

Kellogg's Deal Highlights Sugar Focus In Label Class Actions

By **Lindsey Heinz and Elizabeth Fessler** (November 14, 2019, 4:39 PM EST)

As many working in the food and beverage industry know, the regulatory landscape for manufacturers and retailers has undergone a number of significant shifts in the last few years. While some of these changes concern food safety, others reflect changes in consumers' thinking about nutrition.

One of the biggest shifts has been a change in attitude toward fat and sugar, with added sugar receiving the sort of scrutiny that was once reserved for fat. Given this shift, new litigation has targeted foods allegedly marketed as healthy despite containing significant amounts of added sugar.

The recent settlement reached in *Hadley v. Kellogg Sales Co.* as a result of certain claims on cereals sold by Kellogg's is a prime example of the shifted focus toward sugar, and the agreement may cause companies to question whether simply following regulations on sugar is worth the risk.

Regulating Healthy

Since 1993, the U.S. Food and Drug Administration generally has defined "healthy" and similar terms when used as part of an implied nutrient content claim as having low total fat and certain levels of nutrients of public health concern.[1] But science has evolved a great deal in the decades since the regulation was created; this is reflected, for example, in the updated nutrition facts panels unveiled in 2016.

The FDA has changed its thinking on fats by acknowledging that mono and polyunsaturated fat intake should be encouraged, while consumption of saturated and trans fats should be discouraged.[2] Despite this recognition, the definition of healthy has not yet been updated.[3] Unfortunately, regulation often lags behind science and consumer trends, but the industry was ready to take advantage of these changes in our current understanding of nutrition.

Kind LLC's use of healthy and similar terms in describing its snack bars that were not low-fat brought this issue to the forefront in 2015. The FDA issued Kind a warning letter in March of 2015, but Kind pushed the FDA to reconsider its stance, noting the definition of healthy excludes use of the term to describe foods like nuts, avocado and salmon, which are nearly universally considered to be healthy foods, while allowing the term healthy to describe certain low-fat but sugary foods that many would consider to be unhealthy.[4]



Lindsey Heinz



Elizabeth Fessler

While it took more than a year, the FDA relented.[5] The regulatory definition of healthy remains the same, but the FDA issued guidance in September 2016 that functions essentially to revise the regulation while the FDA considers formal rulemaking to change the definition.[6] The FDA is exercising enforcement discretion and allowing healthy claims on foods that are not low in total fat but have predominantly unsaturated fats, so long as they meet the remaining criteria.

Hadley v. Kellogg

Fat may have been a bogeyman in the 1990s, but sugar seems to have taken that position in recent years. Sugar is sometimes even referred to as an addictive substance,[7] so it came as no surprise that sugary foods became the next regulatory and litigation target. Municipal governments have levied taxes on sugar-sweetened beverages,[8] and foods containing added sugar, including cereals, have been subjected to litigation.

In *Hadley v. Kellogg*, the plaintiffs took issue with terms like "healthy," "heart health" and "lightly sweetened" on certain types of cereals, including Raisin Bran and Frosted Mini-Wheats.[9] While an early decision from the U.S. District Court for the Northern District of California found legal challenges to the term "healthy" were preempted to the extent it was part of an implied nutrient content claim, the court determined that the use of the word in other ways — for example, "Start with a healthy spoonful" — was sufficient to maintain a legal challenge.[10]

Litigation started more than three years ago, with both sides engaging in extensive motion practice, discovery and, ultimately, settlement negotiations.[11] The resulting proposed settlement not only provides a settlement fund of more than \$20 million for cash and voucher payments to consumers, but it also provides for changes to labeling that underscore the plaintiffs' concerns regarding added sugar in the cereals.[12]

Most of the changes agreed upon relate to the amount of added sugar in the cereals. If more than 10% of the calories per serving come from added sugar, certain claims would have to be modified or removed for a period of time:[13]

- "Healthy" claims are to be removed for at least three years, unless they constitute explicit or implicit nutrient content claims governed by regulation.
- "Lightly Sweetened" claims will be removed for at least three years.
- "No High Fructose Corn Syrup" claims will be removed for at least three years.
- "Wholesome," "Nutritious" and "Benefits" claims will be limited to describing particular ingredients or nutrients for at least three years.
- "Heart Healthy" claims are to be removed or modified on Smart Start and Raisin Bran labels.

The settlement is focused on limiting claims regarding the healthfulness of cereals with significant added sugar; a hearing on the preliminary settlement is currently set for Feb. 6, 2020.[14] This case is certainly not the only one of its type currently pending.

