ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

6 Sections This Edition
Cases Per Section 1-5

Reading Calories 0

	% reading value
2019 Served Up	100%
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions for Summary Judgment	100%
Settlements	100%
Appeals	100%

2019 Served Up

To kick off the holiday season and as 2019 comes to a close, here are our 10 key items from 2019 in review, served up in holiday style:

1. Wishing you and yours a cup of kindness yet for auld lang syne!
2. Yes, Virginia, you can try a class action.

   The plaintiff sued Bayer, challenging "One a Day" vitamins' immunity support and health claims. Bayer successfully defended these claims before a jury in California. *Farar v. Bayer AG*, No. 3:14-cv-04601 (N.D. Cal.). Read about it in the April edition of our Food & Beverage Digest.
3. Eggnog police.

   Over 25 class actions have been filed in district courts sitting in New York challenging vanilla flavor. Read about some of these suits in the October edition of our Food & Beverage Digest.
4. A partridge in a pear tree.

   Milk, Meat, Butter, Oils! The FDA considers modernizing standards of identity.
5. Oh, you better watch out, you better not cry.

   The first (non-settlement) slack-fill class was certified. *Escobar v. Just Born Inc.*, No. 2:17-cv-01826 (C.D. Cal.). Read about it in the April and July editions of our Food & Beverage Digest.
6. Who's been naughty?

   Over 20 FDA warning letters were sent to CBD companies, most of them making impermissible health claims, in 2019. Consumers are now getting in the class action game. Read about one of these warning letters in the November edition of our Food & Beverage Digest.
7. And nice?

   Numerous false advertising class actions were dismissed against companies whose products have trace amounts of glyphosate below FDA tolerance levels. Read about it in the July edition of our Food & Beverage Digest.
8. I made it out of clay.

   Key Food Safety Modernization Act implementation dates in 2019. Make sure your supply chain is tight.
9. Chestnuts roasting on an open fire?

   The FDA will not focus on enforcement of compliance with the new Nutrition Facts Label requirements until mid-2020.
10. Bring me flesh and bring me wine.

    The USDA and FDA established an interagency framework for regulating food items produced using cellular agriculture methods of production.

New Lawsuits Filed

Plaintiff Claims It's Impossible to Have Supposed Vegan Whopper His Way

Williams v. Burger King Corporation, No. 1:19-cv-24755 (S.D. Fla. Nov. 18, 2019).

A disgruntled vegan consumer filed a putative class action against Burger King, alleging that the international burger chain cooks its "Impossible Whoppers" on the same grills as meat patties. In August 2019, the plaintiff alleges, the burger chain began offering the "Impossible Whopper," claiming that it is meat-free, "0% beef," and "100% Whopper." The plaintiff claims he practices a strict vegan diet, meaning he does not eat or drink anything that uses animal byproducts. After seeing various advertisements on social media, the plaintiff visited one of the burger franchises, and in the drive-through ordered the new Impossible Whopper sans mayonnaise.

Only afterward did the plaintiff allegedly learn the truth: it is standard procedure to cook the vegan Impossible Whoppers on the same grills as traditional meat patties, which contaminates the vegan patty with meat byproducts. Compounding matters, there was no signage alerting the plaintiff to this fact. This failure, the plaintiff claims, breached Burger King's common-law duties and violated Florida's deceptive and unfair trade practices act. He seeks to certify a nationwide class for these violations.

Plaintiff Udderly Upset at Ice Cream Company's Promotion of "Happy Cows"

Ehlers v. Ben & Jerry's Homemade Inc., No. 2:19-cv-00194 (D. Vt. Oct. 29, 2019).

An ice-cream eater in Vermont has filed a putative class action lawsuit against Ben & Jerry's and its parent company for deceptively labeling and marketing Ben & Jerry's ice cream. The plaintiff contends that Ben & Jerry's used to be a socially conscious company that benefited Vermont dairies and economy—but that changed after Ben & Jerry's was acquired in 2000. Afterward, the plaintiff alleges, Ben & Jerry's products represented that they were made with milk and cream exclusively from "happy cows" on diaries that participated in a humane "Caring Dairy" program. In reality, he alleges, only a minority of the milk and cream in Ben & Jerry's ice cream comes from these Caring Dairy farms, with the remaining coming from mass-production dairy operations.

The plaintiff seeks to represent a class of national and Vermont consumers of Ben & Jerry's ice cream. He alleges that the defendants' false advertising violated the Vermont Consumer Protection Act, breached an express warranty, and caused the companies to be unjustly enriched.

