ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

JANUARY 2021

Edition Facts

4 Sections This Edition
Cases Per Section 1-9

Reading Calories 0

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

New Lawsuits Filed

Another Cup of Freshly Ground Coffee Servings Lawsuits

Moser v. The J. M. Smucker Company, No. 1:20-cv-07074 (N.D. Ill. Nov. 30, 2020).

As we highlighted in the June, July, and August 2020 editions of the *Food & Beverage Digest*, suing coffee manufacturers and their retailers for allegedly misrepresenting the number of cups of coffee that could be brewed from their products became something of a trend in 2020, and it seems sure to continue in 2021. In another recently filed putative class action in Illinois federal district court, the plaintiff piggybacks on several of these lawsuits and alleges that she purchased ground coffee after relying on statements on the labeling that advertised the number of cups that could be brewed from a container of the coffee. She alleges that she only later discovered that the products did not yield the number of servings advertised. The plaintiff also contends that the coffee maker intentionally exaggerated the amount of coffee that could be brewed to induce consumers to purchase its products and that this conduct violates various state consumer protection statutes.

Bougie Boozers Incensed over Rum Age Representations

Alonzo v. William Grant & Sons Inc., No. 1:20-cv-10937 (S.D.N.Y. Dec. 27, 2020).

A New York consumer has taken issue that his spirit of choice might not be aged as long as the product represents it to be. William Grant imports from Nicaragua and sells Flor de Caña rum, which features a label that includes representations such as "Tradition," "Artisanal," "18," "Slow Aged," and "Single Estate Rum." The combination of those representations, according to the complaint, gives consumers a misleading impression of the age of the product. Rum, like other spirits, must be advertised using the age of the youngest spirit included in the finished product when it features a statement of age ("___ years old"). According to the plaintiff, "blending rums of different ages without telling purchasers is deceptive because consumers have come to expect that prominent numbers on the front labels of spirits refers to the age of the youngest spirit used." While the plaintiff admits that the product doesn't technically violate the statement of age regulations, he argues that the labels are nevertheless misleading because 18 is the average age of rum in the product, rather than youngest, as liquors are traditionally labeled.

The plaintiff alleges that he and other class members desired to purchase a product that was 18 years old and understood the number 18 and "Slow Aged" to refer to a statement of age (despite recognizing those claims do not violate the statement of age regulations). The suit complains the product is worth less than advertised and that had the class members known the truth of the rum's age, they would not have bought the product or would have paid less for it. The plaintiff alleges violations of New York consumer protection statutes as well as negligent misrepresentation, fraud, and unjust enrichment.

Consumers Keep Drawing from the (Mostly) Empty Well of Slack-Fill Suits

Iglesia v. Tootsie Roll Industries LLC, No. 3:20-cv-18751 (D.N.J. Dec. 10, 2020).

As we previously covered, courts have consistently concluded that slack-fill suits are more than a little empty. Yet, with recent slack-fill wins and classes certified by the district courts (covered in the April and July 2019 editions) and despite slack-fill losses (covered in the August 2019 and May 2020 editions), consumers and their law firms once again are drawing from the slack-fill well again.

The consumer in this suit again targets Junior Mints and Sugar Babies, the boxed candies that are ever-present at movie theatres. Predictably, she alleges that these products are only a little over half full and that their opaque packaging "dupes" consumers into thinking they are receiving more candy than they are paying for. This empty space, or slack-fill, the plaintiff contends, serves no functional purpose. In addition, although the candy maker recently updated its packaging, the plaintiff claims that change does not remedy the prior losses the plaintiff and putative class members suffered. The plaintiff seeks to certify a New Jersey class for a range of New Jersey consumer and common-law claims.

Other suits have challenged the exact same products, with mixed results. Time will tell whether this consumer and her law firm went to the slack-fill well one too many times.

Smoking Out Deceptive "Smoked Provolone Cheese"

Jones v. Dietz & Watson Inc., No. 1:20-cv-06018 (E.D.N.Y. Dec. 9, 2020).

