YEAR IN REVIEW

2019 Food, Beverage, and Supplement Litigation Roundup

BRYAN CAVE LEIGHTON PAISNER BLP

YEAR IN REVIEW

2019 WAS ANOTHER ACTIVE YEAR FOR NEW REGULATORY ACTIVITY AND LITIGATION TARGETING THE FOOD, BEVERAGE, AND SUPPLEMENT INDUSTRIES.

In this roundup, Bryan Cave Leighton Paisner LLP presents a collection of regulatory developments, key court decisions, and notable settlements that were reached in 2019 and early 2020.

The highlights of this 2019 roundup include:

- New federal legislation governing food labeling.
- New regulations and a burst of litigation regarding CBD-based products.
- An update on slack fill litigation.
- Notable rulings, trials, and settlements.
- Prop 65 and food safety update.
- A preview of areas to watch in 2020.

NEW FEDERAL LEGISLATION

FDA Issues New Rule Regarding Calorie Type Size Requirement on Vending Machine Products

On October 25, 2019, the FDA issued a final rule revising the type size requirements for calorie labeling on foods sold in vending machines. The rule establishes that that the front-of-package calorie information type size must be at least 150 percent the size of the minimum required size of the net weight declaration on the package of the food item. Prior to this rule, the FDA required that the type size be at least 50 percent the size of the largest printed item on the label.

The final rule was issued in response to complaints from trade associations and food manufacturers that the previous requirement presented serious technical difficulties to the packaged food industry. Thus, the rule is meant to reduce the regulatory burden on the industry while maintaining an easy-to-read format for consumers.

FDA Updates Position on How Allulose is Declared on Nutrition Labels

On April 17, 2019, the FDA released non-binding draft guidance intended to provide the current view on how allulose, a low-calorie sweetener found naturally in dried fruits like figs and raisins, can be declared on the Nutrition and Supplement Facts labels of products.

Under the previous 2016 rule, the amount of allulose must be counted towards the amount of total carbohydrates, total sugars, and added sugars declared on Nutrition and Supplement Facts labels. In contrast, the new draft guidance provides that manufacturers can exclude allulose from the amount declared in the total and added sugars declarations.

Additionally, under the 2016 rule, allulose must be counted as four calories per gram of sweetener. But the new draft guidance states that the FDA intends to exercise enforcement discretion to allow manufacturers to use 0.4 calories per gram of allulose.

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FAST GROWING CBD MARKET CREATES REGULATORY CHALLENGES AND LITIGATION OPPORTUNITY

Cannabidiol – known as "CBD" – has emerged as one of hottest food law topics of 2019, and we expect it to continue dominating headlines – and dockets – in 2020.

Products containing this hemp-derived "miracle ingredient" are increasingly popular in the United States, with dozens of brands and products populating store shelves and online marketplaces at a rapid pace. Infused into oils and other products ranging from food and supplements to cosmetics and pet products, CBD is marketed for its ability to safely treat a wide range of ailments. Financial analysts project that U.S. consumer sales of CBD-based products could reach $15 billion by 2022.

CBD's popularity follows federal legislation that sought to regulate CBD-based products, but often creates more questions than answers. In this update, we delve into the regulations, analyze the flurry of CBD-based litigation that's beginning to hit courts across the country, and predict what's yet to come.

What is CBD?

Cannabis is a flowery green plant. Hemp and marijuana are species of cannabis plants with very different uses and characteristics. Along with delta-9-tetrahydrocannabinol (THC), CBD is one of the most prevalent active ingredients of the cannabis sativa plant. But unlike THC, the compound in marijuana that leads to the "high" feeling, CBD does not have psychoactive effects.

For decades, the federal government has outlawed the sale of cannabis and its derivatives, deeming these compounds controlled substances under the "marijuana" umbrella. But in 2018, the legal landscape changed.

Current Regulatory Landscape

In December 2018, President Trump signed the Farm Bill into federal law. The new law removed hemp with low THC content (0.3 percent or less) and derivatives the definition of marijuana under the Controlled Substances Act, thereby creating an opportunity for cannabis-based products to be sold legally.

The 2018 Farm Bill directed the United States Department of Agriculture ("USDA") to establish a national regulatory framework for hemp production. On October 29, 2019, the USDA released its interim final rule for the domestic production of hemp, which provides hemp growers and related businesses some clarity regarding how the federal government plans to regulate hemp and hemp products. Notably, the new law requires a farmer to first be licensed or authorized under a state or tribal hemp program, or through the USDA hemp program, in order to produce hemp. The regulations also clarify the law governing testing procedures to ensure hemp crops come in below the 0.3% THC threshold, and mandate disposal of "hot crops," which are crops testing above the legal limit.

The 2018 Farm Bill explicitly preserved the FDA's authority to regulate products containing marijuana or marijuana-derived compounds. The FDA, in turn, has stated that it remains illegal under the Food, Drug & Cosmetic Act (FDCA), to sell a food or dietary supplement, including pet food, to which CBD or THC have been added.

This is because the FDCA prohibits the sale of food that includes any new substance that is the active ingredient of an approved drug, absent specific exemptions. The FDA has approved one CBD-derived drug for the treatment of certain seizures, and has also approved two drugs with synthetic THC as the active ingredient. Furthermore, in order to be sold legally, the FDA requires hemp-derived ingredients to meet certain regulatory criteria that are mandated for all food additives, including a showing that the ingredient is generally recognized as safe.

The FDA's position, reiterated in a November 2019 Consumer Update, is that well-controlled clinical studies need to be conducted to assess CBD's safety and effectiveness for treating diseases or medical conditions. While the FDA acknowledges "the potential therapeutic opportunities that cannabis or cannabis-derived compounds could offer[,]" the agency remains concerned about CBD's potential known and unknown side effects and interactions with other medications or supplements.

Much still remains uncertain, and legislators have pushed for the FDA to issue further guidance. In 2019, Senate Majority Leader Mitch McConnell introduced an amendment to an appropriations bill that would require the FDA to fast-track guidance, including enforcement discretion for some CBD products, on "the process in which CBD meeting the definition of hemp will be evaluated for use in products." See 2019 Legis. Bill Hist., U.S. S.B. 2522, 2019 Legis. Bill Hist. (2019).

On January 10, 2020, Rep. Collin Peterson, Chair of the House Agriculture Committee, introduced a bill into the U.S. House of Representatives that seeks to expand the definition of dietary supplement to include "hemp-derived cannabidiol or a hemp-derived cannabidiol containing substance[.]" See https://www.congress.gov/bill/116thcongress/house-bill/5587. The bill would also remove some of the restrictions on interstate commerce for hemp and CBD products.

While specific federal regulation of CBD-based products remains lacking, the FDA has issued some guidance regarding hemp seeds. Hemp seeds are the seeds of the cannabis plant. They do not naturally contain THC or CBD. In December 2018, the FDA completed its evaluation of the following hemp seed-derived food ingredients: hemp seed, hemp seed protein powder, and hemp seed oil. The FDA found that these ingredients are generally recognized as safe, and may be legally marketed and sold in human foods such as beverages, smoothies, cereals, snack bars, and baked goods, among others, provided that the products comply with all other federal requirements.

State-Specific CBD Legislation

Adding to the confusion, state laws vary on the legality of ingestible CBD, and state and local regulations are constantly evolving. Overall, most states permit the use of CBD at least for specific medical conditions, but some require medical marijuana cards and only permit CBD to be sold at marijuana dispensaries. Many states define legal CBD as the extract from hemp with zero or very low amounts of THC. Some states have followed the FDA's lead in declining to approve the sale of CBD-containing products – at least for now – while other states allow them.

For example:

- **California:** In 2018, the California Department of Health released a publication noting that California prohibits the use of hemp-based CBD in ingestible products, at least until FDA rules that CBD products can be used as a food or the state makes its own determination that such products are safe for human and animal consumption. Then, in August 2019, the California state legislature considered a proposed new law, AB-228, which would establish a regulatory framework for industrial hemp products to be used as a food, beverage, or cosmetic. The proposed bill would legalize the sale of CBD products by providing that a food, beverage, or cosmetic is not adulterated by the inclusion of industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp, and would prohibit restrictions on the sale of food, beverages, or cosmetics that include industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp based solely on the inclusion of industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp. In a surprising development, the California Senate Appropriations Committee failed to move AB-228 out of the committee and instead held the bill on "Suspense" during its final hearing of the 2019 legislative session, effectively killing the bill – for now.

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- **Massachusetts:** The Massachusetts Department of Agricultural Resources issued guidance indicating that while hemp products such as hemp seed oil, clothing, and building material can be sold in Massachusetts, food, dietary supplement or animal feed containing hemp-derived CBD cannot be sold in the state, and products containing CBD may not make therapeutic or medicinal claims, or be marketed as a dietary supplement, unless approved by the FDA.

By contrast, several states have more lenient regulations regulating CBD products.

For example:

- **Oklahoma:** CBD containing less than 0.3% THC has been excluded from the definition of marijuana since 2015. In 2019, the state legislature enacted a new bill providing: "[t]he addition of derivatives of hemp, including hemp-derived cannabidiol, to cosmetics, personal care products and products intended for human or animal consumption shall be permitted without a license and shall not be considered an adulteration of such products."
- **Maine:** In response to the FDA's guidance, the Maine legislature promulgated a statute in 2019 specifically stating that that food, food additives and food products containing CBD are not considered adulterated based solely on the inclusion of hemp or CBD from hemp. The law requires product labels to identify the amount of CBD by weight, and the THC content must be less than 0.3%, consistent with the Farm Bill.
- **Florida:** On January 1, 2020, Florida Senate Bill 1020 took effect, which legalizes and regulates hemp-derived CBD products, including ingestible products. The product must not include claims that items with hemp or CBD can diagnose, treat, cure or prevent any disease, condition or injury, absent federal approval.
- **Alabama:** Alabama's Attorney General issued a Public Notice in November 2018, stating that CBD from hemp can be legally produced, sold, and possessed in the state.

Enforcement Prompts Consumer Litigation

Over the past year, the FDA has sent a flurry of warning letters to various CBD manufacturers claiming their CBD products constitute unapproved drugs and/or dietary supplements, among other issues, and violate the FDCA. The Federal Trade Commission has also issued warning letters stating that it is illegal to advertise that a product can prevent, treat, or cure a human disease without competent and reliable scientific evidence to support such claims. The FTC letters advise CBD companies to cease making unsubstantiated claims.

Seizing on some language in these warning letters and the continued lack of specific regulatory guidance governing the sale and marketing of CBD-based products, consumer lawsuits have been popping up. Over the past year and a half, several consumer class actions have been filed against CBD manufacturers across the country.

There are a number of theories that plaintiffs have unleashed against CBD manufacturers:

- Piggybacking on the FDA and FTC's warning letters, consumers claim that CBD-based products violate the FDCA because not they are not FDA-approved to treat the medical conditions for which they are advertised.
- Numerous consumer complaints have been filed based on the notion that CBD-based dietary supplements are misbranded and illegal under FDA's guidance suggesting CBD does not meet the FDCA's statutory definition of "dietary supplement."
- Multiple plaintiffs allege the CBD content in the products they purchased are present in an amount lower than advertised on the label.
- At least one plaintiff alleged he was fired from his job for failing a drug test after consuming CBD oil, which was advertised as containing no THC.

While the FDCA offers no private right of action, plaintiffs have bootstrapped these claims to state consumer protection and deceptive advertising laws, and assert an injury based on the theory that the product they purchased is either completely worthless or worth less than what they paid.

In addition to these popular claims, we expect the plaintiff's bar to also test out the following theories in the future:

- CBD marketing claims are false, misleading or unsubstantiated because the CBD products do not provide the claimed benefits.
- CBD manufacturers fail to disclose the products' side effects or potential interaction with other products or medications.

CBD manufacturers have a number of strong defenses they may raise, depending on the specific claims asserted. While this field of law remains in its infancy, litigants can benefit from the existing, well-developed bodies of law governing the labeling and advertising of food products and dietary supplements, much of which can likely be extrapolated to CBD claims. For example, potential defenses may include:

- Express preemption;
- Implied preemption;
- Primary jurisdiction;
- Puffery;
- Lack of reliance/materiality; and
- Lack of standing.

The most notable CBD-related court ruling thus far is a January 3, 2020 order from the United States District Court for the Southern District of Florida staying the case pending guidance by the FDA based on the primary jurisdiction doctrine. *See Snyder v. Green Roads of Florida LLC*, 2020 WL 42239 (S.D. Fla. Jan. 3, 2020). Here, the plaintiffs alleged they purchased CBD product that misrepresented the amount of CBD that each product contained. They alleged a variety of state law claims based on the notion that they relied on the labels in making their purchase decision, and were overcharged for the products. The court declined to dismiss the claims and instead applied the doctrine of primary jurisdiction, which generally requires that four factors be satisfied: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. *Id.* at *7. In deciding to stay the case, the court noted the importance of uniformity in administration of the labeling of ingestible CBD products, and emphasized that the current regulatory framework was inadequate to resolve the legal issues, holding: "As for the adequacy of the current regulatory framework to resolve the issues posed by this case, the Court vehemently disagrees. The FDA regulations currently provide little guidance with respect to whether CBD ingestibles, in all their variations are food supplements, nutrients or additives and what labeling standards are applicable to each iteration." *Id.* The court further determined that while there may be regulatory delays, the rulemaking process is active, and "[g]iven that this case is in the nature of public interest litigation, the delay occasioned by a stay under the current circumstances, would not prejudice Plaintiffs to any significant degree." *See id.*

Multiple CBD-related class actions remain pending in California, Massachusetts, and Florida courts, with several set for pleading motions in the coming months. These initial rulings will provide a litmus test for plaintiff's attorneys as they will undoubtedly continue to experiment with different theories and find new targets. While a motion seeking to certify a class of CBD purchasers is likely still a year away, we anticipate a number of individual issues could predominate over common questions, thereby precluding certification.

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SLACK FILL LITIGATION UPDATE

While slack fill lawsuits have slowed down since exploding a few years ago, the past year saw several interesting decisions and settlements.

In a slack fill case, plaintiffs allege food packaging is deceptive because it contains empty space, or nonfunctional slack fill, that disguises the amount of product in the package.

Notable 2019 developments include:

- *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639 (7th Cir. Dec. 9, 2019). This case arose out of plaintiff's theory that chocolates packaged in an opaque box contained non-functional slack fill. In 2018, as we reported previously, a federal district court granted Fannie May's motion to dismiss the complaint, finding that the plaintiffs "had not adequately pleaded a violation of the (federal) Food, Drug, and Cosmetic Act, and that the FDCA preempted their state-law claims." Affirming the dismissal on other grounds, the Seventh Circuit Court of Appeals ruled that the Bensons had failed to assert a violation of state law because the plaintiffs' allegation that the excess empty space "financially injured" them was conclusory and insufficient to state damages. More specifically, the Court found that the plaintiffs had not pleaded plausible facts to establish that the chocolate in the package was "worth less than the $9.99 that they paid." This was "fatal to their effort to show pecuniary loss," and undermined their attempt to "raise a plausible theory of actual damage." One unusual feature of the Court's decision was its holding that the district court's consideration of the defendant's preemption defense was premature because preemption is an affirmative defense. This departs from numerous well-settled decisions ruling on preemption issues in connection with 12(b)(6) motions.
- *In re McCormick & Company, Inc., Pepper Products Marketing and Sales Practices Litigation*. In a multidistrict litigation accusing McCormick & Co. of deceptively underfilling the pepper it sells in grinders and tins, a D.C. federal judge preliminarily approved a $2.5 million class settlement in early 2020. Consumers first sued McCormick in 2015, challenging the spice manufacturer's response to economic pressures in the black pepper marketplace. The plaintiffs' original complaint alleged that McCormick and other brands it supplied misled consumers by constructing the packages to hide the reduction of product with "nonfunctional slack-fill," or empty space. In July 2019, in a 110-page opinion, the court certified single-state classes of individuals asserting statutory consumer protection claims in three states. The court held that purchasers "were uniformly exposed to the same alleged misrepresentation — pepper containers that did not have visible fill lines and that allegedly contained nonfunctional slack fill." Additionally, the court found "ample common evidence that the challenged action was deceptive," including the product's opaque packaging and McCormick's internal documents. The court declined to certify a multistate class due to material variations between the states' consumer protection statutes. This settlement, assuming it passes final approval, is the first significant class payout in the slack fill context since Ferrara Co. settled similar claims involving its candy packaging in 2018, also paying consumers $2.5 million.

- *Escobar v. Just Born, Inc.*, Case No. 2:17-cv-01826, 2019 WL 46057 (C.D. Cal. June 6, 2019). The plaintiffs had moved to certify a California class of individuals that purchased Just Born's products – Mike and Ikes and Hot Tamales – on the basis that approximately 46% of the products were non-functional slack fill, or empty space, in violation of California law. In a very short decision, the court granted class certification in March 2019. Just Born moved for reconsideration, arguing (1) that the brevity of the court's decision indicated it failed to review the evidence, and (2) that the plaintiff lacked standing to represent a class of Hot Tamale purchasers because she did not purchase that product. The court rejected the first argument, noting that "[t]he length of the Court's order does not have to match the length of the parties' briefs." The court granted Just Born's motion with respect to the Hot Tamales issue, and limited the certified class to include only purchasers of Mike & Ike's. The case is still pending and will likely to be set for trial in fall 2020 unless the parties settle. Notably, a Missouri court denied class certification of similar claims against Just Born in 2018.

- *Ketrina Gordon v. Tootsie Roll Industries, Inc.*, Case No. 18-56315 (9th Cir.). After the plaintiff filed a lawsuit alleging that opaque Junior Mints and Sugar Babies boxes contain about 40% and 33% of slack fill, respectively, the defendant changed its labeling. This prompted plaintiff to withdraw her motion for class certification and instead move for attorneys' fees, arguing that the defendant's labeling change made the plaintiff's claims moot. The district court denied the plaintiff's motion and the plaintiff appealed. On February 12, 2020, the Ninth Circuit held an oral argument. The primary issue was whether the plaintiff received the relief she was seeking even though the defendant changed its labeling, rather than adding more candy to or changing the size of the box. The plaintiff responded that the label change made her case moot because she sought to enforce the false advertising law, not the slack fill law, and the deception associated with the slack fill issue is lessened with the new labeling. The defendant pushed back, arguing that the plaintiff's position throughout her lawsuit has been that labeling changes would not be sufficient because consumers don't pay attention to labeling. The Ninth Circuit took the matter under submission and has not yet ruled on the matter. This decision could have far-reaching impact on other labeling and advertising cases in which the defendant voluntarily changes its label or packaging during the pendency of the lawsuit.

“The court granted Just Born's motion with respect to the Hot Tamales issue, and limited the certified class to include only purchasers of Mike & Ike's. The case is still pending and will likely to be set for trial in fall 2020 unless the parties settle. Notably, a Missouri court denied class certification of similar claims against Just Born in 2018.”

PLANT-BASED PRODUCTS

Last year, we reported that Missouri was the first state to institute a law on "fake meat." The law was passed in August 2018 and targets plant-based meat and cell-cultured meat ("CCM") products. Specifically, the law provides that meat substitutes must include a prominent statement on the front of the package indicating that the product is not derived from harvested production livestock or poultry. Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, and Wyoming have all followed suit in passing laws targeting plant-based meat and CCM products. Notably, the following lawsuits have challenged three "fake meat" statutes:

- *Turtle Island Foods, SPC, et al. v. Richardson*, Case No. 2:18-CV-04173

  First, as we previously mentioned, the Missouri law was challenged in August 2018 when Vegan-brand Tofurky and food-advocacy group Good Food Institute filed suit in the U.S. District Court of the Western District of Missouri seeking preliminary injunction, permanent injunction, and a declaration that the Missouri statute is unconstitutional on the grounds that the statute violates the Free Speech Clause of the First Amendment, the Dormant Commerce Clause, and the Due Process Clause.

  In response, the State of Missouri argued that the law does not affect sellers like Tofurky that use modifiers such as "veggie" and "plant-based" on their labels. Instead, the State argued that the law only prohibits false statements that confuse consumers into believing that meat substitutes are traditional meat products.

  On September 30, 2019, the court denied the plaintiffs' motion for a preliminary injunction, and on December 11, 2019, the Eighth Circuit denied plaintiffs permission for leave to appeal. The litigation is ongoing, and unless the court rules otherwise, plant-based meat and CCM products are required to comply with the Missouri law.

- *Upton's Naturals Co. et al. v. Bryant et al.*, Case No. 3:19-CV-00462

  Mississippi's statute took effect in July 2019 and initially prohibited any plant-based food or CCM product from being labeled as a "meat" or "meat food product." But Mississippi revised the law in response to a lawsuit filed by Upton's Naturals, a company that uses terms like "vegan burgers," "vegan bacon," and "vegan chorizo" on the packaging of its meatless products, and the Plant Based Foods Association on the grounds that the statute violates the First and Fourteenth Amendments.

  As revised, the Mississippi statute permits the use of "meat" and "meat food product" terms on plant-based products provided that brands use appropriate qualifiers such as "meatless," "vegan," and "vegetarian." The lawsuit was dropped after Mississippi altered the statute.

- *Turtle Island Foods SPC v. Soman*, Case No. 4:19-CV-00514

  On July 24, 2019, an Arkansas statute took effect that broadly prohibits "misbrand[ing]" a product as meat, rice, beef, or pork, as well as "[u]tilizing a term that is the same or similar to a term that has been used or defined historically in reference to a specific agricultural product."

  Again, vegan-brand Tofurky challenged this law by filing a lawsuit in the U.S. District Court of the Eastern District of Arkansas seeking an injunction. On December 11, 2019, the court granted Tofurky's motion for preliminary injunction citing the Free Speech Clause of the First Amendment. As a result, the state is prevented from enforcing the law while the suit is ongoing.

FDA And USDA Agree to Jointly Regulate Cell-Cultured Meat Products

On March 7, 2019, the FDA and the U.S. Department of Agriculture's Food Safety and Inspection Service ("FSIS") formally agreed to share authority in regulating CCM products derived from livestock or poultry. The agreement settles the longtime dispute between the FDA and the FSIS, whereby the FDA purported to have jurisdiction under the Federal Food, Drug, and Cosmetic Act ("FFDCA") and the FSIS claimed to have jurisdiction under the Federal Meat Inspection Act ("FMIA").

Under the formal agreement, the agencies agree that the FDA will oversee cell collection, development and maintenance of cell banks, and cell growth and differentiation. The FSIS will oversee the production and labeling of CCMs, including: 1) requiring that establishments that harvest cells obtain a grant of inspection and 2) conducting inspections in establishments where cells are harvested, processed, packaged, or labeled.

Plant-Based Milk Products

Plant-based meat is not the only plant-based product creating some disputes. On March 14, 2019, Senators from Wisconsin and Idaho reintroduced to Congress the "Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese To Promote Regular Intake of Dairy Everyday Act," also known as the Dairy Pride Act. The Dairy Pride Act intends to force the FDA to ensure that the terms "milk," "yogurt," and "cheese" are only used on products derived from dairy animals. The Act was first introduced to Congress in 2017 but did not pass.

The proposed Dairy Pride Act asserts that there is a nutritional value of dairy and that "[a] food is a dairy product only if the food is, contains as a primary ingredient, or is derived from, the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more hooved mammals." It is unclear whether Congress will pass the previously-rejected Act.

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NOTABLE RULINGS, TRIALS, AND SETTLEMENTS

2019 saw several significant class certification developments in the food, beverage and supplement space, raising a host of interesting issues. The stakes were high this year, and we saw a mistrial, some multi-million dollar class settlements with significant label changes, and important class certification decisions that could lead to additional major settlements in the coming year.

One of the biggest recent headline-makers is a rare class action trial, which resulted in a deadlocked jury. *Racies v. Quincy Bioscience, LLC*, Case No. 15-cv-00292-HSG (N.D. Cal.). In 2015, a consumer sought class-wide relief in the U.S. District Court for the Northern District of California against the developers of a brain-health dietary supplement known as Prevagen. The plaintiff sued for: 1) violation of California's Unfair Competition Law (Business & Professions Code § 17200 *et seq.*) and 2) violation of California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750 et seq.) on the grounds that the defendant makes false representations that Prevagen is: 1) "clinically tested" to "improve[] memory" and "supports: healthy brain function, sharper mind, and clearer thinking;" and 2) that Prevagen is "clinically tested" to "improve memory within 90 days." In December 2017, the court certified the class, and the Ninth Circuit rejected the Prevagen-maker's appeal. Two years later, on January 14, 2020, the court declared a mistrial after an 8-member jury deliberated for 3 days and told the court that they were "hopelessly deadlocked" in deciding whether the defendant mislead consumers. Both parties have filed competing motions asking the court to find in their favor as a matter of law, but the court has not yet ruled on either motion.

Other significant decisions and settlements included:

Court of Appeal Decisions

SUPPLEMENTS

- *FTC v. Quincy Bioscience Holding Co.* Similar to the Racies case, in 2017, the FTC and the New York Attorney General sought relief in the U.S. District Court for the Southern District of New York against the developers of Prevagen on the grounds that it advertises that: (1) Prevagen improves memory and provides other cognitive benefits; (2) Prevagen has clinically proven effects; and (3) Prevagen's active ingredient enters the brain and replaces proteins that are otherwise lost with age. Though the district court originally dismissed the complaint, the Second Circuit Court of Appeals vacated that judgment and remanded the case to the district court. See *FTC v. Quincy Bioscience Holding Co.*, 753 F. App'x 87, 87 (2d Cir. 2019). The appellate court found that the FTC plausibly claimed that defendants' representations about Prevagen were contradicted by the results of its clinical trial. For instance, the court agreed with Plaintiffs that defendants' claims about Prevagen's active ingredient (apoaequorin) "enter[ing] the human brain" to supplement the brain's proteins were false and deceptive in light of Defendants' study showing that, to the contrary, "apoaequorin is rapidly digested in the stomach." *Id.* at 89-90. The matter remains pending in the trial court and questions remain as to whether a jury trial would result in another mistrial.
- *Dachauer v. NBTY, Inc.*, 913 F.3d 844 (9th Cir. 2019). In Dachauer, a consumer brought a putative class action in the U.S. District Court for the Northern District of California against the manufacturer of vitamin E supplements, alleging that labels on the supplements violated California laws against false advertising, including: 1) California's Unfair Competition Law (Business & Professions Code § 17200 *et seq.*) and 2) California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*). The consumer asserted claims based on allegations that the supplements falsely claimed that they "support cardiovascular health" and "promote[] immune function," "immune health," "heart health," and "circulatory health." For dietary supplements, the Federal Food, Drug, and Cosmetic Act ("FDCA") distinguishes between "disease claims" and "structure/function claims" that manufacturers make about their products. A structure/function claim describes the role of a dietary ingredient, but may not claim to mitigate a specific disease. 21 U.S.C. § 343(r)(6). Although the FDCA requires manufacturers to have substantiation for their structure/function claims, California law does not allow private plaintiffs to demand substantiation for advertising claims. The district court granted summary judgment in favor of the defendant. Plaintiffs appealed, and the Ninth Circuit affirmed, issuing a critical decision for supplement manufacturers. The decision clarified that structure/

function claims are subject to the same preemption provisions as those involving other claims related to food, such that the FDCA preempts any state law about claims, including structure/function claims, that are not identical to those found in the FDCA and related regulations. As a result, the challenge to defendant's claims that the product promoted cardiovascular health and immune health were preempted, because plaintiff's basis for challenging these claims was that the product did not prevent disease, and the FDCA does not require a structure/function claim to carry this level of substantiation. The court found, however, that the FDCA did not preempt plaintiff's challenge to the "supports immune health" claim because of FDCA requirements that a product disclose material facts regarding risks associated with normal use of the product. While finding the claim was not preempted, the court nonetheless affirmed summary judgment in favor of the defendant because the plaintiff had insufficient evidence that the product was actually harmful, and therefore failed to create a triable issue of fact as to whether the labeling claim was misleading.

- *DeBernardis v. IQ Formulations LLC*, 942 F.3d 1076 (11th Cir. 2019). The plaintiffs brought a class action for violation of Florida consumer protection laws under the theory that the dietary supplements at issue could not legally be sold in the U.S., and were therefore worthless. The Federal Food, Drug, and Cosmetic Act, as amended by the Dietary Supplement Health and Education Act, prohibit the sale of an "adulterated" dietary supplement. A supplement is adulterated if, among other things, it contains a "new dietary ingredient" — i.e., one that was not marketed in the U.S. before Oct. 15, 1994. Because the supplements contained DMBA, a new dietary ingredient, the plaintiffs alleged the product was adulterated, illegal, and therefore worthless. The case is notable for its broad application of the "benefit-of-the-bargain" theory to find an injury, absent any allegation of an unsafe product, a product that failed to perform, or a misrepresentation about product safety or performance. The court cautioned that its reasoning should only be applied to the specific facts of this case. However, it appears this reasoning – finding injury in fact for plaintiffs who simply purchased a supplement with a new and unregulated ingredient – could be extended, in particular to claims involving CBD products. One Florida district court recently considered whether *DeBernardis* would support a plaintiff's claim that the gin he purchased was worthless because it was allegedly adulterated. *Marrache v. Baccardi U.S.A. Inc.*, Case No. 19-23856, 2020 WL 434928 (Jan. 28, 2020). The district court distinguished *DeBernardis* because the FDA generally recognized the additive at issue as safe, and granted the defendant's motion to dismiss.

BEVERAGES

- *Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225 (9th Cir. 2019). In *Becerra*, the plaintiff claimed the use of the term "diet" in soft drinks deceptively conveyed the drinks would aid in weight loss when, in fact, they did the opposite. Relying on studies showing that aspartame, the artificial sweetener used in the soda, caused weight gain and was unlikely to help with weight loss, the plaintiff contended that the word "diet" on the product label was false and misleading. After a series of amended pleadings, the district court dismissed the case with prejudice, finding that no reasonable consumer would believe that the word "diet" in a soft drink's brand name promises weight loss or healthy weight management and, even if a reasonable consumer would believe that, the plaintiff had not sufficiently alleged that any such promise was false because of insufficient allegations that aspartame consumption causes weight gain. The Ninth Circuit affirmed the dismissal, holding that reasonable consumers would not interpret a "diet" soft drink to mean that the beverage would promote weight loss. The court reasoned: "Diet soft drinks are common in the marketplace and the prevalent understanding of the term in that context is that the 'diet' version of a soft drink has fewer calories than its 'regular' counterpart. Just because some consumers may unreasonably interpret the term differently does not render the use of 'diet' in a soda's brand name false or deceptive." The Second Circuit reached the same result in three other cases challenging "diet" soda labels under New York's consumer fraud laws. *Geffner v. Coca-Cola Co.*, 928 F.3d 198 (2d Cir. 2019) (per curiam); *Excevarria v. Dr Pepper Snapple Grp.*, Inc., 764 F. App'x 108 (2d Cir. 2019); *Manuel v. Pepsi-Cola Co.*, 763 F. App'x 108 (2d Cir. 2019).

- *Dumont v. Reily Foods Co.*, 934 F.3d 35 (1st Cir. 2019). The plaintiff alleged that she purchased the defendant's coffee because she thought that a coffee styled "Hazelnut Crème" contained some hazelnut. After learning that the "Hazelnut Crème" coffee contained no hazelnut, the plaintiff brought this class action challenging the coffee's labeling for violating Massachusetts' consumer protection laws. The district court dismissed the case, holding that "the complaint offer[ed] insufficient detail regarding the circumstances of plaintiff's purchase[.]" The split First Circuit panel reversed, finding it a "close question," but ultimately ruling that the complaint plausibly alleged consumer deception. Focusing on the reasonableness of a consumer's perception based on the label as a whole, the majority noted that a reasonable consumer may very well know that the coffee did not contain actual hazelnuts, but this determination was a factual issue not suitable for dismissal on the pleadings: "[w]e ourselves would likely land upon that reading were we in the grocery aisle with some time to peruse the package. That being said, we think it best that six jurors, rather than three judges, decide on a full record whether the challenged label 'has the capacity to mislead' reasonably acting, hazelnut-loving consumers." The dissenting judge found that a reasonable consumer would not, as a matter of law, believe that a package of ground hazelnut-flavored coffee contained actual nuts.
- *Am. Bev. Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749 (9th Cir. 2019). This case involved a city ordinance requiring advertisements for sugar-sweetened beverages to include a prominent disclosure that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." Plaintiffs, a group of beverage associations, sued to prevent implementation of the ordinance, claiming it violated the First Amendment's guarantee to freedom of commercial speech. The district court denied the plaintiffs' motion for a preliminary injunction, concluding the plaintiffs were unlikely to succeed on the merits of their claims because the warning is not misleading, does not place an undue burden on the plaintiffs' commercial speech, and is rationally related to a substantial governmental interest. A three-judge panel reversed the district court's denial of a preliminary injunction, and the matter was then reheard *en banc*. The full court unanimously agreed the ordinance violated the First Amendment, and reversed the district court's denial of the requested injunction. Writing for the majority, Judge Graber held the ordinance violated the First Amendment because it was "unduly burdensome when balanced against its likely burden on protected speech." While agreeing with the majority's result, three different concurring opinions would apply different standards to reach the majority's conclusion.
- *MillerCoors LLC v. Anheuser-Busch Cos. LLC*, 385 F. Supp. 3d 730 (W.D. Wis. 2019). In *MillerCoors*, the company that brews Miller Lite and Coors Light sued its rival, the brewer of Bud Light, in the U.S. District Court for the Western District of Wisconsin and moved for preliminary injunction claiming that the rival's campaigns about MillerCoors' use of corn syrup constitutes false advertising under the Lanham Act. Notably, the Lanham Act prohibits not only false statements but also true statements that convey a materially false or misleading impression. Thus, although MillerCoors does use corn syrup in its fermentation process, all corn syrup is burned up as the beers are brewed, and so MillerCoors sought to prevent its competitor from insinuating that Miller Lite and Coors Light products contain corn syrup. On May 24, 2019, the district court issued a preliminary injunction, holding that MillerCoors was likely to succeed in showing that the claims that Bud Light contains "100% less corn syrup" than Miller Lite and Coors Light and that Bud Light contains "no corn syrup" were misleading because they supported a reasonable interpretation that the finished products contain corn syrup. However, the district court held that MillerCoors was not likely to successfully prove that the stand-alone claims "brewed with," "made with," or "use of" corn syrup are misleading. MillerCoors initially appealed the district court's decision to the Seventh Circuit on the grounds that the district court did not include a separate document setting forth the terms of the injunction, as required by Federal Rule of Civil Procedure 65(d). After the district court modified its ruling in accordance with the Seventh Circuit's instructions, the Bud Light brewer appealed the decision to the Seventh Circuit. The parties are currently awaiting a decision from the Seventh Circuit.

Class Settlements

- *Hadley v. Kellogg Sales Co.*, Case No. 16-CV-04955-LHK (N.D. Cal.). In late 2019, Kellogg reached a $20 million settlement in a class action alleging it misled consumers by using health and nutrition claims to market high-sugar cereal and breakfast bars. The case, filed in the Northern District of California "food court," centered around the claims Kellogg made in connection with Raisin Bran, Frosted Mini-Wheats, Smart Start, and other cereals and snack bars. In addition to monetary relief, the settlement also requires Kellogg to limit "heart health" claims on Smart Start and Raisin Bran cereals, among other injunctive relief.
- *Bayol, et al. v. Health-Ade LLC, et al.*, Case No. 3:18-cv-01462 MMC (N.D. Cal.). Health Ade, one of many kombucha manufacturers facing similar lawsuits, agreed to settle false advertising/labeling claims for nearly $4 million in late 2019. The plaintiffs alleged Health Ade misrepresented the amounts of alcohol and sugar in its popular fermented beverage, thereby deceiving consumers. Health-Ade also agreed to change its formula to better control the variability of alcohol and sugar content, and update its labels to notify purchasers that "[d]ue to natural fermentation, there may be trace amounts of alcohol and small pieces of culture."
- *Hunter v. Nature's Way Products LLC and Schwabe North America Inc.*, Case No. 3:16-cv-00532 (S.D. Cal.). Nature's Way agreed to pay $1.8 million to settle claims that it misrepresented its coconut oil products were "healthy" or "ideal for exercise and weight loss programs[.]" The plaintiff alleged that these advertising and labeling claims were false and misleading because the product was unhealthy and contained a great deal of saturated fat. As part of the settlement, which the court preliminarily approved in September 2019, Nature's Way agreed to discontinue these advertising claims.
- *Hilsey v. Ocean Spray Cranberries, Inc., et al.*, Case No. 3:17-CV-2335-GPC-MDD (S.D. Cal.). In November 2017, plaintiffs filed a class action lawsuit alleging that Ocean Spray wrongfully represented their products as containing "no High Fructose Corn Syrup, Artificial Colors or Flavors." In fact, the complaint alleged, Ocean Spray juice products contain a synthetic ingredient known as malic acid, which produces a tart flavor. Although there is a naturally derived form of malic acid, the Ocean Spray class action asserts that Ocean Spray's products used the synthetic form of malic acid derived from petrochemicals, thereby deceiving consumers into purchasing the products. The court granted class certification in 2018 and denied defendant's motion to decertify the class in July 2019. In October 2019, the parties filed a notice of settlement, followed by a motion for preliminary approval of a $5.4 million class settlement, which the court granted. A final approval hearing is set for mid-2020.
- *Fitzhenry-Russell v. Coca-Cola Co.*, Case No. 5:17-CV-00603-EJD (N.D. Cal.). In *Fitzhenry-Russell*, a consumer filed a lawsuit in the U.S. District Court for the Northern District of California against the defendant, alleging that the claim Seagram's Ginger Ale is "Made with Real Ginger" misleads consumers about the form of ginger in the product and the product's health properties. The plaintiff alleged claims for violating: 1) California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*); 2) California's Unfair Competition Law (Business & Professions Code § 17200 *et seq.*); 3) California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*); and 4) common law misrepresentation. On June 13, 2019, the district court preliminarily approved a $2.5 million settlement between the defendant and the proposed class of consumers. As part of the settlement, the defendant agreed to stop using the "Made with Real Ginger" claim on its Seagram's Ginger Ale product in favor of less clear statements like "Real Ginger Flavor" or "Real Ginger Taste." The district court granted final approval of the settlement on October 3, 2019.

Key District Court Class Certification Decisions

- *Hasemann v. Gerber Products Co.*, 331 F.R.D. 239 (E.D.N.Y. 2019). Plaintiffs brought this class action asserting that Gerber misrepresented that its "Good Start Gentle" infant formula was the first and only formula that reduces the risk that infants will develop allergies, and was the first and only infant formula that the FDA endorsed to reduce the risk of infants developing allergies. According to the Gerber consumers, these statements were false and deceptive; the FDA had actually rejected Gerber's application for approval of these claims. In 2014,

the FDA allegedly sent a warning letter to Gerber telling the company to stop claiming that they had received FDA approval when they had not. The plaintiffs argued they would not have paid as much for the formula, or would not have purchased it had all, had they known that it would not help prevent allergies and was not FDA-approved for this purpose. The court certified New York and Florida classes of purchasers, finding the plaintiffs satisfied class requirements based on the consumer protection laws of these states. However, in a nearly identical case against Gerber, the Ninth Circuit decertified a California class in 2018, finding that the plaintiffs had not set forth an appropriate damages model. *Zakaria v. Gerber Products Co.*, 755 Fed. Appx. 623 (9th Cir. 2018). The Federal Trade Commission also brought suit against Gerber for the same issue, and reached a settlement in the District Court of New Jersey in 2019.

- *Marotto v. Kellogg Co.*, Case No. 18 CIV. 3545 (AKH) (S.D.N.Y.). In *Marotto*, a chef brought a lawsuit in in the U.S. District Court for the Southern District of New York against the makers and marketers of Pringles, seeking to enjoin them from using the phrase "No Artificial Flavors" on Pringles labels. The chef sought relief under the New York deceptive business practices law (N.Y. Gen. Bus. L. § 349), New York false advertising law (N.Y. Gen. Bus. L. § 350), and various common law theories. On December 5, 2019, the district court denied the chef's motion for class certification, finding that "predominance is wholly lacking" in reasoning that only 4 of the 20 Pringles labels circulated within the purported class timeframe used the phrase "No Artificial Flavors." The district court also noted the individualized inquiry into the extent to which consumers were motivated to purchase Pringles based off of the "No Artificial Flavors" label and that the highly-trained celebrity chef is neither "the typical Pringles purchaser nor typical in his zealous avoidance of artificial ingredients." On January 31, 2020, the district court denied the chef's motion for reconsideration.
- *Korte v. Pinnacle Food Groups LLC*, Case No. 17-CV-199-SMY-MAB (S.D. Ill.). In *Korte*, a consumer brought suit in the U.S. District Court for the Southern District of Illinois against a company alleging that it violated Illinois' Consumer Fraud Act (815 Ill. Comp. Stat § 505/1, *et seq.*) and Missouri's Merchandising Practices Act (Mo. Rev. Stat. § 407.010, *et seq.*) in including on the label of its salad dressing "E.V.O.O. – Dressing Made with Extra Virgin Olive Oil." The consumer first filed suit in January 2017, alleging that he bought the dressing because the label tricked him into believing that the dressing contained no water and no other oils besides extra virgin olive oil when it actually contains soybean oil and water. On September 11, 2019, the district court denied class certification, reasoning that there is an absence of consumer complaints that the salad dressing label is deceptive. The court also reasoned that the class definition was overbroad because it included a time period in which the label at issue was not included on the dressing.
- *Bowling v. Johnson & Johnson*, Case No. 17-CV-3982 (AJN) (S.D.N.Y.). In 2017, a consumer brought suit on behalf of a proposed class against the defendants in the U.S. District Court for the Southern District of New York claiming that the defendants' artificial butter spread labels contained the misleading statements: "No Trans Fat" or "No Trans Fatty Acids." The plaintiff alleged that the statements were deceptive because one of the ingredients in the spreads is partially hydrogenated soybean oil, which contains trans fats. On April 22, 2019, the district court denied the consumer's motion to certify the class, suggesting that the consumer's own legal hang-ups contributed to her inability to certify the class. For example, the court concluded that the defendant: 1) made a sufficiently clear showing that the plaintiff is subject to a covenant not to sue contained in a 2015 settlement agreement and 2) raised credible concerns about the plaintiff's allegation that she purchased the artificial butter during the relevant time period.

"The court certified New York and Florida classes of purchasers, finding the plaintiffs satisfied class requirements based on the consumer protection laws of these states. However, in a nearly identical case against Gerber, the Ninth Circuit decertified a California class in 2018, finding that the plaintiffs had not set forth an appropriate damages model."

PROP 65 AND FOOD SAFETY UPDATE

Prop 65 and Acrylamide

As we previously reported, Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act, requires the State of California to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm, and requires products containing those chemicals to bear appropriate warnings. Proposition 65 is enforced by private citizens, consumer advocacy groups, law firms, district attorneys, city attorneys, and the California Attorney General's Office. The list includes about 900 chemicals and is updated each year. In 2019, the following chemicals were added:

- 2-Amino-4-chlorophenol
- Bevacizumab
- 2-chloronitrobenzene
- p-chloro-a,a,a-trifluorotoluene
- 1, 4-Dichloro-2-nitrobenzene
- 2, 4-Dichloro-2-nitrobenzene
- N,N-Dimethylacetamide
- para-Nitroanisole

Acrylamide has been on the Proposition 65 list since 1990. It forms during high-temperature cooking, such as frying, roasting, and baking, regardless of whether goods are cooked at home, in restaurants, or by commercial food processors and manufacturers. Products like coffee, chips (fried and baked), crackers, breads, cookies, and roasted nuts all can contain varying amounts of acrylamide.

In June 2019, in response to recent studies showing that acrylamide does not pose a significant cancer risk, the State adopted a regulation exempting coffee, which contains acrylamide, from Proposition 65's warning requirement for cancer. The regulation became effective on October 1, 2019, and provides that "[e]xposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the process of roasting coffee beans or brewing coffee do not pose a significant risk of cancer."

In October 2019, the California Chamber of Commerce ("CalChamber") filed a lawsuit against California's Attorney General in the U.S. District Court for the Eastern District of California seeking to enjoin the Attorney General and other plaintiffs from enforcing Proposition 65 regulations relating to acrylamide in food. CalChamber argues that companies should not be forced to provide acrylamide warnings because no government entity has determined that acrylamide is a human carcinogen. The case is ongoing.

Banning PFAs in Food Containers

Many perfluoralkyl or polyfluoralkyl substances ("PFAs") function as components of surface coatings because they are stain and heat-resistant. In response to toxicity concerns, over the past decade or so there has been a large effort to remove PFAs from the nation's food supply. For example, in February 2018, Washington State was the first to pass a statute banning the intentional use of PFAs in food packaging. The ban will go into effect in 2022 or two years after the Washington Department of Ecology determines that a safer alternative is available, whichever is later.

In August 2018, the city of San Francisco approved measures to prohibit the use of PFAs in all containers, bowls, plates, trays, cups, lids, straws, forks, spoons, knives, napkins, and other like items that are designed for a single use of prepared foods. The San Francisco legislation went into effect on January 1, 2020.

In June 2019, Maine's governor signed a statute into law that prohibits the intentional use of PFAs in food packaging. Similar to the Washington State law, Maine's statute will not take effect until the later of January 1, 2022, or two years after the Maine Department of Environmental Protection determines that a safer alternative is available. New York is also presently considering a bill that would ban the use of PFAs in single-use food packaging.

On the federal level, in May 2019, the U.S. House of Representatives introduced legislation seeking to allow the FDA to ban the use of PFAs in food containers and cookware. The "Keep Containers Safe from PFAs Act" would give the FDA until 2022 to enforce the ban. Congress is presently considering the Act.

States and Cities Continue to Ban Styrofoam (Polystyrene) and Plastic Straws

Polystyrene plastic is a naturally transparent substance that was made into the popular foam product "Styrofoam." Styrofoam is used in everyday packaging, including "peanuts" used as filler for small shipped items and "to-go" containers from many restaurants.

In May 2019, Maine was the first state to pass a law banning polystyrene food containers at restaurants and grocery stores. Maine's statute will take effect in 2021. Also in May 2019, Maryland became the second state to ban single-use Styrofoam containers. Similar bills are in progress in other states, including Vermont, Colorado, Oregon, New York, and New Jersey. Apart from states, numerous cities across the US, including various cities in California, are banning single-use Styrofoam containers.

Two states – California and Oregon – have now banned the use of plastic straws, as the movement continues to gain traction. The City of Seattle sparked the movement when it banned plastic straws and silverware starting July 1, 2018, in all food establishments, including non-full-service restaurants. Businesses that do not comply with Seattle's ban may face a fine of up to $250.

As of January 1, 2019, full-service restaurants in California are banned from providing plastic straws to customers unless specifically requested. The law does not apply to non-full-service restaurants, including fast-food restaurants, delis, and coffee shops. California's law is punishable by a fine of up to $300 annually. In June 2019, Oregon followed California's lead in becoming the second state to enact a law prohibiting a food and beverage provider from providing single-use plastic straws to consumers unless the consumer specifically requests one. It remains to be seen which additional cities and states will ban Styrofoam and plastic straws.

"In May 2019, Maine was the first state to pass a law banning polystyrene food containers at restaurants and grocery stores. Maine's statute will take effect in 2021. Also in May 2019, Maryland became the second state to ban single-use Styrofoam containers. Similar bills are in progress in other states, including Vermont, Colorado, Oregon, New York, and New Jersey."

WHAT'S TO COME IN 2020

As we move into 2020, we are already seeing some trends emerge in the evolving world of food, beverage and supplement litigation. We expect these areas to dominate the field in the coming year and beyond.

False Advertising Cases Challenging Content. We expect nutritional content claims to continue burying the courts this year. In addition to the breakfast cereal and ginger ale matters discussed above, there have been dozens of cases claiming vanilla products – like soda, ice cream, and yogurt – do not contain real vanilla. Similarly, consumers have filed lawsuits challenging the cocoa content in chocolate-flavored products like Oreos and Cocoa Pebbles, and consumers continue challenging the content of products featuring fruit in the product's name or pictured on the label.

Challenge to Healthiness/Diet Claims. There has been an uptick in lawsuits challenging labels claiming that a food is "healthy," when in fact the product may contain ingredients such as added sugars, fat, and other not-so-healthy additives. While the FDA suggested it would be issuing new regulations governing "healthy" in 2016, no new regulations have been enacted. Lawsuits challenging these claims, known as "implied content" claims, often involve a battle between claims on the front of the package, and information on the nutritional facts panel. Courts differ on their approach to this, with some finding that consumers cannot reasonably rely on a front-of-package label claim clearly contradicted by the nutritional facts panel and/or list of ingredients, while other courts allow these challenges to proceed.

Challenges to "All Natural." As we reported last year, another year has gone by without the FDA providing a formal definition of "natural" in human food labeling. As a result, consumer lawsuits challenging "natural" labels seem to have no end in sight. As with "healthy" claims, the FDA indicated it would be issuing a new definition of "natural" in 2016, which caused some of these lawsuits to temporarily slow down (or be stayed) pending agency regulation. The formal definition never came, and a new generation of "natural" claims have emerged. These new claims primarily challenge the use of certain ingredients that were once considered "natural," but are now allegedly synthetic, such as malic acid, xanthan gum, ascorbic acid, and citric acid. Several of these cases have survived motions to dismiss, with the well-known Ocean Spray matter achieving class certification and a significant settlement.

CBD. As we discussed above, CBD class actions are beginning to trickle into the courts, and we expect this to continue as regulations shift and CBD products gain even more of a hold on the market. A court has not yet considered a motion to certify a class of CBD purchasers, and there have not yet been many rulings on the merits of these false advertising claims. As the courts begin to issue decisions, we will see whether plaintiffs get shut down, or become emboldened by successful rulings. In the meantime, the ever-evolving federal and state regulations could yield further disputes. Moreover, as the industry grows, we expect to see business disputes, shareholder issues, and other types of litigation popping up among the major CBD players nationwide.

Lawsuits involving pet products. Consumers are increasingly filing suit against manufacturers of products for their pets involving false advertising, adulterated products, and other issues. One financial analyst estimated that US consumers spent $75.38 billion on their pets in 2019. As the market grows and consumers increasingly pay close attention to the quality of their pet products, we expect consumer litigation to continue.

Different venues. While food-related class action litigation was once centered in the Northern District of California – leading to its "food court" nickname – we are seeing cases increasingly filed in Missouri, Illinois, New York, Florida, Massachusetts, and other California courts – as well as in other states. This development yields inconsistent results and could lead to increased forum-shopping as plaintiffs identify more favorable venues.

COVID-19. An outbreak that started in November/December 2019 has led to legislative and policy developments in the food and agribusiness sector, and will likely spur new litigation. As of the date of this writing, the FDA has issued new guidance and temporary regulations regarding revised safety and sanitation protocols for food production facilities, relaxing requirements for the labeling of packaged foods during the pandemic, and providing opportunities for drug manufacturers and alcohol distillers to produce alcohol for incorporation into alcohol-based hand sanitizers.

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