What's in a Name? Beverage Retailer Claims Surprise That Hemp Drink (Shockingly) Contains CBD

RWB Beverages LLC v. Hemp Hydrate International Holdings Ltd., No. 19-SMCV-01925 (Cal. Super. Ct. Oct. 31, 2019).

Nevada beverage retailer RWB recently sued Canadian drink manufacturer Hemp Hydrate for intentionally misrepresenting the legality of its products under U.S. law. RWB claims that Hemp Hydrate lied about the legality of its hemp-extract-infused beverages before the two struck a deal to distribute the beverage throughout the U.S. RWB believes the drinks are illegal to sell in the U.S. because the products contain a solution of water with a CBD additive, which according to the retailer both the FDA and the state of California "strictly forbid." RWB claims that it learned that it was distributing an allegedly illegal product after one of its retailers questioned the legality of the drinks, prompting an investigation that led to the so-called "discovery" of the CBD additive. In addition to fraud and negligent misrepresentation, RWB is suing Hemp Hydrate for breach of contract as well as breach of express and implied warranties.

Sugar's Identity Crisis Continues

Chau v. Trader Joe's East Inc., No. 1:19-cv-06596 (E.D.N.Y. Nov. 21, 2019).

A venerable American grocery chain is facing a putative class action lawsuit alleging that the company intentionally deceives consumers into thinking that its product is a better nutritional choice by calling added sugar "organic dehydrated cane juice solids" in its instant oatmeal product. According to the complaint, the product's front-label claims—"Low Fat," "Low Sodium," "Whole Grain," "Heart Healthy"—are all nutritional and health qualities and characteristics that are inconsistent with consuming added sugars. The suit alleges that the oatmeal product does not alert consumers that it contains sugar and thus is misleading because consumers expect a product's label to declare its ingredients by their common or usual name.

Consumers Allege Supplements Spiked with an Illegal and Dangerous Ingredient

Ottesen v. Hi-Tech Pharmaceuticals, No. 4:19-cv-07271 (N.D. Cal. Nov. 4, 2019).

A putative class of pre-workout and weight-loss supplement purchasers sued Hi-Tech Pharmaceuticals, alleging that the company included DHMA in many of its supplements. According to the complaint, DHMA is a "dangerous amphetamine-like stimulant that poses serious health risks," including high blood pressure, nausea, cerebral hemorrhage, and stroke. DHMA can have potentially life-threatening side effects and has been banned by numerous anti-doping agencies, the Department of Defense, NCAA, and other countries, such as Australia. A similar ingredient, DMAA, has been linked to the deaths of multiple U.S. military servicemembers.

Hi-Tech was involved in another high-profile case involving that very same stimulant, which resulted in a court order that the company stop selling products containing the dangerous ingredient "or its chemical equivalent." But according to the newly filed complaint, Hi-Tech simply swapped out DMAA for DHMA, an allegedly equally dangerous ingredient, that according to Hi-Tech's own expert can be "expected to produce similar effects in humans." The plaintiffs allege that Hi-Tech added this illegal ingredient to its supplements without informing consumers, in violation of numerous state and federal consumer protection laws. The complaint also asserts claims for breach of warranty, unjust enrichment, and fraud, arguing that Hi-Tech represented DHMA as a "dietary supplement," when in reality it is an illegal and "unsafe food additive" under FDA regulations. Speaking of the FDA: the agency issued a warning letter to Hi-Tech back in April regarding the use of DHMA in its products, concluding that "dietary supplements containing DHMA … are adulterated."

Motions to Dismiss

Procedural Posture: Granted in Part

Throat Drop Maker Clears Most Claims from "Natural" Labeling Suit

Comfort v. Ricola USA Inc., No. 6:19-cv-06089 (W.D.N.Y. Nov. 15, 2019).

In the April edition of the Food & Beverage Digest, we first wrote that the plaintiff was less than soothed with Ricola's "Naturally Soothing" labeling because the throat drops contained artificial ingredients that are not naturally occurring (like sorbitol and ascorbic and malic acids). The plaintiff raised claims for negligence, unjust enrichment, unlawful and deceptive business practices, and false advertising. The throat drop manufacturer moved to dismiss the plaintiff's lawsuit, arguing that the so-called "Soothing Statement" refers only to *a* natural ingredient that provides long-lasting relief: menthol. The district court, however, observed that the suit is still in its early stages, during which it should draw all inference in the plaintiff's favor. It found that a reasonable consumer could be misled into believing that *all* the throat drops' ingredients were natural.

The district court nevertheless dismissed the plaintiff's negligent misrepresentation and unjust enrichment claims. It found that the plaintiff's unjust enrichment claim only repeated her New York business-law claims. In addition, it concluded that the plaintiff failed to allege any sort of special relationship sufficient to state a negligent misrepresentation claim.

Motions for Summary Judgment

Procedural Posture: Granted

Chocolate "No Artificial Flavors" Labeling Dispute Brings Sweet Victory

Clark v. The Hershey Co., No. 3:18-cv-06113 (N.D. Cal. Nov. 15, 2019).

The Hershey Company recently won summary judgment over claims that its Brookside Dark Chocolate candy labels deliberately misled customers by stating the product contains "No Artificial Flavors." The plaintiffs alleged that Hershey's use of malic acid as an artificial ingredient to provide the chocolate candies with a fresh fruit flavor violates both state and federal consumer protection statutes. But the court rejected that argument, finding that there is a clear distinction between the terms "artificial ingredient" and "artificial flavor" and that the malic acid fell into the former category. The court also didn't buy the plaintiffs' argument that they suffered an injury because they were misled into believing the label's statement "No Artificial Flavors" meant flavored only with natural ingredients.

The court also determined that two of the plaintiffs failed to prove they relied on the "No Artificial Flavors" label when purchasing the Brookside chocolates. Both plaintiffs admitted that they believed the product did not contain artificial flavors when they first purchased the chocolate candies—in 2010 and 2014. But because the label did not exist until mid-2017, the judge said that it would be virtually impossible for the plaintiffs to prove reliance at the time of purchase. Further, the plaintiffs stopped buying the chocolate only after learning from their attorneys that the product purportedly contained artificial flavoring. Accordingly, the court granted Hershey's motion for summary judgment and denied as moot the plaintiffs' petition for class certification.

Procedural Posture: Denied in Part

CBD Oil May Contain Trace THC—But That Doesn't Mean It's a Controlled Substance

Horn v. Medical Marijuana Inc., No. 1:15-cv-00701 (W.D.N.Y. Nov. 22, 2019).

A trucker fired from his job after using a CBD oil that he alleges contained THC may continue to pursue his RICO claim against the manufacturer under the theory of mail and wire fraud. The trucker brought suit against the manufacturer of the CBD oil, alleging a RICO claim against the manufacturer based on the predicate act of distribution of a controlled substance. The district court judge recently reversed its prior ruling that found that the CBD oil was a controlled substance because it contained THC. On reconsideration, the court found that the product did *not* fall within the definition of controlled substance because the THC was found within part of the cannabis plants that were excluded from the Controlled Substances Act's definition of marijuana. Finding that the presence of THC in a product is not a controlled substance if it is derived from a defined part of the *Cannabis sativa* plant, the court found the plaintiff could not proceed with his RICO claim on this theory.

The court, however, handed a win to the plaintiff in finding that he could continue to pursue his RICO claim on the predicate acts of mail and wire fraud. The court denied summary judgment to the defendants on this basis because there is evidence that the defendants advertised in multiple ways that the CBD oil did not contain THC and that these statements were false.

Settlements

Plaintiffs Strike Juicy Deal over "No Artificial Flavors" Labeling Suit

Hilsley v. Ocean Spray Cranberries Inc., No. 3:17-cv-02335 (S.D. Cal. Nov. 8, 2019).

The makers of Ocean Spray juice recently agreed to pay $5.4 million and change the labeling of certain juice-based beverage products to end litigation accusing the company of misrepresenting those products as containing "no artificial flavors." The plaintiffs' motion for preliminary approval of class settlement, which is set for hearing in early 2020, asks the court to bless the deal. Among other things, the proposed settlement would allow nationwide class members to obtain $1 for each bottle of the products they purchased up to a maximum recovery of $20.

The putative class action, filed in November 2017, alleges that Ocean Spray's CranGrape and CranApple beverages are mislabeled because they contain artificially synthesized ingredients—like malic acid—despite labels that advertise the products as having "no high fructose corn syrup, artificial colors or flavors." The plaintiffs argue that applicable law requires companies to disclose on front and back labels that products are artificially flavored, which Ocean Spray did not do here. The proposed settlement would benefit all consumers who have purchased the products since 2011.

Appeals

Ninth Circuit Reaffirms That Removing Defendant Need Only Plausibly Allege a Basis for Federal Court Jurisdiction under CAFA

Arias v. Residence Inn, No. 19-55803 (9th Cir. Sept. 3, 2019).

The plaintiff filed a putative class action against Marriott alleging that the hotel chain failed to pay wages, provide rest breaks, and provide itemized wage statements in violation of state wage-and-hour laws. Marriot removed the action to federal court under the Class Action Fairness Act. According to the court, "To satisfy the amount-in-controversy requirement, Marriott relied on a combination of the complaint's definition of the class, Marriott's employee

data ([the] number of nonexempt employees, hourly rate of pay, and number of workweeks worked by putative class members), and assumptions about the frequency of the violations alleged in the complaint." Based on these assumptions, Marriott alleged that the amount in controversy exceeded $15 million (and that even a very conservative estimate exceeded $5 million), exclusive of attorneys' fees. Marriott also argued that 25 percent of the amount of estimated damages should be added to the amount in controversy to account for attorneys' fees.

One month after Marriott filed its notice of removal, the district court remanded the case sua sponte. The court found that Marriott's amount in controversy calculations were conjectural and speculative, and faulted Marriott for not offering evidentiary support for its assumptions. The district court also found that Marriott's attorneys' fees estimates were equally speculative.

On appeal, the Ninth Circuit reversed. The appellate court found that the notice of removal satisfied the amount in controversy requirement because it made plausible allegations about the number of class members, number of workweeks, and assumed violation rates, all based on the allegations in the complaint. The district court improperly remanded the case for Marriott's alleged failure to "prove" the amount in controversy without giving Marriott an opportunity to offer evidentiary support. The Ninth Circuit also agreed with Marriott that it was allowed to rely on "a chain of reasoning that includes assumptions" when determining the amount in controversy, noting that Marriott would bear the burden of showing its assumptions were reasonable on remand. Finally, the Ninth Circuit confirmed that a removing defendant may include estimated attorneys' fees in the amount in controversy.

Eleventh Circuit Reverses Dismissal, Finds Purchase of "Valueless" Supplements Confers Standing

Debernardis v. IQ Formulations LLC, No. 18-11778 (11th Cir. Nov. 14, 2019).

The Eleventh Circuit reversed dismissal of a pair of supplement purchasers' suits against IQ Formulations and Europa Sports Products for unlawfully marketing a "valueless" product. The consumers alleged that the dietary supplements they purchased from the defendants—an energy stimulant known as Metabolic Nutrition Synedrex—are actually banned from sale under the Federal Food, Drug, and Cosmetics Act (FDCA) and are therefore valueless. The plaintiffs claimed that they suffered an injury by purchasing these supplements that could not be legally sold or possessed because they had "no economic or legal value." The problem, the plaintiffs alleged, was that the supplement contained the ingredient methylpentane citrate (known commonly as DMBA). DMBA is by definition a "new dietary ingredient" under the FDCA, the inclusion of which causes a supplement to be considered "adulterated" under the FDCA and unsafe for human consumption. The plaintiffs argued that the defendants engaged in "unlawful, deceptive, and unjust conduct" when they sold the supplements and failed to disclose that the sale of the supplements was illegal in the U.S. But the Southern District of Florida didn't buy the plaintiffs' argument. It concluded that they had suffered no injury in fact and thus lacked standing to pursue any of their claims.

On appeal, the Eleventh Circuit looked to determine whether the plaintiffs had alleged sufficient facts to establish that they suffered an injury in fact under *Spokeo*. The appellate court recognized that the FDCA expressly bans the sale of adulterated dietary supplements and noted that Congress had created a presumption that supplements containing new dietary ingredients couldn't be confirmed as safe. And the court pointed out that the FDA has taken issue with other products containing DMBA, sending warning letters to 14 different companies, identifying their products as adulterated because they contained the ingredient.

The defendants argued that none of this mattered to the plaintiffs' standing argument because they suffered no injury as they received the benefit of the bargain they made. The defendants reasoned that the plaintiffs made no allegations that the supplements failed to work as intended or that they had paid a premium for the product. But the Eleventh Circuit disagreed, holding that the products were in fact valueless because the plaintiffs received *no* benefit for their bargain. An adulterated dietary supplement, the Eleventh Circuit reasoned, cannot lawfully be sold and therefore has no value at all. Therefore, the court concluded that the plaintiffs had standing to pursue their claims because they had "plausibly alleged that they suffered an economic loss when they purchased supplements that were worthless because the FDCA prohibited" their sale.

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