Dietz & Watson faces a putative class action alleging that labeling the company's packaged cheese product as "Smoked Provolone Cheese" is misleading because the "smoked" flavor is added, *not* from actually smoking the cheese. The complaint alleges that consumers expect a product labeled as "smoked"—which does not include any qualification that the product is flavored—to get its smoked flavor from being smoked over wood chips. But, as declared on the label's ingredient list, the cheese actually is flavored with added "smoke flavor." The complaint argues that the label is false and misleading because it should have included the common or usual name of the food, "Natural Smoke Flavored Provolone Cheese" to indicate that the cheese is flavored with smoke flavor. The plaintiff seeks to certify a nationwide class of purchasers and asserts violations of New York consumer protection statutes, negligent misrepresentation, breaches of warranties, fraud, and unjust enrichment.

Consumers Allege Holes in Blueberry Donut Packaging

Moncure v. 7-Eleven Inc., No. 1:20-cv-10935 (S.D. Cal. Dec. 26, 2020).

7-Eleven faces a putative class action alleging that the company's labeling for its 7-Select brand's blueberry donut holes is misleading because it contains a smaller amount of blueberries than consumers expect based on the label. The complaint alleges that the label's "blueberry" statement on the front package—which is not further qualified—gives consumers the impression that the product's flavor is only from the characterizing ingredient of blueberries. But, the complaint alleges, the ingredients list on the product discloses that it actually contains added blueberry flavor. A similar qualification, the plaintiff contends, is missing on the product's front label. The plaintiff seeks to certify a nationwide class of purchasers and asserts violations of New York consumer protection statutes, negligent misrepresentation, fraud, and unjust enrichment.

Consumers Pop Off over Flavoring Ingredients

Salony v. VMG Partners LLC, No. 7:20-cv-10273 (S.D.N.Y. Dec. 6, 2020).

A putative class action alleges that the manufacturer of PopChips deceives buyers of its cheddar and sour cream chips into believing cheddar and sour cream are the primary flavoring ingredients when, in fact, they are largely absent from the products themselves. The complaint states that because the packaging is devoid of statements such as "other natural flavors" or "artificial flavors," consumers understand the chips are flavored by the ingredients displayed on the front of the label. The images of cheddar cheese and sour cream on the chips' packaging only magnifies consumer deception, according to the complaint, especially given the supposed health benefits provided by the nutrients in these ingredients are also lacking. The plaintiff seeks to represent all New York residents who purchased the products, asserting claims under New York's consumer protection statutes and for negligent misrepresentation, breach of warranties, fraud, and unjust enrichment.

Not-So-Natural Products Face Scrutiny in Midwest Suits

Powell v. MDBC LLC, No. 2022-CC10477 (Mo. Cir. Ct. Dec. 10, 2020).
Powell v. Cyclone Promotions LLC, No. 2022-CC10479 (Mo. Cir. Ct. Dec. 10, 2020).
Powell v. Casablanca Foods LLC, No. 2022-CC10480 (Mo. Cir. Ct. Dec. 10, 2020).

A Midwest plaintiffs' attorney has brought a wave of new class actions in Missouri state court alleging claims of deceptive, unfair, and false merchandising practices against companies that have used the phrases "all natural" or "no artificial anything" on their products. The defendants range from makers of biscuits (Mason Dixie Biscuit Co), hot sauce (Cyclone Promotions), and harissa sauce (Casablanca Foods).

A common thread between these new lawsuits is the plaintiff's allegation that the phrasing "all natural" or "no artificial anything" leads him, and other reasonable consumers, to believe that the products do not contain synthetic ingredients. In reality, the plaintiff alleges, the products contain ingredients such as sodium acid, xanthan gum, and citric acid. The plaintiff seeks to certify classes of Missouri citizens who purchased the various products in the five years before the suits were filed.

