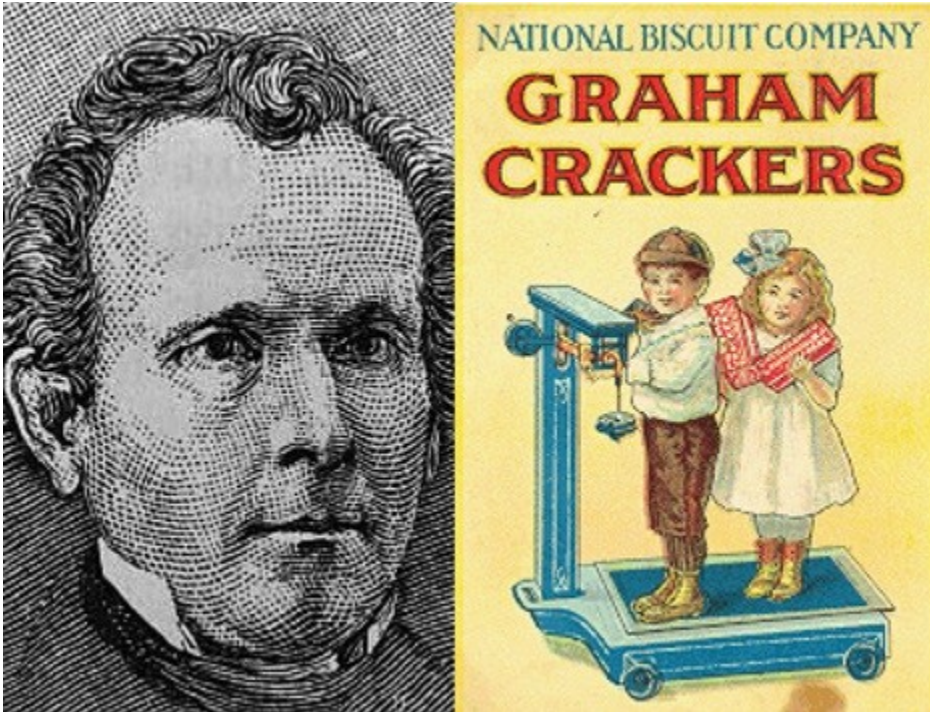


Graham Cracker Caper or Class Action Case? Consumer Survey Evidence May Tell Us

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by J. Michael Keyes



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Graham Crackers—the ubiquitous, rectangular-shaped snack crackers with air holes and perforations—occupy a unique niche in American snack food lore. In the 1830s, the Rev. Sylvester Graham, a Presbyterian minister from Connecticut, became a ferocious advocate of healthy living. Among other things, he invented his “Graham Bread” made from coarsely ground unsifted wheat flour. Apparently, a staple diet of Graham Bread—coupled with vegetarianism and abstention from spirits and tobacco—would do wonders to suppress human carnal desires. Several decades later, NABISCO introduced its “Graham Crackers” to widespread acclaim. The morsel really took off in 1925 when NABISCO added a touch of honey and launched its “Honey Made” line. Today, multiple companies make their own versions of “graham cracker” and consumers are still clamoring for them. According to one estimate, in 2020 alone, more than \$450 million dollars’ worth of graham crackers were sold by a handful of the top vendors in the United States. That’s a hell of a cracker.

With such a long, storied history, graham crackers couldn’t possibly be the subject of a class action suit for false advertising in 2021, could they? Meet Chandra Campbell, who recently purchased a box of “Honey Graham Crackers” at Whole Foods. Despite the ingredient listed on the packaging, Ms. Campbell was allegedly shocked—shocked!—that her graham crackers were not made from healthy whole wheat “graham” flour. She also thought her crackers were sweetened with actual honey as opposed to some other sweetening agent. Channeling her inner Rev. Graham, she brought hellfire and brimstone. She sued Whole Foods in the U.S. District Court for the Southern District of New York for false advertising on her behalf and on behalf of all other similarly-situated aggrieved consumers.

Whole Foods' response? Pshaw! Whole Foods moved to dismiss the complaint arguing that no reasonable consumer could be deceived by its use of "Honey Graham Crackers." Judge Gregory Woods denied the motion. He believed that Ms. Campbell had plausibly stated a claim that she and others were deceived. Importantly, he noted that whether a product package misleads consumers is generally not divined by judges. Instead, "[e]vidence such as a consumer survey, not merely judicial introspection, is needed to determine what consumers understand the phrase to mean in the context of this particular product and its packaging."

The important takeaway is that even when a food product has been around for many, many decades, that does not necessarily insulate it from false advertising claims—even if those claims seem implausible based upon the product's success and longevity in the marketplace. Judge Woods' decision underscores the importance of consumer surveys to separate the wheat from the chaff in these types of cases. Is Ms. Campbell's claim legit or will it be a mere graham cracker caper? Consumer survey evidence may ultimately be the path to salvation for Ms. Campbell and the rest of her class action flock.