ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

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Cases Per Section 2-9

Reading Calories 0

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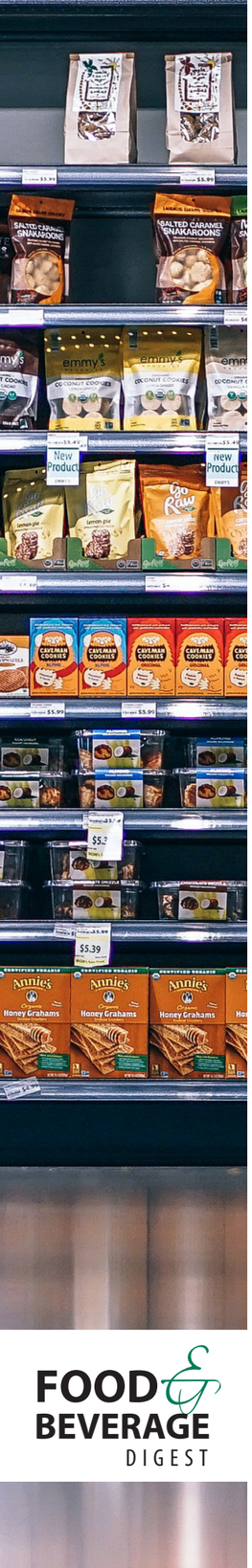
New Lawsuits Filed	100%
Motions to Dismiss	100%



New Lawsuits Filed

No Spoonful of Cinnamon Here

Majak v. Catalina Snacks Inc., No. 2:21-cv-09445 (C.D. Cal. Dec. 6, 2021).

A consumer purportedly in search of healthy cereals has sued the maker of a keto-friendly cereal for not delivering what she wanted—the plain-as-day health benefits of cinnamon. In a putative class action filed in California federal court, the plaintiff alleges that the labeled "Cinnamon Toast" cereal misleads consumers into believing the product actually contains cinnamon. In reality, the plaintiff hotly claims, the cereal does not.

According to the complaint, health-conscious consumers seek products with functional flavors—like cinnamon—because they "possess[ ] health beneficial properties, such as antioxidants that fight against free radicals and prevent damage to cells," and help to manage blood sugar and cholesterol levels. But because the defendant's product does not actually contain cinnamon, the plaintiff claims she was denied these health benefits and would not have purchased, or would have paid significantly less for, the product. The complaint claims that because the product lacks its characterizing ingredient (cinnamon), it should disclose on its front label that it contains "Natural Flavors." The complaint seeks to certify a California class for violations of California's consumer protection laws and breach of express and implied warranty and seeks damages, restitution, and declaratory and injunctive relief.

All this is fine and good, but what we really wonder is if the defendant's "Cinnamon Toast" cereal contains any toast. It's in the name after all, yet strangely the complaint makes no effort to tie up this loose end.

Not So Sweet as Honey?

Wilim v. Mondelēz Global LLC, No. 1:21-cv-06855 (N.D. Ill. Dec. 24, 2021).

The plaintiffs' bar has turned its attention to that staple of afterschool snacks and cheese boards everywhere, the Ritz cracker. Represented by Sheehan & Associates P.C., an Illinois consumer filed a putative class action on Christmas Eve alleging that the cracker manufacturer advertises Ritz's Honey Wheat flavor as containing more honey, whole grains, and fiber than it actually does.

According to the complaint, Ritz crackers contain 5 grams of whole grains per 16-gram serving (as advertised) but do not advertise the number of refined grains per serving. As a result, consumers allegedly are misled into eating too many crackers—and consuming too many refined grains—per serving to reach the recommended number of whole grains. And the use of honey, the complaint alleges, is no more than a Trojan horse used to make the crackers a darker color, which consumers "associate … with a significant amount of whole grain ingredients." Furthermore, the complaint alleges that consumers pay a premium for their mistaken belief that honey is the Ritz cracker's primary sweetener, when in reality the sweetness of the buttery cracker comes from conventional sugar. According to the plaintiff, these misrepresentations give rise to multistate class claims for violations of state consumer protection laws, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Crackers Are Too Thin on Whole Wheat Flour

Randolph v. Mondelēz International Inc., No. 1:21-cv-10858 (S.D.N.Y. Dec. 17, 2021).

A purchaser of "Stoned Wheat Thins" has alleged that, while the product branding and label convey that the main ingredient of the product is stoneground whole wheat flour, in reality the crackers are primarily made from unbleached enriched flour. The plaintiff contends that he would not have paid as much for the product had he known about this allegedly misleading claim. According to the complaint, stoneground wheat is worth a premium because it boasts superior health benefits over unbleached enriched flour. The crackers' misleading label, he claims, therefore causes economic harm to the purchasers of the product who sought out stoneground wheat crackers. The plaintiff seeks to certify a New York class alleging claims of unlawful trade practices, false advertising, and unjust enrichment.

St. Louis Consumers Singing the Blues over "Natural" Salad Dressing Claims

Hayes v. Stonewall Kitchen LLC, No. 2122-CC09788 (St. Louis Cir. Ct. Nov. 23, 2021).

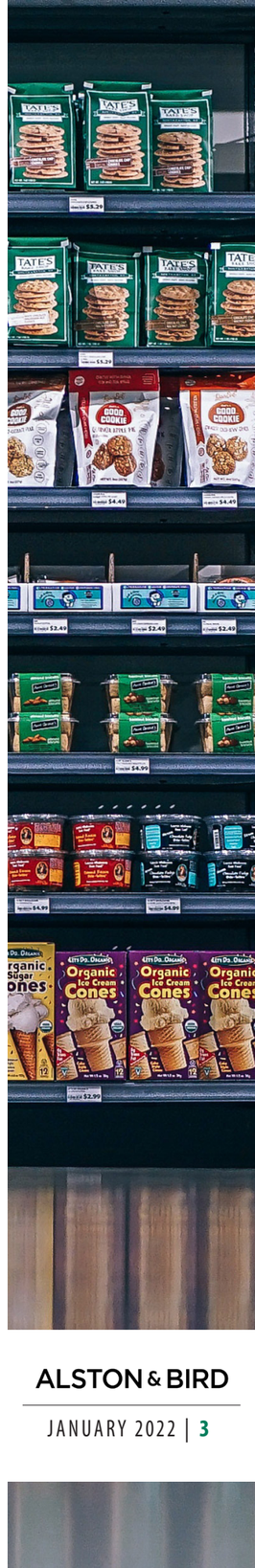
Salad shenanigans are stirring in the Midwest, where a class action complaint challenges Napa Valley Naturals Honey Lemon & Avocado dressing and Dijon & Avocado dressing. The plaintiffs complain that the products' labels both indicate the dressings are "natural," despite containing the allegedly synthetic ingredient xanthan gum. Since other dressings under the Napa Valley Naturals brand also bill themselves as "natural," the complaint claims the plaintiff has standing to bring claims against other dressings in the line that the plaintiff has not purchased himself.

As always, we'll keep you updated on whether this is a lemon of a case as it progresses.

Plaintiff Claims Fruit Cocktail Is "Mucho" on the Sugar, Less So on the Vitamin C

Hancock v. Arizona Beverages USA LLC, No. 3:21-cv-01735 (S.D. Ill. Dec. 22, 2021).

A brand of fruit juice is not as rich in Vitamin C as it claims, or so alleges a consumer in a putative class action filed in Illinois federal court. According to the complaint, the defendant's "Mucho Mango Fruit Cocktail" touted misleading claims like "VITAMIN C FORTIFIED" and "VITAMIN C FORTIFIED – ANTIOX," leading the plaintiff to purchase the fruity drink because she (wrongly) believed that it contained more Vitamin C than comparable products. The plaintiff claims that the FDA requires that products claiming to be "fortified" must contain at least 10% more of the nutrient than a reference food product. However, the complaint alleges, the defendant's fruit cocktail provides no reference food product or basis for its fortification claim.



The plaintiff adds that the fruit cocktail went "mucho" on the added sugar and should be consumed sparingly. Thus, the plaintiff presumes, the "Mucho Mango Fruit Cocktail" makes misleading fortification claims when alternatives *could* be more consistent with dietary guidance. The plaintiff seeks to certify Illinois and multistate consumer fraud classes of consumers for violation of Illinois's consumer protection law, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

When Flavoring Representations Fall Flat

Conley v. The Kroger Company, No. 2:21-cv-05642 (S.D. Ohio Dec. 8, 2021).

Flavored sparkling water is all the rage these days, and the plaintiffs' bar has taken notice as more and more sparkling water products hit the market. As we have covered here, here, oh and here, many of these sparkling waters have found themselves in hot—or at least warmer—water about their flavors. The national grocery chain in this case has again found itself the subject of a putative class action, though for a different reason than before.

An Ohio plaintiff has alleged that despite claiming to be "naturally flavored," the defendant's sparkling water brand actually contains malic acid, which allegedly is an artificial flavor and made in a petrochemical plant. The plaintiff seeks to certify a nationwide class for breach of express warranty, fraud by omission, fraud, negligent misrepresentation, unjust enrichment, "money had and received," and a violation of Ohio's Consumer Sales Practices Act. She also seeks "civil recovery for criminal conduct," claiming that the sparkling water's label violates Ohio's Pure Food and Drug Law, a law that permits civil recovery.

Just a Protein Bar Trying to FIT In

Vitiosus v. Alani Nutrition LLC, No. 3:21-cv-02048 (S.D. Cal. Dec. 8, 2021).

Three protein-seeking—yet self-proclaimed health conscious—consumers have a gripe with FIT SNACKS protein bars. According to the plaintiffs, the brand name "FIT" is a synonym for "healthy," so naturally the protein bars suggest they meet all the regulatory baggage that comes with the term "healthy."

Unsurprisingly, the plaintiffs march out a litany of FDA dietary requirements, such as the fat, cholesterol, and vitamin levels, for a food to be labeled "healthy." They also claim that the protein bars do not meet these regulatory requirements, yet misled the plaintiffs to believe that they were a healthy option. The plaintiffs seek to represent a nationwide class, a California subclass, and a New York subclass for violations of California and New York consumer and business laws, breach of express warranty, and unjust enrichment.

"Healthy" Juice Claims Getting Squeezed

Yoshida v. Campbell Soup Company, No. 3:21-cv-09458 (N.D. Cal. Dec. 7, 2021).

A group of consumers filed a lawsuit challenging that V8 Fruit and Vegetable Blends make false and misleading health claims. The plaintiffs allege that, despite product claims like "Boost Your Morning Nutrition" and "healthy greens," the fruit- and vegetable-packed drinks are also packed with sugar, which is associated with increased mortality and risk of metabolic disease, cardiovascular disease, type-2 diabetes, and other diseases and conditions. The complaint points to scientific evidence that allegedly demonstrates that consuming juice is unhealthy and adds that the defendant failed to disclose these "material" facts to consumers. The plaintiffs seek to certify a California class for violations of California consumer protection laws and breach of warranty.

Glucose Control Claims Out of Control

Horti v. Nestlé USA Inc., No. 4:21-cv-09812 (N.D. Cal. Dec. 20, 2021).

Three consumers of Boost brand Glucose Control drinks have sued, claiming the drinks make false and misleading representations about their efficacy. The plaintiffs allege that the drinks are marketed as supplements that help manage blood sugar for people with diabetes—but, in reality, they don't have that ability. The claims made on the product, according to the plaintiffs, came from one clinical trial where the drinks were associated with a smaller rise in glucose levels compared with a different nutritional drink. This, the plaintiffs contend, is not the same as "controlling" glucose—as the product labels purport to do. The plaintiffs seek to certify California and New York classes alleging unfair practices and false advertising claims.

Motions to Dismiss

Procedural Posture: Granted

Court Finds Oats & Flax Oatmeal Too Bland to Mislead Consumers

Warren v. Whole Foods Market Group Inc., No. 1:19-cv-06448 (E.D.N.Y. Dec. 3, 2021).

It seems that conclusory allegations and oatmeal have a lot in common (at least to one of our contributors): they are both mushy, bland, and tend to get dismissed in favor of stuff with a little more substance (and taste).

With this kind of a lead-in, the result of this case is nearly self-evident. The plaintiffs sued a national grocer, claiming that its 365 Everyday Value branded Oats & Flax Instant Oatmeal misrepresented that it was sweetened with added fruit juice (instead of sugar) and (paradoxically) that it contained only "100% Whole Grain." The district court rejected these claims as implausible.

First, it observed that the oatmeal did not represent that it is "sugar-free," "low in sugar," or "without added sugar." Considering the ingredients list and nutrient facts panel, the court also found that no reasonable consumer would make the leap from "dehydrated cane juice solids" to believe the sugar came from fruit juice. Second, the district court observed that it was hard to square the plaintiffs' belief that the oatmeal contained only "100% Whole Grain," given their allegation that they thought the oatmeal contained "a fruit juice ingredient."

Making a "grain-to-grain" comparison, the district court also observed that no reasonable consumer could believe that the oatmeal was made exclusively from grains when the front label indicates that the whole grain made up only a portion of each serving.

Although they had the opportunity to do so, the plaintiffs made no attempt to amend these claims, and the case was dismissed with prejudice on January 4.

Procedural Posture: Denied in Part

Plaintiffs' Pasta Sauce Preservatives Protest Still Pasta-ble

Bolden v. Barilla America Inc., No. 1:19-cv-02237 (N.D. Ill. Dec. 10, 2021).

The future still holds pasta-bilities for this group of plaintiffs, at least according to an Illinois federal district court. The plaintiffs brought consumer fraud claims against the defendant for allegedly misrepresenting its pasta sauce as containing "no preservatives." The culprit ingredient that allegedly made this claim an impasta? Citric acid.

Initially filed in California, this suit later landed in Illinois federal court to join another case against the defendant alleging similar claims challenging the sauces' "no preservatives" claims. But not all the plaintiffs' claims will move forward. The district court tossed the plaintiffs' breach of implied warranty and negligent misrepresentation claims due to a failure to show anything more than an economic injury. According to the district court, allegations of the acid-reflux and heartburn from consumption of the citric acid do not pasta the test as physical injuries. The judge also tossed the plaintiffs' claims for injunctive relief, concluding that the plaintiffs have ways to avoid the allegedly deceptive products, such as by purchasing another brand of pasta sauce or by going traditional and making their own.

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