ALSTON & BIRD

FOOD & BEVERAGE

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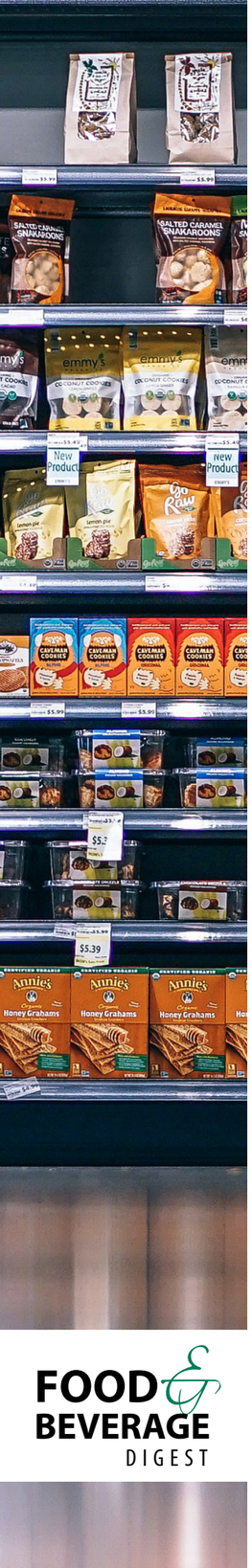
Edition Facts

4 Sections This Edition
Cases Per Section 1-9

Reading Calories 0

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



New Lawsuits Filed

Burger Joint Sues Insurer over COVID-19 Closings

In-N-Out Burgers v. Zurich American Insurance Co., No. 8:20-cv-01000 (C.D. Cal. May 29, 2020).

In-N-Out Burgers, like many businesses across the country, recently sued its insurer, Zurich American Insurance Company, alleging that Zurich improperly denied In-N-Out's claim for business interruption and other losses that are covered under In-N-Out's "all risk" insurance policy with Zurich. According to the complaint, In-N-Out, a restaurant chain that operates primarily in California and the Southwest, was forced to close its restaurants in response to stay-at-home orders issued as a result of the coronavirus pandemic. In-N-Out alleges that it has suffered significant monetary losses and is looking to recoup some of its lost profits through its business interruption suit against Zurich. In-N-Out alleges that its policy covers loss of or damage to property and that the coronavirus damaged its property by causing contamination on its property. But when In-N-Out filed a claim for coverage under its policy, Zurich denied it.

Customary Allegations Are Budding in CBD Class Actions

Rodriguez v. Just Brands USA Inc., No. 2:20-cv-04829 (C.D. Cal. May 29, 2020).

With the regulatory status of cannabidiol (CBD) in food and dietary supplements still in limbo, plaintiffs are increasingly opting for more traditional claims and allegations emblematic of typical food and beverage litigation. One new putative class action seeks to challenge not the legality of the CBD products that the plaintiff purchased, but instead whether those products delivered the promised amount of CBD. Specifically, the complaint alleges that Just Brands USA—purveyors of a range of CBD products, including gummies, flavored tinctures, edibles, creams, and vapes—consistently overstated the amount of CBD in their products. The plaintiff claims that independent lab testing supports these allegations and reveals that the defendant "underfilled" its CBD products so that they contained only a fraction of the represented amount of CBD. According to the complaint, one product underfilled by 100%, meaning the product had no CBD at all. The plaintiff seeks to certify nationwide and California classes, raising claims for unjust enrichment, breach of warranty, and violations of California and Florida consumer protection laws.

Suit Says Nectar Not Natural

Gross v. Vilore Foods Co. Inc., No. 3:20-cv-00894 (S.D. Cal. May 13, 2020).

Two consumers filed a putative class action in California, alleging that Vilore Foods distributes, advertises, markets, and sells a variety of "Kern's" juices and juice-based products that are misbranded and falsely advertised. According to the complaint, the juice manufacturer includes certain undisclosed artificial flavors in its Kern's brand juices, despite labeling those products as flavored with only natural ingredients. Specifically, the complaint details that Kern's Mango and Apricot Nectars are sold in cans that advertise the product as "100% Natural" despite containing malic acid. The plaintiffs further allege that while natural and unnatural forms of malic acid are considered GRAS (generally recognized as safe) for use as flavorings, the d-malic acid that Kern's products use is not. That ingredient is allegedly manufactured in petrochemical plants from benzene or butane—components of gasoline and lighter fluid—and the plaintiffs claim that the defendant's most deceptive act is its failure to disclose the use of that artificial flavoring. The plaintiffs allege that had they known these products were not 100% natural, as advertised, they would not have purchased the products, or would not have paid as much as they did. The plaintiffs seek relief under numerous state consumer protection laws as well state and federal food labeling laws and are calling for Vilore to cease distributing and advertising the products as 100% natural and to re-label or recall all existing deceptively packaged products.

