Class Action Chaos

The Rise of Consumer Class Action Lawsuits in New York

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ABOUT THE DATA

The data in this report includes over 750 complaints alleging deceptive practices or false advertising filed in New York between 2015 and 2021 seeking class certification. This data was compiled based primarily through a Courthouse News (CNS) search of New York class actions categorized as "370-other fraud." This list was supplemented through a search of federal court dockets through *Law360*'s advanced case search function for class actions filed in New York federal courts under the same designation. The vast majority of New York's consumer class actions are filed in federal court due to the federal Class Action Fairness Act (CAFA) and the availability of statutory damages in federal, but not state, court.

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Executive Summary

Class action lawsuits asserting that New Yorkers are misled by the marketing of products and services *tripled* between 2017 and 2020, from 60 to 183 claims. Despite the pandemic, New York is on pace to shatter its consumer class action lawsuit record this year.

- With about 60% of its consumer class action docket targeting food products in 2020, New York has more food-related lawsuits than the next four top states combined.
- A handful of attorneys generate most of this litigation. One lawyer is responsible for filing over two hundred lawsuits — an average of two consumer class actions filed in New York courts every week.
- These lawsuits rarely reach a court ruling and never go to trial. Most are "voluntarily dismissed," which typically indicates that a business decided to settle rather than spend far more to "win" the case.
- When these lawsuits reach a judge, they often flounder and fail. While judges occasionally scold plaintiffs for their dubious claims, no court has imposed sanctions for bringing a frivolous lawsuit.
- New York's litigation surge stems from claims that range from the absurd to the ridiculous. Do New Yorkers think a 200-tablet bottle of Advil will have more pills based on the size of the bottle? Are they concerned about the type of cocoa in their Cocoa Pebbles? Are they buying "Yumions" snacks for the health benefits of onions?
- Recently introduced legislation would expand the opportunity to bring these types of lawsuits against a broader range of businesses and exponentially raise damage awards.

New York can address the surge of class action lawsuits that are making a mockery of the state's civil justice system and refocus the litigation on truly deceptive practices by taking three steps:

1. Amend the state's consumer protection law to prevent lawyers from threatening businesses with astronomical statutory (minimum) damages in class action lawsuits that dwarf any loss experienced by consumers.
2. Reject proposals to further expand liability under the guise of "modernizing" the statute.
3. Establish clear, commonsense principles to govern these claims and promptly dismiss cases where no reasonable consumer would be misled.

New York's class action problem is costly and often ridiculous, but it can be fixed.

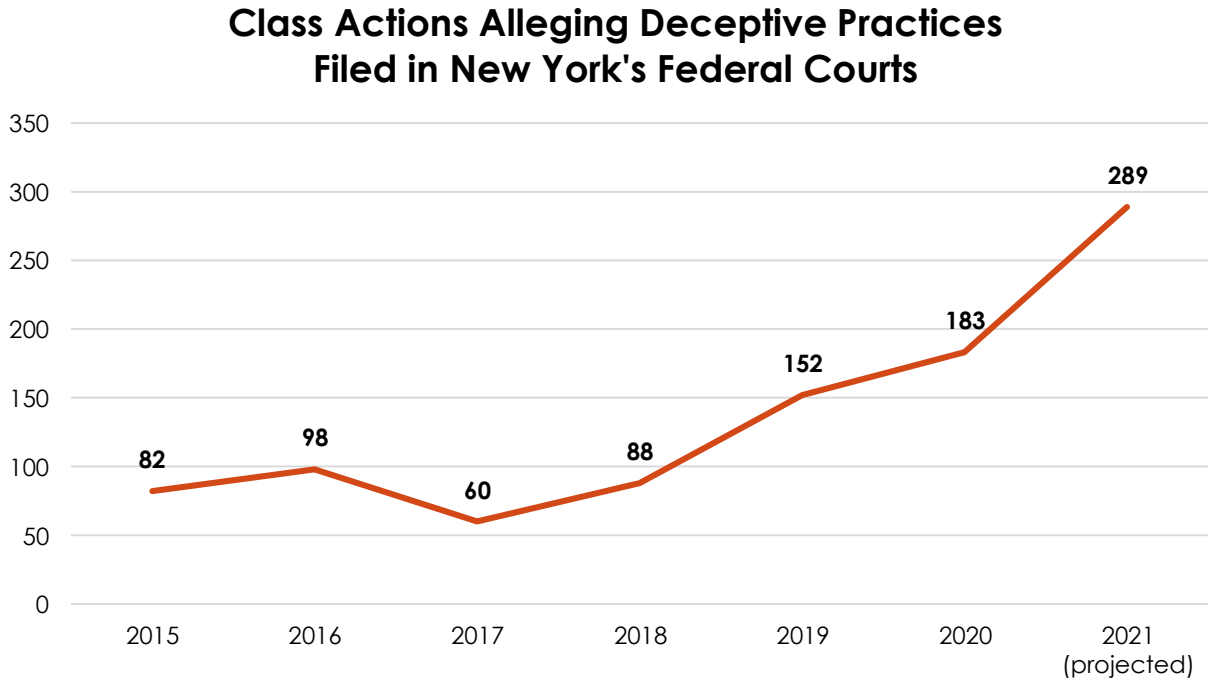
New York's Class Action Explosion

Class action lawsuits claiming New Yorkers are misled when purchasing products and services tripled between 2017 and 2020, and are heading toward an all-time high in 2021. A handful of attorneys and law firms have driven this litigation, creating claims where no reasonable New Yorker has been misled. These lawsuits typically provide no benefit to consumers. The targeted businesses often settle the lawsuits to avoid the cost of litigation or the risk of substantial liability if a court certifies the case as a class action.

The Rise in Consumer Class Actions

New York has experienced an extraordinary rise in the number of consumer class actions filed in its federal courts. In 2015, New York was already a favorite jurisdiction for the plaintiffs' bar to file class action lawsuits.[1] Aside from a brief dip in 2017, the number of lawsuits filed in New York just keeps on rising.

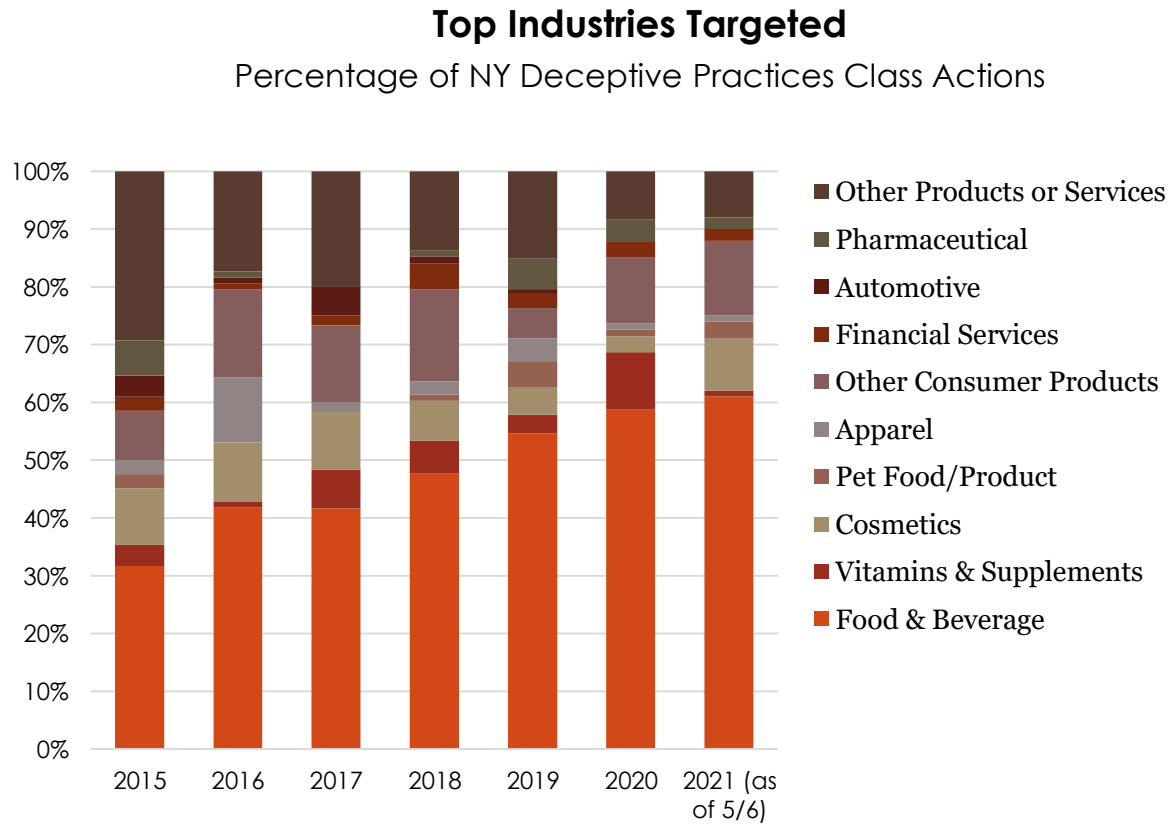
New York's class action attorneys clearly did not slow down during the COVID-19 pandemic. The litigation surge has continued in 2021 with the year's 100th consumer class action lawsuit filed on May 6. At this pace, New York may approach 300 of these lawsuits in 2021, dwarfing its previous records.



The vast majority of these claims are filed in two of New York's four federal district courts, the Southern District (Manhattan) and the Eastern District (Brooklyn and Long Island).

The Nation's Food Court

The rise in New York's consumer class actions is largely a result of lawsuits targeting businesses that sell food and beverages. As the chart below shows, each year, the percentage of class action lawsuits targeting products that New Yorkers place in their shopping carts, grab at a grocery store, or buy at a restaurant has gone up. Lawsuits claiming that businesses mislead consumers in how they labeled, marketed, or advertised food made up about one-third of deceptive practices class actions in 2015. Now, these "food court" lawsuits account for about 60% of New York's consumer class actions – exceeding deceptive practices claims against all other products and services combined. Over 100 food class actions were filed in New York in 2020 alone.



This is a New York phenomenon. An annual study conducted by a national law firm found that, in 2020, New York hosted more class actions targeting food and beverage products than any other state.[2] New York seized the title of the nation's "Food Court" from the long-reigning champion, California, in 2019. Last year, New York hosted nearly half of the nation's food class action litigation with more claims filed in New York than the next top four top states *combined*.[3]

The Most Common Types of Lawsuits

The most common types of allegations in New York's consumer class actions have shifted over the years. Lawsuits targeting particular marketing practices have surged when one or a few lawyers routinely file cut-and-paste lawsuits targeting similar products. Other types of claims fizzle out after adverse court rulings or other factors.

