ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

FEBRUARY 2022

Edition Facts

2 Sections This Edition
Cases Per Section 2-9

Reading Calories 0

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

New Lawsuits Filed

White-Chocolate-Fudge-Covered Pretzels (*Allegedly*) Fudged Ingredients

Haas v. Aldi Inc., No. 1:22-cv-00375 (N.D. Ill. Jan. 22, 2022).
Cox v. Star Brands North America Inc., No. 3:22-cv-00141 (S.D. Ill. Jan. 22, 2022).

Two putative class actions have been filed in Illinois federal courts seeking to vindicate the rights of woebegone white-fudge-covered pretzel lovers. The complaints allege that the "white fudge" covered pretzels are actually covered with a coating made from vegetable oils, *not* dairy ingredients or milkfat that the plaintiff claims is necessary for fudge.

The complaints claim that, in comparison, other covered pretzel products are either covered with ingredients as advertised, like milk chocolate, or don't mislead consumers by admitting they are covered with yogurt or white crème. The plaintiffs seek to represent a class of Illinois consumers and a class of consumers from various states and assert claims for violations of consumer protection statutes, breach of contract, breach of warranties, negligent misrepresentation, and unjust enrichment.

Consumer Claims Peanut Butter Crackers Go Against the Whole-Grain

Vazquez v. Snyder's-Lance Inc., No. 1:22-cv-00026 (E.D.N.Y. Jan. 3, 2022).

A whole-grain (but only whole-grain) loving consumer lodged a putative class action against a brand of "Whole Grain Sandwich Crackers" with peanut butter, alleging that the snack misleads consumers by highlighting the crackers' whole grains with claims like "WHOLE GRAIN SANDWICH CRACKERS" and "11g WHOLE GRAIN." According to the plaintiff, such representations mislead consumers to expect more whole grains than they actually get from the crackers.

The plaintiff's allegations already appear to have started crumbling, as the complaint concedes that whole grains predominate over other refined grains in the crackers. But, the plaintiff contends, the relative difference between the amount of the two types of flours is "very small, or insignificant." The plaintiff also claims that the crackers' addition of caramel color serves to further mislead consumers, who purportedly attribute a products' darker coloring with containing more whole grains. The complaint seeks to certify a class of New York residents and certain state subclasses asserting claims under the New York consumer protection statute and various state consumer fraud acts, breach of express warranty, breach of the implied warranty of merchantability, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment.

Consumer All Up in Knots over "Butter" Pretzel Claims

Kowal v. Synder's-Lance Inc., No. 1:22-cv-00441 (N.D. Ill. Jan. 25, 2022).

An Illinois-based plaintiff filed a putative class action alleging that the defendant's "Butter Snaps Pretzels" mislead consumers because the product lacks a palpable amount of butter. The plaintiff alleges that instead of containing "real butter," the product contains "natural flavor (enzyme modified butterfat)," which, according to the complaint, consists of fractions of microscopic drops of real butter to which enzymes are added.

Yet consumers allegedly get it twisted, conflating the presence of butter ingredients with butter flavor. The plaintiff seeks to certify an Illinois and multistate class of purchasers and asserts violations of Illinois and other states' laws, breach of contract, breach of warranties, violations of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment.

Heavy Metal Suit Rocking the East Coast

Dardarian v. La Flor Products Co., No. 2:22-cv-00547 (E.D.N.Y. Jan. 30, 2022).

Step aside Eddie, a consumer has filed a putative class action, raising a *rime* (*of the ancient mariner*) that a spice manufacturer should *run to the hills*. Raising claims for false advertising (*the evil that men do*), the plaintiff alleged that the *writing is on the wall* because the spice manufacturer failed to disclose that its spices and seasonings contain heavy metals. In fact, the plaintiff claimed, a consumer advocacy group's tests allegedly revealed that there is reason to *fear* leaving consumers in the *dark*. Some of the spices contained potentially dangerous heavy metals like arsenic, cadmium, and lead. The plaintiff seeks to certify California and nationwide classes for violation of California's consumer protection laws, unjust enrichment, and fraud.

We will rock on to see if these allegations are *aces high* or whether they suffer the same lofty fate as *Icarus*.

Consumers Fooled by Foil's Made in USA Claim

Shirley v. Reynolds Consumer Products LLC, No. 1:22-cv-00278 (N.D. Ill. Jan. 17, 2022).

It's no fool's gold, but a consumer claims that the defendant's aluminum foil is still plenty deceptive. A consumer filed a putative class action alleging that the aluminum foil maker's "Foil Made in U.S.A." claim on its products is deceptive because it wrongly implies that all materials used in the foil are sourced from within the United States. In reality, the plaintiff claims, an element used to make foil, bauxite, is sourced from outside the United States.

The plaintiff alleges that, consequently, the aluminum foil violates the Federal Trade Commission's "Made in USA" standard because not all—or virtually all—of the raw materials and components used in the product are sourced from within the United States. The plaintiff

seeks to certify an Illinois and multistate class of purchasers and asserts violations of Illinois and other states' laws, breach of contract, breach of warranties, violations of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment.

Lawsuit Claims "No Added MSG" Noodle Products Are—Actually—Full of It

Henry v. Nissin Foods (U.S.A.) Co., No. 1:22-cv-00363 (E.D.N.Y. Jan. 21, 2022).

A putative class action filed in New York federal court alleges that a company's "No Added MSG" noodle products mislead consumers into believing they do not contain MSG or MSG-equivalent free glutamates. The lawsuit complains that the premade noodle products, which include Cup Noodles, Top Ramen, Hot & Spicy, and Chow Mein, do in fact contain MSG and therefore violate state consumer protection laws.

The complaint further avers that because consumers understand the term "MSG" to refer to free glutamates generally (or, possibly, Madison Square Garden), they would understand "No Added MSG" to mean the food "does not contain free glutamates—in sodium salt form or otherwise" (or, possibly, no playoffs for Knicks fans). Based on these allegations, the complaint asserts putative class claims for violations of various states' consumer protection laws and breach of warranties. The complaint further demands compensatory and punitive damages, restitution, injunctive relief, and attorneys' fees and costs.

Oh Snap! Natural Flavoring (Briefly) Under Attack

Williamson v. Dyla LLC, No. 1:22-cv-00402 (S.D.N.Y. Jan. 16, 2022).

Following a recent trend, the plaintiff filed a suit centered on the use of malic acid in a fruit-flavored product. The plaintiff alleged that the ingredient list for Diet Snapple Peach Tea discloses the use of "malic acid." But, according to the complaint, there are both naturally occurring forms of malic acid (L-malic acid) and synthetic forms (D-malic acid and DL-malic acid). The plaintiff claimed that "laboratory analysis" concluded that the product contains synthetic DL-malic acid, and that the defendant was required to tell consumers it uses the artificial version instead of using the generic name "malic acid."

Is that reference to "laboratory analysis" enough to get the plaintiff over the Rule 12(b)(6) hurdle? It looks like we may never know because the plaintiff voluntarily dismissed this suit.

Plaintiff Complains That Italian Sodas Contain Artificial Preservatives and Flavors

Herring v. Schnuck Markets Inc., No. 2222-CC00096 (Mo. Cir. Ct. Jan. 14, 2022).

According to a putative class action complaint filed in Missouri state court, a beverage maker's Culinaria Italian Soda products are deceptively labeled "NO ARTIFICIAL COLORS, FLAVORS, OR PRESERVATIVES" because they allegedly contain synthetic preservatives and flavor agents. In particular, the lawsuit claims that the products contain ascorbic acid (which is ostensibly used as a synthetic preservative) and citric acid (which purportedly serves as both a synthetic preservative and synthetic flavor agent). On behalf of a putative class of Missouri consumers, the complaint asserts claims for violations of Missouri's Merchandising Practices Act, breach of express warranty, and unjust enrichment. The complaint prays for compensatory damages, restitution and disgorgement, and attorneys' fees and costs.

Does This Natural Flavor Enhancer Pack a Punch?

Gouwens v. Target Corporation, No. 3:22-cv-50016 (N.D. Ill. Jan. 16, 2022).

Fruit-punch-flavored beverage concentrate is the latest in a long line of products targeted for its use of natural flavor enhancements. According to a recent putative class action filed in Illinois, the defendant has been misleading consumers about the presence of artificial ingredients in its Fruit Punch Liquid Water Enhancer.

The fruit punch concentrate, which the defendant markets under its private label Market Pantry line, advertises that it contains "Natural Flavor with Other Natural Flavors." According to the complaint, this representation signifies that the product contains only natural ingredients, yet a "laboratory analysis" indicated that the product contains an artificial form of one ingredient. The plaintiff contends that the natural flavor labeling is misleading and that she would not otherwise have paid a "premium" for the fruit-punch product.

The plaintiff seeks to certify two classes: one class of Illinois consumers who purchased Market Pantry flavored drink concentrates and another multistate class. She brings claims for violations of state consumer fraud acts, breach of contract, breaches of express and implied warranty, negligent misrepresentation, common-law fraud, and unjust enrichment.

Do You Believe in Miracle [Pasta]?

Germano v. Strumba Media LLC, No. 2:22-cv-00008 (E.D.N.Y. Jan. 3, 2022).

Hoping to find a healthier alternative to that gooey, melt-in-your-mouth fettucine alfredo that doesn't require loosening your belt at the dinner table? According to one New York plaintiff, you'll have to wait just a little while longer.