Plaintiff Wants More Folgers in His Cup

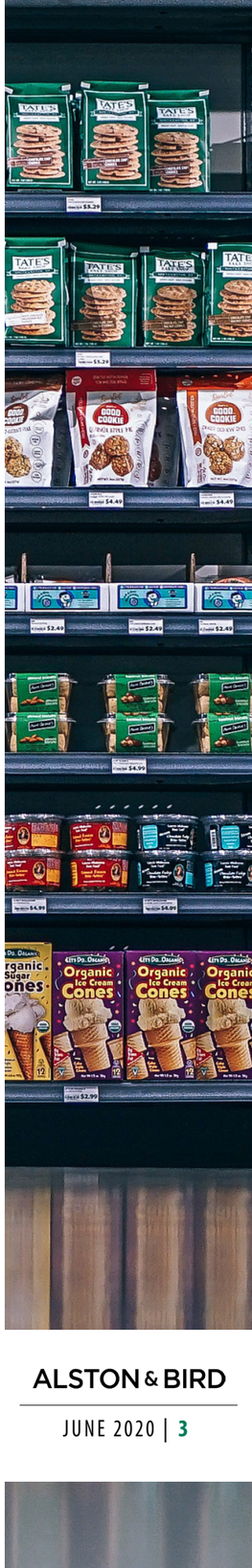
Ibarra v. The Folger Co., et al., No. 3:20-cv-00850 (S.D. Cal. May 5, 2020).

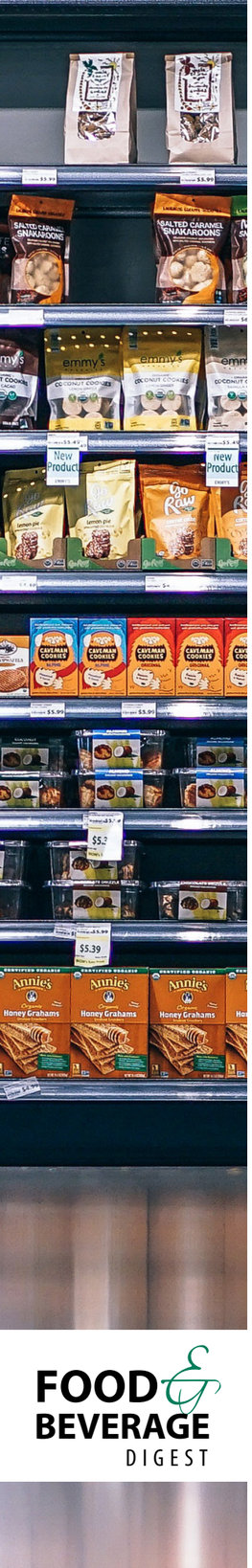
A putative class action filed in the Southern District of California claims that Folgers mislabels its coffee products and tricks consumers into paying more money for less coffee than what is advertised. Many of the company's popular coffee products, including its Colombian, Brazilian, classic roast, and breakfast blends, state the number of cups per package on the cannister's front panel. But according to the plaintiff, the back panel—which contains serving instructions and the corresponding number of cups that can be made from each package—doesn't square with the representations on the front label. The plaintiff is seeking to represent a class of California consumers who purchased Folgers products that advertised an incorrect number of servings on the front panel. The complaint alleges unlawful, unfair, and deceptive business practices in violation of California law and seeks compensatory and injunctive relief.

Florida Consumers Barking Mad over Alleged Misbranding of Pet CBD Products

Astorria Sassano v. PetSmart Inc., CACE-20-006963 (Div. 4), (17th Jud. Cir., Broward Cnty., FL May 22, 2020).

