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# Consumed
## Food Regulation Updates

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# Seventh Circuit's *Franco v. Chobani* Decision Confirms That FDA Enforcement Discretion Is No Shield Against Consumer Class Actions

## Executive Summary

- **What's new:** The Seventh Circuit revived a putative nationwide class action alleging Chobani deceptively marketed its Zero Sugar Greek yogurt, holding that the claims are not preempted by the FDCA.
- **Why it matters:** For food, beverage and consumer product companies that have built labeling strategies around FDA guidance rather than formal rulemaking, *Franco v. Chobani* materially recalibrates the risk calculus.
- **What to do next:** Companies should consider identifying allulose-containing products bearing sugar-related claims, evaluating other claims consistent with FDA guidance but conflicting with state law, and assessing state law risk independently.

The U.S. Court of Appeals for the Seventh Circuit has revived a putative nationwide class action alleging that the food company Chobani deceptively marketed its Zero Sugar Greek yogurt, holding that the claims are not preempted by the Federal Food, Drug, and Cosmetic Act (FDCA).

The July 27, 2026, decision is a pointed reminder that a federal agency's decision not to enforce its own rules, even when reviewing labeling, does not neutralize exposure under state consumer protection statutes.

For food, beverage and consumer product companies that have built labeling strategies around Food and Drug Administration (FDA) guidance rather than formal rulemaking, *Franco v. Chobani* materially recalibrates the risk calculus.

## The Seventh Circuit's Decision

Under FDA regulations, a product may not be labeled "sugar free" or "zero sugar" unless it contains less than 0.5 grams of sugars as defined in 21 C.F.R. § 101.9(c)(6)(ii), which in turn defines "Total Sugars" as "the sum of all free mono- and disaccharides (such as glucose, fructose, lactose, and sucrose)."

Chobani's yogurt was marketed as sugar-free but contained 4 grams of allulose per serving. Allulose is a naturally occurring monosaccharide not listed in FDA's regulation.




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The plaintiffs sued under the consumer protection laws of numerous states, and because the FDCA expressly preempts state labeling requirements that conflict with federal standards, the case turned entirely on whether allulose is a "sugar" encompassed by FDA's regulation that lists other types of sugars.

In 2020, FDA issued guidance announcing its intent to exercise enforcement discretion for the exclusion of allulose from "Total Sugars" and "Added Sugars" declarations, "pending review of the issues in a rulemaking." That rulemaking has never occurred.

The district court nevertheless treated the guidance as controlling, deferred to it under *Auer* and dismissed on preemption grounds. Unlike *Chevron* deference, which has been permanently altered by *Loper Bright* (see below), *Auer* deference calls for courts to defer to an agency's reasonable interpretation of its own regulations.

The Seventh Circuit reversed. Invited to weigh in, FDA filed an *amicus* brief taking the position that § 101.9(c)(6)(ii) is unambiguous and captures all monosaccharides, including allulose. Although Chobani had received approval of its zero-sugar labeling from FDA, that approval was given under the agency's enforcement discretion policy, not its regulation.

The panel agreed, reasoning that the "such as" parenthetical is illustrative rather than limiting: "The FDA defined a class by way of chemistry; it reinforced that definition through examples, all of which share the same chemical structure."

In other words, because allulose is a monosaccharide, it is a sugar that counts toward "total sugars" under FDA's regulation.

Because the plaintiffs sought to enforce standards identical to the federal ones, their claims survived preemption. The court separately held that deception was plausibly alleged, rejecting Chobani's argument that consumers care about sugar's health effects rather than its chemistry (allulose is not absorbed by the body in the same way as other sugars): "Whether reasonable consumers care about the existence of allulose in their yogurt isn't the same thing as asking whether reasonable consumers would be deceived by it."

## Compliance — and Even Agency Signoff — Is Not a Shield

Chobani did not merely rely on generalized guidance. It obtained a temporary marketing permit that required submission of its proposed label to FDA's Office of Nutrition, Food Labeling and Critical Foods, which demanded revisions to the allulose- and sugar-content portions and then published its approval in the Federal Register.

The court was unmoved: While Chobani may reasonably have believed it was safe from federal enforcement, "the agency's marketing permit said nothing about state law consumer protection suits," and Chobani was "a sophisticated actor" that should have known FDA's enforcement priorities "would not immunize the company" from state law claims.

This is the familiar cycle of regulatory ambiguity in acute form. Enforcement discretion paired with the slow pace of the rulemaking process opens space for a marketing claim that may be consistent with but technically outside the letter of the law; the promised rulemaking never arrives; and the plaintiffs' bar converts the gap between the unamended regulation and the agency's enforcement posture into a state law deception theory.

The Seventh Circuit's decision makes this flywheel even more harrowing for food, beverage and consumer products companies because draft guidance and enforcement discretion make up the vast majority of FDA's regulation in the food space.

## The Post-*Loper Bright* Overlay

It is unclear how this decision would have come out under *Chevron*. Under the previous regime, FDA may have received more deference to its scientific view that allulose, while a monosaccharide, should be treated differently when it comes to contributing to the total sugar content of foods.

But, under *Loper Bright*, this interpretation is a judicial task. (See our July 9, 2024, client alert "Supreme Court's Overruling of *Chevron* Deference to Administrative Agencies' Interpretations of Statutes Will Invite More Challenges to Agency Decisions.") The court adopted its position citing *Loper Bright* alongside *Kisor*, while acknowledging that an agency's views may still be informative under *Skidmore*.

The practical consequence is that courts will independently determine whether informal guidance carries the force of law without deferring to the agency's scientific judgment or rationale in all cases. FDA's assertion that its enforcement posture should govern also carries correspondingly less weight.

Notably, *Franco* also illustrates that an agency's litigating position can prevail over its own published guidance. Companies that structure labeling around guidance rather than rulemaking bear that exposure.

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## Practical Takeaways

- **Evaluate inventory exposure.** Companies should consider identifying allulose-containing products bearing sugar-related claims across labels, websites, retailer pages, social media and advertising. And they should consider the impact of this opinion on other claims that may be consistent with FDA guidance but may conflict with state law requirements.
- **Enforcement discretion is not a safe harbor.** FDA's policy may signal only that it will not pursue federal enforcement; it does not bar state law challenges or claims from private plaintiffs. In fact, enforcement discretion may become more of a signal for the plaintiffs' bar under *Franco*.
- **Assess state law risk independently.** Companies may want to evaluate how a reasonable consumer would read an absolute claim, since that question is factual and rarely resolved on the pleadings.

## Conclusion

*Franco* binds only federal courts in Illinois, Indiana and Wisconsin, and other courts may reach different conclusions on preemption, enforcement discretion and questions the panel left open — including "no added sugar" claims.

Chobani also preserved additional arguments for remand, including a preemption theory based on FDA's label approval and *Monsanto Co. v. Durnell*. Even so, the immediate lesson is durable: Federal regulatory comfort and state law litigation risk are separate inquiries, and white space creates litigation risk.