

## Why Honey Is A Sweet Target For Consumer Litigation

By **John Johnson and James Muehlberger** (January 28, 2021, 5:14 PM EST)

A satirical article that appeared in the Washington Times in 1906 invited readers to learn from an expert about how they know that a product isn't "real" honey.[1] While the article was published over a century ago, it could easily appear today, as allegations about mislabeled honey continue.

Earlier this month, the U.S. District Court for the District of Kansas granted summary judgment for a honey manufacturer in *Wingate v. Barkman Honey LLC*, after concluding that the consumer plaintiff failed to produce evidence that the company's honey failed to meet the plaintiff's idiosyncratic definition of "raw" honey.[2]

This decision creates an opportunity to step back and consider honey's unique qualities, as well as the current regulatory and litigation landscape that surrounds it. With this understanding, food companies can better protect themselves and their brands.

Although it's only a single ingredient, honey is a complicated food that comes in many varieties. Options range from mass-produced filtered honey to small-batch artisanal honey in all sorts of colors.

Some consumers are attracted to this sweetener because they consider it earthier, more natural and possessing health benefits associated with some of honey's constituents. Others purchase it for taste and texture, or to support beekeepers. When compared to other sweeteners, honey can be more expensive for both consumers to buy and manufacturers to produce.

Honey producers have sometimes been accused of diluting their product with syrup. They have also faced many other accusations, including that their honey contains contaminants, that it lacks some key quality characteristic, or that its country of origin has been wrongly declared.

Given such accusations, it's critical for producers, distributors, retailers and consumers to understand honey's identity and the multifaceted regulatory environment around it.

U.S. Food and Drug Administration guidance defines honey as "a thick, sweet, syrupy substance that



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bees make as food from the nectar of plants or secretions of living parts of plants and store in honeycombs."<sup>[3]</sup>

The FDA's definition addresses the concern that a product may be labeled as honey when it is either a blend of honey and a syrup, or just syrup made to look like honey. For decades, FDA has monitored this issue and taken enforcement actions against violators, including import refusals,<sup>[4]</sup> import limitations,<sup>[5]</sup> recalls,<sup>[6]</sup> seizures<sup>[7]</sup> and criminal prosecution.<sup>[8]</sup>

The FDA also examines honey to verify that it does not contain nonpermitted contaminants. If it finds contaminants, the agency still considers the product to fall within the definition of honey, but determines that it is honey with a nonpermitted contaminant. When it has discovered honey containing, for example, unlawful animal drug residues, the FDA has responded with import refusals,<sup>[9]</sup> import limitations<sup>[10]</sup> and seizures.<sup>[11]</sup>

However, the FDA has not generally developed legally enforced quality parameters for honey. Thus, there are no agency definitions for "pure" or "raw" honey, or specifications about pollen, enzymes or heat treatments.

While the FDA could regulate country of origin declarations for honey, the primary agency responsible for such declarations is U.S. Customs and Border Protection. Almost every imported product must include a country of origin declaration, which allows the consumer to make an informed decision when purchasing a product.

Beyond this basic labeling requirement, there is an additional consideration for honey, because the U.S. has placed anti-dumping duties on Chinese honey to protect domestic production from Chinese honey being sold below fair market value.

Some importers have sought to circumvent these duties by falsely declaring that imported honey was from somewhere other than China. This has resulted in import seizures<sup>[12]</sup> and criminal prosecutions.<sup>[13]</sup> In general, Chinese honey is considered to be less desirable.

The FDA's dictionary definition of honey is not the only one. The U.S. Department of Agriculture has a voluntary grading standard for honey, which addresses various quality characteristics and reflects the many varieties of honey that exist. It includes seven color designations, three types and two styles — one of which is filter honey, which does not contain pollen.<sup>[14]</sup>

The National Honey Board is a nonregulatory group, under USDA oversight, that is dedicated to growing the U.S. market for honey. The board has established various definitions, including "commercially raw honey," which is "[h]oney as obtained by minimum processing. This product is often labeled as raw honey."<sup>[15]</sup>

In addition to these federal-level definitions, honey is defined in the Codex Alimentarius, a set of international food standards created by a 189-member commission.<sup>[16]</sup> The codex includes a definition of honey that starts similarly to the one adopted by the FDA, but becomes more technical by including specifications for characteristics such as sugar and moisture content.