A plaintiff filed suit in New York federal court after she purchased and consumed Miracle Noodle Fettuccine Shirataki Noodles, a plant-based alternative to pasta that is made with a root plant known as konjac. According to the complaint, food made with konjac will make you feel less full, but you stay that way—konjac is "indigestible" and "swells in the human digestive tract," creating significant risks of choking and intestinal blockage. The plaintiff contends that the defendants were well aware of the risks of konjac-based products—consumers complained on one of the defendant's website of "horrendous stomach ache[s]" and other ill health effects. Yet, according to the complaint, the defendants continued to manufacture and sell the product, often as a potential weight-loss supplement.

The plaintiff was hospitalized after doctors uncovered an undigested mass of Miracle Noodles requiring emergency bowel surgery. She now brings claims for negligence, breach of implied warranty, violations of the New York General Business Law, and strict liability violations for failure to warn and defective design.

Motions to Dismiss

Procedural Posture: Granted

Oversweet Amount in Controversy Allegation Spoils Caramel Topping Case

Rand v. Kilwins Quality Confections Inc., No. 1:21-cv-01513 (N.D. Ill. Jan. 10, 2022).

Suppose a plaintiff filed a putative class action alleging that your sea salt caramel topping overstates its contents. Instead of filing in one of the most plaintiff-friendly venues in the country, he inexplicably filed the case in Illinois federal court, citing the court's jurisdiction under the Class Action Fairness Act (CAFA).

Now suppose you took a hard look at your sales of the challenged product and realize that, contrary to the plaintiff's claim that the amount in controversy exceeds $5 million, only about $286,000 in product sales are at issue. Do you take the risk and litigate the case in federal court, which undoubtedly would be more receptive to your heady preemption arguments, and risk an appellate court that finds the court lacked subject-matter jurisdiction? Or do you double down in state court, knowing well that the case won't resolve until class certification, summary judgment, or even trial.

This hypothetically sticky situation became all too real for our champion of confectionary candy covering. It concocted a combined course in a surprisingly contested motion, leading with the CAFA jurisdictional question and following with its substantive arguments for dismissal. Giving the plaintiff every benefit in its amount in controversy calculation (compensatory damages, a 9x multiplier on punitive damages, and restitution), the best the district court could confect was $3.9 million, still well below the $5 million amount in controversy threshold. It allowed the plaintiff one more chance to save its federal lawsuit; otherwise, the case is destined for state court.

The Space Between … Popular Fruit Snacks

Klausner v. Annie's Inc., No. 7:20-cv-08467 (S.D.N.Y. Jan. 24, 2022).

A putative class of New York plaintiffs can no longer fill their time—or their snack bags, it seems—following a dismissal with prejudice of their slack-fill claims against the defendant.

The plaintiff alleged, on behalf of a putative consumer class, that more than 60% of a popular fruit-snack box is composed of empty space, or slack-fill. According to the plaintiff, the size of the fruit-snack box was so large that consumers believed they were buying more fruit snacks than they actually were. The plaintiff brought claims for violations of the New York General Business Law, negligent misrepresentation, breaches of express and implied warranty, fraud, and unjust enrichment.

A New York district court judge tossed the amended claims for good, finding no likelihood of future harm because the plaintiff alleged that she (1) repeatedly purchased the snacks with the knowledge of the empty space inside; and (2) wouldn't make the same purchase until the defendant changed the purportedly misleading packaging.

Future plaintiffs face an uphill battle in bringing slack-fill claims. The district court's decision tracks dismissals of similar slack-fill suits against purveyors of fried chicken, pasta, protein powder, and candy.

Vanilla Suit Put on Ice, Ice Baby

Santiful v. Wegmans Food Markets Inc., No. 7:20-cv-02933 (S.D.N.Y. Jan. 28, 2022).

New year, same vanilla allegations—and same results. In this putative class action, the plaintiffs challenged the terms "vanilla" and "naturally flavored" on the front label of a gluten-free vanilla cake mix. Accepting as true the allegations that the product is not predominantly flavored by natural vanilla extract and that a reasonable consumer cares about the portion of vanilla derived from natural vanilla, the court still dismissed the suit.

The court first found that allegations that consumers expect the product to be mainly or predominantly flavored from vanilla beans "are conclusory statements that the Court is not required to accept" and cited a slew of cases reaching the same result. The court also rejected the plaintiffs' contention that the ingredient list was misleading because it did not disclose the presence of artificial flavoring. That contention was purportedly based on lab testing, but the complaint didn't contain any information about the testing methodology; the date, time, or place of testing; who conducted the testing; and what the exact product tested was. Moreover, the ingredients at issue—ethyl vanillin, vanillin, maltol, and piperonal—could be either artificial or natural depending on how they are derived.

As courts continue to reject these vanilla-flavoring lawsuits, does that mean there is an end in sight? Or will plaintiffs simply search out more receptive judges? In the words of the immortal Vanilla Ice: "Will it ever stop? Yo, I don't know."

Procedural Posture: Denied

Vanilla Suit Still Warm on West Coast

Javed v. Fairlife LLC, No. 3:21-cv-04182 (N.D. Cal. Jan. 12, 2022).

On the other side of the country, consumer protection claims skated by on thin (vanilla) ice before a California federal court finally warmed to these allegations. The plaintiff alleged he was misled into believing that defendant's protein shake derived its "vanilla" flavor predominantly or exclusively from vanilla's natural flavor, rather than from any artificial vanilla flavor. His belief allegedly was based on the label's prominent display of "Vanilla" and "Natural Flavors," alongside pictures of vanilla beans and vanilla flowers that encase the product from front to back.

The judge concluded that the label's "vivid" vanilla imagery is visible at all angles and is enough for the case to survive on a false labeling claim at the motion to dismiss stage. In denying the defendant's motion to dismiss, the judge also allowed the plaintiff's unjust enrichment claim, as well as his "adequately alleged" claim for injunctive relief, to go forward.

Consumer's Icelandic Yogurt Suit Put in Deep Freeze

Steinberg v. Icelandic Provisions Inc., No. 3:21-cv-05568 (N.D. Cal. Jan. 25, 2022).

A California federal court put a consumer's false labeling claim on permanent ice, dismissing the complaint with prejudice after finding that her claims of deception were implausible because there were no words or pictures on the product's front label that could create a reasonable belief that the product was made entirely in Iceland, as the plaintiff alleged. Giving the plaintiff's allegations a cold shoulder, the judge reasoned that the lack of any misrepresentation, paired with the presence of fine print revealing the truth, refuted any inference that the product's label was false, deceptive, or misleading.

The plaintiff alleged that the label on the Skyr product—a traditional Icelandic cultured dairy product with a similar consistency, but milder flavor, to Greek yogurt—misrepresented that the product was made in Iceland in violation of California's consumer protection statutes. The front packaging of the product states "Traditional Icelandic Skyr" and "Icelandic Provisions" and has imagery of a countryside with a snow-covered backdrop. The back of the packaging states "Distributed by Icelandic Provisions, New York, NY," and "Proudly made in Batavia, NY with domestic and imported ingredients." The side panel notes that the product "is the only Skyr available in the US that contains Icelandic Heirloom Skyr Cultures"—a claim the plaintiff didn't dispute. Despite those facts, the plaintiff claimed that she understood the labeling representations to indicate that the product was made in Iceland and that as a result of the allegedly false and misleading labeling, she paid a price premium for the product.

Analyzing the plaintiff's claims under the reasonable consumer standard, the judge made clear that the claims had less than a snowball's chance in H-E-double-hockey-sticks of surviving the defendant's motion to dismiss. The judge noted that while whether a reasonable consumer is misled is a factual question typically not amenable to determination on a motion to dismiss, there are "rare situations where factual allegations may fail as a matter of law." This was one of those situations. Because the words and imagery did not represent that the product was made in Iceland, the brand name alone was not misleading, the product's front label did not contain any Icelandic words, the Icelandic flag, or the word "authentic," the judge quickly decided to bury plaintiff's claims. Further piling on the plaintiff's pleading failures, the judge analyzed analogous cases and noted that the product labeling also did not contain any images, maps, or invitations to visit a particular place in Iceland that would mislead a reasonable consumer to believe the product was made in Iceland. The claims of deception were further weakened by the fact that the product contains an explicit disclosure of the truth—that the product is manufactured in Batavaia, NY. The judge melted any chance of the plaintiff's complaint surviving, refusing to grant leave to amend because the facts were fatal to any alleged label misrepresentation of the place of origin.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories 0

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

March 13–15

29th Annual Symposium on Alcohol Beverage Law and Regulation

Alan Pryor will speak on the panel "Food for Thought: Food and Beverage Labeling Litigation Trends" at this symposium hosted by the National Alcohol Beverage Control Association (NABCA).

March 13–15

Food Integrity 2022

Sam Jockel will speak on the panel "Preparing for the Baby Food Safety Act of 2021 and Closer to Zero" at this virtual event hosted by New Food. This conference will explore the key challenges facing the global food and beverage sector.

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Katherine Wheeler Gamsey
404.881.7462
katie.gamsey@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Jamie George
404.881.4951
jamie.george@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Amanda Newton Wellen
404.881.4809
amanda.wellen@alston.com

Kathryn Clifford Klorfein
404.881.7415
kathryn.klorfein@alston.com

Taylor Lin
404.881.7491
taylor.lin@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD