ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

6 Sections This Edition
Cases Per Section 1-6

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Preliminary Injunctions	100%
Trials	100%
Appeals	100%
Cannabis Corner	100%

New Lawsuits Filed

Plaintiff Wary That Pastries Have Nary a Berry

Louis v. Nature's Path Foods USA Inc., No. 1:19-cv-02584 (E.D.N.Y. May 1, 2019).

The packaging for the defendant's toaster-style "Frosted Wildberry Acai Toaster Pastries" prominently displays acai berries (including five of a total 11 berries on the packaging). But acai, the plaintiff alleges, is not only the least predominant berry for these pastries, but also the fourth-least predominant *ingredient*. And even then, the acai comes only in powder form.

Seeing this acai-heavy packaging, reasonable consumers would expect that the pastries contain more acai than other fruits and all the health benefits associated with acai berries. That it doesn't—and that powdered acai actually lacks its nutrient- and antioxidant-packed virtues—renders the pastries deceptive, misleading, and overpriced. The plaintiff seeks to certify nationwide, New York, and California classes.

Trifecta of "Dolphin Safe" Class Actions Hooks Tuna Titans

Myers v. Nestlé Purina PetCare Co., No. 5:19-cv-00898 (C.D. Cal. May 13, 2019).
Duggan v. Bumble Bee Foods LLC, No. 4:19-cv-02564 (N.D. Cal. May 13, 2019).
Gardner v. StarKist Co., No. 3:19-cv-02561 (N.D. Cal. May 13, 2019).

After a year's investigation and in a coordinated maneuver, the plaintiffs believe they have caught the big one with three putative class actions against the tuna giants. In two of the suits, the plaintiffs challenge claims by Bumble Bee and the makers of "Fancy Feast" that they employ safe fishing practices so that their tuna is "dolphin safe." The plaintiffs counter that the defendants actually employ "fish aggregating devices," which the plaintiffs deride as "floating death traps."

But StarKist allegedly went beyond the pale. Despite its prior dolphin ad campaigns, StarKist is alleged to have concealed the dolphin-related dangers of its fishing practices, avoided government oversight and enforcement, and designed complex ownership schemes (and even used offshore tax havens) designed to obscure fishers' links to their StarKist buyers. Though the plaintiffs raise the customary consumer protection and unjust enrichment claims against Nestlé Purina and Bumble Bee, they challenge StarKist with a claim under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act.

Plaintiffs Don't Buy Oreo's "Real" Cocoa Label

Harper v. Mondelez International Inc., No. 3:19-cv-02747 (N.D. Cal. May 20, 2019).

A new complaint alleges that Mondelez International's claims that Oreo cookies are made with "real" cocoa are false and deceptive.

The putative class action complaint alleges that the cocoa used in Oreos is made using a process called "Dutching," which involves washing cacao seeds in an alkaline solution before roasting and extracting the liquid cocoa. This process, according to the plaintiff, results in less-flavorful cocoa powder than traditional methods. The new suit asserts claims for violations of California's consumer protection, unfair competition, and false advertising laws. The plaintiff is also pursuing claims for unjust enrichment and fraud, claiming that she either wouldn't have purchased the Oreo brand cookies or wouldn't have paid as much for the product had she known that the sweets didn't contain real cocoa.

Plaintiff Worries Stress Relief Lotion Doesn't Work

Sullivan v. Johnson & Johnson Consumer Cos., No. 1:19-cv-02803 (E.D.N.Y. May 13, 2019).

The essential oils market is booming, generating $3.8 billion in 2018 alone. According to the plaintiff's complaint, that growth and high consumer demand have created a "perfect storm" for companies (like Johnson & Johnson) to mislead their customers about their essential oils imitation products.

In this action, Aveeno Stress Relief moisturizing lotion and body wash have drawn the plaintiff's ire because its labeling claims that it reduces stress and relaxes users. But instead of containing the purportedly stress-reducing aromatherapy ingredients and essential oils, these products allegedly only contain useless synthetics. And despite J&J's reference to "clinical studies," *reliable* studies show that consumers are buying nothing more than a placebo effect. The plaintiff seeks to certify a nationwide class and recover treble and punitive damages for these deceptive practices. It's enough to keep someone up at night.

Plaintiff Takes Issue with Kroger's "Artisan" Ice Cream Label

O'Neil v. The Kroger Co., No. 2:19-cv-04125 (C.D. Cal., removed May 13, 2019).

In another recently filed putative class action, the plaintiff complains that Kroger's Deluxe Churned "Artisan" Vanilla Bean ice cream products don't live up to their deluxe artisan pedigree. According to the plaintiff, the term "artisan" refers to a high-quality or distinctive product that is made in small batches—as opposed to mass production—and by someone who is skilled in the trade. But, the plaintiff alleges, Kroger's "artisan" ice cream products aren't. The plaintiff asserts purported California consumer protection claims and seeks to certify a California class.

Consumers Gripe About Tomatoes' Origin

Snarr v. Cento Fine Foods Inc., No. 3:19-cv-02627 (N.D. Cal. May 14, 2019).

Another new suit alleges that Cento Fine Foods Inc. misleadingly labeled its canned San Marzano tomatoes, which the plaintiffs allege weren't really grown in the Agro Sarnese-Nocerino region in southern Italy.

Just like a sparkling wine must originate from the Champagne region of France to be considered "Champagne," San Marzano tomatoes must originate from a specific region of southern Italy to be certified as "San Marzano." Consumers claim that Cento Fine Foods labels its tomatoes as "San Marzano," despite not having the required DOP, or "denominazione di origine protetta" marking that certifies a true San Marzano tomato. Consumers claim that this DOP marking can only be certified by an official San Marzano entity and that the third-party certification of Cento's San Marzano tomatoes is not legit. Alleging that they would not have purchased, or would not have been willing to pay a price premium for, the products absent the certified DOP marking, the plaintiffs have asserted claims that Cento violated California's unfair competition and false advertising laws.

Motions to Dismiss

Procedural Posture: Granted

Justin Timberlake and Bai Brands In Sync with Partial Dismissal of "No Artificial Flavors" Suit

Branca v. Bai Brands LLC, No. 3:18-cv-00757 (S.D. Cal. Mar. 7, 2019).

The district court partially dismissed a putative class action against Bai Brands LLC and other defendants, including Justin Timberlake. The lawsuit alleges that the defendants violated federal and state law by mislabeling Bai drinks as containing "NO artificial flavors" and as being "naturally flavored." Specifically, the beverages allegedly failed to identify in the drink's ingredients list an artificial form of malic acid by its scientific name. In partially dismissing the lawsuit, the court found that it lacked jurisdiction over Timberlake and other individual defendants, and that the defendants were not required to list beverage ingredients by their scientific names. However, the court allowed claims against the corporate entities as to the allegedly "NO artificial flavors" and "naturally flavored" labeling to proceed.

Smucker's Trims Olive Oil Mislabeling Suit

Robinson v. The J.M. Smucker Company, No. 4:18-cv-04654 (N.D. Cal. May 8, 2019).

Smucker's convinced a California federal court to throw out portions of a putative class action alleging that its Crisco 100% Extra Virgin Oil No-Stick Spray does not, in fact, contain 100% extra virgin olive oil. The court ruled that the plaintiff had not adequately pled her claims for negligent misrepresentation or for violations of California's unfair competition and false advertising laws, reasoning that the plaintiff had not demonstrated economic loss. In addition, the judge ruled that the plaintiff already had an adequate remedy for her alleged injury, which doomed her statutory claims, and that the plaintiff could not seek punitive damages. The California Consumer Legal Remedies Act (CLRA) claim, however, was deemed actionable because the plaintiff's purchase of the product—which she had plausibly alleged is not 100% extra virgin olive oil—was a sufficient economic injury.

Procedural Posture: Denied

Nestlé Can't Drown Poland Spring Water Label Suit

Patane v. Nestlé Waters North America Inc., No. 3:17-cv-01381 (D. Conn. Mar. 28, 2019).

Nestlé Waters has been accused of fraudulently labeling Poland Spring Water and lying about the water's source, according to plaintiffs who allege that the company duped consumers into paying millions more for the product.

The plaintiffs originally filed suit in 2017, accusing Nestlé of misleadingly advertising that its water—which is not naturally occurring—is "spring water." That complaint was dismissed on preemption grounds, but the plaintiffs recast their allegations as claims for fraud, breach of contract, and violations of various states' consumer-protection statutes. The district court dismissed the plaintiffs' Vermont state-law claims because Vermont has no standard defining spring water. But it declined to dismiss claims under eight other states' laws that were not preempted. Nestlé raised a host of defenses in its motion, but each were either denied by the court or deemed inappropriate to be addressed at the pleading stage.

Preliminary Injunctions

Procedural Posture: Granted

Limited Injunctive Relief Keeps Bud Light "Corn Syrup" Ads Flowing

MillerCoors LLC v. Anheuser-Busch Cos. LLC, No. 3:19-cv-00218 (W.D. Wisc. May 24, 2019).

During the Super Bowl, Anheuser-Busch launched an ad campaign contrasting Miller Lite's and Coors Light's use of corn syrup in brewing with Bud Light's use of rice. MillerCoors took great offense, filed a false advertising action under the Lanham Act, and moved for a preliminary injunction. Anheuser-Busch maintains that its ads are literally true—and they are.

The district court granted MillerCoors a preliminary injunction, but it won't offer MillerCoors any solace. It rejected MillerCoors's claims that Anheuser-Busch launched the campaign to deceive consumers into thinking MillerCoors used the *high fructose* variety of corn syrup. The injunction prohibits Anheuser-Busch from offering any ad that implies corny syrup is present in consumers' beer, leaving a lot of room for Anheuser-Busch to continue its advertising crusade against MillerCoors's brewing process.

Trials

Monsanto Hit with $2 Billion Verdict in Third Roundup Trial

Pilliod v. Monsanto Co., No. RG17862702, JCCP Mo. 4953 (Cal. Sup. Ct. May 13, 2019).

In the third Roundup case to go to trial in California, an Alameda County jury found that Monsanto's popular weed killer likely caused a couple's non-Hodgkin lymphoma and awarded them more than $2 billion in damages.

Attorneys for Monsanto again tried to press the point that numerous experts, including the U.S. Environmental Protection Agency, have approved Roundup's main ingredient—glyphosate—and have determined that the chemical is not a carcinogen. But the most recent trial didn't just focus on Roundup's main ingredient. The plaintiffs' attorneys highlighted Roundup's other harmful ingredients, such as its surfactant—polyoxyethylene tallow amine, known as POEA—a chemical that is banned in Europe. POEA helps Roundup spread across and stick to leaves but is actually 40% to 60% more toxic than glyphosate, according to one of the plaintiffs' experts. And according to this expert, when the two chemicals are combined, they become 50 times more toxic than POEA alone. This argument could play a large role in the more than 1,000 Roundup cases still awaiting trial.

Appeals

9 out of 9 Justices Agree—Preemption of Failure-to-Warn Pharma Claims Is a Question for the Judge

Merck Sharp & Dohme Corp. v. Albrecht, No. 17-290 (S. Ct. May 20, 2019).

In a rare unanimous decision, the Supreme Court provided needed clarity to the brand-drug preemption doctrine and reversed a much-maligned Third Circuit decision that had resurrected a years-old multidistrict litigation. First, the Court held that a judge—and not a jury—should decide whether consumers' claims are preempted. Judges, the high court reasoned, are best positioned to interpret agency decisions in light of the governing statutory and regulatory context.

Second, the Court offered new clues to the cryptic "clear evidence" standard for preemption. Now, preemption is appropriate only when (1) "the drug manufacturer fully informed the FDA of the justifications for the warning required by state law" by "submit[ing] all material information to the FDA"; and (2) the FDA "informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning." Though the high court resolved lingering uncertainties surrounding this doctrine, it is no boon to drug manufacturers. If anything, this decision may have narrowed this preemption doctrine.

SCOTUS Clarifies Scope of Class Action Removal

Home Depot U.S.A. Inc. v. Jackson, No. 17-1471 (S. Ct. May 28, 2019).

The U.S. Supreme Court recently clarified important nuances of the class action removal process, holding that third-party counterclaim defendants cannot remove claims filed against them to federal court. In a 5–4 decision, the Court ruled that when a defendant files class-action counterclaims against a third party, that third-party counterclaim defendant cannot remove the claims under either the general removal statute or the Class Action Fairness Act. As a result, Home Depot will be stuck in North Carolina state court to defend against counterclaims brought against it by the original defendant in a debt collection case filed by a bank that is no longer a party to the litigation.

Cannabis Corner

By Rachel Lowe

California legislators introduced 40 new cannabis bills during the 2019 legislative session.

Fix for weak tax revenues? Because many cities refused to permit cannabis shops in California, only about 600 licensed stores are currently operating, a mere 10% of projections. Possibly the most controversial proposed legislation is A.B. 1356, which would require localities to issue a *minimum* number of local cannabis dispensary licenses based on population data if more than 50% of a locality's electorate voted in 2016 to legalize recreational marijuana. If passed, this bill would mandate issuing more than 2,000 new licensed cannabis stores in California.

CBD from industrial hemp. Another noteworthy proposal, A.B. 228, would prohibit restrictions on the sale of food, beverages, and cosmetics that include *industrial hemp* or cannabinoids, provided that THC levels are less than 0.3% by weight. A.B. 228 would also require a warning label on industrial hemp CBD products stating: "*CANNABIDIOL USE WHILE PREGNANT OR BREASTFEEDING MAY BE HARMFUL. KEEP OUT OF REACH OF CHILDREN.*" Products containing cannabis-derived CBD with THC levels greater than 0.3% by weight are already permitted in California pursuant to the licensing scheme in the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). A.B. 228 was unanimously passed out of the Assembly on May 22, 2019.

Must love dogs? S.B. 627 would expand the ability of qualified veterinarians to discuss *and recommend* cannabis as a treatment for animals, with certain restrictions. (A.B. 2215, passed last year, only paved the way for "discussions" about cannabis.) If passed, as expected, this will help address California's surging interest in medical cannabis and CBD for pets.

Banks to help California get that tax revenue. S.B. 51 would create special cannabis-related financial institutions—cannabis limited charter banks and credit unions—to alleviate one of the current banking problems in the industry. Currently, many FDIC-insured entities will not bank with growers and sellers of cannabis and, as a result, licensed cannabis businesses have a harder time paying taxes and engaging in other required financial activities. Section 1(e) of the proposed legislation sums it up best: "While income from the sale of cannabis products is considered ill-gotten gains by the federal government, that income is still taxable."

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