ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

3 Sections This Edition
Cases Per Section 1-8

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Appeals	100%

New Lawsuits Filed

Don't Go Gushing About This Fruit Snack!

McDermott v. General Mills Sales Inc., No. 1:22-cv-01555 (N.D. Ill. Mar. 24, 2022).

Naturally, Gushers Fruit Snacks are all-natural, right? Not so fast, says Sheehan & Associates P.C. (naturally, on behalf of its client). Reverting to the traditional "natural" lawsuits we've seen before, the unremitting firm again represents a plaintiff in a putative class action in Illinois. The named plaintiff contends that the Gushers packaging is false and misleading because the fruit snack advertises that it contains no artificial flavors, yet it contains "malic acid." According to the complaint, L-malic acid occurs naturally in various fruits, but laboratory analysis indicates that the makers of Gushers used the artificially produced DL-malic acid instead. Customers are harmed because they pay a premium, believing that "Strawberry Splash" and tropical-flavored Gushers contain only naturally flavored ingredients.

According to the plaintiff, the misrepresentations give rise to claims for violations of state consumer protection laws, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment. The plaintiff seeks to represent an Illinois and multistate class of consumers.

Water Enhancer Allegedly Enhances Flavors with Non-Natural Ingredients

McCall v. Publix Super Markets Inc., No. 8:22-cv-00584 (M.D. Fla. Mar. 14, 2022).

A putative class action with strikingly similar allegations to the Gushers complaint (and also featuring a plaintiff represented by Sheehan & Associates P.C.—naturally) alleges that a popular grocery chain's brand of strawberry-watermelon water enhancer deceives consumers by not disclosing that it includes non-natural ingredients. While the water enhancer doesn't claim to be "All Natural," according to the plaintiff the statement "Natural Flavor With Other Natural Flavors" combined with omitting any reference to artificial flavors on the front label and displaying pictures of strawberries and watermelon caused consumers to expect the product to contain only natural flavors.

After a complex organic chemistry lesson about the atomic makeup of malic, L-malic, and DL-malic acid, the complaint winds its way to alleging that the product label is deceptive because the ingredient designates the malic acid used by its "generic name" (malic acid) rather than its specific name, "DL-malic acid," which it claims is the artificial formulation of the ingredient that is used in the product. According to the complaint, the defendant adds DL-malic acid to (gasp) *enhance* the flavor of its water enhancer and make it taste tart and fruity, like strawberries and watermelon.

According to the complaint, the defendant "had the option to add naturally extracted L-Malic Acid … but intentionally used artificial DL-Malic Acid because it was likely cheaper or more accurately resembled natural flavors than citric acid or other acids." The plaintiff seeks to certify an Alabama and multistate class to pursue claims under Florida's consumer protection statute and for breach of contract, breach of express warranty, negligent misrepresentation, fraud, and unjust enrichment.

Oh, Mega Deception for Fish Oil?

Foster v. Whole Foods Market Group, No. 1:22-cv-01240 (E.D.N.Y. Mar. 25, 2022).

The defendant's 100% wild-caught fish oil softgels advertise that they contain "Omega-3s EPA & DHA." Directly below that representation is the phrase "1000mg Per Serving," and below that, "From Small Cold-Water Fish." According to one consumer in New York, this allegedly fishy phrasing misleads consumers who believe that based on the product's labeling—with one phrase directly above the other—the softgels contain 1000mg of omega-3s EPA & DHA per serving, when in reality, they only contain 300mg of omega-3s.

The plaintiff casts a wide net of claims and seeks to represent a New York and nationwide class of consumers who purchased the product believing they were ingesting more than three times the actual amount of this "essential" fatty fish supplement per serving. On behalf of the New York subclass, the plaintiff seeks relief for purported violations of the New York General Business Law and breaches of express warranty. The plaintiff also seeks relief on behalf of all putative claimants for the defendant's alleged unjust enrichment.

I Can't Believe It's Not Made with (Significant Amounts of) Olive Oil?

Hite v. Unilever, No. 7:22-cv-02188 (S.D.N.Y. Mar. 16, 2022).