"Say Cheese!" Isn't Cutting It

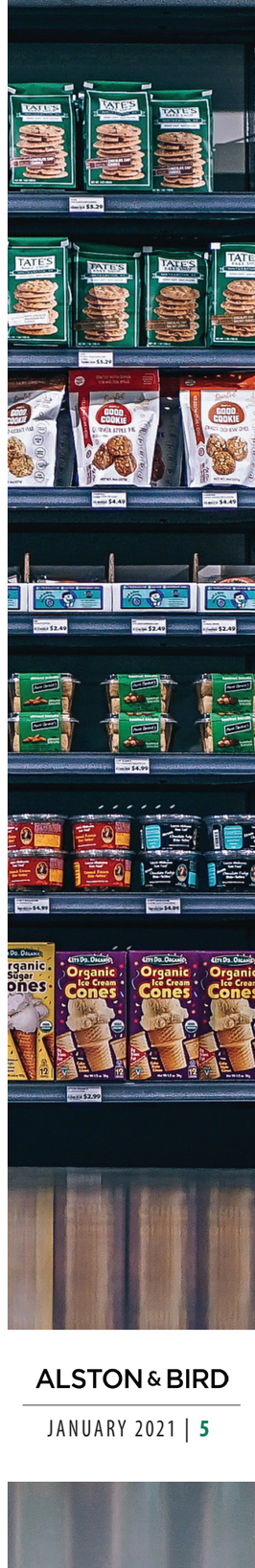
Nason v. Inventure Foods Inc., No. 7:20-cv-10141 (S.D.N.Y. Dec. 3, 2020).

A putative class action filed in New York alleges that Inventure Foods Inc. misleadingly markets its TGI Fridays brand Mozzarella Sticks Snacks because the snacks contain cheddar, not mozzarella, cheese. In fact, the complaint alleges, mozzarella is not even an ingredient. The complaint alleges that these snacks would be more aptly named "cornmeal snacks, artificially flavored mozzarella." Although the label states that the snacks are "natural and artificially flavored," that labeling is nonetheless deceiving because consumers do not conclude that "natural and artificially flavored" modifies "Mozzarella Stick Snacks." According to the complaint, this labeling is "a sleight of hand on the hurried consumer." The plaintiff seeks to represent a class of all purchasers in New York, and she is pursuing injunctive and monetary relief for claims of violations of the New York General Business Law, negligent misrepresentation, breaches of express and implied warranties, fraud, and unjust enrichment.

A Dogfight Against Maverick Consumer over Pizza Labels

Zuchowski v. SFC Global Supply Chain Inc., No. 1:20-cv-10171 (S.D.N.Y. Dec. 3, 2020).

Karen Zuchowski has filed a putative class action in New York federal court against Red Baron Brick Oven Pizzas alleging that the defendant falsely advertised its pizzas as having "preservative free crust" and "no artificial flavors." The pizzas, according to the plaintiff, actually contain preservatives and synthetic flavoring ingredients including sodium stearoyl lactylate, enzymes, monoglycerides, and diglycerides. The plaintiff also challenges the defendant's claims that the products contain no artificial flavors, pointing out that they contain "commercially manufactured and highly processed" ingredients like modified food starch and hydrolyzed soy and corn proteins. Red Baron, the plaintiff alleges, cannot legally market its pizzas as having a preservative-free crust or being free of artificial flavors and injured the plaintiff and others by charging a premium for its frozen pizzas. The plaintiff seeks an injunction, compensatory damages or restitution, and attorneys' fees.



Motions to Dismiss

Procedural Posture: Granted

Flavoring Suits Put on Vanilla Ice

Clark v. Westbrae Natural Inc., No. 3:20-cv-03221 (N.D. Cal. Dec. 1, 2020).
Cosgrove v. Blue Diamond Growers, No. 1:19-cv-08993 (S.D.N.Y. Dec. 7, 2020).

As regular readers of this digest know, we've been keeping a close eye on the burgeoning vanilla litigation over the past two years. In recent months, we covered an uptick in new vanilla filings, but while new suits continue to flood in, more courts have begun to reject these flavoring cases, particularly when product labels do not imply that the product's flavoring derives solely from the vanilla bean.

