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%
Motions for Preliminary Injunction	100%
Settlements	100%
Regulatory	100%
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New Lawsuits Filed

Consumers Complain That CBD Products Lack the Advertised Quantity of CBD

Potter v. Potnetworks Holdings Inc., No. 1:19-cv-24017 (S.D. Fla. Sept. 27, 2019).

Consumers across the country continue to file false advertising lawsuits against manufacturers and sellers of cannabidiol (CBD) products based on alleged misstatements about the amount of CBD in the products. In this lawsuit, which was filed in a Florida federal district court, the plaintiffs allege that the defendants misrepresented the amount of CBD contained in various edible and cosmetic products. The products, the plaintiff claims, actually contain significantly less CBD than the quantity stated on the products' labels. The plaintiffs further allege that consumers rely on the products' labeling to accurately represent the amount of CBD in the products and are harmed by purchasing products that contain less CBD than advertised. Based on this theory, the plaintiffs assert claims for unjust enrichment and violation of the Florida Deceptive and Unfair Trade Practices Act.

Just the Unemployment Line?

Darrow v. Just Brands USA Inc., No. 1:19-cv-07079 (N.D. Ill. Oct. 28, 2019).

Opposite the bevy of new suits alleging that CBD products contain less CBD than advertised are a number of new suits that claim CBD-infused products are causing consumers to test positive for THC. An Illinois truck driver recently filed one such suit, claiming that Just Brands' misrepresentation that its JustCBD gummy candies contained "NO THC" cost him his job. Trevor Darrow alleges that he was fired for testing positive for THC after consuming JustCBD watermelon candy rings. Darrow claims the watermelon candy rings he consumed were falsely labeled "NO THC," despite actually containing enough THC to cause him to fail his drug test. The putative class action suit was lodged in the Northern District of Illinois on behalf of all Illinois purchasers of JustCBD products in the past three years. Darrow's suit follows two others in New York and California, where CBD consumers have similarly alleged that they failed employer-issued drug tests as a result of eating CBD-infused products.

Will a "Natural" Apple a Day Keep the Lawsuits Away?

Slowinski v. Heineken USA Inc., No. 1:19-cv-06764 (N.D. Ill. Oct. 11, 2019).

Beer giant Heineken USA Inc. is facing a putative class action lawsuit related to its claim of "no artificial flavors or colors" on the packaging of its Strongbow Hard Apple Cider. The suit alleges that Heineken intentionally misled consumers by labeling its Strongbow Cider as not containing any artificial flavors when, in fact, the cider contains synthetic malic acid, which is used to create a natural apple flavoring. According to allegations in the complaint, Heineken chose to advertise its products using these false and deceptive claims despite being aware that its customers expected better quality from naturally flavored products. The plaintiff alleges that Heineken intentionally used the artificial flavor because it was likely a cheaper option than adding a natural flavor derived from a spice or fruit juice. The suit seeks permanent injunctive relief against Heineken, as well as certification of nationwide and state subclasses of consumers who purchased Heineken's products over the past 10 years.

"Juicy" Praline Pecans Under Scrutiny

Henderson v. Rite Aid Corporation, No. 1:19-cv-09870 (S.D.N.Y. Oct. 25, 2019).

Disgruntled consumers filed a putative class action suit against Rite Aid Corporation alleging that the pharmacy giant deceptively advertises its Gourmet Praline Pecans as coated in a sweet and salty glaze made from evaporated cane juice when, in fact, the "juice" listed on the ingredient label is just another word for sugar. The lawsuit claims that Rite Aid's Dreamhouse Fine Foods pralines give consumers the impression that its pecans are a better nutritional choice over other, comparable products and points out that consumers generally pay more for premium ingredients with positive nutrient qualities. The suit raises claims under New York's consumer protection law, as well as for breach of warranty, fraud, and unjust enrichment, and seeks to certify both nationwide and state subclasses of pecan purchasers to recover compensatory and punitive damages.

Rash Decisions Allegedly Behind "All Natural" Marketing Campaign

Lisowski v. Henry Thayer Co., No. 2:19-cv-01339 (W.D. Pa. Oct. 18, 2019).

Thayer, a manufacturer of personal-care products, is facing a new suit alleging that its Natural Remedies line of products boasts various forms of "all natural" labeling that is false, misleading, and designed to deceive health-conscious consumers. According to the complaint, Thayer labels claim that its products are "natural" and/or "preservative-free," when in fact the ingredients of many of those same products include synthetic components, such as phenoxyethanol, polysorbate 20, and numerous preservatives. The new suit also complains that Thayer's deception extends to its official website and social media accounts, which prominently feature phrases like "naturally sourced ingredients," and "natural healing powers" as well as the hashtags #naturalbeauty, #naturalremedies, and #naturalskincare, among others.

The new suit complains that Thayer's deceptive marketing campaign conned consumers to pay a premium for the products compared with others that did not purport to be "natural remedies." Notably, the complaint cites draft guidance from the U.S. Department of Agriculture that limits products that may be classified as "natural" to those produced or extracted from a natural source that have not undergone an unnatural-chemical change from its source material. The putative class is seeking refunds for its Thayer purchases as well as punitive damages and injunctive relief ordering Thayer to cease its deceptive marketing campaign.

