ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

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New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions for Summary Judgment	100%

New Lawsuits Filed

This Meat Is Purportedly Beyond Belief

Roberts v. Beyond Meat Inc., No. 1:22-cv-02861 (N.D. Ill. May 31, 2022).

Summer is here, and with it comes backyard grilling, poolside burgers, and … false advertising? The *steaks* have never been higher for a plant-based meat substitute company with products available in 90 countries worldwide. Named plaintiffs in Illinois—on behalf of themselves and a putative class of individuals—allege that the defendant is falsely advertising the protein content of its products in order to deceive consumers into believing that consumption of its meat substitutes is not a huge mis-steak.

According to the complaint, the manufacturer of the imitation meat miscalculates the percentage of meat in its products by using a common method for calculating a food's protein content, rather than a more rigorous calculation that the plaintiffs contend is required by the FDA for these specific products. The plaintiffs have a T-bone to pick with that calculation because their "industry standard testing" reflects that the defendant's products do not in fact contain the amount of protein advertised because of the inaccurate calculation. As a result of that allegedly raw deal, the plaintiffs bring claims under state consumer fraud statutes and the Magnuson–Moss Warranty Act and for breaches of express and implied warranty and unjust enrichment. They seek to represent a national class, a consumer fraud multistate class, and an Illinois state class. Stay tuned for updates on who comes out as the *weiner* in this meaty match.

Will Shortbread Claims Rise or Be Defeated by Weak Starter?

Howze v. Mondelēz Global LLC, No. 1:22-cv-00351 (W.D.N.Y. May 11, 2022).

"Dying in your beds, many years from now, would you be willin' to trade all the days, from this day to that, for one chance, just one chance, to come back here and tell our enemies that they may take our lives, but they'll never take OUR BUTTER!"

That's what Spencer Sheehan must have heard Mel Gibson say the first time he watched *Braveheart*, because Sheehan & Associates P.C. has brought a case to vindicate the sensibilities of Scotsmen everywhere. According to the complaint, the defendant's brand of shortbread cookies misleads consumers by evoking Scottish themes in its branding and packaging. How could Scottish themes be misleading, you ask? Well, the cookies' plaid packaging and brand name (which comes from an 1869 Scottish novel character) allegedly leads consumers to believe that they are buying authentic Scottish shortbread, when in reality, the defendant uses canola and palm oil shortening in their cookies. In fact, according to such lofty and reputable sources as "one amateur food writer" and an *anonymous* Amazon review, shortbread is traditionally made with butter. It's a shame that the complaint didn't complete the trifecta with a citation to the ever-authoritative Wikipedia. But why stop there? Why not allege that the shortbread promised extra-stale cookies that were actually made in 1869?

The complaint seeks to certify a New York class and a multistate class and asserts claims for violations of various state consumer protection statutes, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment. Come for the nine quoted definitions of shortbread, stay to find out if the claims fall short.

"Superfood" Supplement Is *Not*-So-Naturally-Flavored

Helems v. Ghost LLC, No. 3:22-cv-00674 (S.D. Cal. May 13, 2022).

A purportedly health-conscious plaintiff on the West Coast filed a putative class action against a dietary supplement manufacturer's lime-, guava-, and iced tea lemonade-flavored dietary supplements and powders. According to the complaint, the defendant falsely labeled a brand of "superfood" greens as "Naturally Flavored" when the product allegedly contains the artificially occurring additive DL-malic acid that enhances, simulates, or reinforces the sweet and tart taste that consumers associate with fruit flavor. The plaintiff contends that the "Naturally Flavored" claim on the supplement's label "appeal[s] to" and misleads the consumers seeking "natural" products.

The plaintiff seeks to certify a California class of purchasers, claiming violations of the California consumer protection statutes and unjust enrichment.

A Fruitless Search for Fruit-Filled Food?

Marino v. YummyEarth Inc., No. 3:22-cv-02740 (N.D. Cal. May 8, 2022).

Have you, dear reader, ever been so outraged by a food that you plopped down and angrily jabbed at your computer to submit a scathing review? According to one California plaintiff's new lawsuit, many consumers have resorted to doing so. "Nasty." "Gross." "Zero fruit flavor." "Flavorless Waste of Money." These are just a few of the reviews included as screenshots in a new putative class action filed in California challenging the defendant's fruit snacks. Yet it's not the Mayor of Flavortown, Guy Fieri, against whom this California plaintiff has filed suit. Nor does the complaint allege that the products might be bland, challenge the defendant's trade name "YumEarth," or even take issue with the packaging's depictions of fruit "with drawn-on smiley faces." This is no laughing matter. Seriously.

Instead, the complaint has a sort of identity crisis, flitting among "made with real fruit," added sugars, and implied vitamin claims, which apparently means that it was reasonable for the plaintiff to believe that all of the defendant's products contained real fruit and were healthier than candy. According to the plaintiff, these misrepresentations give rise to claims for violations of California consumer protection laws, breaches of express and implied warranty, and unjust enrichment. In a surprise twist, in addition to a nationwide class, the complaint seeks to certify a "California Class" of all persons who purchased the products in … Oregon? But we expect the plaintiff to iron out those pesky Rule 23 and jurisdictional requirements in time.

Don't Make Me "Glucose Control"

Owen v. Nestlé HealthCare Nutrition Inc., No. 3:22-cv-02855 (D.N.J. May 16, 2022).

A putative class action challenges the defendant's BOOST-brand Glucose Control drinks, which are ostensibly "designed for people with diabetes" and "help manage blood sugar." The plaintiff contends that these claims equate to an express or implied disease claim related to diabetes control and prevention appearing on dietary supplements, which is prohibited as a matter of law. The complaint also alleges that these claims are false and deceptive because the drinks allegedly do not actually control or manage blood glucose levels. According to the plaintiff, the defendant's own clinical trial purportedly shows only that the drink influences a "slightly favorable response" on glucose levels, as compared with one other unidentified product.

Based on these allegations, the complaint asserts claims for breaches of express and implied warranty, unjust enrichment, and violations of New Jersey's consumer protection laws. The plaintiff prays for compensatory, statutory, and punitive damages, as well as injunctive relief, restitution, and an award of attorneys' fees and costs.

Plaintiff Yells from the Mountaintop That Herbal Ingredients Do Not Have Claimed Therapeutic Benefit

Davis v. Ricola USA Inc., No. 3:22-cv-03071 (C.D. Ill. May 8, 2022).

The maker of a popular brand of cough drops is not feeling that soothing sensation after it became a target of a putative class action. According to the complaint, the defendant falsely labels its cough suppressants and lozenges as "Made with Swiss Alpine Herbs," which purportedly misleads consumers to believe that the product's herbal ingredients are what make the popular cough drops work. The complaint specifically points to the front label of the defendant's product, which displays representations like "Cough Suppressant," "Oral Anesthetic," "Effective Relief," "Made With Swiss Alpine Herbs" and pictures of 10 herbs. This labeling, according to the complaint, leads consumers to expect that the lozenges' herbal ingredients are what yield the sweet relief the defendant's product provides. But the back label's Drug Facts tell a different story, laments the plaintiff. The plaintiff contends that the only active ingredient in the defendant's product that provides any pharmacological effect is menthol, not herbs.

The plaintiff asserts putative class claims for violations of Illinois and various other states' consumer protection statutes, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment. The complaint seeks injunctive relief; monetary, statutory, and punitive damages; and costs and attorneys' fees.

Plaintiff Is Beefing About Burger Size

Chimienti v. Wendy's International LLC, No. 1:22-cv-02880 (E.D.N.Y. May 17, 2022).

Ah, the beef burger lovers strike again. But this time, they're griping about the size of their burgers, claiming in a putative class action that the defendants falsely advertise the size of their burgers, inflating just how big their beef patties and burger toppings appear to the consumer eye. The plaintiff contends that the two defendants—both internationally recognized burger chains that converted the world into beef patty and French fry aficionados—use undercooked beef patties in their advertisements to make the patties appear about 15–20% larger than the fully cooked patties that consumers are actually served. The plaintiff seeks certification of a nationwide class, asserting claims for violation of consumer protection statutes, breach of contract, negligent misrepresentation, and unjust enrichment.

The complaint is replete with imagery, displaying comparison photos of the products alongside screenshots of Twitter diatribes and consumer reviews to drive this beef home. But these cherry-picked (patty-picked?) anecdotes only portray the plaintiff's view of the bun. Other reviews grill up a very different picture: "OMG The Baconator tasted American" and "It looks good; it tastes good; It's a five all day on the play." Of course, dear reader, you are welcome to sample the burgers yourselves. One of our contributors did, and left feeling a little more American.

Law Firm Casts Line into Pet Food Products

Van Orden v. Hikari Sales U.S.A. Inc., No. 1:22-cv-00504 (N.D.N.Y. May 14, 2022).

Could it be that the law offices of Sheehan & Associates P.C. has a fish tank? Otherwise, we are not sure how the firm decided to take up a challenge to "Algae Wafers," fish food marketed for algae-eating fish. One thing's clear, though: if they keep up this pace of filings, Sheehan & Associates is gonna need a bigger boat.

In this putative consumer class action, the plaintiff takes issue with the fish food's "dried seaweed meal," "spirulina," and "vegetable rich wafer" (whatever that is) claims—all apparently superfoods for algae-eating fish. However, the plaintiff alleges that the product is actually made with de minimis amounts of algae and spirulina and instead is mainly made from fish meal, fish by-product, and wheat and starch derivatives (yum). Not only does this (possibly) create an existential crisis for algae-eating and vegan fish everywhere, but it is also allegedly misleading and deceptive. The plaintiff seeks to certify New York and multistate classes of purchasers and asserts violations of New York law, breach of warranties, violation of the Magnuson–Moss Warranty Act, and negligent misrepresentation, fraud, and unjust enrichment. But in the meantime, if you need any more fish or algae jokes, let minnow.

Where Has All the (Real) Rum Gone?

Brown v. Zamora Company USA LLC, No. 1:22-cv-02703 (N.D. Ill. May 22, 2022).

A grumbling consumer has a real case of the doldrums. What indecorum has our consumer ready to rumble, you might ask? Rumor has it that the defendant allegedly engaged in a spectrum of misconduct about its small batch … rum, of course. Rummaging through a scrum of regulations, the consumer claims the rum has additives—like glycerin, vanillin, caramel color, and added sugar—that purportedly push the defendant's product out of the rum class. On top of that, the consumer harrumphs, glycerin, vanilla, caramel color, and added sugar are not custrumarily employed in rum in accordance with established trade usage. Finally, and picking up the drumbeat of earlier rum cases, the consumer alleges that the product's claim that it is "aged for up to 7 [or 10] years" crumbles because the rum contains a blend of differently aged rums and only the oldest is actually aged for the full 7–10 years.

The consumer filed a putative class action in federal district court, seeking to certify Illinois and multistate consumer fraud classes and trumpeting that the defendant is liable for violations of consumer protection laws, breach of warranty, misrepresentation, and unjust enrichment. It's a real rum conundrum. Well, allegedly.

Honey! I Shrunk the … Amount of Honey?

Hunt v. General Mills Sales Inc., No. 1:22-cv-02835 (N.D. Ill. May 29, 2022).

It's true that Nature Valley's Oats 'n Honey granola bars contain both honey and oats. But taking one Illinois consumer by surprise, the granola bars also contain other ingredients! Perhaps this consumer was too busy wiping crumbs off of her draft complaint to take a look at the ingredients label to discover that there are, indeed, other ingredients in this crunchy snack. (If only there were a place on food labels that disclosed what ingredients were included in a … oh, wait.) But ingredients labels be damned! According to this health nut, "It is misleading to promote a product as made with certain limited ingredients, even where an ingredient list will contain all ingredients."

The plaintiff contends that the granola bars' labels "tell" consumers that the product is made of just two ingredients—honey and oats—and that honey is the primary sweetener ingredient in the product. The complaint also claims that the "Nature Valley" brand name leads consumers to expect the granola bars to be made solely with oats and honey because "these are natural ingredients, *from nature*." Refusing to stop there, the complaint goes on to lament the ills that sugar has in our society, discussing how more consumers are turning to honey as a healthier sweetener alternative (and no, this is not a "no sugar added" complaint). *But*, the complaint does helpfully explain that both doctors and nutritionists concur that consuming excess sugar contributes directly and indirectly to health problems.

All of this leads up to the plaintiff's primary allegation—that the granola bars contain a de minimis amount of honey. As for the specifics of the "other representations and omissions" that are "false and misleading," you'll just have to take this plaintiff's word for it. Maybe we can see them if we drink enough imitation rum. In any event, the plaintiff here claims that had she known the truth, she would not have bought the product or would have paid less for it. Thus, she seeks to certify an Illinois and multistate consumer fraud class to pursue claims under the various states' consumer protection and consumer fraud statutes, as well as breach of warranty, negligent misrepresentation, fraud, unjust enrichment, and preliminary and injunctive relief.

Motions to Dismiss

Procedural Posture: Granted

You Wanna Pizza Dis? Wisconsin Court Says, "Hard Pass"

Lemke v. Kraft Heinz Foods Co., No. 3:21-cv-00278 (W.D. Wisc. May 6, 2022).

Pizza in the morning, pizza in the evening, pizza at supper time. When pizza's on a bagel, you can eat pizza any time—even when a plaintiff claims your beloved Bagel Bites don't contain real mozzarella cheese or tomato sauce. According to a complaint filed by the prolific Sheehan & Associates, Kraft misrepresents that its mini pizza bagels contain real mozzarella cheese and tomato sauce when they really use a mozzarella cheese blend that includes part-skim milk and sauce that uses thickening agents to reduce the amount of actual tomato ingredients. But a Western District of Wisconsin judge didn't bite, rejecting the plaintiff's pie-in-the-sky allegations. (Sorry for all the cheesy puns, hopefully you're not laugh-tose intolerant).

The judge found that the part-skim cheese in the product conformed to the definition and standard of identity prescribed for mozzarella cheese, and the defendant's use of a cheese blend wasn't deceptive because the defendant never claimed the product used 100% mozzarella. As to the saucier allegations, the district judge noted that there is no standard of identity for tomato sauce, and the FDA's Policy Guide merely required the sauce and constituent ingredients to be properly displayed on the ingredient list.

The decision also delivered a parting jab at Sheehan, noting that the court agreed with recent decisions of the federal courts in Illinois and New York "rejecting other suits brought by plaintiff's counsel for advancing an interpretation of a product's packaging that is 'unreasonable and unactionable'"—including suits we have covered involving vanilla ice cream, "golden butter" crackers, and Strawberry Pop-Tarts.

Procedural Poster: Denied in part

Failure to Provide Notice Is No Goud-A

Kinman v. The Kroger Co., No. 1:21-cv-01154 (N.D. Ill. May 27, 2022).

A good-sized wedge of a lawsuit against a national grocer went up in smoke. The Northern District of Illinois gutted claims brought by prolix plaintiffs' lawyer Spencer Sheehan that the defendant's "smoked" sliced gouda cheese was not smoked over hardwood, but was instead

flavored with liquid smoke. While the opinion is silent as to whether a reasonable consumer would expect that pre-sliced grocery store cheese is smoked over artisanal hardwood whilst Dutch tulips perfume the air and fair maidens sing folk songs in a ring, it did allow the consumer protection claim to go forward. The court concluded that, although "smoke flavor" was listed in the ingredients list, the plaintiff adequately pleaded an omissions theory (that she would not have bought the cheese had she known it was not smoked over hardwood) based on the Seventh Circuit's 100% Grated Parmesan Cheese ruling in *Bell v. Publix*, which (depending on the case) can have grating implications.

The court did, however, dismiss the fraud, negligent misrepresentation, and breach of warranty claims (the plaintiff failed to give the required pre-suit notice to assert a breach of warranty claim), as well as the plaintiff's injunctive relief demand. We are fond-ue of the court's common sense footnote regarding the plaintiff's attempt to represent purchasers from other states: "Plaintiff might do well to consider whether these claims are worth pursuing.… Plaintiff is unlikely to be an adequate representative of class members who purchased the product in the respective states … this Court is unlikely to grant a fee petition with respect to class counsel's time spent on claims that fail for such reasons." Dismissal was without prejudice, so we'll keep an eye on this, dear readers.

Motions for Summary Judgment

Procedural Poster: Denied in part

Plaintiffs' Fruit Labeling Claim *Man*-go On

Silver v. BA Sports Nutrition LLC, No. 3:20-cv-00633 (N.D. Cal. Apr. 29, 2022).

A California federal judge chopped all but one of the plaintiffs' false labeling claims targeting the defendant's BodyArmor sports drink at summary judgment. According to the "sports enthusiasts," the defendant's sports drink label falsely claims to provide objectively "superior hydration" and misleads consumers into believing that the drink contains real fruit based on the label's fruit imagery and each flavor's fruit-inspired name (e.g., "Banana Strawberry, Blackout Berry, Fruit Punch, Orange Mango, and Grape"). The plaintiffs contended that instead, the sports drink was nothing more than a sugary beverage, offering no "superior hydration" qualities, and containing no real fruit ingredients.

According to the court, the plaintiffs' deposition testimony revealed some rotten arguments about the sports drink's claims about superior hydration and its sugar content. The court pointed to the plaintiffs' own statements, which indicated that they neither relied on, nor were they deceived by, any alleged misrepresentations about either of these claims. But the plaintiffs' fruit labeling claim remains *all ripe, all ripe, all ripe*, according to the federal judge.

The district court concluded that the label's fruit imagery pear-ed with the plaintiffs' belief that fruit is healthy made the defendant's product ap-peeling to the plaintiffs for purchase and misled them into believing that the sports drink's fruit flavors were "natural" and came from real fruit. Despite the defendant's counterargument that the plaintiffs read the ingredients list and must have known that the drinks contained no fruit, the court found that the plaintiffs did not "affirmatively testify" that they knew the drinks lacked real fruit, pointing instead to the plaintiffs' testimony that "they believed the drinks contained fruit because of the labeling."

Perhaps, the court had to draw the lime somewhere.

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