The codex definition also specifies contaminants — such as nonpermissible animal drug residues — and several quality indicators, including pollen content and limited use of heating.<sup>[17]</sup> The heating consideration is further defined in the annex establishing parameters for hydroxymethylfurfural, a

substance produced when honey is heated.

The codex clarifies the annex "is intended for voluntary application by commercial partners and not for application by governments."<sup>[18]</sup> Although not law, the codex definition can find its way into litigation, either directly or through state legislation that incorporates it.

In the 2010s, a wave of litigation focused on filtered honey, which has the pollen removed from it to meet consumer preferences for characteristics like increased clarity and slower crystallization. In these suits, the plaintiffs alleged that the filtered honey was not honey because, according to some definitions, "[no] pollen ... may be removed except where this is unavoidable in the removal of foreign inorganic or organic matter."<sup>[19]</sup> The plaintiffs alleged that the product had avoidable pollen removed and thus was not real honey.

This allegation ultimately gained little traction, and these suits largely disappeared. Recent class actions have not challenged products for not meeting the definition of honey, but instead focus on claims about the honey, such as:

- Processing;<sup>[20]</sup>
- Origin;<sup>[21]</sup>
- Type — e.g., which plants were used to make the honey;<sup>[22]</sup> and
- Purity — e.g., whether certain contaminants are present.<sup>[23]</sup>

These claims generally relate to a product's value proposition, especially compared to filtered honey, with a characteristic that justifies the additional cost. These claims also relate to some of honey's unique qualities, such as pollen or enzymes found in raw honey.

Recent lawsuits have specifically targeted terms such as "raw." These suits involve debates about the word's meaning, and whether the claim is false or whether a reasonable consumer would be deceived. While the codex does not define raw honey, plaintiffs have dragged the codex into their complaints by referring to the voluntary commercial standard for hydroxymethylfurfural — a compound surely few consumers have heard of.

Not surprisingly, consumer surveys demonstrate that there is no commonly shared definition of "raw." Rather, consumers have many different interpretations of what constitutes raw honey. The surveys also show that people purchase honey labeled as raw for many different reasons.

Some may buy raw honey based upon their unique interpretations of what "raw" means. Others may buy it for reasons that have nothing to do with the word "raw" on the label, such as taste or texture. These individual issues doom any proposed consumer class action based upon alleged consumer deception from the "raw" claim on the labels.<sup>[24]</sup>

While honey's qualities make it more attractive for consumer lawsuits, these cases fit in the larger context of food litigation in which plaintiffs are suing under state consumer protection laws. These laws have common themes, but there is variation between the states in the elements and pleading requirements.

These differences are critical when evaluating the merit of a complaint, and whether the plaintiff has stated a claim upon which the court can grant relief — and courts have become more willing to apply the reasonable consumer standard at both the complaint and summary judgment stages. Other food

cases can be illustrative for how a specific court is utilizing judicial notice and how it is contextualizing a claim within the regulatory and labeling frameworks that impact a reasonable consumer's expectations for honey and the associated claims.

Honey manufacturers and brand owners can take proactive steps to decrease the risk of becoming a target for a class action. To start, they can track food litigation trends to identify if their current marketing strategies are similar to other lawsuits.

Furthermore, they can identify which claims are critical for their marketing strategy, then only retain the critical claims and remove the rest, to create fewer potential targets. If the critical claims are undefined in the law or ambiguously defined, they can define those claims as applied to their products on the label or website. This will decrease the risk of arguing over definitions in a court.

However, honey manufacturers and brand owners should not just hope that this will all go away. While the hot issues will change with time, based on consumer expectations, regulatory context and technological capabilities, concerns about mislabeled honey have existed for more than 100 years, and unfortunately may continue to generate litigation.