In early December, federal courts in California and New York granted motions to dismiss a pair of cases against producers of almond and soymilk products, finding that the plaintiffs failed to allege that a reasonable consumer would be tricked into believing that the products' vanilla flavor was derived exclusively from the vanilla bean, as alleged. Both courts swept aside claims that the labeling representations would be perceived by a reasonable consumer as misleading, noting in one case that "[t]he Product makes one representation—that it is vanilla flavored—and Plaintiffs do not allege that the Product did not deliver on that representation. This alone is fatal to Plaintiffs' case."

While companies that may come under fire from similar flavoring suits in the future will likely be able to point persuasively to these two cases, there is still room for the plaintiffs' bar to distinguish the pair of rulings because one court called out that the label at issue did "not contain any other words or pictures that suggest the vanilla flavor is derived exclusively from the vanilla bean," as some product labels that have drawn plaintiffs' ire have. But when there are no imaging or other claims that imply the product's flavoring derives solely from the vanilla bean plant, and the product only makes representations about the flavor it contains, "the appropriate inquiry is whether the product indeed has that flavor." Absent "well-pled allegation[s] that the Product does not taste like vanilla," it is likely that courts will continue to dispose of these flavoring cases, though they are unlikely to do so at the same pace plaintiffs continue to file them.

Tainted Dog Food Suit Dismissed for Chasing Its Own Tail

Song v. Champion Petfoods USA Inc., No. 0:18-cv-03205 (D. Minn. Dec. 22, 2020).

A Minnesota federal district court sent a putative class action to the doghouse, observing that the plaintiffs' allegations of deception were "contrived by lawyers." The plaintiffs, along with other consumers scattered across the country, filed at least 17 putative class actions (including ones we have covered) alleging the defendant's dog food was deceptively labeled as "Biologically Appropriate," "Fresh Regional Ingredients," "Nourish as Nature Intended," or "Delivering Nutrients Naturally" because the products contained or had a *risk* of containing heavy metals, bisphenol A (BPA), pentobarbital, or "non-fresh, non-regional ingredients."

The court, however, threw the plaintiffs no bones on their second amended complaint and dismissed the lawsuit with prejudice. First, the court observed that the plaintiffs—at most—conceded that heavy metals are naturally occurring and provided no basis to conclude that the products contained such high quantities to harm pets. Second, it found the phrase "Nourish as Nature Intended" constituted puffery, remarking "Mother Nature cannot be deposed." Third, the court observed that the plaintiffs' interpretation of "Fresh Regional Ingredients" was patently unreasonable because labeling expressly does not represent that fresh, regional ingredients are the *only* ingredients in the products. Finally, the plaintiffs unreasonably interpreted the labeling to represent that the dog foods were manufactured in such a way to eliminate "all possible risk" they contained any of the alleged elements and compounds.

Procedural Posture: Denied

Testing Does Not Gnaw at Court in Grain-Free Dog Food Case

Hough v. Big Heart Pet Brands Inc., No. 3:19-cv-03613 (N.D. Cal. Dec. 8, 2020).

A California federal district court has allowed a class action challenging Big Heart pet food's "grain free" labeling to move forward. The lawsuit alleges that the defendant falsely markets its Grain Free Easy to Digest Salmon Sweet Potato & Pumpkin Recipe dog food as being "Grain Free" when independent testing shows that the dog food contains significant amounts of grains like corn and soy protein.

The defendant moved to dismiss, arguing that the plaintiff lacks standing because she relies on testing results for a bag of dog food that she did not purchase herself. The district court, however, rejected this argument, ruling that the plaintiff's allegations of the testing were sufficient to sustain her complaint as an example of the pet food's contents. More specific allegations, the district court observed, simply were not necessary at this stage. Although the district court allowed most of the plaintiff's claims to move forward, it nevertheless dismissed the plaintiff's claims under the federal Magnuson–Moss Warranty Act and for equitable relief, injunctive relief, and punitive damages as vestiges of a prior complaint that should have been removed.

Regulatory

Regulators Move Toward a No-Chill Approach to Unsubstantiated CBD Health Claims

Federal Trade Commission: FTC Announces Crackdown on Deceptively Marketed CBD Products (Dec. 17, 2020).
Food & Drug Administration: FDA Warns Companies Illegally Selling CBD Products (Dec. 22, 2020).

