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From Grocery Aisles to Courtrooms: What's Next In Ultra-Processed Food Litigation and Regulation

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For many consumers, understanding the composition of food products is key to making informed decisions about healthy eating. As ultra-processed foods ("UPFs) occupy a growing share of grocery stores and American diets, UPFs have drawn increasing scrutiny by litigators, regulators, and lawmakers.

On August 25, Judge Mia Roberts Perez of the Eastern District of Pennsylvania issued a decision dismissing an action against multiple major food companies. *Martinez v. Kraft Heinz Co*. The complaint alleged that these companies knowingly marketed and sold allegedly addictive and harmful UPFs to children. The plaintiff alleged that as a result of consuming these UPFs, he suffered extensive health problems including type 2 diabetes and non-alcoholic fatty liver disease. By asserting that many of the defendant food companies used to be owned by major tobacco companies, the plaintiff invoked the legacy of Big Tobacco to argue that they used "their cigarette playbook to fill our food environment with addictive substances."

Despite this and other strategic storytelling, the case was quickly dismissed. In a concise opinion, Judge Roberts Perez observed that while the plaintiff dedicated much of his complaint to summarizing the science behind UPFs, the allegations regarding his own experience was, in her words, "woefully deficient." Given the ubiquity of UPFs in the average diet and the still developing science regarding the health effects of UPF consumption, the plaintiff faced an uphill battle in attempting to establish how each product from each defendant contributed to his health diagnoses. Ultimately, the plaintiff's failure to establish this causal connection was fatal to his case. In reaching her decision, Judge Roberts Perez reasoned that the plaintiff failed to allege when he ate Defendants' products in relation to his symptoms, to identify what foods or products he consumed, or even to identify which specific products he consumed of the 100 brands sold by Defendants.

Judge Roberts Perez's opinion underscores the challenges that lie ahead for future litigants who seek to tie their health outcomes to consumption of UPFs. *Twombly* and other pleading standards still control. The opinion illustrates the steep causation hurdles plaintiffs face: isolating a specific UPF, ingredient, or processing method as the driver of disease is extraordinarily difficult, especially given the pervasiveness of UPFs in modern diets. As it stands, food products that fall under the umbrella of UPFs are wide-ranging, and the combination of chemicals and additives that compose UPFs is even more diverse.

To address the lack of consensus on what constitutes UPFs, the FDA and USDA have issued a Request for Information to gather data and information to develop a uniform definition of UPFs. They are currently accepting public comments which must be submitted by September 23. Their hope is that a uniform definition will allow them to better address health concerns and to standardize research and policy related to consumption of UPFs. The questions posed in the RFI contemplate what types of ingredients, food processing, and nutritional composition might be used to characterize a food as ultra-processed.

Concurrent to the FDA and USDA's efforts, several states have proposed their own definitions of UPFs in light of the growing need for guidance in regulating UPF marketing and consumption. California was out in front. On September 12, California lawmakers passed the first state bill aimed at protecting children from UPFs in schools. If signed by Governor Gavin Newsom, California Assembly Bill 1264 would introduce the first legal definition of UPFs in the U.S. The bill's definition of UPFs focuses on the technical effect of certain substances rather than on specific ingredients. In comparison, a proposed bill in Massachusetts defines UPFs by the processing steps involved in their production, while states including Florida and Louisiana are considering proposed legislation defining UPFs as foods that include a set number of listed ingredients.

The growing wave of regulation around UPFs is likely to spur increased research, funding, and attention to better understand the health impacts of these products and to pinpoint which ingredients, processes, or substances should be the real focus of concern. Even once federal agencies and state legislatures settle on definitions of UPFs, determining which foods fall under those definitions will remain an evolving process, and challenges like those faced by the plaintiff in *Martinez v. Kraft Heinz Co.* are likely to persist. For businesses, close monitoring of emerging legislation, federal standard-setting, and litigation will be essential.

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