A mayonnaise dressing manufacturer and distributor faces a putative class action alleging that the product's "With Olive Oil" label is false and misleading. The plaintiff alleges that the "With Olive Oil" claim, along with pictures of two olives on branches and green packaging, creates a misleading expectation that the product contains a significant amount of olive oil, which it allegedly does not. Instead, according to the complaint, the most predominant oil is soybean oil, followed by olive oil.

At this point, the plaintiff seems to have as much interest in extending the olive branch as the product contains olive oil (allegedly). She seeks to certify New York and multistate classes of purchasers and asserts violations of New York law, fraud, breach of contract, breach of warranties, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, and unjust enrichment.

Say CHEESE!!

Smith v. General Mills Sales Inc., No. 1:22-cv-01529 (N.D. Ill. Mar. 23, 2022).

On behalf of cheese-loving tweens and preteens everywhere, an Illinois-based plaintiff filed suit against the makers of Totino's Pizza Rolls, alleging that the iconic snack misleads consumers into believing that the product contains a non–de minimis amount of pizza ingredients, especially cheese. According to the complaint, the pizza rolls contain small amounts of cheese and only a de minimis amount of "real" cheese (less than 2% of cheese derived from dairy ingredients, according to plaintiffs). The crust of the argument is that the pizza roll label should have disclosed that the snack's mozzarella cheese blend is imitation. The plaintiff seeks to certify Illinois and multistate classes of purchasers and asserts violations of Illinois consumer protection law, breach of warranty, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment.

Suit Seeks Breath of Fresh Air for Animals "Humanely" Sourced by Popular Taqueria

Prescott v. Dos Toros LLC, No. 1:22-cv-02425 (S.D.N.Y. Mar. 24, 2022).

A putative class action accuses a New York–based restaurant chain of falsely advertising its chicken and pork products as "naturally" and "humanely" raised. According to the complaint, these animals are actually raised in unnatural and inhumane industrial facilities with no access to outdoor spaces and are kept in crowded and "stressful conditions of confinement." The complaint argues that reasonable consumers do not perceive these conditions to be natural or humane and contends that by using these representations, the restaurant chain can sell a greater volume of products at higher prices. The complaint asserts claims on behalf of a putative nationwide class of consumers for violations of statutory consumer protection laws and breach of express warranty.

"Great Taste… [*Not So*] Naturally"?

Pressnell v. Kettle Foods Holdings Inc., No. 6:22-cv-00468 (D. Or. Mar. 25, 2022).

A putative class action filed in Oregon federal court alleges that the defendant's marketing and labeling of its kettle-cooked potato chips misleads consumers about just how "natural" its chips really are. The plaintiffs take issue with the representation on the front label that reads "great taste…naturally" because according to the complaint, the product contains the non-natural synthetic ingredients maltodextrin and citric acid. The complaint claims that the defendant's entire marketing scheme and product labeling deceives consumers into believing that its products are made only with natural ingredients. The plaintiffs contend that the misrepresentations are highlighted by the defendant's expansive all-natural marketing campaign, claiming that the defendant has established itself as an "all-natural empire" and pointing to numerous promotional materials touting its "ALL NATURAL" products. As a result of this allegedly royal deception, the complaint seeks to certify a nationwide class, as well as California and Missouri subclasses, and asserts claims for violations of state consumer protection laws, breaches of warranty, and unjust enrichment.

Got Milk?

Sneed v. Ferrero U.S.A. Inc., No. 1:22-cv-01183 (N.D. Ill. Mar. 6, 2022).

The egg-shaped delicacy of our childhood faces the wrath of sweet-cream lovers in a putative class action challenging the Kinder Joy egg's "Sweet Cream Topped With Cocoa Wafer Bites" representation. According to the plaintiffs, the iconic sweet treat delivers the treat and the toy—but is missing the cream. The complaint contends that the "Sweet Cream Topped With Cocoa Wafer Bites" representation on the label is false, deceptive, and misleading because the product doesn't contain any dairy-derived cream—only "artificial cream, derived from hardened vegetable oils." The complaint argues that this fails to align with the product's mostly white packaging (which allegedly represents milk) and with the dictionary definitions of "cream," so illuminatingly proffered in the pleading. This putative class action seeks certification of an Illinois class of consumers, as well as a consumer fraud multistate class. The complaint asserts claims for violations of state consumer protection laws, breach of contract, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Motions to Dismiss

Procedural Posture: Granted

Consumer Can't Take the Heat as Cooler Suit Melted in Motion to Dismiss

Turk v. Rubbermaid Inc., No. 7:21-cv-00270 (S.D.N.Y. Mar. 21, 2022).