A similar suit against Post Foods LLC regarding claims on its cereals is pending,[15] and Kind is currently involved in discovery in multidistrict litigation dealing, in part, with its "healthy" claims on its snack bars.[16] And similar snack bars such as Clif Bars and Perfect Bars have faced similar litigation related to

their sugar content.[17] Like "natural" claims in years past, health claims on products with added sugar have been the subject of litigation, and a multimillion-dollar settlement makes it likely this trend will continue for the foreseeable future.

Food for Thought

Although labeling claims may be consistent with regulations, the industry should be wary of making claims inconsistent with current thoughts on what constitutes a healthy food. While the cereals at issue were in line with the FDA's definition and guidance on "healthy" — which does not reference sugar — the litigation still resulted in a significant monetary settlement and labeling changes, reflecting the consumer concern about added sugars.

The bottom line: Despite following the regulations, Kellogg's ended up embroiled in costly and lengthy litigation. And the company's decision to settle was almost certainly a strategic move to close this chapter.

As with other frequently challenged label claims, the industry should be reviewing its labels to determine if the claims align with scientific consensus and consumer expectations. If a product has added sugar, its manufacturer may benefit from evaluating whether claims about the healthy aspects of the product are appropriate and consistent with consumers' current understanding of the term.

Given that nutritional advice can rapidly evolve in response to a growing body of research and that many consumers differ in which attributes they value in their food, this evaluation is certainly not an easy task — but the stakes of this litigation are too high for the industry to ignore.

Lindsey Heinz is a partner and co-chair of the food, beverage and agribusiness practice group, and Elizabeth Fessler is an associate at Shook Hardy & Bacon LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 21 CFR 101.65(d)(2); see also Use of the Term "Healthy" in the Labeling of Human Food Products: Guidance for Industry, available at: <https://www.fda.gov/media/100520/download>.

[2] U.S. Food & Drug Administration, Use of the Term "Healthy" in the Labeling of Human Food Products: Guidance for Industry, at 5 (Sept. 2016) available at: <https://www.fda.gov/media/100520/download>.

[3] Id.

[4] U.S. Food & Drug Administration Warning Letter to KIND, LLC, Mar. 17, 2015, available at: <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/kind-llc-03172015>; Press Release, KIND, LLC, FDA Reverses Stance, Affirms KIND Can Use "Healthy" on Its Labels, (May 10, 2016), available at: <https://www.kindsnacks.com/media-center/press-releases/fda-reverses-stance.html>.

[5] <https://www.kindsnacks.com/media-center/press-releases/fda-reverses-stance.html>.

[6] U.S. Food & Drug Administration, Use of the Term “Healthy” in the Labeling of Human Food Products: Guidance for Industry, at 5 (Sept. 2016) available at: <https://www.fda.gov/media/100520/download>.

[7] For example, WebMD has a “Sugar Addiction Facts” slideshow (available at: <https://www.webmd.com/diet/ss/slideshow-sugar-addiction>) and a book search on Amazon shows numerous books devoted to ending your sugar addiction, such as Dan DeFigio, *Beating Sugar Addiction for Dummies* (2013).

[8] See, e.g. Matt Fair, *Philly Sugar Tax’s Bitter Foes Face Long-Shot Legal Battle*, Law360 (June 20, 2016), <https://www.law360.com/articles/808197?scroll=1&related=1>.

[9] See *Hadley, et al. v. Kellogg Sales Company*, No. 5:16-cv-04955-LHK, Dkt. 62 (N.D. Cal. Apr. 5, 2017).

[10] *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1077-78 (N.D. Cal. 2017).

[11] *Hadley*, No. 5:16-cv-04955-LHK, Dkt. 325 at 2 (N.D. Cal. Oct. 21, 2019).

[12] *Id.* at 3-6.

[13] *Id.*

[14] *Hadley*, No. 5:16-cv-04955-LHK, Dkt. 326 (N.D. Cal. Oct. 22, 2019).

[15] *Krommenhock, et al. v. Post Foods, LLC*, No. 3:16-cv-04958-WHO (N.D. Cal.).

[16] *In re KIND LLC “Healthy and All Natural” Litig.*, No. 1:15-md-02645-WHP, Dkt. 140 (S.D.N.Y. Feb. 11, 2019).

[17] *Milan, et al. v. Clif Bar & Company*, No. 3:18-cv-02354-JD (N.D. Cal.); *Clark, et al. v. Perfect Bar, LLC*, No. 3:18-cv-06006-WHA. While *Clark* was dismissed on December 21, 2018, an appeal is pending.