A Florida consumer who purchased Only Natural Pet Hemp Seed Oil with Krill and Cod Liver sued PetSmart in Florida state court on behalf of a putative class of Florida consumers, alleging that the product was a new animal drug that lacked Food and Drug Administration (FDA) approval and was misbranded under the Federal Food, Drug, and Cosmetic Act (FDCA). The consumer further alleges that PetSmart's advertising of the product without disclosing to consumers that the product was unlawful and misbranded misled consumers into believing that PetSmart had complied with all applicable laws and regulations, when it had not. As a





result, the plaintiff alleges that she and other purchasers of the product were deprived of the benefit of their bargain because they paid for products that could not be lawfully sold and were therefore valueless. The plaintiff asserts a single cause of action for violation of the Florida Deceptive and Unfair Trade Practices Act and seeks to represent a Florida class of purchasers who purchased the product from PetSmart with a credit or debit account.

CBD Company's Lab Reports Are Fraudulently High

Accelerated Analytical Inc. v. Lifted Liquids Inc., No. 3:20-cv-00442 (W.D. Wis. May 11, 2020).

Accelerated Analytical and Accelerated Cannabis, two Wisconsin testing laboratories, are suing Lifted Liquids Inc. and its owner and CEO for falsifying or forging lab results from Accelerated. Lifted is a manufacturer and retailer of CBD products that sells both directly to consumers under its own label and provides "white labeled" products to other retailers. According to Accelerated's complaint, Lifted sold numerous white-label products to other retailers along with falsified or made up certificates of analysis (COA) from Accelerated. Accelerated provided testing services for dozens of Lifted products in 2019, and some of those tests showed that certain Lifted products had a total THC content of 0.50%—well above the 0.30% limit for legal CBD.

Despite providing test results and COAs showing the true THC content of certain Lifted products, Accelerated discovered in early 2020 that at least 24 of its COAs were altered and made available on a retailer's website selling Lifted products that were advertised as having THC contents below the 0.30% threshold. In some instances, products that had tested as high as 0.50% were lowered to just 0.10% on the product labeling and corresponding COA. In other instances, Accelerated discovered that Lifted had created completely false COAs for products Accelerated never tested, including fake results and forged signatures from Accelerated employees. Accelerated is seeking injunctive relief to remove the falsified COAs as well as compensatory and punitive damages under the Lanham Act and Wisconsin Deceptive Trade Practices Act.

Mushroom Supplements May Not Be So Mighty After All

Gatling v. Windmill Health Products, No. 1:20-cv-04030 (S.D.N.Y. May 26, 2020).

Health-conscious consumers filed a class action against Windmill Health Products for allegedly falsely marketing a line of its Country Farms Farm Fresh Nutrition products as "natural" when they contain synthetic ingredients. The plaintiffs claim they purchased the Fresh Nutrition supplements, including Mighty Mushrooms, Bountiful Beets Capsules, and Super Fruit & Veggies, because the products' packaging contained the representation that they were "natural." But according to the complaint, Windmill's representations are misleading because the product's ingredients include citric acid, silica, stearic acid, gelatin, magnesium stearate, and maltodextrin. They argue that consumers lack the meaningful ability to test or independently ascertain or verify whether the products really are natural and instead rely on the ingredients label to know the true nature of the ingredients in the products. The plaintiffs argue they would not have paid a premium for these products if they had known the products contained synthetic ingredients. The plaintiffs demand monetary damages, injunctive relief, and disgorgement of Windmill's earnings through its allegedly unlawful conduct.

Vanilla Vigilante Moves On, Attacks Chocolate Label

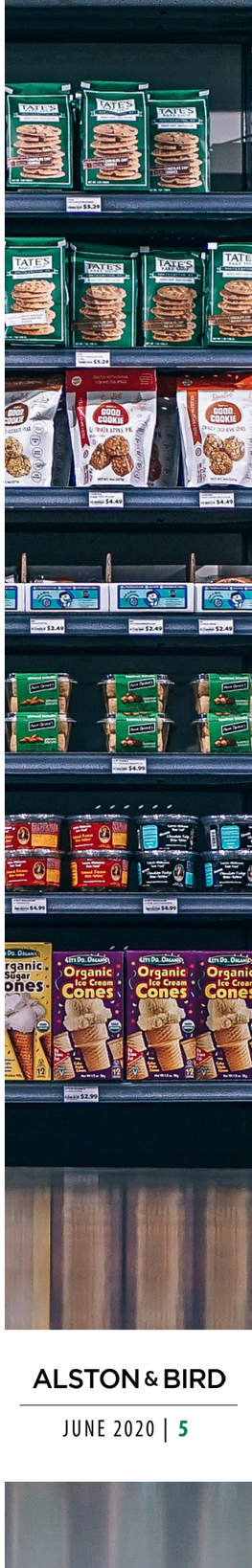
Sencen v. Froneri US Inc., No. 7:20-cv-04024 (S.D.N.Y. May 24, 2020).

The year 2020 is full of surprises. The latest: Spencer Sheehan filed a complaint challenging a vanilla product's labeling for something *other than* its vanilla flavoring claims. A new putative class action filed against Froneri US alleges that the company falsely labels its Häagen-Dazs Vanilla Milk Chocolate Ice Cream Bars as being dipped in milk chocolate when, according to the complaint, the ingredients list shows that the chocolate coating is actually a "milk chocolate and vegetable oil coating." The complaint calls out that the front of the product's box makes no reference to an oil and instead uses "milk chocolate" as part of the product name. "Milk Chocolate" is also shown prominently under an image of a chunk of chocolate along with a subheading that the vanilla ice cream is "dipped in, then drizzled in rich milk chocolate." But according to the complaint, the ice cream bars' coating does not meet the standards for identity for chocolate, and therefore cannot be labeled as such. While the ingredient list on the back of the product's packaging clues customers in on the presence of vegetable oil, the plaintiff argues that most customers make purchasing decisions very quickly and do not take the time to examine the back of the product before they buy it. The complaint alleges that Froneri takes advantage of this reality to make money off unsuspecting consumers.

Protein Pancakes Pack Smaller Punch than Advertised

Minor v. Baker Mills Inc. and Kodiak Cakes LLC, No. 4:20-cv-02901 (N.D. Cal. April 28, 2020).

"Increasingly health conscious" consumers are challenging the labeling and marketing claims by the manufacturers of Kodiak Cakes Flapjack and Waffle Mix. The putative class action alleges that labeling on the flapjack and waffle mix is false and misleading because the product contains 17% less protein than disclosed on the product's packaging. The plaintiff bases the 17% figure on an amino acid content test of the product that supposedly helps to show that rather than having 14 grams of protein per serving, as advertised, the pancake and waffle mix only packs 11.5 grams. The suit also alleges that the product is misbranded because the required Percent Daily Value column in the Nutrition Facts Panel was left completely blank. The plaintiff expressly disclaims any causes of action under the FDCA or other regulations promulgated by the FDA and instead asserts claims under various California consumer protection laws, common-law fraud, and unjust enrichment.



Motions to Dismiss or Stay

"Unlawful" CBD Cases Stall as Courts Wait on FDA

Colette v. CV Sciences Inc., No. 2:19-cv-10227 (C.D. Cal. May 22, 2020).

In the February 2020 edition of the *Food & Beverage Digest*, we highlighted a Florida district court that stayed a putative class action challenging the sale of CBD products to allow the FDA to weigh in on the issue. Recently, a second district court endorsed this wait-and-see approach and stayed a similar putative class action pending in California.

The plaintiffs filed this suit following a rash of warning letters that the FDA issued to various CBD manufacturers last fall. The plaintiffs contend that it is illegal to add CBD to any food or to claim CBD as a dietary supplement. The suit lodged a range of claims under California's and Arizona's consumer protection laws and sought declaratory relief. The district court, however, observed that the regulatory status of CBD products is an open issue of first impression and that the FDA has not formally established its position on the issue. Without FDA guidance, the district court reasoned, proceeding any further risked inconsistent rulings. It stayed the action, but not before dismissing the plaintiffs' request for declaratory relief, finding that the plaintiffs failed to explain how they realistically would be threatened by future alleged violations.

Nothing to Be Sad About with "Happy Cows" False Ad Suit Ruling

Ehlers, et al. v. Ben & Jerry's Homemade Inc., et al., No. 2:19-cv-00194 (D. Vt. May 7,2020).

Ben & Jerry's won a motion to dismiss a suit that alleged the ice cream manufacturer misrepresented that it only sources its milk from "happy cows" on farms that comport with the stringent standards set by its "Caring Dairy" program. Refusing to accept the plaintiffs' claims, the court reasoned that the complaint failed to allege that Ben & Jerry's actually made the purportedly misleading statement. The plaintiffs' theory of deception, according to the court's order, was centered on a heading from Ben & Jerry's website that stated: "Basic standards for being a Caring Dairy farmer (required for all farmers)." According to the court, the company website also clarified that those standards were only aspirational for farms if they wished to be in the Caring Dairy program, which not every farm is a part of. The court also found that the complaint did not plausibly allege that a consumer would make a purchasing decision based entirely on that single heading on the company website. And the judge rejected the plaintiffs' prayer for injunctive relief because Ben & Jerry's had already removed the allegedly deceiving advertising and, as a result, there was no risk of any future harm.