Purchasers of Marine Chest and DuraChill Coolers will have to cool off after a heated battle in New York district court landed their counsel in hot water with one federal judge. The original complaint alleged that the portable ice coolers advertised that they would retain ice for "5 days," a representation the plaintiffs allegedly interpreted as meaning that the coolers would retain enough ice to keep food at a safe temperature for at least five days, even if the coolers were repeatedly opened and closed. The court slammed the lid on the plaintiffs' injunctive relief claims, finding that the plaintiffs, as past purchasers, lacked standing to pursue their request for injunctive relief and admonished the plaintiffs' counsel for bringing such "plainly frivolous" claims following the *Gordon v. Target Corporation* ruling (see below), which emphasized that the Second Circuit has squarely foreclosed the possibility of injunctive relief for past purchasers. Even though the plaintiffs wisely did not attempt to defend their injunctive relief in opposition briefing, the court sua sponte threatened Rule 11 sanctions

should the plaintiffs' counsel try to float another injunctive relief claim through the Southern District of New York for a past purchaser.

The court also dismissed the plaintiffs' consumer protection claims, finding that no reasonable consumer would view the advertising as misleading, given that the cooler's labels advertised that they would retain ice for "up to" five days, not "at least" five days. The court poured out the plaintiffs' other claims too, melting the breach of express warranty claim for failure to allege pre-suit notice and dumping the negligent misrepresentation claim for failure to plead a "special relationship." While the court did grant leave for the plaintiffs to file a second amended complaint (though *not* for any injunctive relief), it reiterated that the plaintiffs must have a good-faith basis for doing so.

Toddler Drink Suit Put in Timeout

Gordon v. Target Corp., No. 7:20-cv-09589 (S.D.N.Y. Mar. 18, 2022).

Talk about the Terrible Twos. After a first warning shot, a well-known plaintiff's counsel received a second scolding about raising frivolous claims for injunctive relief on behalf of past purchasers. Oh, and a popular retail giant prevailed on its motion to dismiss a putative class action complaint that alleged labeling on its "Toddler Next Stage" drink is deceptive and misleading.

The complaint, which asserted a toy chest full of consumer protection, warranty, and common-law claims, alleged that the company's toddler formula deceives consumers into believing the product provides better nutrition than normal milk. The complaint further alleged that the product's inclusion of an infant formula nutrition panel and similar naming convention to infant formulas sold by the retailer misled consumers into thinking the product is appropriate for infants as well, when it allegedly is not. Shelving the complaint's theories of liability, a New York federal judge explained that the drink's label does not promise the benefits the complaint alleges it does. Nor had the plaintiff alleged the requisite injury from any alleged deception. As a result, the court put most of the plaintiff's claims in a corner, dismissing with leave to amend all but the injunctive relief claim, which was canned for good.

No Use Crying Over Spilled (Chocolate) Milk

Yu v. Dreyer's Grand Ice Cream Inc., No. 1:20-cv-08512 (S.D.N.Y. Mar. 16, 2022).

Following the lead of two prior decisions in the same federal district, a New York federal judge dismissed a class action complaint that alleged that representations on the label of Häagen-Dazs ice cream bars were misleading because the bars' chocolate coating contains vegetable oil. The complaint alleged that the addition of vegetable oil to the chocolate coating fundamentally changed the nature of the bars' coating and was contrary to consumers' expectations that the coating contained only "chocolate ingredients"—cacao beans, dairy ingredients, sweetener, and flavorings.

But the judge didn't bite on these arguments, finding that the label did not suggest to a reasonable consumer that the product's coating was made only or exclusively with chocolate and that the coating indeed contained milk chocolate. In any event, the ingredient list contained more detailed information, accurately disclosing the product's "milk chocolate and vegetable oil coating." According to the court, reliance on the ingredient list was proper here because this was not a case where consumers had to look beyond a misleading representation on the front of the box to discover the truth from the ingredient list on small print on the side of the box. Rather, here, the ingredient list *confirmed* other representations on the packaging. Although the plaintiff was granted leave to amend, the court warned it would close the case if she failed to do so within 21 days. Within a day of that deadline passing with no amended complaint on file, the court made good on that promise and directed the case to be closed.

