Columbia**

D.C. Consumer Protection Procedures Act, D.C. Code §§ 28-3901 *et seq.*

1. Unlawful “whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to [. . .] (e) misrepresent as to a material

fact which has a tendency to mislead; [or] (f) fail to state a material fact if such failure tends to mislead.”

2. In addition to allowing individual consumers to sue, the law allows a “nonprofit organization [to], on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.”

**D. Florida**

Florida Unfair and Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.203(7) (prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce . . .”)

**E. Illinois**

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Compiled Statutes §§ 505/1 *et seq.* (makes unlawful “unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact”)

**II. Types of Claims**

**A. “Natural” Claims**

1. *Organic Consumers Assn. v. Bigelow Tea Co.*, 2017 CA 8375 B (D.C. Superior Court) (claim that presence of trace amounts of glyphosate rendered “natural” label misleading)
2. *In Re: General Mills Glyphosate Litig.*, 2017 U.S. App. LEXIS 27628 (D. Minn. July 12, 2017) (dismissing claims that presence of trace amounts of glyphosate render the statement “Made with 100% Natural Whole Grain Oats” misleading)
3. *Allred v. Frito-Lay North America, Inc.*, 2018 WL 1185227 (S.D. Cal. Mar. 7, 2018); *Allred v. Kellogg Co.*, 2018 WL 1158885 (S.D. Cal. Feb. 23, 2018) (both denying motions to dismiss claims that salt-and-vinegar potato chips were mislabeled as “all natural” when they contained synthetic malic acid)

4. *Branca v. Bai Brands, LLC*, 2019 U.S. Dist. LEXIS 37105 (S.D. Cal. Mar. 7, 2019) (denying motion to dismiss claims that Bai beverages are mislabeled as containing only natural ingredients due to the alleged presence of synthetic malic acid)
5. *Axon v. Citrus World, Inc.*, 354 F.Supp.3d 170 (E.D.N.Y. 2018) (dismissing claims that trace amounts of glyphosate rendered “natural” in brand name misleading)
6. *Brown v. Starbucks Corp.*, 2019 U.S. Dist. LEXIS 33211 (S.D. Cal. Mar. 1, 2019) (dismissing claims that packaging of “sour gummies” gave the misleading “impression” that the candies contain only natural ingredients; packaging did not make “natural” claims and all ingredients were identified in the ingredient list)

**B. *Organic/Non-GMO Claims***

1. *Podpeskar v. Dannon Co.*, 2017 U.S. Dist. LEXIS 198948 (S.D.N.Y. Dec. 3, 2017) (dismissing claims that “natural” label on yogurt was misleading based on the allegation that the cattle that produced the milk used to make the yogurt ate GMO grain or were fed antibiotics)
2. *In re KIND LLC "Healthy & All Natural" Litig.*, 287 F. Supp. 3d 457 (S.D.N.Y. 2018) (denying motion to dismiss claims that KIND marketed its products as “non-GMO” even though they allegedly contain synthetic and genetically modified ingredients)
3. Most organic claims are preempted by the Organic Food Production Act of 1990, 7 U.S.C. §§ 6501-6524. *See, e.g., Organic Consumers Ass'n v. Hain Celestial Grp., Inc.*, 285 F. Supp. 3d 100 (D.D.C. 2018). *But see Segedie v. Hain Celestial Grp., Inc.*, No. 14-CV-5029 NSR, 2015 U.S. Dist. LEXIS 60739 (S.D.N.Y. May 7, 2015) (holding that OFPA did not preempt claims that food products were mislabeled as “organic” because they allegedly contained ingredients prohibited in organic products)
4. The National Bioengineered Food Disclosure Standard (effective Jan. 1, 2020) preempts claims that meat is non-GMO because livestock is fed GMO feed

**C. *“Healthy” Claims***

1. Claims that “Diet” Products Do Not Lead to Weight Loss
  - a. *Manuel v. Pepsi-Cola Co.*, 2019 U.S. App. LEXIS 7724 (2d Cir. March 15, 2019); *Becerra v. Dr Pepper/Seven Up, Inc.*, 2018 U.S. Dist. LEXIS 142074 (N.D. Cal. August 21, 2018) (affirming dismissal of claims that “diet” sodas would deceive a reasonable consumer into believing that consumption of “diet” sodas will lead to weight loss;

studies cited in the complaint “establish, at most, that people who drink beverages with non-nutritive sweeteners continue to gain weight. None of the studies purports to establish a causal relationship between non-nutritive sweeteners and weight gain to a degree that is sufficiently strong.”

- b. *Krommenhock v. Post Foods, LLC*, 255 F. Supp. 3d 938 (N.D. Ill. 2017) (denying motion to dismiss claims that breakfast cereals’ claims to be “nutritious”, “wholesome” and “healthy” were deceptive because of the cereals’ high sugar content)
- c. *Clark v. Perfect Bar, LLC*, 2018 WL 7048788 (N.D. Cal. Dec. 21, 2018) (dismissing claims that added sugar rendered deceptive packaging that allegedly led plaintiffs “to believe that the bars would be healthy” on grounds that “[t]he actual ingredients were fully disclosed” so that “[r]easonable purchasers could decide for themselves how healthy or not the sugar content would be.”)

2. Claims that Trace Amount of Glyphosate Renders “Healthy Product Attributes” Misleading

- a. *Frankel v. Bob’s Red Mill Natural Foods*, No. 3:18-cv-5394 (N.D. Cal.) (steel cut oatmeal labeled as “wholesome” and “To Your Health” allegedly misleading in light of trace amounts of glyphosate)
- b. *GMO Free USA v. Pret a Manger, Ltd.*, 2019 D.C. Super. LEXIS 5 (D.C. Super. Ct. April 29, 2019) (motion to dismiss denied in case alleging that products labeled as “natural” are misleading because of trace amounts of glyphosate)
- c. *Paracha v. General Mills, Inc.*, No. 2:18-cv-7659 (C.D. Cal.) (presence of trace amounts of glyphosate renders “healthy product attribute” representations – such as “may reduce the risk of heart disease” and “made with 100% whole grain oats” – misleading)

**D. Environmentally Friendly/Sustainability Claims**

- 1. FTC “Green Guides” (16 C.F.R. Part 260) address “environmental marketing claims;” California incorporates the Green Guides into the Environmental Marketing Claims Act (Cal. Bus. & Prof. Code § 17580.5)
- 2. *Walker v. Nestlé USA, Inc.*, No. 1:19-cv-0723-L (S.D. Cal.) (asserting that Nestlé USA labels its chocolate products as “sustainably sourced” and as being produced in connection with efforts to “improve the lives of cocoa farmers” but, in fact, produced using child labor and/or child slave labor and as a result of rainforest deforestation)

3. *Hodson v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018) (affirming dismissal of claims for failing to disclose use of child labor in its chocolate supply chain on its labels; no duty to disclose absent a “physical defect relating to the central function of the chocolate [or a] safety defect.”)
4. *Smith v. Keurig Green Mountain, Inc.*, No. 4:18-cv-6690 (N.D. Cal.) (asserting that single serving coffee pods labeled as recyclable are not capable of being recycled)
5. *Organic Consumers Assn. v. Bigelow Tea Co.*, 2018 D.C. Super. LEXIS 11 (D.C. Super. Ct. Oct. 31, 2018) (dismissing claims that tea that allegedly contained trace amounts of glyphosate did not render “environmentally friendly” or “sustainable” labeling misleading)