Regulatory

What Are GMOs? Federal Agencies Try Not to Add to the Confusion

The FDA, Environmental Protection Agency, and U.S. Department of Agriculture (USDA) launched an initiative aimed at increasing understanding of genetically engineered foods. The "Feed Your Mind" platform provides an online educational resource answering basic questions about GMOs—what are they, why do they exist, and how do they affect health?

Funded by Congress, this initiative comes as the USDA's compliance date for bioengineered (BE) food disclosure, January 1, 2022, approaches. "Feed Your Mind" notes that consumers "will start seeing the 'bioengineered' label" on food; however, those mandatory labels will not carry words such as "GMO" or "genetically engineered"—the focus of this consumer understanding initiative. One has to wonder whether the government's use of these various terms—GMO, genetically engineered, BE, bioengineered—may be adding to what Feed Your Mind describes as the "confusion around what GMOs are and how they are used in our food supply."

FDA Warns Companies Illegally Selling CBD Products That Claim to Treat Medical Conditions

The FDA has issued a warning letter to BIOTA Biosciences for illegally selling unapproved products containing CBD in ways that violate the FDCA. BIOTA Biosciences markets private-label CBD and wholesale CBD extracts, and their products include beverages, bulk CBD extracts, water-soluble CBD, and injectable curcumin. The BIOTA Biosciences products now being recalled were marketed and sold as remedies for serious diseases and as an alternative to opioids. Under the FDCA, any product intended to treat a disease or otherwise have a therapeutic or medical use, and any product (other than a food) that is intended to affect the structure or function of the body of humans or animals, is a drug and must undergo FDA approval. To date, the FDA has only approved one CBD product for such purposes—a prescription drug that treats rare, severe forms of epilepsy. The FDA said it intends to pursue companies that "illegally market CBD products with claims that they can treat medical conditions," a continuation of the FDA's efforts to crack down on unsubstantiated claims that CBD products can be used as an effective medical treatment for various ailments.

Appeals

Eleventh Circuit Affirms Dismissal for No Injury in Glyphosate Case

Doss v. General Mills Inc., No. 19-12714 (11th Cir. May 20, 2020).

On appeal from a motion to dismiss in the Southern District of Florida, the Eleventh Circuit affirmed the lower court's dismissal of a putative class action against General Mills for lack of Article III standing. Mounira Doss sued the cereal manufacturer back in 2018, alleging that the company failed to disclose the presence of glyphosate in its Cheerios and Honey Nut Cheerios. Glyphosate is a weed killer that has taken center stage in the much-publicized Roundup litigation and is often sprayed on oats—a primary ingredient in Cheerios. According to Doss, the herbicide is a "probable human carcinogen." Doss claimed that testing revealed glyphosate levels in the cereal ranging between 470 to 1,125 parts per billion (ppb), levels well above the 160 ppb "health benchmark" set by a nonprofit study.

Doss sought to represent a class of all Florida residents who had purchased a box of Cheerios without understanding that it contained glyphosate, claiming those consumers otherwise would never have purchased the cereal. But the Eleventh Circuit agreed with the lower court's determination that Doss's alleged injury was merely "conjectural or hypothetical." Critically, the court explained, Doss never alleged that she purchased any boxes of Cheerios that actually contained any levels of glyphosate. Rather, she claimed that she and other consumers suffered an economic loss solely by purchasing Cheerios they otherwise would not have, had they known the products contained glyphosate. But the court explained that her benefit-of-the-bargain theory didn't match her allegations, which asserted only that "ultra-low levels of glyphosate may be harmful to human health." Doss claimed that she was misled by General Mills' health-related statements, including that the cereal was "packed with nutrients" and was "wholesome," asserting that those statements were irreconcilable with the presence of glyphosate in the product. But because she made "no allegation that the cereal she purchased even contain[ed] glyphosate, never mind harmful levels of it," the court found that she suffered no legally cognizable injury.

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Marcos Alvarez
404.881.4745
marcos.alvarez@alston.com

Rachel Naor
415.243.1013
rachel.naor@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Kathryn Klorfein
404.881.7415
kathryn.klorfein@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Learn more about our Food & Beverage Team

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ATLANTA | BEIJING | BRUSSELS | CHARLOTTE | DALLAS | LONDON | LOS ANGELES | NEW YORK | RALEIGH | SAN FRANCISCO | SILICON VALLEY | WASHINGTON, D.C.