Federal Judge Pops Pastry Suit

Chiappetta v. Kellogg Sales Co., No. 1:21-cv-03545 (N.D. Ill. Mar. 1, 2022).

An Illinois federal judge recently dismissed a putative class action alleging that the packaging of Unfrosted Strawberry Pop-Tarts was misleading because it gave the impression that the fruit filling contains only strawberries and/or more strawberries than it does. To refresh your memory, the complaint alleged that the product's labeling, which depicted half of a fresh strawberry and the word "Strawberry" matched with red fruit filling, was deceiving because the product's filling also contains dried pears, apples, and a red food dye, among other ingredients. But the judge didn't bite, finding that "no reasonable consumer could conclude that the filling contains a certain amount of strawberries based on the" packaging. Further toasting the complaint, the court pointed out that the plaintiff failed to identify any "untruths on the packaging" or a plausible deception and noted that the front label does not state or suggest anything about the amount of strawberries in the pastry's filling or guarantee that the filling contains only strawberries.

Because the plaintiff admitted that the Pop-Tarts did contain some strawberries, the court found her interpretation of the label unreasonable and unactionable. The plaintiff's breach of express and implied warranty claims also failed because she did not meet her pre-suit notice obligations. The court crumbled the plaintiff's claim that she could satisfy the pre-suit notice obligation by filing suit and swept away her claim that receipt of consumer complaints was enough to relieve her duty to notify the defendant before filing suit. After crinkling up the wrapper for the trash bin (possibly), the judge finally ruled that the plaintiff's negligent misrepresentation claim was barred by Illinois's economic loss doctrine, which denies relief based on tort claims for a party whose "complaint is rooted in disappointed contractual or commercial expectations."

Consumer Has a Latte Bitter Feels After "Slightly Sweet" Case Crashes Out

Brown v. Kerry Inc., No. 1:20-cv-09730 (S.D.N.Y. Mar. 7, 2022).

A New York federal judge granted a chai tea maker's motion to dismiss a complaint alleging that its "Slightly Sweet" advertising for its Chai Tea Latte is false and misleading. The plaintiff alleged that the product purported to be low in sugar thanks to phrases like "Slightly Sweet" and "A Less Sweet Twist on Our Authentic Chai," which led her to believe the product was low in sugar. In reality, she alleged, the product contains 11 grams of sugar, which allegedly exceeds the FDA's definition of "low sugar."

But the court quickly soured on the plaintiff's pleadings, finding it did not need to accept as true her "conclusory allegations" that the representation was materially misleading and finding that the label language was mere puffery because it provides no objective measurement or indication of the amount of sugar in the product. The court also noted that the product label explicitly states the amount of sugar and number of calories in the product, which further dispels any ambiguity or confusion about the sugar content. And further reaffirming its position, the court pointed out that there was no plausibly alleged deceptive statement on the packaging that needed to be corrected by the nutritional information. While the court granted the plaintiff leave to amend, she failed to meet the deadline to do so. The judge has since ordered the case closed.

Procedural Posture: Denied

Motion to Dismiss Isn't All It's Cracked Up to Be in "Free-Range" Eggs Case

Mogull v. Pete and Gerry's Organics LLC, No. 7:21-cv-03521 (S.D.N.Y. Feb. 28, 2022).

A plaintiff's "free-range" egg lawsuit can take flight in New York federal court after a district judge denied the defendant's motion to dismiss. The complaint alleged that the defendant's "free-range" representations are false and misleading because the defendant's egg production method actually involves "cramming" 20,000 hens into a henhouse at a time. Without an *eggs-it* for the hens to access outdoor space, the plaintiff claims that the defendant's eggs aren't free-range at all and that the conditions the defendant's chickens are kept in are contrary to her and other purchasers' understanding of free-range.