**E. *Claims Involving Ingredients and Product Attributes***

1. *Broomfield v. Craft Brew Alliance, Inc.*, 2017 U.S. Dist. LEXIS 142572 (N.D. Cal. Sept. 1, 2017) (denying motion to dismiss claims that labeling of Kona Beer led consumers to believe the beer -- largely brewed in the continental U.S. -- was brewed exclusively in Hawaii where the label listed the brewer’s address “75-5629 Kuakini Highway, Kailua-Kona, Hawaii, 96740,” contained a large map of the Big Island identifying the location of Kona Brewing Company’s brewery, and statement inviting customers “to visit our brewery and pubs whenever you are in Hawaii.”)
2. *Hu v. Herr Foods, Inc.*, 251 F. Supp. 3d 813 (E.D. Pa. 2017) (in case alleging that presence of citric acid rendered “No Preservatives Added” statement on label misleading, court granted judgment on the pleadings because plaintiff failed to plead that citric acid functioned as a preservative in the snacks at issue)
3. *Weiss v. Trader Joe's Co.*, 2018 U.S. Dist. LEXIS 220863 (C.D. Cal. Nov. 20, 2018) (dismissing claims that label deceptively implied that alkaline water provided superior health benefits to typical water, was a “superior source of hydration” and could help “balance pH internally” because claims were either literally true or mere puffery)
4. *Fitzhenry-Russell v. Keurig Dr Pepper Inc.*, 345 F. Supp. 3d 1111 (N.D. Cal. 2018) (denying summary judgment on whether “Made with Real Ginger” label statement misleadingly implies that the product is made from ginger root rather than from a ginger extractive)
5. *Singleton v. Fifth Generation, Inc.*, 2016 U.S. Dist. LEXIS 14000 (N.D.N.Y. Jan 12, 2016) (denying motion to dismiss claims that label statements that vodka was “Handmade” and “Crafted in an Old Fashioned Pot Still by America's Original Microdistillery” were misleading; “Tito's labels could plausibly mislead a reasonable consumer to believe that its

vodka is made in a hands-on, small-batch process, when it is allegedly mass-produced in a highly-automated one.”)

6. *McKinniss v. Kellogg USA*, 2007 U.S. Dist. LEXIS 96106 (C.D. Cal. Sept. 21, 2007) (no reasonable consumer would conclude that “Froot Loops” contained real fruit)

#### **F. *Slack Fill Claims***

1. Products are deemed to be misleading if they contain “slack fill,” defined by 21 C.F.R. § 100.100(a) as “the difference between the actual capacity of a container and the volume of the product contained therein.” Slack fill is not misleading if it is “functional” or if consumers can fully view the contents of the package. 21 C.F.R. § 100.100(a). Slack fill is “functional” if it is necessary to protect the contents of the package, is a requirement of the machinery used to fill the package, is the result of unavoidable settling during shipping and handling, is necessary for the package to perform a specific function, is part of the presentation of the food in a reusable container, or reflects the impossibility of increasing the fill level or reducing the package size. 21 C.F.R. § 100.100(a)(1) – (6).
2. *Daniel v. Tootsie Roll Indus., LLC*, 2018 U.S. Dist. LEXIS 129143 (S.D.N.Y. Aug. 1, 2018) (dismissing slack fill case where the plaintiff failed to demonstrate that the slack fill in Junior Mints candy boxes was “non-functional.”)
3. *Bratton v. Hershey Co.*, 2017 U.S. Dist. LEXIS 74508 (W.D. Mo. May 16, 2017) (noting that “[c]onsumers spend an average of 13 seconds making an in-store purchasing decision,” the court denied motion to dismiss claims involving “opaque, non-pliable cardboard boxes of candy where the slack fill “serves no purpose, such as protection of the contents” and “is not attributable to settling of the contents.”)

#### **G. *Claims Asserted Against Competitors***

*Tortilla Factory, LLC v. Rowdy Mermaid Kombucha LLC*, 2:18-cv-02984 (C.D. Cal.); *Tortilla Factory, LLC v. Better Booch, LLC*, 2:18-cv-02980 (C.D. Cal.); *Tortilla Factory, LLC v. Humm Kombucha, LLC*, 2:17-cv-09092 (C.D. Cal.); *Tortilla Factory, LLC v. Health Ade, LLC*, 2:17-cv-09090 (C.D. Cal.)

### **III. Legal Issues Worth Following**

#### **A. *Standing to Assert Claim for Injunctive Relief***

1. *Davis v. Hain Celestial Group, Inc.*, 297 F. Supp. 3d 327, 338 (E.D.N.Y. 2018) (“plaintiffs lack standing to seek injunctive relief because they have “necessarily become aware of the alleged misrepresentations [and] ‘there

is no danger that they will again be deceived by them.’’) (citation omitted).