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***Disclosure: Muehlberger represented Barkman Honey in Wingate v. Barkman Honey LLC.***

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[1] Fake Honey, Wash. Times, July 3, 1906 (Last Edition), at 7.

[2] Wingate v. Barkman Honey LLC, No. 5:19-cv-04074-HLT-JPO, 2021 WL 50987 (D. Kan. Jan. 6, 2021).

[3] FDA, Proper Labeling of Honey and Honey Products: Guidance for Industry, available at <https://www.fda.gov/files/food/published/PDF---Guidance-for-Industry--Proper-Labeling-of-Honey-and-Honey-Products.pdf>.

[4] FDA Refusal Report, available at <https://www.accessdata.fda.gov/scripts/importrefusals/>.

[5] FDA, Import Alert 36-01 ([Economic] Adulteration of Honey), available at [https://www.accessdata.fda.gov/cms\\_ia/importalert\\_108.html](https://www.accessdata.fda.gov/cms_ia/importalert_108.html).

[6] See, e.g., FDA, Enforcement Report, May 12, 1999, at 5.

[7] See, e.g., FDA Consumer, Oct. 1995, at 34.

[8] See, e.g., FDA Consumer, Nov. 1979, at 29.

[9] FDA Refusal Report, available at <https://www.accessdata.fda.gov/scripts/importrefusals/>.

[10] FDA Import Alert 36-04 (Honey and Blended Syrup due to Unsafe Drug Residues), available at [https://www.accessdata.fda.gov/cms\\_ia/importalert\\_108.html](https://www.accessdata.fda.gov/cms_ia/importalert_108.html).

[11] FDA, Enforcement Report 2003, Center for Food Safety and Applied Nutrition, available at <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/enforcement-story-archive/center-food-safety-and-applied-nutrition-2003>.

[12] U.S. Immigration and Customs Enforcement, HIS Chicago Seizes Nearly 60 Tons of Honey Illegally Imported from China, available at <https://www.ice.gov/news/releases/hsi-chicago-seizes-nearly-60-tons-honey-illegally-imported-china>.

[13] U.S. Department of Justice, Two Companies and Five Individuals Charged with Roles in Illegal Honey Imports, available at <https://www.justice.gov/usao-ndil/pr/two-companies-and-five-individuals-charged-roles-illegal-honey-imports-avoided-180>.

[14] USDA, United States Standards for Grades of Extracted Honey, available at [https://www.ams.usda.gov/sites/default/files/media/Extracted\\_Honey\\_Standard%5B1%5D.pdf](https://www.ams.usda.gov/sites/default/files/media/Extracted_Honey_Standard%5B1%5D.pdf).

[15] National Honey Board, Definition of Honey and Honey Products, available at <https://www.honey.com/files/general/Honey-Definitions.pdf>.

[16] Codex Alimentarius, Members, available at <http://www.fao.org/fao-who-codexalimentarius/about-codex/members/en/>.

[17] Codex Standard for Honey (12-1981), available at [http://www.fao.org/input/download/standards/310/cxs\\_012e.pdf](http://www.fao.org/input/download/standards/310/cxs_012e.pdf).

[18] Id.

[19] Cal. Food Code 29413(e).

[20] See, e.g., *Pierce v. North Dallas Honey Co.*, No. 3:19-cv-00410-B (N.D. Tex. Feb. 19, 2019).

[21] See, e.g., Complaint at 1-2, *Greer v. Strange Honey Farm*, No. 3:19-cv-00518 (E.D. Tenn. Dec. 17, 2019).

[22] See, e.g., *Moore v. Trader Joe's Co.*, No. 4:18-cv-04418-KAW (N.D. Cal. June 24, 2019).

[23] See, e.g., *Tran v. Sioux Honey Ass'n*, No. 8:17-cv-00110-JLS-SS, 2020 WL 905571 (C.D. Cal. Feb. 24, 2020).

[24] See, e.g., *Wingate*, 2021 WL 50987.