Claims on the Rise

VANILLA, OTHER FLAVORING, AND INGREDIENT-BASED CLAIMS

Plaintiffs' lawyers filed nearly 100 vanilla lawsuits between 2019 and 2020, comprising about one third of New York's consumer class action litigation.

Lawsuits targeting the flavoring of products, especially those labeled "vanilla," appear to have launched in February 2019 with a complaint alleging that a cream soda was not made with aged vanilla, as advertised.[4] Since then, the lawsuits have exploded, targeting nearly any vanilla-flavored product. Plaintiffs' lawyers filed nearly 100 vanilla lawsuits between 2019 and 2020, comprising about one third of New York's consumer class action litigation.

Generally, these lawsuits claim that consumers are misled to believe that products – from ice cream to soy milk to granola bars – are flavored solely or predominantly by pure vanilla. The lawsuits claim that consumers either would not have bought the product if they had known it was not made with pure vanilla or that they overpaid for it. While vanilla lawsuits have migrated to other states, New York is the epicenter.

As candy-maker Mars observed in a motion it filed to dismiss a lawsuit taking issue with its vanilla Dove ice cream bars, the claim "presupposes consumers' purchasing decisions are driven not by their desire for ice cream enrobed in a chocolate shell, but instead by their desire for vanilla ingredients sourced exclusively from the 'tropical orchid of the genus Vanilla (V. planifolia).' That is absurd."[5]

By 2020, these lawsuits had expanded to target other sources of flavoring. Do consumers believe the flavor of "smoked" almonds, Gouda, or provolone truly comes from smoke?[6] Do they realize that cheddar and sour cream-flavored potato chips[7] and Krispy Kreme "glazed apple pie"[8] include artificial flavors? Are consumers surprised to learn that lemon biscotti and other cookies contain non-lemon flavorings?[9] Are they offended to find that "Wasabi Soy Sauce" almonds contain horseradish?[10] Do consumers buy Hostess's carrot-cake "Donettes" because they expect the donuts to contain real carrots?[11] All of these are actual lawsuits filed in New York.

Closely related to the flavoring lawsuits are those that assert that a product's name or marketing leads consumers to believe that the product contains a certain ingredient or more of that ingredient than indicated on the ingredients list. Are strawberries the only fruit ingredient in Strawberry Pop Tarts?[12] Are cocoa pebbles made with unprocessed cocoa?[13] Do consumers choose to buy Reese's White or White Kit Kats because they want real white chocolate?[14] Do graham crackers have enough graham flour or honey?[15]

In most cases, consumers can easily find the answers to these questions simply by reading the FDA-regulated ingredients panel on the back of the package or through common sense. But the lawsuits assume that a consumer – even one for whom specific ingredients are a deciding factor in purchasing a product – will not read the package.

HEALTHY PRODUCTS AND SUGAR CONTENT

These lawsuits claim that products are marketed in a way that makes consumers view them as healthier than warranted. For example, some assert that juice drinks mislead consumers when they are labeled "no added sugar" since the product naturally has a significant amount of sugar.[16] Another targets frozen chicken nuggets marketed as "packed with goodness" because they contain saturated fat.[17] Lawsuits have also targeted iced tea that is described as lightly, slightly, or "a tad" sweetened."[18] These types of claims have gradually increased since 2018.

COVID-19 RELATED LAWSUITS

The pandemic predictably resulted in the use of New York's deceptive practices law for a variety of COVID-19 related class actions. For example, lawsuits have targeted marketing regarding the effectiveness of hand sanitizers and air purifiers, and the move from in-person to online education.[19]

A Steady Flow of Litigation

PRODUCT ORIGIN

Some lawsuits allege that consumers would not buy a product, or would have paid less for it, if they knew where it was made. For example, recent New York lawsuits claim that consumers are misled to believe Godiva chocolates are imported from Belgium when they are made in Pennsylvania,[20] "Hawaiian Rolls" are made in Hawaii rather than California,[21] and Tecate beer is made in Mexico when it is brewed in Holland.[22] Another lawsuit alleges that it is uncertain whether canned tomatoes are grown in fields in San Marzano, Italy, or whether the seeds are from San Marzano and the tomatoes are grown elsewhere in Italy.[23] Origin claims are a small, but steady, part of New York's class action litigation.

ORGANIC FOODS, DATA PRIVACY & PRICING PRACTICES

Class action lawsuits brought under New York's deceptive practices law claiming that food does not qualify as organic, that businesses or other organizations failed to secure personal information, or that companies engaged in misleading pricing or billing practices make up a small percentage of New York's deceptive practices lawsuits. They comprise about ten percent of these claims since 2015.

OTHER PRACTICES OR REPRESENTATIONS

Lawsuits allege that a diverse assortment of business practices and product representations mislead consumers. For example, several lawsuits claimed that the use of "diet" in the name of a soft drink leads consumers to believe soda is a weight-loss product.[24] Other lawsuits allege that

"Optimum" batteries do not contain more power than ordinary batteries,[25] air fresheners do not eliminate odors,[26] and trucks are not actually "Ford tough."[27] These lawsuits, which span a wide range of industries, comprised about half of deceptive practices class actions between 2015 and 2018. As flavoring and ingredient lawsuits came to dominate New York's litigation landscape, lawsuits targeting other practices have fallen as a percentage of the total litigation to just 33% and 26% in 2019 and 2020, respectively. The total number of New York class action filings in this category, however, is consistently in the range of 30 to 50 per year.

Earlier Hot Claims that are Losing Steam

SLACK FILL

Slack fill claims allege that the size of a product's container, box, or other packaging might lead a consumer to believe he or she will get more of the product than the package actually contains. Boxes and bags of candy were often the target of these claims, such as Junior Mints, Sour Patch candy, Mentos, and Swedish Fish.[28] But New York's slack fill lawsuits also took issue with pancake mix,[29] pasta,[30] Italian ices,[31] bottled Frappuccino drinks,[32] wraps and sandwiches,[33] deodorant,[34] detergent,[35] and packages of egg rolls.[36] A series of lawsuits even challenged the size of pain reliever bottles marked with the precise number of pills inside.[37]

Slack fill litigation has dried up, a likely result of court rulings against plaintiffs and companies making insignificant changes to packaging to reduce the opportunity for lawsuits.

Between 2015 and 2018, "slack fill" litigation was a significant portion of New York's consumer class action litigation—about one in eight of these lawsuits asserted that packages should have had a few more candies, provided another sip of a drink, or dispensed another squirt of a product. Slack fill litigation has dried up, a likely result of court rulings against plaintiffs and companies making insignificant changes to packaging to reduce the opportunity for lawsuits.

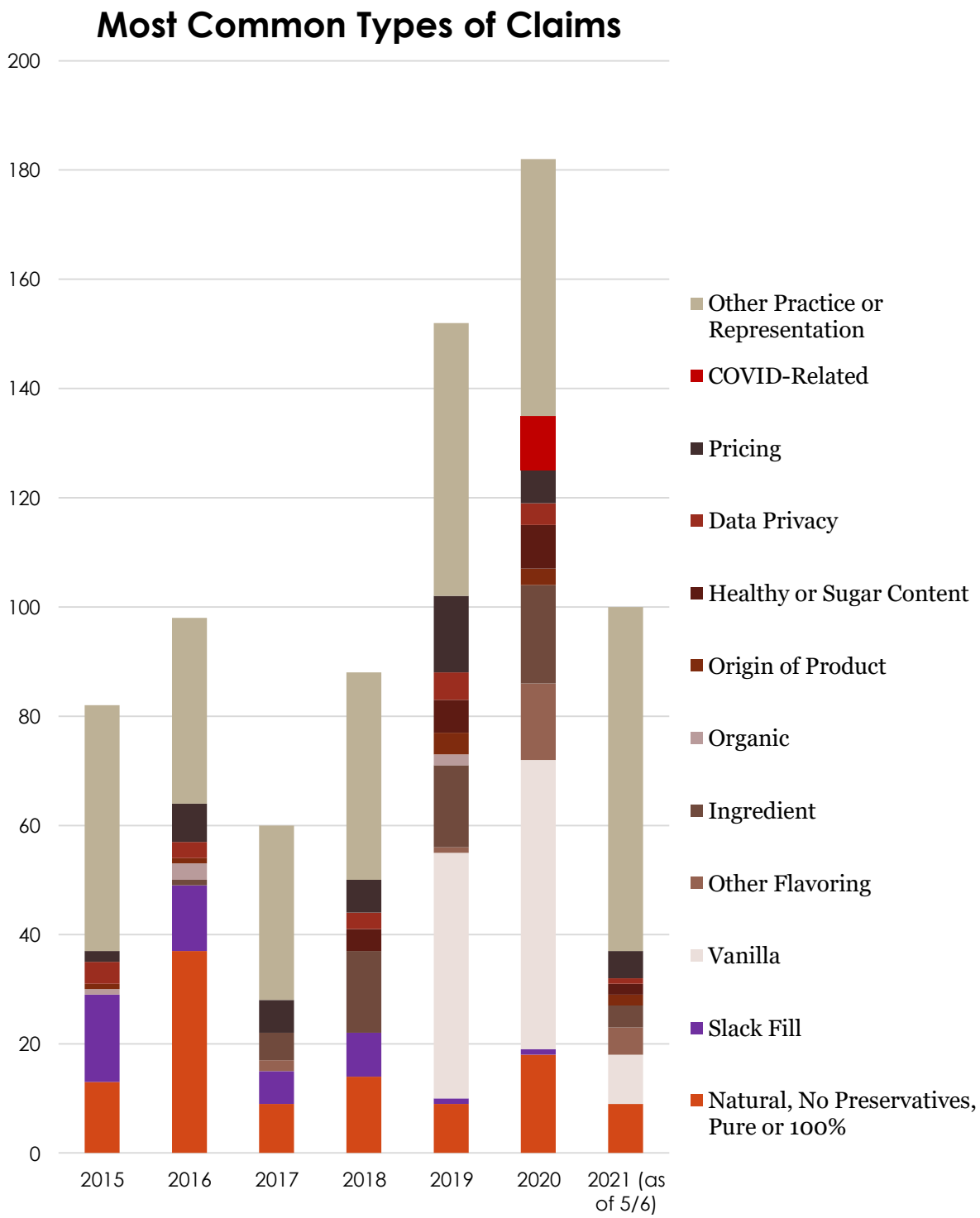
In 2019 and 2020 combined, New York attorneys filed just two slack fill lawsuits out of 334 class actions alleging deceptive practices.

NATURAL, NO PRESERVATIVES, PURE, OR 100%

Products marketed as "natural," "nothing artificial," or "no preservatives" are a consistent target for plaintiffs' lawyers. These lawsuits typically allege that products marketed using these terms include an ingredient or substance that is synthetic, such as citric acid,[38] or that the product is processed in a way that renders it no longer "natural."[39]

Lawsuits make similar allegations against products marketed as "pure" or containing "100%" of an ingredient. For instance, a series of lawsuits claimed that various brands of "100% Grated Parmesan Cheese" were not 100% cheese because they contained a small amount of cellulose, which keeps the cheese from sticking together in the package.[40]

These types of claims peaked in 2016 when they made up about one third of deceptive practices class actions filed in New York. They have slowed as businesses became aware that using these terms in product marketing will put them in the crosshairs for a lawsuit. Still, this litigation made up about 10% of New York's consumer class actions in 2020.



New York's Most Frequent Filers

A handful of attorneys and law firms are behind most class actions alleging deceptive business practices filed in New York. These firms often specialize in certain types of claims, develop a template for the complaint, shop for products that use similar labeling, marketing, or packaging, and then file similar lawsuits over and over again.

The Lee Litigation Group dominated the litigation between 2015 and 2018,[41] bringing about one out of every five consumer class actions filed in New York during that period. C.K. Lee and Anne Seelig filed most of the state's slack fill lawsuits and an assortment of other claims targeting products marketed as "natural" or "no preservative," and challenging other marketing practices.

A single attorney brought more than half of New York's deceptive practices litigation in 2019 and nearly two thirds of these lawsuits last year.

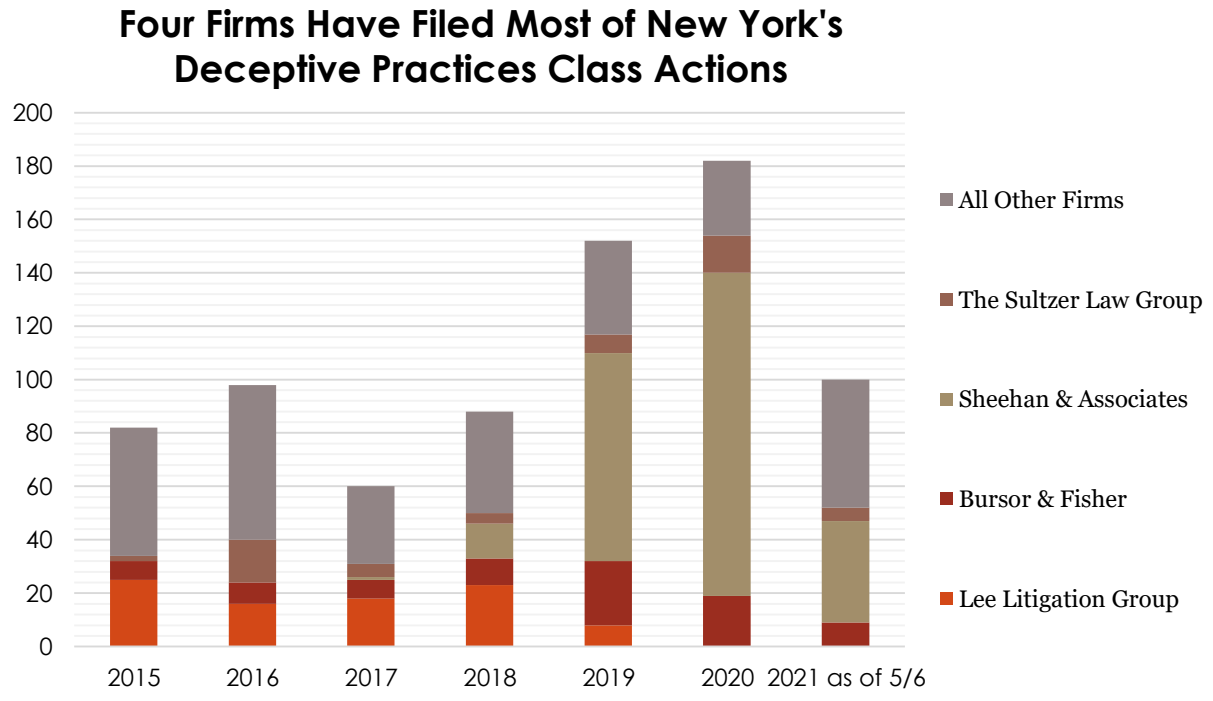
By 2019, another lawyer emerged to claim the throne as king of New York's consumer class actions: Spencer Sheehan of Sheehan and Associates, P.C. Sheehan is responsible for the unabated filing of lawsuits challenging the flavoring of foods, including the vanilla lawsuits, as well as those claiming that a product lacks an ingredient that consumers expect or should have more of an ingredient. He has also filed class action lawsuits in just about every other category discussed in this report. Sheehan's unrelenting cascade of lawsuits has contributed to New York becoming the nation's top jurisdiction for food litigation and an overall hot spot for consumer class actions. This single attorney brought more than half of New York's deceptive practices litigation in 2019 and nearly two thirds of these lawsuits last year.

Sheehan is on a similar pace in 2021. His litigation has thrust New York's litigation excesses in the national spotlight, from *Inside Edition* to the *Wall Street Journal*.[42]

Two other firms have also maintained a steady level of consumer class action litigation in New York. The Sultzer Law Group has focused on litigation targeting "natural" cosmetics, pet foods, and vitamins and supplements, and representations on non-food products. Meanwhile, Bursor & Fisher has what may be the most diverse array of lawsuits of the frequent filers. Its attorneys have filed consumer class actions in New York in areas including slack fill, data privacy, natural foods and other consumer products, marketing practices involving electronics, insect repellant, medications, and fee charges.

These four law firms generated nearly two thirds of all class actions alleging deceptive practices filed in New York between 2015 and 2021.

Other firms that have filed a lesser but still significant amount of consumer class action litigation in New York since 2015 include Denlea & Carton LLP, Faruqi & Faruqi LLP, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, Reese LLP, The Richman Law Group, The Law Offices of Mark Schlachet, and Law Offices of Paul C. Whalen PC.



What Happens to the Litigation?

Businesses often make the judgment that it makes more financial sense to settle these cases quickly than to pay far more on filing motions to dismiss and motions for summary judgment, producing documents, and sending executives for depositions so that they can "win" the case. They also know that if a lawsuit moves forward and is certified as a class action, the likely cost of a settlement rises from a few thousand dollars to hundreds of thousands or millions of dollars. As shown later in this paper, when businesses fight these claims, courts often agree that the claims lack merit. But far more often businesses settle even the most ridiculous complaints to cut their losses.

Usually, within a few months of when the complaint is filed, the docket simply indicates that the plaintiff voluntarily dismissed the case per stipulation of the parties. This typically indicates that the parties entered a confidential, private settlement. Less often, it may indicate that the plaintiffs' lawyer, after being confronted with obvious flaws in the lawsuit, withdrew the complaint and walked away before an adverse ruling and without any ramifications or penalty.

When there is a private settlement, the attorneys who filed the case receive several thousand dollars for their efforts and the individual class representative (the named plaintiff) gets a more modest sum. Consumers who were purportedly harmed receive no money and, at best, an insignificant change is made to the products' labeling, packaging, or marketing. In fact, consumers lose because the cost of this litigation, which often addresses practices where no reasonable consumer was misled, is reflected in the price of goods and services.

New York's Top 10 Most Ridiculous Consumer Class Action Lawsuits

There are many deserving contenders for the dubious distinction of being named among the Top 10 most ridiculous consumer class actions filed in New York. Putting aside numerous lawsuits claiming that consumers expect vanilla-flavored products to contain pure vanilla, here are some of the most head-scratching examples of this litigation.

	PRACTICE TARGETED IN THE COMPLAINT	FILED BY	DATE FILED	STATUS
1	**My Chips Aren't the Same as the Restaurant Appetizer?** Consumers buy bags of "TGI Fridays Potato Skins" chips because of health benefits associated with potato skins and tie the product to popular appetizers served at restaurants.[43] The ingredients list accurately indicates that the chips are made from potato flakes and potato starch.	C.K. Lee and Anne Seelig, Lee Litigation Group, PLLC	3/27/19	Dismissed in part on 6/8/20 because "no reasonable consumer would believe that the snack chips, shelf-stable and sold at room temperature in gas stations, would be identical in taste or substance to an appetizer, prepared with perishable dairy products and served hot in a restaurant."[44] Voluntarily dismissed on 9/21/20.
2	**Yumions Lack the Health Benefits of Fresh Onions!** Consumers are misled to believe 7-Eleven's "Yumions," which are marketed as "crunchy onion snacks," will contain real onions rather than corn meal, onion powder, and natural flavoring as indicated on the ingredients list. "Onion powder and added onion flavor also lack the health and nutrition benefits that are provided by real onions," such as fiber, vitamin C, folate, vitamin B6, and potassium.[45]	Spencer Sheehan, Sheehan & Associates, P.C.	1/11/21	Pending.

3	**Vegans Want Dairy?** Miyoko's "European Style Cultured *Vegan* Butter," which the package describes as "melts, bakes, and spreads *like* butter" misleads consumers because the product lacks any milk or dairy ingredients. The products "bask in dairy's 'halo' by using familiar terms to invoke positive traits" of dairy to the "detriment and impoverishment of plaintiff and class members."[46]	Spencer Sheehan, Sheehan & Associates, P.C. Joshua Levin-Epstein, Levin-Epstein & Associates, P.C. Larry Paskowitz, Paskowitz Law Firm, P.C.	10/30/18	Voluntarily dismissed on 2/28/19, reflecting a private settlement.[47] Even before the lawsuit, the product's packaging was modified to place "Vegan" in bold and add "made from plants."[48]
4	**Diet Soda Isn't a Weight Loss Product?** By naming its soda "Diet," Pepsi misleads consumers to believe the beverage's consumption would assist in weight loss. "Because a representation that a product is 'diet' inherently and necessarily implies it will assist in weight loss, Pepsi's implicit promise is that, because Diet Pepsi does not contain calories, it will assist in weight loss, or at least healthy weight management, i.e., will not cause weight gain (in the same way that drinking water could not possibly result in weight gain)."[49]	Derek T. Smith & Abraham Z. Melamed, Derek Smith Law Group, PLLC Jack Fitzgerald, Trevor M. Flynn & Melanie Persinger, Law Office of Jack Fitzgerald Andrew Sacks & John Weston, Sacks Weston Diamond, LLC	10/16/17	Dismissed by the court because reasonable consumers understand that diet sodas are lower calorie versions of their regular counterparts.[50]
5	**I Thought That "200 Tablets" Bottle of Advil Would Have More Pills!** Various size box and bottles of Advil, which have labels that clearly indicate the precise number of pills inside the bottle, mislead consumers to believe they are "buying more than what is actually being sold" because of the size of the product's packaging.[51]	C.K. Lee, Lee Litigation Group, PLLC	4/14/15	Dismissed by the court in October 2016, finding the claim "does not pass the proverbial laugh test."[52]
6	**No Carrots in Carrot-Cake Donuts?** Consumers expect Hostess's Carrot Cake Donettes to contain real carrots or to contain more carrots. They cannot determine whether the donut's taste comes from carrots, substances derived from carrots, or other natural or artificial flavors that simulate a carrot taste.[53]	Spencer Sheehan, Sheehan & Associates, P.C.	8/9/20	Voluntarily dismissed on 3/2/21.

7	**Strawberries Are Not the Only Fruit in Strawberry Pop-Tarts?** The packaging of Frosted Strawberry Pop-Tarts is misleading because the label gives consumers the impression that the fruit filling only contains strawberries as its fruit ingredient. **"**Consumers do not expect a food labeled with the unqualified term 'Strawberry' to contain fruit filling ingredients other than strawberry, and certainly do not expect pears and apples, as indicated on the back of the box ingredient list."[54]	Spencer Sheehan, Sheehan & Associates, P.C.	9/5/20	Amended complaint filed 3/13/21. Pending.
8	**Who Knows What the Cows Eat?** Kraft and Daisy deceptively label their sour cream "All Natural" (Kraft) and "Pure & Natural" (Daisy) because the milk and cream is derived from cows whose feed might contain genetically modified corn or soy. The lawsuit did not allege that there are any GMO products in the sour cream itself or its ingredients. [55]	Michael R. Reese and George V. Granade, Reese LLP Melissa W. Wolchansky, Amy E. Boyle, and Charles D. Moore, Halunen Law	8/17/16	Dismissed by the court in December 2018 because the allegations were so speculative and inconsistent with federal law that the complaint "fails to comport with reality."[56]
9	**You Owe Me an Inch of Lunch!** Consumers paid to receive a whole Pret A Manger wrap, but because the plaintiff's wrap was packaged with one inch of space between two halves, consumers did not receive the full amount for which they paid.[57]	C.K. Lee and Anne Seelig, Lee Litigation Group PLLC	7/31/17	Voluntarily dismissed on 2/25/19, reflecting a private settlement.[58]
10	**If Candy is White, It Must be Chocolate** Kit Kat White is "intended to be viewed and understood as white chocolate" because the candy is sold side-by-side with milk and dark chocolate varieties in retail stores. Yet, the wafers have a "white confection coating" and do not contain white chocolate.[59]	Spencer Sheehan, Sheehan & Associates, P.C.	6/7/19	Dismissed by the court in July 2020, finding that the candy is indeed white, there is no statement anywhere on its packaging or in any advertisement that says the product contains white chocolate, and the product is clearly described as "crisp wafers 'n crème."[60]

How Are Courts Responding?

The types of consumer class actions discussed in this report often settle before a court issues a ruling. When cases reach a judge, the lawsuits often flounder and fail. While judges occasionally scold plaintiffs who bring dubious claims, in no case did a court impose sanctions on an attorney for filing a frivolous lawsuit. Even some of the most far-fetched cases, however, have survived a motion to dismiss, usually because a court finds that, accepting the plaintiff's allegations as true, it cannot be certain at any early stage in the litigation that no reasonable consumer could be misled.

Little Appetite for Vanilla Lawsuits

As discussed earlier, the sharp increase in recent consumer class action lawsuits filed in New York comes in significant part from cases claiming that consumers expect vanilla-flavored products to be made with pure vanilla. The past year suggests that courts have little appetite for vanilla litigation.

New York courts have generally recognized that when a consumer is looking for a vanilla-flavored product and they get a vanilla-flavored product, there is no misrepresentation.

The Southern District of New York has dismissed complaints challenging vanilla-flavoring claims at least four times over a 12-month period.[61] In each case, the court found that a "reasonable consumer" would not be misled by a claim indicating a product is flavored with vanilla when that product, in fact, tastes like vanilla.[62] For example, in a case targeting vanilla-flavored almond and soy milk products, the Southern District explained that "without more, the 'Vanilla' representation would be misleading only if the Product did not actually taste like vanilla, but [plaintiffs] concede it does."[63] Thus far, New York courts have generally recognized that when a consumer is looking for a vanilla-flavored product and they get a vanilla-flavored product, there is no misrepresentation.

Cocoa is Cocoa and White Does Not Mean Chocolate

Courts have had similar reactions to lawsuits targeting the source of other flavorings and ingredients. For example, the Eastern District of New York has ruled that it was not misleading for the manufacturer of Oreos to advertise the cookies as made with "real" cocoa when they do, in fact, contain cocoa.[64] In that instance, the complaint claimed that consumers would understand "real cocoa" to refer to cocoa in an "unadulterated, non-artificially processed form," not cocoa that has been refined through an alkalizing process.

Two judges in the same district court dismissed separate claims against the Hershey Company, finding the recipe used to make White Reese's peanut butter cups and Kit Kat White candy bars

did not need to contain chocolate to avoid misleading consumers.[65] "White," the Kit Kat court found, means "the color of new snow or milk," which accurately describes the color of candy marketed as "Crisp Wafers 'n *Crème*."[66] Nothing on either package mentions chocolate and, as the Reese's court observed, a simple glance at the ingredient list on the back of the packaging makes clear that chocolate is not an ingredient.[67]

A Chip is Not a Restaurant Appetizer

Recently, the Southern District of New York partially dismissed a lawsuit claiming that consumers who buy "TGI Fridays Potato Skins Snacks" do so because they believe the chips are "authentic potato skins with a genuine potato skins taste — that is, a product that was actually derived from TGIF's famous potato skins appetizer."[68]

No reasonable consumer would expect that "snack chips, shelf-stable and sold at room temperature in gas stations, would be identical in taste or substance to an appetizer, prepared with perishable dairy products and served hot in a restaurant."

Applying the principles that "[a] reasonable consumer does not lack common sense," the court found that no reasonable consumer would expect that "snack chips, shelf-stable and sold at room temperature in gas stations, would be identical in taste or substance to an appetizer, prepared with perishable dairy products and served hot in a restaurant."[69]

Nor would a reasonable consumer believe that a snack chip would contain thick slices of potato skins or somehow be "derived from" the restaurant's appetizer.

But, perhaps being overly generous to the plaintiff, the court declined to entirely dismiss the case, finding it is possible that consumers might expect the chips to contain potato skins as an ingredient when they do not. Within three months of that decision, the parties appear to have settled the lawsuit.

New Yorkers Know "Diet" Soda is Not a Weight Loss Product

The U.S. Court of Appeals for the Second Circuit has resoundingly rejected lawsuits claiming that the use of the word "diet" to market diet sodas is false or misleading because it conveys promises that the beverage will assist in weight loss.[70] In each instance, the appellate court agreed with the trial court—these plaintiffs failed to state claims because the use of the term "diet" on a soda label indicates to a reasonable consumer the beverage is lower in sugar or calories than its non-diet soda counterpart, not that the beverage will benefit the consumer's health.

"[I]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial."[71] Specifically, in the soft drink context, the Second Circuit observed that "diet" is defined and commonly understood as meaning "reduced in or free from calories."[72] The court concluded that, "in the context of soft drink marketing, the term 'diet' carries a clear meaning," which a reasonable consumer understands as describing the drink's low caloric content, not a "more general weight loss promise."[73]

Courts Grow Skeptical of Lawsuits Targeting "Natural" Products

Federal courts in New York recently dismissed (in whole or in part) lawsuits based on claims that a product's label misleadingly refers to a product as "natural," in cases involving orange juice,[74] sour cream,[75] cough drops,[76] and dog food.[77]

For instance, the Eastern District of New York was critical of plaintiffs' claims that Daisy and Breakstone sour cream do not qualify as natural: "Plaintiff does not allege that the sour cream contains GMOs or even that the fermented milk used to make the sour cream contains GMOs—only that dairy cows *might* eat genetically modified feed and *might* be subject to accelerated milk production processes and that this possibility somehow makes the cows' milk—and by extension the Defendants' sour cream products—unnatural and their 'natural' labeling deceptive."[78] In dismissing the lawsuit, the court found the allegations "so speculative" and "so inconsistent with federal law" that the complaint "fails to comport with reality."[79]

Judicial skepticism toward these claims presents a shift from an earlier trend allowing similar claims to proceed beyond a motion to dismiss,[80] which often led to settlements that incentivized more lawsuits.

Not the Perfect Coffee Experience? Sue!

The Southern District of New York tossed a claim challenging whether Starbucks provides "premium" or "high-end" coffee as part of the "perfect coffee experience,"[81] when, according to plaintiffs, several New York store locations had unsanitary conditions.[82] Nearly all the language to which the lawsuit objected, the court found, was obvious "puffery" — "subjective claims about products that cannot be proven either true or false."[83]

Kentucky Bourbon Made in New York?

A federal district court recently considered a lawsuit claiming New Yorkers would believe that a brand of Kentucky bourbon is made exclusively in New York.[84] That case involved Widow Jane "Kentucky Bourbon Whiskey," which, as its name suggests, was distilled in Kentucky. The bottle also indicated that the product included limestone mineral water from the Widow Jane Mine in Rosendale, New York, which was added after it arrived in Brooklyn for bottling. The court found it implausible that reasonable consumers would believe "Kentucky Bourbon Whiskey" is distilled in New York and uses only New York water when the label indicates otherwise.[85] It also found that the precise source of the added limestone mineral water as originating from within the Widow Jane Mine boundaries or a nearby source was inconsequential to consumers.[86]

Belgian-Style Chocolates or Imported from Belgium?

On the other hand, Plaintiffs' lawyers had recent success in another product origin claim challenging whether New Yorkers buy Godiva chocolate because they believe the products are made in Belgium.[87] The company's products are labeled "Belgium 1926," representing that the company was founded in Belgium that year. A lawsuit brought on behalf of chocolate buyers pointed to this phrase, combined with statements such as "Assorted Belgian Chocolate Caramels" and "Delicious Belgian chocolates brought to you" used on packaging and in social

media, as misleading.[88] The company responded, however, that several pages of its website, media coverage, and other sources inform the public that its chocolates are manufactured in Reading, Pennsylvania. At the motion to dismiss stage, during which a court draws all reasonable inferences in a plaintiff's favor, the court found the plaintiff's allegations sufficient for the litigation to proceed.[89]

Slack Fill Cases Take Up Less Space on Court Dockets

Slack fill claims have dwindled in New York, as courts have found that packages accurately indicate the amount of the product in the package and consumers understand that some extra space is generally unavoidable due to packaging needs and other factors. The beginning of the end of slack fill cases may have its origins in lawsuits that went so far beyond common sense that they led to widespread judicial skepticism of these claims.

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For example, one New York lawsuit claimed that consumers were misled to believe that bottles of Advil would contain more medication than the number of pills clearly stated on the package.[90] In that case, the Eastern District of New York held that "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, noting the claim "does not pass the proverbial laugh test."[91]

More recently, the Second Circuit affirmed dismissal of a class action asserting that consumers overpaid for L'Oréal moisturizers and cosmetics because the products did not dispense every last ounce of the product indicated on the container.[92] In that instance, the trial court found the claim conflicted with federal regulations, which require a product's packaging to disclose the net weight of products regardless of the amount that is accessible through the dispensing mechanism. "A reasonable consumer would know that a container that dispenses a viscous cosmetic through a pump will not dispense all of the cosmetic," the trial court found.[93] The Second Circuit affirmed, finding that if plaintiffs were permitted to move forward with their claims, they would impermissibly use New York's consumer law to impose labeling requirements on top of those already mandated by federal law.[94]

New York courts have also dismissed slack fill claims targeting protein powder[95] and candy, such as Swedish Fish.[96] In the case of the allegedly insufficiently stocked Swedish Fish, the court found that the complaint had simply made "bare assertions" that any space in the box did not result from valid reasons, such as settling or packaging needs.[97] Nor did the complaint indicate why reasonable consumers would disregard the net weight, serving size, and number of servings accurately, clearly, and visibly displayed on the box.[98]

Read the Ingredients?

One might think that a reasonable consumer who is especially concerned with the healthfulness of a product or its contents would read the ingredients list. That's not always the outcome in court.

Perhaps the most significant recent ruling in this area involves Cheez-It crackers. A consumer class action claimed Cheez-It boxes labeled "whole grain" or "made with whole grain" misled consumers because the crackers' primary grain content is enriched white flour. The Eastern District of New York dismissed the case, observing that the boxes accurately displayed on the front panel the precise number of grams of whole grain per serving ("Made with 5g [or 8g] of WHOLE GRAIN per serving").[99] The box said whole grain. The ingredients included whole grain. Consumers received crackers with the amount of whole grain indicated on the box. The ingredients list indicated the product contained more white flour than whole grain. The label would not mislead reasonable consumers. Case dismissed.

In a 2018 ruling, the U.S. Court of Appeals for the Second Circuit disagreed and revived the lawsuit. A three-judge panel of the appellate court found that the label could "communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, *whole* grain."[100] Consumers cannot be expected, the court said, to read additional information on the front and side of the package, which would have clarified the ingredients.[101] *The Wall Street Journal* unkindly summarized the decision: "America's 'reasonable consumer' is held to be dumber than a box of crackers."[102]

Consumers also cannot be expected, it seems, to read the sugar content of a product or compare the ingredients of the choices available. For instance, a lawsuit filed in the Southern District of New York targeted the truthful labeling of Odwalla products as "100% Juice" with "No Added Sugar." The court allowed the lawsuit to proceed, finding that these representations could imply that similar products have added sugar and are less healthy, as the plaintiff claimed.[103]

Any ambiguity about the healthfulness of the product could be clarified by reading the nutrition facts label on the back of the box, in "exactly the spot consumers are trained to look."

Some New York courts, however, have given more credit to the common sense of consumers. For example, in 2020, the Eastern District of New York dismissed a lawsuit claiming that a label on snack bars advertising "1 gram of sugar" and the name "ONE bars" overstates the product's nutritional value. Any ambiguity about the healthfulness of the product could be clarified by reading the nutrition facts label on the back of the box, in "exactly the spot consumers are trained to look."[104]

Considering Solutions

New York's consumer protection law was designed to "secure an honest market place where trust, and not deception, prevails."[105] Unfortunately, as this paper shows, the law has been misused in recent years to generate hundreds of lawsuits targeting the marketing of products where no reasonable New Yorker has been misled. A combination of legislative reform and judicial action may discourage frivolous claims and encourage use of the courts to address truly deceptive practices.

What Makes New York Attractive for Lawsuits?

The class action lawsuits discussed in this report are typically brought under New York's consumer protection law, which is encompassed in two sections of the General Business Law (GBL).[106] The first provision, GBL § 349, broadly prohibits deceptive acts or practices. A second section, GBL § 350, prohibits false advertising.

When first enacted, New York's attorney general had exclusive authority to enforce these laws, and he or she can still today seek restitution for consumers and impose substantial civil penalties for violations.[107] Since 1980, however, individuals and their attorneys have had the ability to file lawsuits for deceptive practices and false advertising. The types of lawsuits filed by private attorneys examined in this paper are never filed by the state attorney general, even as the same laws prohibiting deceptive practices and false advertising apply.

GBL § 349 is particularly attractive for plaintiffs' lawyers.[108] The law's vague prohibition of deceptive practices can be used to target virtually any product, service, or activity. Courts interpret the law to not require an individual to show that a business intended to mislead consumers or even that a consumer relied on a misleading practice in deciding to purchase a product or service, as would be required in a traditional action for fraud.[109] A plaintiff needs to claim only that a practice is "likely to mislead a reasonable consumer acting reasonably under the circumstances."[110] Courts have found that, except in rare circumstances, this determination requires the considerable expense of a full jury trial.

In addition, GBL § 349 permits a person who is injured by a deceptive practice to recover actual damages or a minimum amount of $50 (known as statutory damages).[111] Courts can triple a person's actual damages up to $1,000 if a business willfully or knowingly engaged in a deceptive practice.[112] Unlike ordinary litigation in which each side shoulders its own expenses, a court may order a business to pay a consumer who wins a GBL § 349 claim his or her attorney's fees.[113]

Unlike New York, some other states' consumer protection laws give people the ability to recover their actual losses and do not provide for recovery of minimum statutory damages or triple damages.[114] In addition, some states do not authorize consumer class actions or, when they do, prohibit plaintiffs' lawyers from seeking statutory damages in class action litigation.[115] Several additional states that do not have statutory or treble damages also prohibit consumer class

actions,[116] avoiding the type of litigation brought in New York. Bringing class action litigation on behalf of New York consumers allows for especially large lawsuits (and potential settlements), given the population of the state.

Plaintiffs Seek Statutory Damages in Class Actions, Even When New York Law Says They Cannot

New York is also an attractive place to file consumer class actions because the statutory damages provision ($50 under GBL § 349) has been misused in class action litigation. These minimum amounts (as well as the potential for triple damages for willful violations and the ability to recover attorney fees) are intended to provide a sufficient incentive for *individual* consumers to seek recovery stemming from ordinary, small day-to-day consumer purchases. They were not intended to be used in class actions.

New York's Civil Procedure Law and Rules specifically provide that a "minimum measure of recovery created or imposed by statute" is not available in a class action unless the statute that authorizes the minimum damages authorizes its use in a class action.[117] This sound policy recognizes that statutory damages serve the same purpose as aggregating claims through a class action. Both statutory damages in individual actions and class actions are intended to provide an adequate incentive to bring small claims that might otherwise not be financially worthwhile to bring. When these two mechanisms are combined, however, the result is a threat of astronomical liability that is wildly disproportionate to the claimed loss.

A 2010 U.S. Supreme Court decision has allowed plaintiffs' lawyers to seek statutory damages in New York's consumer class actions, a result never intended by the state legislature. In that case, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, a divided Court held that rules governing lawsuits in federal court trump New York's rules governing class actions.[118] Four dissenting justices, led by Justice Ginsburg and representing the Court's full ideological spectrum, expressed concern that the effect of the decision is to approve an attempt "to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy."[119]

The result is that plaintiffs' lawyers can seek statutory damages when consumer class actions are litigated in New York's federal courts, even as such awards are prohibited in New York's state courts.[120] Respected jurists such Judge Jack B. Weinstein have suggested that Justice Ginsburg's dissenting opinion in *Shady Grove* "was the right one."[121] As Judge Weinstein recognized, a federal court's certification of a consumer class action lawsuit seeking statutory damages under New York's deceptive practices law "undermine[s] the substantive state law's policy: to prevent catastrophic and unfair judgments against defendants—a result to be avoided if possible."[122]

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Three Steps to Rein in Abusive Litigation

1. Restore the legislature's intent by clarifying that statutory damages are not available in consumer class actions.

There is no reasoned principle for awarding actual damages in New York's consumer class actions when litigated in state courts but allowing the threat of astronomical statutory damages when the same lawsuits are decided in federal courts. There is a simple solution: Amend General Business Law § 349(h), which provides for statutory damages, to explicitly provide that these damages are available only in individual actions. A similar amendment can be made to GBL § 350-e.

These changes would make clear that the restriction on statutory damages is a substantive part of New York's consumer protection law, not an element of the state's class action law that conflicts with federal procedures. In fact, Justice Ginsburg's dissenting opinion in *Shady Grove* suggests this approach,[123] and several federal courts have used it to preserve consumer class action requirements adopted by other states when the litigation proceeds in federal court. [124] These amendments would simply restore what is already supposed to be New York law.

2. Reject proposals to expand liability.

Although consumer class action in New York is clearly unhinged, in recent years, legislators have introduced bills that would further incentivize these claims. The Legislature should reject invitations to make the Empire State even more of a magnet for this type of litigation.

The latest iteration of this legislation, introduced on April 21, 2021, is A.2495A / S.6414. Ironically, this bill is deceptively marketed as the "Consumer and Small Business Protection Act," when it would subject businesses of all sizes to a broader range of the types of dubious lawsuits examined in this report and threaten them with significantly higher damage awards.

The legislation would turn New York's consumer protection law, including its relaxed standard for liability and generous damage provisions, into an all-purpose plaintiffs' lawyer bonanza.

The legislation would purportedly "modernize" GBL § 349 by increasing the amount of statutory damages from $50 to $1,000. The bill explicitly authorizes statutory damages in class action lawsuits, subjecting businesses to liability of up to $1 million or 2% of the business's net worth, whichever is greater. This provision would allow lawyers to threaten massive awards even when no consumer was actually misled by a business's practices and seek amounts that are vastly disproportionate any consumer loss. The plaintiffs' lawyer wish-list also adds vague terms to the statute (prohibiting acts that are "unfair" or "abusive," in addition to deceptive) and give courts unlimited discretion to increase a damage award. Making matters worse, the legislation authorizes advocacy groups to bring lawsuits, eliminating the need for plaintiffs' lawyers to have to find an actual person who at least claims to have been injured by a deceptive practice.

Finally, the bill allows plaintiffs' lawyers to bring claims under the statute "regardless of whether or not the underlying violation is consumer-oriented, has a public impact or involves the offering of goods, services or property for personal, family or household purposes." In other words, the legislation would turn New York's consumer protection law, including its relaxed standard for liability and generous damage provisions, into an all-purpose plaintiffs' lawyer bonanza. Future lawsuits under GBL § 349 would stray far from the law's intended purpose of protecting consumers. It is this provision that proponents suggest helps small businesses by allowing them to use the statute to sue other businesses, when, in actuality, the bill substantially increases the likelihood they they will be sued and for more money.[125]

In sum, rather than "modernize" New York's consumer protection law, proposals of this kind would place the state further out of the mainstream in nearly every way.

3. Firmly respond to meritless and vexatious litigation.

Dubious consumer class actions are often settled or withdrawn before reaching a ruling on a motion to dismiss or soon thereafter. Despite the cost, disruption, and risk, businesses must be willing to fight back in court against meritless claims. Otherwise, the sue, settle, and sue-again cycle will continue unabated.

It is imperative that courts use their authority to dismiss implausible claims as a matter of law at the earliest opportunity.

As this paper shows, many federal judges have shown a willingness to reject implausible claims that take issue with marketing practices that would not mislead a reasonable consumer. At an early stage of litigation, however, some judges understandably give plaintiffs the benefit of the doubt and allow questionable claims to proceed or permit them to amend their complaints repeatedly to address deficiencies. It is imperative that courts use their authority to dismiss implausible claims as a matter of law at the earliest opportunity.[126]

Courts should establish clear, commonsense principles to govern consumer class actions and dismiss cases where no reasonable consumer would be misled.

ENDNOTES

[1] *See* Perkins Coie LLP, Food Litigation 2016 Year in Review 2 (Mar. 2017) (indicating New York placed second in the nation, behind California, in 2015 and 2016 for the number of class action lawsuits targeting food and beverage marketing).

[2] Perkins Coie LLP, 2020 Food & Consumer Packaged Goods Litigation Year in Review 4 (Feb. 2021).

[3] According to the Perkins Coie *Year in Review*, lawyers filed 220 food class action lawsuits nationwide in 2020. The top five jurisdictions for these claims were New York (107), California (58), Missouri (13), Washington, D.C. (10), and Illinois (8). *See id.*

[4] *Sharpe v. A W Concentrate Co.*, No. 1:19-cv-00768 (E.D.N.Y. filed Feb. 7, 2019); *see also* Corinne Ramey, *The Case for Plain Vanilla Gets Its Day in Court*, Wall St. J., Feb. 7, 2021.

[5] Mars Wrigley Confectionary US, LLC's Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint, *Garadi v. Mars Wrigley Confectionary US, LLC*, No. 1:19-cv-03209, at 16 n.8 (E.D.N.Y. filed Dec. 23, 2020). Soon after a hearing on this motion, the plaintiff unsuccessfully attempted to dismiss his own claim to avoid an adverse ruling. Order, *Garadi v. Mars Wrigley Confectionary US, LLC*, No. 1:19-cv-03209 (E.D.N.Y. Feb. 17, 2021) (finding Plaintiffs Notice of Voluntary Dismissal untimely and indicating that the court would rule on the pending motion to dismiss).

[6] *Fleischer v. Aldi Inc.*, No. 1:21-cv-00443 (E.D.N.Y. Jan. 27, 2021) (smoked white cheddar cheese); *Jones v. Dietz Watson Inc.*, 1:20-cv-6018 (E.D.N.Y. filed Dec. 9, 2020) (smoked provolone cheese); *Bynum v. Family Dollar Stores Inc.*, No. 1:20-cv-6878 (S.D.N.Y. filed Aug. 25, 2020) (almonds with "natural smoked flavor"); *Watson v. Dietz Watson Inc.*, No. 1:20-cv-6550 (S.D.N.Y. filed Aug. 17, 2020) (smoked gouda); *Colpitts v. Blue Diamond Growers*, No. 1:20-cv-2487 (S.D.N.Y. filed Mar. 22, 2020) ("smokehouse" almonds).

[7] *Salony v. VMG Partners LLC*, No. 7:20-cv-10273 (S.D.N.Y. filed Dec. 6, 2020); *Larocca v. Frito-Lay, Inc.*, No. 1:20-cv-4245 (E.D.N.Y. filed Sept. 11, 2020); *Walace v. Wise Foods Inc.*, No. 1:20-cv-6831 (S.D.N.Y. filed Aug. 24, 2020); *Ithier v. Frito-Lay N. Am. Inc.*, No. 7:20-cv-1810 (S.D.N.Y. filed Mar. 1, 2020).

[8] *Williams v. Krispy Kreme Doughnut Corp.*, No. 1:19-cv-11878 (S.D.N.Y. filed Dec. 27, 2019).

[9] *Bardsley v. Nonni's Foods LLC*, No. 7:20-cv-2979 (S.D.N.Y. filed Apr. 11, 2020) (Limone Biscotti cookies); *Rodriguez v. 7-Eleven Inc.*, No. 1:20-cv-2636 (S.D.N.Y. filed Mar. 29, 2020) (Iced Lemon Cookies); *Cruz v. D F Stauffer Biscuit Co.*, No. 1:20-cv-2402 (S.D.N.Y. filed Mar. 19, 2020) (Lemon Snaps cookies).

[10] *Hernandez v. Blue Diamond Growers*, No. 1:19-cv-1467 (S.D.N.Y. filed Feb. 15, 2019).

[11] *James v. Hostess Brands LLC*, No. 1:20-cv-6259 (S.D.N.Y. filed Aug. 9, 2020).

[12] *Brown v. Kellogg Sales Co.*, No. 1:20-cv-7283 (S.D.N.Y. filed Sept. 5, 2020).

[13] *Copeland v. Post Consumer Brands LLC*, No. 2:19-cv-2488 (E.D.N.Y. filed Apr. 26, 2019).

[14] *Winston v. The Hershey Co.*, 1:19-cv-03735 (E.D.N.Y. filed June 26, 2019) (Reese's); *Rivas v. The Hershey Co.*, No. 1:19-cv-3379 (E.D.N.Y. filed June 7, 2019) (Kit Kat).

[15] *Warren v. The Stop Shop Supermarket Co.*, No. 7:20-cv-8718 (S.D.N.Y. filed Oct.19, 2020); *Campbell v. Whole Foods Market Group Inc.*, No. 1:20-cv-1291 (S.D.N.Y. filed Feb. 13, 2020); *Watson v. Kellogg Sales Co.*, No. 1:19-cv-1356 (S.D.N.Y. filed Feb. 12, 2019); *Jamison v. Target Corp.*, No. 1:19-cv-650 (E.D.N.Y. filed Feb. 1, 2019); *Brown v. Walmart Inc.*, No. 2:19-cv-569 (E.D.N.Y. filed Jan. 29, 2019); *Kennedy v. Mondelez Global LLC*, No. 1:19-cv-302 (E.D.N.Y. filed Jan. 15, 2019).

[16] *See, e.g., Casey v. Odwalla Inc.*, No. 7:17-cv-2148 (S.D.N.Y. filed Mar. 24, 2017).

[17] *Burke v. MG Wellington LLC*, No. 1:16-cv-2968 (S.D.N.Y. filed Apr. 21, 2016).

[18] *Nelson v. Ito En (N. Am.) Inc.*, No. 7:20-cv-07496 (S.D.N.Y. filed Sept. 12, 2020); *Salerno v. The Coca-Cola Co.*, No. 1:20-cv-711 (E.D.N.Y. filed Feb. 8, 2020); *Taylor v. Tipp Distributors, Inc.*, No. 1:20-cv-00712 (E.D.N.Y. filed Feb. 9, 2020).

[19] *See, e.g., Garbus v. UV Sanitizer USA LLC*, No. 2:20-cv-05358 (E.D.N.Y. filed Nov. 4, 2020) (air sanitizer); *Migliore v. Hofstra Univ – Maurice A. Deane School of Law*, No. 2:20-cv-03671 (E.D.N.Y. filed Aug. 13, 2020) (online education); *Quattrociocchi v. Rochester Inst. of Technology*, No. 6:20-cv-06558 (W.D.N.Y. filed July 30, 2020) (online education); *Lepore v. Molekule Inc.*, No. 2:20-cv-02571 (E.D.N.Y. filed June 9, 2020) (air purifier); *Dibartolo v. Gojo Indus. Inc.*, No. 1:20-cv-01530 (E.D.N.Y. filed Mar. 24, 2020) (Purell hand sanitizer); *Gonzalez v. Gojo Indus. Inc.*, No. 1:20-cv-00888 (S.D.N.Y. filed Feb. 1, 2020) (Purell hand sanitizer).

[20] *Hesse v. Godiva Chocolatier Inc.*, No. 1:19-cv-00972 (S.D.N.Y. filed Jan. 21, 2019).

[21] *Galinsky v. King's Hawaiian LLC*, No. 7:20-cv-10931 (S.D.N.Y. filed Dec. 25, 2020).

[22] *Schelmetty v. Heineken USA Inc.*, No. 7:20-cv-09985 (S.D.N.Y. filed Nov. 27, 2020).

[23] *Sibrian v. Cento Fine Foods Inc.*, No. 2:19-cv-00974 (E.D.N.Y. filed Feb. 19, 2019).

[24] See discussion *infra* at 15.

[25] *Ferguson v. Duracell U.S. Operations Inc.*, No. 7:20-cv-10734 (S.D.N.Y. filed Dec. 19, 2020).

[26] *Akwei v. Reckitt Benckiser Group PLC*, No. 1:17-cv-06080 (S.D.N.Y. filed Aug. 11, 2017).

[27] *Kommer v. Ford Motor Co.*, No. 7:17-cv-01724 (S.D.N.Y. filed Mar. 8, 2017).

[28] *See, e.g., Jocelyn v. CVS Pharmacy Inc.,* No. 1:17-cv-09029 (S.D.N.Y. Nov. 17, 2017) (gummy fish*); Daniel v. Tootsie Roll Indus. LLC,* No. 1:17-cv-7541 (S.D.N.Y. filed Oct. 3, 2017) (Junior Mints); *Izquierdo v. Mondelez Int'l Inc.*, No. 1:16-cv-04697 (S.D.N.Y. filed June 20, 2016) (Sour Patch candy); *Hu v. Perfetti Van Melle USA Inc.*, No. 1:15-cv-03742 (E.D.N.Y. filed June 26, 2015) (Mentos); *Daniel v. Mondelez Int'l Inc.*, No. 2:17-cv-00174 (E.D.N.Y. filed Jan. 12, 2017) (Swedish Fish); *Hu v. Hershey Co.*, No. 1:15-cv-03741 (E.D.N.Y. filed June 26, 2015) (Ice Cubes gum).

[29] *Martinez v. The Quaker Oats Co.*, No. 7:16-cv-08607 (S.D.N.Y. filed Nov. 4, 2016).

[30] *Stewart v. New World Pasta Co.*, No. 7:16-cv-06157 (S.D.N.Y. filed Aug. 3, 2016); *Berni v. Barilla S.P.A.*, No. 1:16-cv-4196 (E.D.N.Y. filed July 28, 2016).

[31] *Orbach v. JJ Snack Foods Corp.*, No. 7:18-cv-00321 (S.D.N.Y. filed Jan. 12, 2018).

[32] *Lee v. Starbucks Corp.*, No. 1:15-cv-01634 (E.D.N.Y. filed Mar. 27, 2015).

[33] *Lau v. Pret A Manger USA Ltd.*, No. 1:17-cv-05775 (S.D.N.Y. filed July 31, 2017).

[34] *Parker v. Proctor Gamble Co.*, No. 1:15-cv-06172 (S.D.N.Y. filed Aug. 8, 2015); *Chong v. Kao USA Inc.*, No. 1:15-cv-2131 (E.D.N.Y. filed Apr. 14, 2015).

[35] *Garcia v. Proctor Gable Co.*, No. 1:15-cv-09174 (S.D.N.Y. filed Nov. 20, 2015).

[36] *Hu v. Tristar Food Wholesale Co.*, No. 1:15-cv-06954 (E.D.N.Y. filed Dec. 7, 2015); *Ren v. Domega NY Int'l Ltd.*, No. 1:15-cv-06484 (E.D.N.Y. filed Nov. 12, 2015).

[37] *Marte v. CVS Health Corp.*, No. 1:15-cv-09431 (S.D.N.Y. filed Dec. 2, 2015) (CVS brand Acetaminophen and Ibuprofen products); *Fermin v. Pfizer Inc.*, No. 1:15-cv-02133 (E.D.N.Y. filed Apr. 14, 2015); *Marte v. McNeil-PPC Inc.*, No. 1:15-cv-01745 (S.D.N.Y. filed Mar. 9, 2015) (Motrin); *Fermin v. McNeil-PPC Inc.*, No. 1:15-cv-01215 (E.D.N.Y. filed Mar. 9, 2015) (Tylenol).

[38] *See, e.g., Thur v. Hornell Brewing Co.*, No. 2:21-cv-01200 (E.D.N.Y. filed Mar. 5, 2021); *Riedel v. Lucini Italia Co.*, No. 1:16-cv-00169 (E.D.N.Y. filed Jan. 13, 2016); *Chen v. Outernational Brands Inc.*, No. 1:16-cv-01634 (E.D.N.Y. filed Apr. 4, 2016); *Minker v. Ricola USA Inc.*, 1:15-cv-09014 (S.D.N.Y. filed Nov. 16, 2015).

[39] *See, e.g., Axon v. Florida's Natural Growers Inc.*, No. 1:18-cv-04162 (E.D.N.Y. filed July 20, 2018).

[40] *See, e.g., Campana v. Kraft Heinz Food Co.*, No. 1:16-cv-01529 (E.D.N.Y. filed Mar. 29, 2016); *Ducorsky v. Wal-Mart Stores Inc.*, No. 1:16-cv-01571 (S.D.N.Y. filed Mar. 1, 2016).

[41] *See* Lisa Fickenscher, *Woman Fed Up With Unfilled Boxes Sues Candy Company*, N.Y. Post, Oct. 5, 2017; *Woman Sues Pret A Manger for $5.5 MILLION Claiming the Sandwich Chain is Tricking Customers Into 'Paying for Air' by Using Oversized Packaging*, Daily Mail, Aug. 1, 2017.

[42] Corinne Ramey, *The Case for Plain Vanilla Gets Its Day in Court*, Wall St. J., Feb. 7, 2021; *Meet the Long Island Lawyer Pursuing Nearly 100 Lawsuits Over Products Labeled as 'Vanilla'*, Inside Edition, Nov. 30, 2020; *see also Lawyer Launches Court Fight Over Fake Vanilla in Food And Drink... But McDonald's Hits Back, Insisting It's a 'Flavour' and People Don't Expect the Real Thing*, Daily Mail, Feb. 8, 2021; Ken Schachter, *LI Lawyer Now Spars With Food Companies Over Smoke Flavoring in Products*, Newsday, Jan. 11, 2021.

[43] *Troncoso v. TGI Friday's Inc.,* No. 1:19-cv-02735 (S.D.N.Y. filed Mar. 27, 2019).

[44] *Troncoso v. TGI Friday's Inc.*, 2020 WL 3051020, at *7 (S.D.N.Y. June 8, 2020).

[45] *Socol v. 7-Eleven, Inc.*, No. 7:21-cv-00194 (S.D.N.Y. filed Jan. 11, 2021).

[46] *Brown v. Miyoko's Kitchen, Inc.*, No. 2:18-cv-06079 (E.D.N.Y. filed Oct. 20, 2018) (emphasis added).

[47] Elaine Watson, *Lawsuit vs Miyoko's Kitchen Challenging Plant-Based 'Butter' is Voluntarily Dismissed*, Food Navigator-USA, May 17, 2019 (confirming private settlement and discussing why defendants often enter them).

[48] Ryan Boysen, *If It's Vegan, It's Not Butter, Proposed Class Action Says*, Law360, Oct. 31, 2018.

[49] *Manuel v. Pepsi-Cola Co.*, No. 17-cv-07955 (S.D.N.Y. filed Oct. 16, 2017).

[50] *Manuel v. Pepsi-Cola Co.*, No. 17-cv-07955, 2018 WL 2269247, at *8 (S.D.N.Y. May 17, 2018), *aff'd*, 763 Fed. Appx. 108 (2d Cir. Mar. 15, 2019).

[51] *Fermin v. Pfizer*, No. 1:15-cv-02133 (E.D.N.Y. filed Apr. 14, 2015).

[52] *Fermin v. Pfizer, Inc.*, 15 F.Supp.3d 209, 212 (E.D.N.Y. 2016).

[53] *James v. Hostess Brands LLC*, No. 1:20-cv-06259 (S.D.N.Y. filed Aug. 9, 2020).

[54] *Brown v. Kellogg Sales Co.*, No. 1:20-cv-07283 (S.D.N.Y. filed Sept. 5, 2020).

[55] *Newton v. Kraft Heinz Foods Co. and Daisy Brand LLC*, No. 1:16-cv-04578 (E.D.N.Y. filed Aug. 17, 2016).

[56] *Newton v. Kraft Heinz Foods Co.*, 2018 WL 11235517, at *9 (E.D.N.Y. Dec. 18, 2018).

[57] *Lau v. Pret A Manger (USA) Ltd.*, No. 1:17-cv-05775 (S.D.N.Y. filed July 31, 2017).

[58] Joyce Hanson, *Pret A Manger Nears Settlement Of Underfilled Wraps Suit*, Law360, Jan. 30, 2019.

[59] *Rivas v. Hershey Co.*, No. 1:19-cv-03379 (E.D.N.Y. filed June 7, 2019).

[60] *Rivas v. Hershey Co.*, 2020 WL 4287272, at *5-6 (E.D.N.Y. July, 27 2020).

[61] *See Steele v. Wegmans Food Mkts., Inc.*, 472 F. Supp. 3d 47, 50 (S.D.N.Y. 2020); *Barreto v. Westbrae Nat., Inc.*, 2021 WL 76331, at *4 (S.D.N.Y. Jan. 7, 2021); *Cosgrove v. Blue Diamond Growers*, 2020 WL 7211218, at *4 (S.D.N.Y. Dec. 7, 2020); *Pichardo v. Only What You Need, Inc.*, 2020 WL 6323775, at *5 (S.D.N.Y. Oct. 27, 2020).

[62] *See Pichardo*, 2020 WL 6323775, at *5 ("It is difficult to comprehend what is misleading when the Defendant's 'Smooth Vanilla' tastes like vanilla.").

[63] *Cosgrove*, 2020 WL 7211218, at *3.

[64] *See Harris v. Mondelez Global LLC*, 2020 WL 4336390 (E.D.N.Y. July 28, 2020).

[65] *See Winston v. Hershey Co.*, 2020 WL 8025385 (E.D.N.Y. Oct. 26, 2020); *see also Rivas v. Hershey Co.*, 2020 WL 4287272 (E.D.N.Y. July, 27 2020).

[66] *Rivas*, 2020 WL 4287272, at *5 (emphasis added).

[67] *Winston*, 2020 WL 8025385, at *4.

[68] *Troncoso v. TGI Friday's Inc.*, 2020 WL 3051020 (S.D.N.Y. June 8, 2020).

[69] *Id.* at *7.

[70] *See Geffner v. Coca-Cola Co.*, 928 F.3d 198 (2d Cir. 2019); *Excevarria v. Dr Pepper Snapple Group, Inc.*, 764 Fed. Appx. 108 (2d Cir. 2019); *Manuel v. Pepsi-Cola Co.*, 763 Fed.Appx. 108 (2d Cir. 2019).

[71] *Geffner*, 928 F.3d at 200 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) (internal quotations omitted).

[72] *Id.*

[73] *Id.*

[74] *Axon v. Florida's Natural Growers, Inc.*, 813 Fed. Appx. 701 (2d Cir. 2020) (ruling use of the word "natural" in orange juice name would not lead reasonable consumers to believe that the product would be free of any trace of glyphosate).

[75] *Newton v. Kraft Heinz Foods Co.*, 2018 WL 11235517 (E.D.N.Y. Dec. 18, 2018).

[76] *Comfort v. Ricola USA, Inc.*, 2019 WL 6050301 (W.D.N.Y. Nov. 14, 2019) (phrase "Naturally Soothing" not misleading when the cough drop package ingredient list indicated synthetic, artificial, or genetically modified ingredients).

[77] *Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 248 (S.D.N.Y. Apr. 18, 2019) (dog food labeled "natural" not misleading, despite detection of trace amounts of glyphosate).

[78] *Kraft Heinz Foods Co.*, 2018 WL 11235517, at *1 (emphasis in original).

[79] *Id.* at *9.

[80] *See, e.g., Marotto v. Kellogg Co.*, 2018 WL 10667923 (S.D.N.Y. Nov. 28, 2018) (finding plaintiffs sufficiently pled that ingredients were artificial and misleadingly labeled as a "premium" "all natural" product with "natural flavoring ingredients"); *Silva v. Smucker Natural Foods, Inc.*, 2015 WL 5360022 (E.D.N.Y. Sept. 14, 2015) (denying motion to

dismiss because whether a reasonable consumer could interpret Smucker's representations of its "Natural Brew" root beer is a factual claim about the soda's ingredients); *In re Frito-Lay N. Am., Inc. All Natural Litig*., 2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013) (finding chip manufacturer did not meet the heavy burden of extinguishing the possibility that a reasonable consumer could view an "all natural" label as meaning products were GMO-free).

[81] *George v. Starbucks Corp*., 2020 WL 6802955, at *1 (S.D.N.Y. Nov. 19, 2020).

[82] *Id*.

[83] *Id*. at *2 (internal citations and quotations omitted).

[84] *Boshnack v. Widow Jane Distilleries LLC*, 2020 WL 3000358 (S.D.N.Y. June 20, 2020).

[85] *Id*. at *3.

[86] *Id*.

[87] *Hesse v. Godiva Chocolatier, Inc*., 463 F. Supp. 3d 453 (S.D.N.Y. May 29, 2020).

[88] *Id*. at 460–61.

[89] *Id*. at 468-69 (internal citation omitted).

[90] *Fermin v. Pfizer Inc*., 215 F.Supp.3d 209 (E.D.N.Y. Oct. 18, 2016).

[91] *Id*. at 212.

[92] *Critcher v. L'Oreal USA, Inc*., 959 F.3d 31 (2d Cir. 2020).

[93] *Critcher v. L'Oreal USA, Inc*., 2019 WL 3066394, at *5 (S.D.N.Y. July 11, 2019).

[94] *Critcher,* 959 F.3d at 36.

[95] *Bautista v. Cytosport, Inc*., 223 F.Supp.3d 182 (S.D.N.Y. Dec. 12, 2016).

[96] *Bautista v. Cytosport, Inc*., 223 F.Supp.3d 182 (S.D.N.Y. Dec. 12, 2016).

[97] *Daniel*, 287 F. Supp. 3d at 87-88.

[98] *See id*. at 192-93.

[99] *Mantikas v. Kellogg*, 2017 WL 2371183, at *4-5 (E.D.N.Y. May 31, 2017).

[100] *Mantikas v. Kellogg Co*., 910 F.3d 633, 637 (2d Cir. 2018).

[101] *Id*. at 637 (citing *Williams v. Gerber Prods. Co*., 552 F.3d 934, 939-40 (9th Cir. 2008) ("[R]easonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box… Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.").

[102] Editorial, *Cheez-Its and the Judiciary*, Wall St. J., Dec. 17, 2018.

[103] *See Casey v. Odwalla, Inc*., 338 F.Supp.3d 284 (S.D.N.Y. Sept. 19, 2018).

[104] *Melendez v. ONE Brands, LLC*, 2020 WL 1283793, at *7 (E.D.N.Y. Mar. 16, 2020). Similarly, the same court rejected a claim against the manufacturer of Atkins nutrition bars that targeted the product's "low" "Net Carbs" label, finding the labels consistent with company's method for determining the amount of advertised carbohydrates. *Colella v. Atkins Nutritionals, Inc*., 348 F.Supp.3d 120, 142 (E.D.N.Y. 2018).

[105] *Goshen v. Mutual Life Ins. Co. of New York*, 2002, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190.

[106] N.Y. Gen. Bus. Law § 349(a).

[107] N.Y. Gen. Bus. Law § 349(b); N.Y. Gen. Bus. Law. 350-d.

[108] The false advertising statute provides for greater statutory damages, $500, and permits courts to triple actual damages up to $10,000 for willful or knowing violations. N.Y. Gen. Bus. Law. § 350-e. Unlike GBL § 349, however, a private action for false advertising brought under Section 350, requires proof of actual reliance. *See Pelman ex rel. Pelman v. McDonald's Corp*., 396 F.3d 508, 511 (2d Cir. 2005).

[109] *See Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 731 N.E.2d 608 (N.Y. 2000).

[110] *Stutman*, 95 N.Y.2d at 29.

[111] N.Y. Gen. Bus. Law § 349(h).

[112] *Id*.

[113] *Id*.

[114] *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 22 (2000).

[115] *See, e.g.*, Ala. Code § 8-19-10; Colo. Rev. Stat. § 6-1-113; Idaho Code § 48-608; Kan. Stat. Ann. § 50-634; La. Rev. Stat. § 51:1409(A); Mont. Code Ann. § 30-14-133; N.H. Rev. Stat. §§ 358-A-10, -10a; N.M. Stat. Ann. § 57-12-10; Ohio Rev. Stat. § 1345.09; Or. Rev. Stat. § 646.638; S.C. Code Ann. § 39-5-140; Tenn. Code Ann. § 47-18-109; Utah Code § 13-11-19; *see also* Va. Code Ann. § 59.1-204 (providing for statutory damages, but in a state where class actions are generally not authorized).

[116] *See, e.g.*, Ark. Code Ann. 4-88-113(f)(1)(B); Ga. Code Ann. § 10-1-399(a), Miss. Code Ann. § 75-24-15(4).

[117] N.Y. C.P.L.R. § 901(b).

[118] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

[119] *Id.* at 436 (Ginsburg, J., joined by Kennedy, Breyer, and Alito, JJ).

[120] Scholars, such as New York University Law School Professor Oscar Chase, have criticized this outcome. *See* Oscar Chase, *Living in the Shadow: Class Actions in New York After Shady Grove,* N.Y.U. J. of Legis. & Pub. Pol'y Quorum 114 (2014).

[121] *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 501 (E.D.N.Y. 2017), *remanded by Kurtz v. Costco Wholesale Corp.*, 768 Fed. Appx. 39 (2d Cir. 2019).

[122] *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 39 (E.D.N.Y.), *reconsideration denied*, 140 F. Supp. 3d 241 (E.D.N.Y. 2015). Ultimately, Judge Weinstein certified classes of consumers of "flushable wipes" made by three manufacturers, finding the court bound by *Shady Grove* to this "undesirable" breach of principles that traditionally instruct federal courts to apply the substantive law of the applicable state. *See Kurtz*, 321 F.R.D. at 502.

[123] *Shady Grove*, 559 U.S. at 437 (observing that rather than prohibit class actions "wholesale" in penalty cases, "[t]he New York Legislature could have embedded the elimination in every provision creating a cause of action for which a penalty is authorized"); *see also* Chase, N.Y.U. J. of Legis. & Pub. Pol'y Quorum, at 119 (recommending repeal of C.P.L.R. § 901(b) coupled with a review of New York statutes providing for statutory damages or civil penalties to determine whether those laws should be amended to retain the "compromise that led to the passage of CPLR article 9 and liberalized class action practice in New York").

[124] *See, e.g.*, *Greene v. Gerber Prods. Co.*, 262 F.Supp.3d 38, 61 (E.D.N.Y. Aug. 2, 2017) (finding the Ohio Consumer Sales Practices Act's class action notes prerequisites are substantive in nature as they are intertwined with the state law's substantive rights); *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 506 (D. Conn. 2015) (holding Connecticut Unfair Trade Practices Act provision limiting class actions to Connecticut residents was intertwined with substantive remedy and not preempted by federal rules); *In re Ford Tailgate Litig.*, 2014 WL 1007066, at *9 (N.D. Cal. Mar. 12, 2014), *order corrected on denial of reconsideration*, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014) (provision allowing only individual claims applied because it intertwined with Tennessee Consumer Protection Act's rights and remedies, not contained in the Tennessee Rules of Civil Procedure); *Tait v. BSH Home Appliances Corp.*, 2011 WL 1832941, at *8-9 (C.D. Cal. May 12, 2011) (same). *But see Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1335-36 (11th Cir. 2015) (holding that federal class action rules displaces prohibition of class actions found in Alabama Deceptive Trade Practices Act when claim proceeds in federal court).

[125] A previous iteration of this legislation, A. 679 / S. 2407 (introduced Jan. 9, 2019), was favorably reported by two Assembly committees, but ultimately not enacted. While similar to the 2021 legislation, the 2019 bill included additional unsound proposals, such as authorizing use of the private right of action and its threat of excessive damages and attorneys' fees to target any potential violation of other federal, state, or local laws or regulations, including laws enforced by government regulators. It would have also increased statutory damages from $50 to $2,000 per violation and eliminated a longstanding commonsense defense that confirms that when a business practice is consistent with federal regulations and Federal Trade Commission interpretations of the law, that practice cannot violate New York's consumer law. *See* Jonah M. Knobler, *Extreme Pro-Plaintiff Changes Proposed to New York's Consumer-Protection Law*, Patterson Belknap, Misbranded: The Food/Drug/Cosmetic False Advertising Blog, May 15, 2019 (providing critique of the 2019 legislation).

[126] *See generally* Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. Cin. L. Rev. 1 (2018)