2. *Kommer v. Bayer Consumer Health*, 710 Fed. App’x 43, 44 (2d Cir. 2018) (finding no standing to seek injunctive relief because plaintiff “concedes, ‘now [that he] knows of Defendants’ [alleged] deception and false advertising, . . . he is no longer likely to purchase another pair of Dr. Scholl’s Custom Fit Orthotics Inserts ever again.’’)
3. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018) (holding that “a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an actual and imminent, not conjectural or hypothetical threat of future harm;” specifically, a plaintiff seeking injunctive relief may show that “she will be unable to rely on the product’s advertising or labeling in the future, and so will not purchase the product although she would like to.”)
4. *Schneider v. Chipotle Mexican Grill, Inc.*, 328 F.R.D. 520 (N.D. Cal. 2018) (“Importantly, the Ninth Circuit’s conclusion [in *Davidson*] is narrower than a blanket conclusion that plaintiffs seeking injunctive relief in mislabeling class actions always have standing. The principle set forth in *Davidson* is more accurately cast as the court’s ‘not [being] persuaded that injunctive relief is *never* available for a consumer who learns after purchasing a product that the label is false.’’)(emphasis in original)

**B. Does *Bristol-Myers Squibb* Apply to Class Actions?**

1. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (holding that although a state court could exercise specific jurisdiction over a non-resident company with respect to claims of residents of that state in a mass tort action, it could not assert personal jurisdiction over a non-resident company in connection with the claims of non-resident plaintiffs)
2. Courts holding that *Bristol-Myers Squibb* limits personal jurisdiction in class actions include *McDonnell v. Nature’s Way Prods., LLC*, 2017 U.S. Dist. LEXIS 177892 (N.D. Ill. Oct. 26, 2017), *Chavez v. Church & Dwight Co.*, 2018 U.S. Dist. LEXIS 82642 (N.D. Ill. May 16, 2018); *In re Dental Supplies Antitrust Litig.*, 2017 U.S. Dist. LEXIS 153265 (E.D.N.Y. Sept. 20, 2017)
3. Courts holding that *Bristol-Myers Squibb* does not apply to class actions include *Fitzhenry-Russell v. Dr Pepper Snapple Grp.*, 2017 U.S. Dist. LEXIS 155654 (N.D. Cal. Sept. 22, 2017); *Feller v. Transam. Life Ins.*

*Co.*, 2017 U.S. Dist. LEXIS 206822 (C.D. Cal. Dec. 11, 2017); *Molock v. Whole Foods Mkt.*, 2017 U.S. Dist. LEXIS 99795 (D.D.C. June 22, 2017)

4. Issue currently before the D.C. Circuit, the Seventh Circuit, and the Fifth Circuit

**C. *Rule 11 Sanctions for Failure to Conduct Investigation***

1. *Allred v. Kellogg Co.*, 2018 U.S. Dist. LEXIS 38576, \*4 (S.D. Cal. Feb. 23, 2018) (observing, in response to Kellogg’s argument that the plaintiff’s complaint had “failed to prove Kellogg is using the artificial [malic acid and sodium diacetate] over the natural ones,” that “if Allred indeed filed a lawsuit without any idea as to its veracity, Kellogg’s remedy would lie in Rule 11.”)
2. *Hu v. Herr Foods, Inc.*, 251 F. Supp. 3d 813 (E.D. Pa. 2017) (denying motion for sanctions because original complaint withdrawn under Rule 11’s safe harbor)
3. *Branca v. Bai Brands, LLC*, 2019 U.S. Dist. LEXIS 37105 (S.D. Cal. Mar. 7, 2019) (denying motion for sanctions under Rule 11 in light of plaintiff’s claims to have conducted pre-filing testing, given Ninth Circuit law requiring that a complaint “completely lack[ ] a factual foundation” in order to give rise to sanctions)