

NUTR 510: Introduction of U.S. Food Regulations

Private Food Regulation Through Litigation: The “Reasonable Consumer”



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“It all started in Austin, Texas in the mid-90s, on the very same land where we sit today. It’s been over twenty years, but we still make it in batches, use old-fashioned pot stills, and taste-test every batch to make sure you get only the best.”

American Airlines

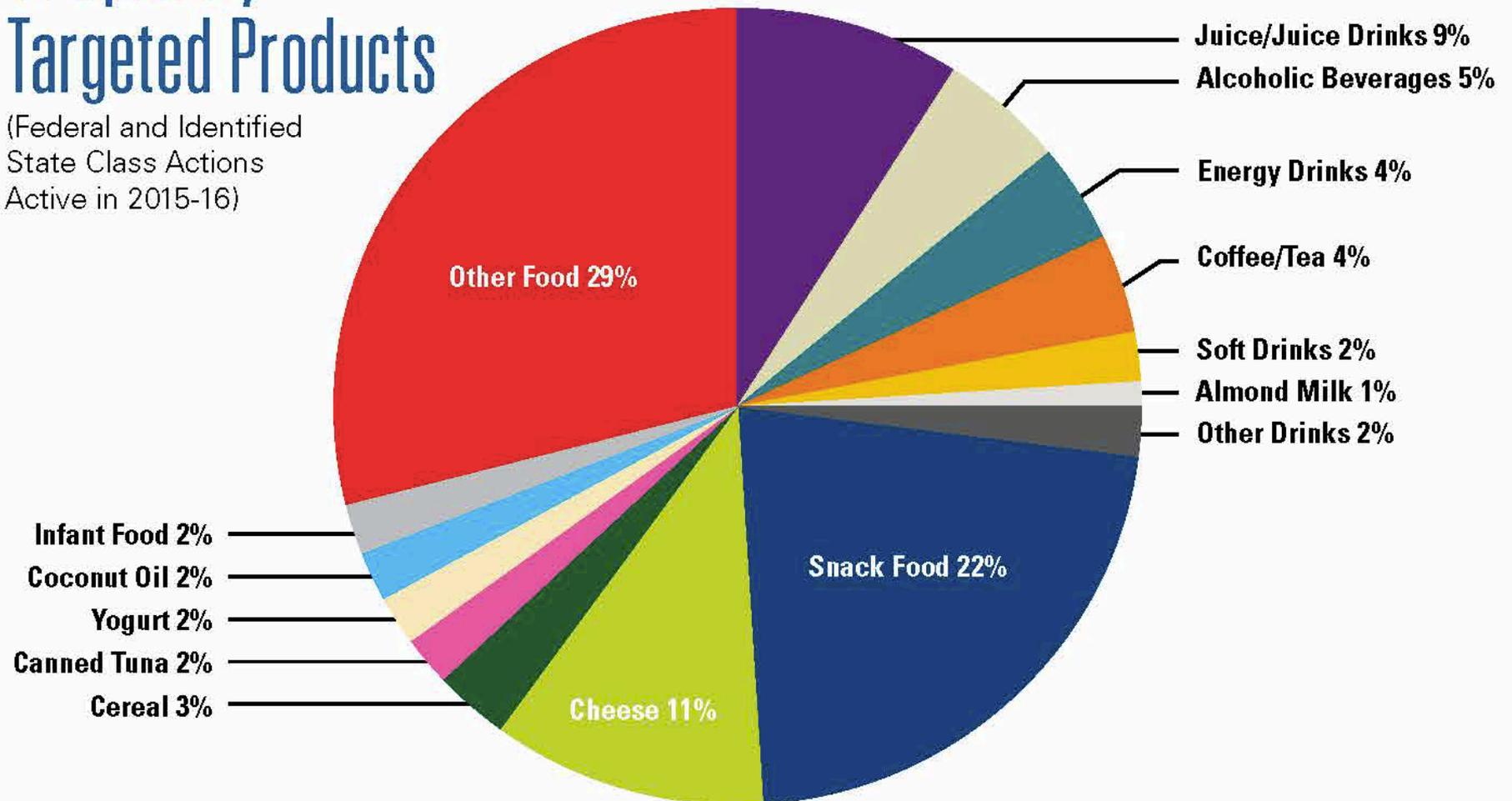


Legal Framework

Federal	State
Federal Food, Drug, and Cosmetic Act	Illinois Consumer Fraud and Deceptive Business Practices Act
FDA / Department of Justice	Private Individuals, Businesses, Organizations

Frequently Targeted Products

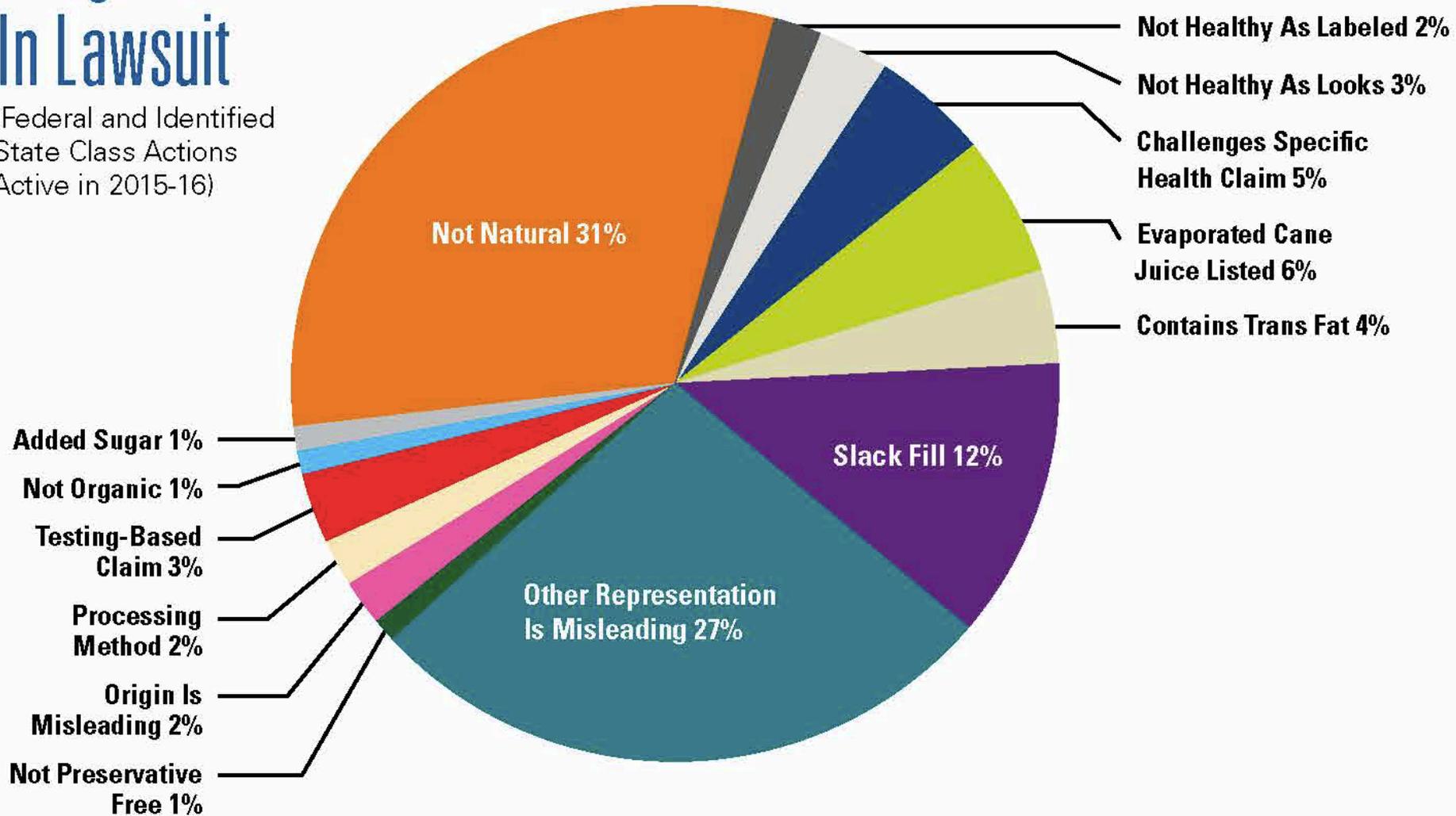
(Federal and Identified State Class Actions Active in 2015-16)



Source: US Chamber Institute for Legal Reform

Allegation In Lawsuit

(Federal and Identified
State Class Actions
Active in 2015-16)