The Federal Trade Commission (FTC) and the Food & Drug Administration (FDA) are cracking down on companies making unsubstantiated health-based claims for their CBD products. On December 17, the FTC announced that it was taking action against six CBD companies for making scientifically unsupported claims about their products' ability to treat various health conditions. All six are in the process of settling with proposed consent orders that require the companies to stop making the claims and to notify their customers of the consent orders. Five of these six settlements also make history by including the first monetary sanctions issued by the FTC against CBD product manufacturers and sellers. Similarly, on December 22, the FDA issued five warning letters to CBD companies related to the illegal marketing of CBD products that have not been approved to treat the medical conditions that they claimed to treat.

The agencies previously have expressed concern over CBD companies' health and medical claims without appropriate regulatory approvals or reliable scientific evidence and human clinical testing. Although in practice regulators have imposed a lighter touch on more generic CBD labeling, the FTC's imposition of monetary sanctions shows that it has embraced a tougher stance and will police health and medical claims more closely.

Appeals

Standing Dooms Trans Fat Suit

McGee v. S-L Snacks National, No. 17-55577 (9th Cir. Dec. 4, 2020).

The plaintiff sued Diamond Foods Inc. in California federal court, alleging that the defendant engaged in unfair practices, created a nuisance, and breached the warranty of merchantability by including partially hydrogenated oils (also referred to as "trans fat") as an ingredient in Pop Secret brand popcorn. The plaintiff alleged that she was injured by Diamond's actions in three ways. First, she alleged that the amount of trans fat in the popcorn caused her economic injury because she believed she was purchasing a safe product when she was not. Second, she alleged that the amount of trans fat she consumed caused her physical injury because consuming trans fat in any quantity is dangerous. Third, she alleged that her consumption of Pop Secret increased her risk of heart disease and other diseases and therefore posed a risk of future physical injury.

The district court dismissed the plaintiff's claims for lack of Article III standing, concluding that the plaintiff failed to sufficiently allege an injury in fact. The plaintiff appealed. On appeal, the Ninth Circuit affirmed the district court's dismissal for lack of standing. The Ninth Circuit found that the plaintiff's allegations of economic injury were insufficient because she did not contend that Diamond made any representations about Pop Secret's safety, particularly because the label disclosed that the product contained artificial trans fat. She therefore did not plausibly allege that she did not receive the benefit of her bargain or paid more for the product than it was worth. The plaintiff's allegations of present physical injury were insufficient because she did not cite any medical testing to support her allegations; she merely presumed that consumption of trans fat invariably resulted in some physical injury. Finally, the plaintiff did not plausibly allege that consumption of Pop Secret substantially increased her risk of disease because the studies she relied on to support this proposition did not state that consumption of any amount of trans fat over time led to the substantial increase that the plaintiff alleged. Because the plaintiff failed to adequately allege injury in fact, the district court properly dismissed her complaint for lack of standing.

Pet Food Manufacturer Stays Out of the Doghouse

Reitman v. Champion Petfoods USA Inc., No. 19-56467 (9th Cir. Dec. 9, 2020).

In October, a federal district court denied class certification to a group of pet owners alleging that Champion Petfoods misled them about the presence of heavy metals in their dogs' food. The disgruntled pet owners claimed that the dog food packages contained misleading information and that the dog food contained heavy metals like arsenic and mercury.

On appeal, the Ninth Circuit upheld the lower court's decision to deny certifying a class action. First, the circuit court agreed with the lower court that the individualized questions abounded because the ingredients used varied among the 47 different flavors of pet food that the defendant sold. It would require an individual examination into the various types of food, making a class mechanism neither manageable nor the best path forward. Second, the Ninth Circuit agreed that the plaintiff's damages model only measured consumer "expectations" in the abstract and could not measure the *premium* attributable to the challenged statements (or omissions) on the packaging.

The plaintiffs will now have to proceed without a class.

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