Cracking the defendant's challenge to this suit, the court found the all*egg*ations were enough to survive a motion to dismiss because the defendant's "free-range" representations appeared on its consumer facing packaging and on its website, and the plaintiff alleges she relied on those representations in purchasing—and paying a premium for—the defendant's eggs. The court also yolked the defendant's claim that its statements were true because its farming practices meet the "Certified Humane Free-Range" qualifications because the claim "free-range" was displayed as a standalone phrase throughout the packaging. And frying the defendant's puffery defense, the court held that the "free-range" representation is "an affirmative claim about [the] product's qualities," not merely an exaggeration or overstatement. The court also let fly the plaintiff's fraud and breach of warranty claims, ultimately finding that the defendant's egg production methods are not free-range, as described to consumers.

Challenge to "Sustainably Sourced" Claims Survives

Walker v. Nestlé USA Inc., No. 3:19-cv-00723 (S.D. Cal. Mar. 28, 2022).

A federal judge in the Southern District of California denied a popular chocolate manufacturer's motion to dismiss a putative class action challenging its allegedly deceptive claims of sustainably sourced products. The plaintiff originally filed suit after purchasing chocolate products that prominently featured their social and environmental benefits on the packaging and claimed she would not have purchased the products had she known the representations were false. The representations included statements that the defendant supports cocoa farmers and helps improve their lives, but according to the plaintiff, those claims aren't accurate because the defendant allegedly sources its cocoa from West African plantations that rely on child labor and child slave labor, contribute to deforestation, and use other practices harmful to the environment.

In ruling on the motion to dismiss, the court noted that for false advertising cases, it normally looks to the advertising itself, but whether a *business practice* is deceptive is usually not a question of fact appropriate for decision at the pleading stage. The court explained that while some of the defendant's plans were aspirational, its representations that its cocoa was "sustainably sourced" and that the defendant's business plan would "help improve" the lives of farmers and "support" them were at odds with the fact that the child labor problem has gotten worse, not better. Ultimately, the court determined that the plaintiff plausibly alleged the challenged statements were deceptive and denied the motion to dismiss. The court also dismissed the defendant's standing arguments that challenged the plaintiff's ability to assert claims on behalf of putative class members for the types of chocolate products the plaintiff didn't purchase herself, noting that the challenge was really just an objection to the alleged class definition, which was more properly addressed at the class certification stage.

Appeals

Appeals Court Props Up Prop 65 Claims for "Toxic" Face Cream Suit

Lee v. Amazon, No. A158275 (Calif. Ct. App. Mar. 11, 2022).

In a case with far-reaching implications for online resellers of third-party products, a California appellate panel held that Amazon could face Proposition 65 liability for offering on its website, without warnings, skin-lightening face creams that allegedly contain mercury. After a January 2019 bench trial, the lower court found that Amazon was immune from liability under Section 230 of the federal Communications Decency Act (CDA)—a statute that

insulates interactive computer services providers from legal responsibility for information created and developed by third parties. In other words, providers of interactive computer services are liable only for speech that is properly attributable to them. The trial court also found that while Amazon could have a duty to warn under Proposition 65 for third-party sales, the plaintiff had not shown that each and every product identified in the operative complaint contained mercury, meaning that test results finding mercury in a unit of a given product could not be generalized to other units of that product or to similar products.

But the appellate panel found that Amazon was not immunized under the CDA because the lawsuit sought to hold Amazon responsible for its own conduct, not for third-party sellers' content. According to the panel, the claims did not require Amazon to modify or remove third-party content but rather to provide a warning when Amazon had actual or constructive knowledge of the presence of toxins covered by Proposition 65. The panel further reasoned that a contrary ruling would give Amazon a competitive advantage over brick-and-mortar stores, as there was "no question" that such stores would have an obligation to provide Proposition 65 warnings if they were aware that the products at issue contained mercury. As to the generalization of testing results, the panel reasoned that because mercury was an active ingredient in the products, while there might be variation in the actual concentration of mercury from one unit or batch to another, there would not be units in which mercury was completely absent. We will continue to monitor developments in this space, to see just how far the tide has turned (or not) against online retailers.

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Taylor Lin
404.881.7491
taylor.lin@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Jamie George
404.881.4951
jamie.george@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Barbara Jones-Binns
202.239.3139
barbra.jones-binns@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Kathryn Clifford Klorfein
404.881.7415
kathryn.klorfein@alston.com

Amanda Newton Wellen
404.881.4809
amanda.wellen@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD