ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

MAY 2023

Edition Facts

4 Sections This Edition
Cases Per Section 1-8

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions To Dismiss	100%
Motions for Judgment on the Pleadings	100%
Appeals	100%

New Lawsuits Filed

More Sugar More Problems

Lee v. Nature's Path Foods Inc., No. 3:23-cv-00751 (S.D. Cal. Apr. 24, 2023).

It's been said that a spoonful of sugar helps the medicine go down. But according to a California-based plaintiff, bowls full of it are bad for you. Shocking, we know. The sugar-averse plaintiff at the center of a new class action filed against the manufacturer of a line of granola cereals also treats us to this helpful tidbit: If one "overpours" a serving of granola by 282%, one would consume "two to four times the calories, fat and sugars listed on the Nutrition Facts label." MATH! And according to the complaint, "that amount of added sugar is decidedly *not* healthy." LOGIC!

That fun tidbit—based on a *Consumer Reports* food-testing survey—is just part of the alleged support for the plaintiff's claims that the defendant falsely advertises its granola cereals as healthy, despite containing purportedly high levels of added sugar. According to the complaint, the defendant makes health and wellness representations "through the use of the words 'wholesome,' 'nourish,' and 'healthier' in the challenged phrases" and "bolsters the 'healthy' message by highlighting the more healthful ingredients in the Products," such as "Fiber-rich coconut flakes" and "ALA Omega-3-rich flax seeds,"" while ignoring or downplaying their added sugars." The complaint alleges that such health and wellness messaging for the products is false and misleading because the 7 to 9 grams of added sugar per serving contributes 10% to 14% of the products' calories.

Notably, the complaint alleges that the disclosure of added sugar on the nutrition facts panel is insufficient to dispel the company's "misleading health and wellness claims" because reasonable consumers are "not expected to inspect that information," and even if they did, "most consumers cannot make accurate assessments of a food's healthfulness based on the Nutrition Facts Panel." The complaint alleges a cereal-bowl-full of violations, including violations of California's consumer protection claims, breaches of express and implied warranty, negligent and intentional misrepresentation, and unjust enrichment.

A Fruity Faux Pas

Smiley v. Arizona Beverages USA LLC, No. 1:23-cv-01107 (D. Md. Apr. 26, 2023).

Sour flavors can serve as an oasis in the desert of parched palates, can they not? According to one Maryland citizen, not when those flavors are accompanied by "multiple preservatives." In a new suit against the manufacturer of sour fruit snacks, the plaintiff claims that she was left with a bitter taste in her mouth after reviewing the product's ingredients list. According to the complaint, the defendant labels its fruit snacks as free from preservatives, when in reality, the products allegedly "contain multiple preservatives," including citric acid, ascorbic acid, lactic acid, and fumaric acid.

The plaintiff accuses the company of deceptive labeling practices and *cleverly* proclaims that consumers seeking preservative-free snacks made "a fruitless endeavor" by purchasing the defendant's fruit snacks. We'll rate that one a 6/10 on the pun scale. In any event, the plaintiff brings a variety of claims on behalf of Maryland and nationwide classes, including violations of state consumer protection acts and unjust enrichment.

Fitness Enthusiast Ups Lawsuit Rep Count

Schiebe v. Ultima Health Products Inc., No. 3:23-cv-00632 (S.D. Cal. Apr. 7, 2023).

Back in March, we introduced you to a plaintiff who was pumping out lawsuits against various nutritional supplement manufacturers at a torrid pace. It appears that the self-described college student seeking "to lose weight and add muscle mass" chose to skip another gym session in favor of a few more trips to his attorney's office. The plaintiff has now filed his eighth lawsuit, alleging nearly identical claims from his first seven suits, this time targeting an electrolyte mix manufacturer as the defendant.

Specifically, the plaintiff alleges the label of the electrolyte mix is misleading because the label states that the mix contains "Natural Flavors with Other Natural Flavors" despite containing—you guessed it—DL-malic acid, a synthetic flavoring. The complaint is largely copied and pasted from the other seven, again making the same arguments that DL-malic acid is artificial flavoring derived from petrochemicals and that it is not a "natural flavor" as defined by federal and state regulations. Therefore, just as the plaintiff alleges in the other seven lawsuits, the label's "natural" claim is deceiving. With this latest lawsuit, the plaintiff seeks to certify a California class, pursuing causes of action under California's Business & Professions Code and the state's Consumers Legal Remedies Act, as well as unjust enrichment and breach of express warranty. What's next for our fitness enthusiast? Will he keep pushing his (lawsuit) rep count higher at the sacrifice his gainz? We'll be sure to keep you posted.

Getting Saucy About Synthetics

Forby v. SC BCP Acquisition Co. LLC, No. 23-LA-0420 (Ill. Cir. Ct. April 11, 2023).

It's natural to expect a product labeled as "All Natural" to be free of preservatives, right? One Illinois plaintiff says yes. In a putative class action filed in Illinois state court, the plaintiff contends that she purchased a popular liquor company's "All Natural" maple bourbon barbeque sauce last summer. She alleges that she purchased the summer staple believing, based on the product's label, that it was free of all artificial ingredients. Yet, according to the complaint, the barbeque sauce contains ascorbic acid, a synthetic ingredient commonly used as a preservative. The plaintiff contends that she paid a premium for the sauce and would not have purchased it—or would have paid less for it—had she known it contained a synthetic addition. Based on these allegations, she asserts claims for breach of express warranty, violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, and unjust enrichment. The plaintiff seeks to represent a class of Illinois consumers who purchased the barbeque sauce in the last five years.

Plaintiff Raises a Ruckus over Energy Drinks

Chauca v. Rowdy Beverage Inc., No. 3:23-cv-00730 (S.D. Cal. Apr. 20, 2023).

A New York plaintiff alleges that the defendant's energy drinks are falsely labeled with a "No Preservatives" statement, despite purportedly listing citric acid and ascorbic acid as ingredients. The plaintiff avers that the statement is misleading, even if the defendant intended the citric acid and ascorbic acid ingredients to impart flavor to the drink, rather than to act as a preservative. The plaintiff seeks to represent a nationwide class of consumers as well as a New York subclass. The complaint asserts a multitude of claims, including violation of New York's General Business Law, violation of various state consumer protection statutes, breach of express warranty, unjust enrichment, negligent misrepresentation, and fraud. Stay tuned to find out whether the plaintiff's buzz can carry him all the way.

Goodness Gracious, *No* Balls of Fire?

Pizzaro v. Sazerac Company Inc., No. 7:23-cv-02751 (S.D.N.Y. Apr. 2, 2023).

Spencer Sheehan is back to put a new gloss on the deluge of cases filed against a defendant liquor distributor for alleged false advertising. And this time, he's intent on making a mountain out of a mini. Readers of this *Digest* are likely familiar with a recent line of complaints alleging that the defendant's Fireball Cinnamon product intentionally misleads consumers. The crux of the previous allegations was that the Fireball Cinnamon product sported a nearly identical label to the defendant's Fireball Cinnamon Whisky product, but the former was a flavored malt beverage while the latter was a traditional distilled spirit. Additionally, earlier plaintiffs have alleged that the product's label is deceptive because it reads "natural whisky & other flavors" while a more careful description might be "natural whisky flavors and other flavors."

While this complaint borrows heavily from those themes, the specific claim at issue here is that the defendant's 50 mL "mini" bottle is false and misleading. While the plaintiff refers to the product's labeling, she also relies in part on the fact that consumers are conditioned to think that 50 mL bottles contain liquor, and she alleges that the defendant intentionally manipulated that belief to drive sales of its product.

The plaintiff is a New York resident seeking to represent a statewide class for alleged violations of New York's General Business Law, breaches of express and implied warranty, fraud, and unjust enrichment. If you're interested in 13 paragraphs of traditional Sheehan prose describing different products entirely; tweets from "[o]ne Virginian"; citations to unnamed "sources"; or product reviews from an alleged consumer lamenting the lack of that "great ball of fire traversing your neck and setting your stomach on fire," I'd suggest you read this complaint for yourself.

Can't Catch a Fast Break

Zielinski v. Sazerac Company Inc., No. 1:23-cv-00305 (W.D.N.Y. Apr. 5, 2023).

The Heat is rising in New York, and we're not just talking about the recent triumph in the Eastern Conference Semifinals. A defendant liquor distributor faces yet another follow-on suit alleging that the labeling on its Fireball Cinnamon flavored malt beverage product intentionally misleads consumers into believing that they are purchasing the defendant's flagship Fireball Cinnamon Whisky product. Like a growing number of plaintiffs across the county, the plaintiff in this case alleges that the two products are nearly identical in appearance and branding, but the malt beverage product (Fireball Cinnamon) contains only about half as much alcohol as the distilled spirit product (Fireball Cinnamon Whisky).

This complaint differs in one small respect, however, in that it attempts to establish that the defendant knew that its product would confuse consumers by including a screenshot of the defendant's website's FAQ page. In bold letters, the question asks, "How can I tell the difference between Fireball Cinnamon and Fireball Whisky Products?" Whether the court views this as an acknowledgement of the alleged deception or an attempt to avoid it, the outcome of the case might provide some guidance on whether acknowledging similarities is a sound legal approach.

The New York plaintiff brings claims in his individual and representative capacity and will attempt to establish nationwide and statewide classes. The causes of action include alleged violations of New York's General Business Law, fraud, fraudulent omission, unjust enrichment, and breach of express and implied warranty.

"I Want (Healthy) Candy!"

Porter v. HealthSmart Foods Inc., No. 23-CIV-01531 (Cal. Super. Ct. Apr. 6, 2023).

An Indiana-based candy company faces a lawsuit filed in California by a health-conscious plaintiff who alleges that the company's candy products are fraudulently and unlawfully marketed in a campaign designed to deceive consumers. According to the complaint, the defendant's candy—advertised under names like "HealthSmart" and "Sweet Nothings"—falsely suggest that the candy is healthy. The plaintiff has three major gripes with the candy. First, she claims that the defendant displays a false and misleading serving size on the products to deceive consumers into believing that the candy has less fat and fewer calories than they do. The plaintiff also alleges that the defendant misrepresents the candy's Weight Watchers Smart Points values on the labels, further misleading consumers into believing that based on the points values, the defendant's candy is comparable to consuming fruits and vegetables. Finally, the plaintiff alleges that the defendant's online marketing misrepresents the products as being "healthy nutrition," "all natural," and "great for all diets," despite purportedly containing artificial and synthetic ingredients and despite manipulating the serving sizes to artificially inflate the candy's nutritional value.

The plaintiff's claims include violations of California state business law, including unfair business practices, false advertising, and common-law claims of fraud and negligent misrepresentation.

Motions to Dismiss

Procedural Posture: Granted

Case About Carbonated Lemon Water Leaves "Court with a Sour Taste in Its Mouth"

Matthews v. Polar Corp., No. 1:22-cv-00649 (N.D. Ill. Mar. 22, 2023).

It's not every day the federal judiciary pens a pun worthy of a title line in this digest. But one federal judge in Illinois did not pull any punches in expressing to plaintiffs' attorney Spencer Sheehan exactly how he felt about Sheehan's litany of consumer fraud cases in the Northern District of Illinois and across the country. The actual complaint and order granting the defendant's motion to dismiss offer little fizz compared to the rest of the action on the docket. Representing an Illinois citizen, Sheehan alleged that the defendant's representation of its Polar brand lemon seltzer product is false, deceptive, and misleading because the seltzer lacks the amount and type of lemon ingredients expected by consumers. The defendant's motion to dismiss was granted in a two-line minute entry on the docket.

Obviously, the story doesn't end there. Two weeks after granting the defendant's motion to dismiss by minute entry, the court entered a second, *much* longer, minute entry. In it, the judge remarked that "[w]hile reviewing the caselaw in this area, [the] Court could not help but notice a few common threads." We'll paraphrase: Attorney Sheehan files a *ton* of these suits and seems to lose on motions to dismiss a lot. In the judge's words: Sheehan is "seemingly covering just about every aisle in the grocery store, without much success." And the court remarked that while "attorney Sheehan keeps bringing cases about how to read product labels … he can't seem to read the tea leaves from the judiciary."

Given that "track record," the court questioned whether Sheehan's filings comply with the Federal Rules and ordered Sheehan to prepare and file an Excel spreadsheet identifying all consumer fraud cases that he has filed in any federal court since January 1, 2020. Sheehan complied. And then some. The "and then some" drew a strong rebuke from the bench. In fact, the judge lamented Sheehan for including so much information in his filing as to render "the spreadsheet unreadable to any pair of eyes old enough to peer from behind the bench." "Less is more," the court said. And the court ordered Sheehan to "redo it."

Sheehan complied with the court's instructions, given the second chance, and filed an exhibit displaying the hundreds of cases that he's filed since 2020, including whether those cases managed to survive a motion to dismiss. In its final minute entry, the court recognized the plaintiff's notice of voluntary dismissal (filed nearly a month earlier) and closed the case, but not before providing our title line quote and leaving Sheehan with these parting words:

> Suffice it to say that this case about carbonated lemon water has left this Court with a sour taste in its mouth. The theory of the case was not close to viable. The facial deficiency of the complaint prompted this Court to order Plaintiff's counsel to file a spreadsheet identifying all similar consumer cases that he has filed across the country. This Court will keep that spreadsheet in hand and in mind, just in case Plaintiff's counsel files another case in this district with the same basic theory. Going forward, counsel should proceed with eyes wide open.

Federal Court Finds Chicken Broth Labeling Im*peck*able

Henry v. Campbell Soup Co., No. 1:22-cv-00431 (E.D.N.Y Mar. 31, 2023).

The plaintiff in this New York federal court wound up with egg on her face when the court dismissed her putative class action filed against the defendant's chicken broth product. The plaintiff alleged that the defendant's "NO MSG ADDED" label was false and misleading because the chicken broth purportedly contained some glutamate (a form of monosodium glutamate (MSG)). The defendant pecked back, moving to dismiss the complaint, arguing that its chicken broth label could not plausibly deceive a reasonable consumer, particularly based on the clarifying language that appears next to the broth's "NO MSG ADDED" statement.

Carefully *eggs*-amining the label, the court considered a disclaimer adjacent to the product's "NO MSG ADDED" statement, which explains that the product does contain some glutamate because a "small amount of glutamate occurs naturally in yeast extract." To the defendant's *egg*-citement, the court agreed that the disclaimer on the product label "wholly undermines Plaintiff's claim of consumer confusion." In evaluating the disclaimer, the court also found that it "confirms, rather than contradicts or supplements, the information contained on the front of the package." Further, while the disclaimer was in a smaller font, it still appeared in close proximity to the claim, was bolded and in all caps, and was in a contrasting font color.

The court took care to distinguish a different New York action in which a disclaimer was on the back of the packaging. Likewise, the court distinguished the "narrow" disclaimer here—that no MSG was "added"—from other false advertising cases, where the defendants attempted to include a "broad" disclaimer, such as "All Natural" or "Total 0%." Unlike in the broad disclaimer cases, here, the court held that the representation was narrow and could not mislead a reasonable poultry product purchaser.

Leading the plaintiff to the *eggs*-it, the court also rejected the plaintiff's argument that the label violates FDA guidance. The court concluded that the FDA guidance on "NO MSG ADDED" labeling statements pertains only to stand-alone statements. Because the defendant's chicken broth label here includes a disclaimer, the FDA guidance did not apply. For these reasons, the court dismissed the plaintiff's claims for violation of New York's state consumer law, breach of express warranty, and Magnuson–Moss Warranty Act, closing the case.

Motions for Judgment on the Pleadings

Procedural Posture: Granted

"Margarita Hard Seltzer" Suit Goes to Bed Before the Fiesta Even Starts

Warren v. The Coca-Cola Company, No. 7:22-cv-06907 (S.D.N.Y. Apr. 21, 2023).

A putative class action challenging a Margarita Hard Seltzer product was dismissed just two weeks before Cinco de Mayo—the day on which the country celebrates all things tequila and tacos. Talk about a party foul, right? It might have been, *if* reasonable consumers believe a *hard seltzer* product selling in the grocery aisle for $1.50 contains tequila. As a federal district court recently concluded, they don't, and our plaintiff was left with a low-proof lawsuit that failed to state a claim.

The plaintiff sued the defendant in New York federal district court, claiming that a global beverage company misrepresented that its Topo Chico branded "Margarita Hard Seltzer" products contain tequila by using the terms "margarita" and "hard" as well as including images of agave plants on the products' front labels. With a far more eloquent analysis than here about why reasonable consumers would not be misled, the district court essentially exclaimed, "Y'agave be kidding me."

For starters, the district court observed that reasonable consumers know hard seltzers are distinct from cocktails containing distilled spirits (like a margarita). Viewing the label in context, the court noted that the labeling contained none of the contextual clues that consumers would expect with a tequila-based product (like the words "tequila" or "cocktail" or an image of a margarita). In fact, those contextual clues make it "abundantly clear" to reasonable consumers that the Margarita Hard Seltzer products do not contain tequila. Other language on the product label, like "Strawberry Hibiscus" and "Prickly Pear," demonstrates that the term "margarita" simply identifies the hard seltzers' flavor profile.

In addition, reasonable consumers will realize that the defendant's hard seltzer products are sold in grocery stores to the tune of $1.50 per can, a fact that casts serious doubt on the plaintiff's theory of deception. In the court's view, "adults are aware of where liquor can and cannot be sold" and the prices at which they are sold. It dismissed the complaint with prejudice, leaving the plaintiff and her attorney possibly in search of greener agave fields.

Appeals

Dismissal Affirmed

Ninth Circuit Affirms Dismissal, and You Butter Believe It!

Pardini v. Unilever U.S. Inc., No. 21-16806 (9th Cir. Apr. 18, 2023).

The Ninth Circuit affirmed a district court's dismissal of a lawsuit filed against the defendant manufacturer of "I Can't Believe It's Not Butter! Spray." The consumer class action complaint took issue with the butter spray's nutrition panel, which listed 0 calories and 0 grams of fat per serving. The issue, the plaintiffs claimed, had to do with the serving size, which was measured in the number of "sprays." The plaintiffs argued that the fat and caloric amounts were too low to "reflect customary usage" of the product and claimed that the product's serving size should be measured by the tablespoon, which aligns with the serving-size measurements provided by the FDA for butter products. Because the Federal Food, Drug, and Cosmetic Act (FDCA) regulations have differing requirements for different subcategories of "fats and oils," the question here melted down to whether the defendant's butter spray was appropriately categorized as a "spray type" of fats and oils, or whether the "butter, margarine, oil, and shortening" subcategorization of fats and oils applied. If the latter is true, the defendant's nutrition panel, including the fat and caloric representations, would be incorrect.

The district court concluded that the butter spray was properly categorized as a spray type, rather than a butter, margarine, oil, or shortening, meaning the fat and calorie amounts complied with federal law. The Ninth Circuit agreed. That is, the Ninth Circuit affirmed that based on the proper classification of the defendant's product as a spray type, the caloric and fat content representations were accurate and were not misrepresentative, as the plaintiffs had unsuccessfully argued. The court pointed to the plaintiffs' repeated references to the "form and function" of the defendant's product to conclude that the product could not be anything other than a spray product. (For instance, the court noted that even the plaintiffs agreed that it would take 40 sprays of the defendant's product to generate one tablespoon of non-spray butter.)

The court concluded that the plaintiffs' position—that the product's serving size information should align with the FDCA regulations for butter, as opposed to the regulations for a spray—would impose additional labeling requirements beyond those required for a spray type under federal law. Therefore, the Ninth Circuit affirmed that the plaintiffs' claims were preempted under federal law. Closing out the opinion, the court noted that to the extent the plaintiffs disagree with the FDA's classifications of food products, they should raise the issue with the agency, not with the court.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories 0

	% engaging value
Knowledgeable Speakers	100%
Current Topics	100%
Alston & Bird Approved	100%

June 4–7

34th Annual Food Label Conference

Rachel Lowe and Sam Jockel will present the session "Sustainability & Environmental Marketing Claims" at this conference hosted by Prime Label Consultants. The session will cover regulatory and litigation developments, including recent court rulings, and provide insights on risk mitigation.

June 13–15

DISCUS 2023 Annual Conference

Alan Pryor will speak on the panel "RTD Revolution: Navigating the Legal Landscape of Ready-to-Drink Cocktails" at this conference hosted by the Distilled Spirits Council of the United States (DISCUS). Attendees will leave this session with a deeper understanding of the legal considerations involved in the RTD market and the tools they need to navigate the ever-evolving regulatory landscape.

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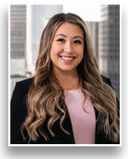

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