



Protein Power: Defendants Are Beating Back Allegations of Misleading Protein Content

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Key Takeaway

Defendants have found recent success having courts dismiss or significantly narrow consumer class action lawsuits alleging that products' advertised protein content is false or misleading.

A slew of putative class action lawsuits, primarily filed in the Northern District of California, allege that the makers of protein bars and shakes, breakfast foods, and snack products inaccurately represent the amount of protein in their products.

These class action lawsuits are most often based upon one of two theories. The first is that the protein content advertised on a product's packaging is misleading because it assumes the addition of milk (and the protein the milk contains) will be added to the product.^[1] The second theory is that the products are made with "low quality proteins," and, consequently, only 40% to 50% of the protein in the product can be used by the human body. Thus, the theory goes, because these products have a low Protein Digestibility Corrected Amino Acid Score ("PDCAAS"), the packaging is deceptive or misleading because the advertised amount of protein far exceeds the amount that the human body can absorb.^[2]

Plaintiffs use these theories to underpin claims for violations of state consumer protection statutes (for example, California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, and New York's General Business Law §§ 349 & 350) and common law causes of action for of fraud, unjust enrichment, and breach of express and implied warranties.

Defendants, however, have successfully defeated or significantly narrowed these claims through motions to dismiss. To start, the FDA has clarified that protein content claims may be based on either of the methods mentioned in 21 C.F.R. § 101.9(c)(7)—that is, using a "nitrogen method" of calculation or the "protein digestibility-corrected" figure.^[3] Thus, the federal Food Drug Cosmetics Act expressly preempts any claim that a low PDCAAS renders nitrogen-method front-label protein claims misleading. Therefore, courts have granted motions to dismiss plaintiffs' claims that the product's protein claim is inherently misleading when compared to the amount the body could digest.^[4]

Defendants have also successfully argued that the plaintiffs failed to allege reliance on the nutritional facts panel, and thus could not establish standing.^[5] And at least one court found that an advertised protein percentage alone does not constitute an express statement nor an actionable misstatement sufficient to state a claim for breach of express warranty or common law fraud.^[6]

While plaintiffs will no doubt continue to challenge protein content label claims, these recent decisions show a willingness by courts to scrutinize plaintiffs' allegations and are good news for companies defending against similar claims.

^[1] *Nacarino v. KSF Acquisition Corp.*, No. 22-CV-04021, 2022 WL 17178688 (N.D. Cal. Nov. 23, 2022) (alleging the product itself contained only 2g of protein per serving when it was advertised to contain "20g HIGH PROTEIN" when added to milk, as instructed); *Cintron v. KSF Acquisition Corp.*, No. 7:22-cv-06541 (S.D.N.Y.) (same); *Brown v. Natures Path Foods, Inc.*, No. 21-CV-05132, 2022 WL 717816, at *2 (N.D. Cal. Mar. 10, 2022) (alleging "in very small, barely legible font" that the protein content claim is "per serving with milk").

^[2] *Luna v. Brad's Raw Chips, LLC*, No. 23-0926 (N.D. Cal.) (alleging the product's front label protein content claim is misleading because the low PDCAAS reveals that a much lower amount of protein will actually be digested); *Roffman v. Perfect Bar, LLC*, No. 22-CV-02479, 2022 WL 4021714 (N.D. Cal. Sept. 2, 2022) (same); *Brown v. Van's Int'l Foods, Inc.*, No. 22-CV-00001, 2022 WL 1471454, at *2 (N.D. Cal. May 10, 2022) (same); *Brown v. Natures Path Foods, Inc.*, No. 21-CV-05132, 2022 WL 717816, at *2 (N.D. Cal. Mar. 10, 2022) (same).

^[3] See *Brown v. Natures Path Foods, Inc.*, 2022 WL 717816, at *6.

^[4] *Roffman*, 2022 WL 4021714, at *7; *Brown v. Van's Int'l Foods, Inc.*, 2022 WL 1471454, at *5-6; *Brown v. Natures Path Foods, Inc.*, 2022 WL 717816, at *7.

^[5] *Roffman*, 2022 WL 4021714, at *6; *Brown v. Van's Int'l Foods, Inc.*, 2022 WL 1471454, at *10; *Brown v. Natures Path Foods, Inc.*, 2022 WL 717816, at *4.

^[6] *Nacarino*, 2022 WL 17178688, at *7-9.

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