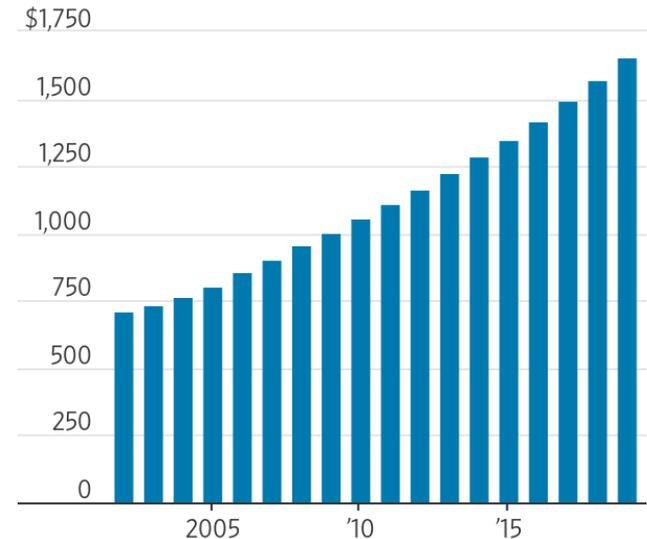
Source: US Chamber Institute for Legal Reform

The Litigation Environment: Cost-Benefit Analysis

- Quietly (and quickly) Settle
 - \$10,000 - \$25,000
- Fight the Lawsuit
 - Motion or Dismiss
 - \$50,000 - \$100,000
 - If lose motion...
 - Settlement price increases
 - More expensive litigation
 - Hire experts
 - Risk of losing case

Top Billing

Elite lawyers routinely charge more than \$1,500 an hour.



Benson v. Fannie May Confections Brands, Inc., 944 F.3d 639 (7th Cir. 2019)

- Facts
- Misbranded if “container . . . misleading”
- Slack Fill definition
 - Actual capacity > product volume
- Misleading if “nonfunctional”
 - Protection of food contents
 - Operational necessities for machinery
 - Unavoidable product settling
 - Functional need for packaging, such as allowing consumption
 - Reusability of the container after consumption
 - Cannot change package size due to labeling requirements, facilitate handling, discouraging theft

Benson v. Fannie May Confections Brands, Inc.,
944 F.3d 639 (7th Cir. 2019)

Elements of Illinois Consumer Fraud Act

- Deceptive or unfair act
- Intent that others rely on the deception
- Act in the course of trade or commerce
- Caused actual damages
- How to analyze the elements?
 - Reasonable Consumer
- Damages

Bell v. Publix Super Markets (7th Cir. 2020)

- Facts
 - Standard of Identity
 - Cellulose
 - Front versus Back Label
- Reasonable Consumer
- District Court
 - What would reasonable consumer do if front label is ambiguous?
 - Common sense about unrefrigerated cheese
- Standard to survive motion to dismiss
 - “plausible” that significant portion of reasonable consumers deceived



Bell v. Publix Super Markets (7th Cir. 2020)

- Rule: accurate fine-print list does not foreclose as a matter of law that an ambiguous front label deceives a reasonable consumer
- Shopping behavior of reasonable consumer
 - Danone v. Chobani (distracted and hurrying)
 - Low-priced, everyday items (greeting cards)
- Deceptive advertising often intentionally uses ambiguity to mislead consumer while maintaining deniability (literal vs. implied falsity)
 - Immunizing front label with back label disclosure would validate highly deceptive advertising
- Fanciful Labels
 - Froot Loops & Crunch Berries
 - Dreyer's Ice Cream Sundae Cone
 - Kraft Food "real vegetable" crackers
 - What would reasonable consumer do if front label is ambiguous?
- How to demonstrate "reasonable consumer"
 - Consumer surveys
 - Linguistic experts
- Bell has alleged sufficient facts to move forward

Bell v. Publix Super Markets (7th Cir. 2020)

- Common sense about unrefrigerated cheese
 - Sold with pasta and sauce, not refrigerated cases
 - “Ask USDA” article
 - Kraft patent
 - Actual experience in store
- Bell alleged enough to move forward

Bell v. Publix Super Markets (7th Cir. 2020)

- Preemption (FDCA v. State Laws)
 - Standard of Identity allows for cellulose
 - Can legally call it “grated _____ cheese”
 - Forcing the “addition” of a label versus prohibiting a voluntary statement
 - “Grated Parmesan Cheese, 100% from Italy”
- **Ultimately up to a jury to weigh the facts, not a judge to decide as a matter of law**

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