Failed Warnings—Not So exHEMPlary

Environmental Research Center Inc. v. Manitoba Harvest USA LLC, No. RG19038961 (Cal. Super. Ct. Oct. 15, 2019).

A new suit filed under California's Proposition 65 alleges that hemp foods enterprise Manitoba Harvest failed to warn consumers about the levels of lead and cadmium in several of its hemp-seed products. The complaint alleges that six Manitoba food products, including different flavors of hemp snacks and protein powder, caused consumers to be exposed to lead or cadmium at levels high enough to violate Prop. 65. According to the complaint, Manitoba "has failed to disclose the presence of these chemicals to the public, who undoubtedly believe they have been ingesting totally healthy and pure products pursuant to the company's statements." The nonprofit plaintiff is seeking injunctive and declaratory relief along with civil penalties.

The Manitoba Health lawsuit comes on the heels of multiple Prop. 65 notices filed against California companies in the cannabis space that allege those companies failed to warn consumers about chemicals at issue in marijuana smoke itself.

Motions to Dismiss

Procedural Posture: Granted

Kraft Feeling Sunny After Beating Juice Pouch False Labeling Suit

Tarzian v. Kraft Heinz Foods Co., No. 1:18-cv-07148 (N.D. Ill. Oct. 10, 2019).

A putative class action was recently filed by consumers who purchased 10-packs of Capri Sun juice pouches with labeling that stated the beverages contained "no artificial preservatives." The suit alleges this statement was false and misleading because the beverages contained citric acid, a preservative alleged to be artificial when produced on an industrial scale. The plaintiffs did not allege that they knew that Kraft, the manufacturer of Capri Sun, used artificial citric acid; they merely described the industrial process for producing citric acid and concluded that Kraft likely used that type of artificial citric acid in Capri Sun.

Kraft moved to dismiss the complaint, arguing, among other things, that the plaintiffs failed to allege that the "no artificial preservatives" statement was false and misleading because the plaintiffs did not allege that the beverages actually contained artificial citric acid. The district court agreed, finding that the plaintiffs' allegations merely detailed the process commonly used to manufacture citric acid throughout the industry, then stated: "Thus, Defendant's citric acid is artificial." The district court concluded that such an allegation was "too great of an inferential leap" to satisfy the federal pleading standards and dismissed the complaint in its entirety.

Motions for Preliminary Injunction

Procedural Posture: Denied

Court Finds Missouri Law Has No Beef with Tofurky

Turtle Island Foods SPC v. Richardson, No. 2:18-cv-04173 (W.D. Mo. Sept. 30, 2019).

A federal district court recently rejected Turtle Island Foods' (d/b/a The Tofurky Company) request for a preliminary injunction to halt the enforcement of a meat advertising law in the state. That law, passed in 2018, made it a misdemeanor in Missouri to advertise "a product as meat that is not derived from harvested production livestock or poultry." Tofurky, a plant-based meat producer, filed a complaint against the state challenging the constitutionality of the statute and alleging that it violates Tofurky's First Amendment rights, the Dormant Commerce Clause, and the Due Process Clause. Tofurky sought a preliminary and permanent injunction preventing enforcement of the statute as well as a declaration that the statute is unconstitutional both on its face and as applied to Tofurky.

The faux-meat manufacturer said in its complaint that it fears prosecution under the statute for its labels, which include terms like "deli slices" and "smoked ham." But because Tofurky products' labels also include modifiers such as "veggie," "all vegan," and "plant based," the court found the company was not at risk of being prosecuted under the statute. According to the court, those modifying terms prevent the type of misrepresentation the law was intended to protect against. In denying the preliminary injunction, the court found that Tofurky was not likely to succeed on the merits of its claim because the speech that Tofurky wished to engage in was not prohibited by the statute. Apparently unconvinced that its products are safe from prosecution, Tofurky has filed an appeal with the Eighth Circuit.

Settlements

Free Toy Inside Is a Healthy $20+ Million Settlement in Sugary Cereal Suit

Hadley v. Kellogg, No. 5:16-cv-04955 (N.D. Cal. Oct. 21, 2019).

Readers may be familiar with this sugary cereal suit from Judge Koh's previous opinion on price premium restitution methodology. The suit, originally filed in 2016, took aim at Kellogg for its "healthy" marketing campaign for several of the company's popular cereals such as Raisin Bran and Frosted Mini-Wheats. Now, after six mediations and three years of litigation, Kellogg has agreed to a proposed class settlement that would limit Kellogg's use of "healthy," "lightly sweetened," and other advertising claims on various cereals for at least three years. An expert testified that the value of this injunctive relief could top $11 million, and the settlement is also set to provide a $12 million cash fund as well as an additional $8.25 million worth of Kellogg's product vouchers. A hearing on the motion to preliminarily approve the

settlement is set for February 2020. By that time, it is also likely that the Food and Drug Administration (FDA) will have redefined "healthy" since the FDA's proposed rule change has already been submitted to the Office of Management and Budget for final clearance.

Pet Food Companies May Get Out of the Dog House

Mael v. Evanger's Dog & Cat Food Co., No. 3:17-cv-05469 (W.D. Wash. Oct. 30, 2019).
Reitman v. Champion Petfoods USA Inc., No. 2:18-cv-01736 (C.D. Cal. Oct. 30, 2019).

A proposed class has reached a settlement for over $500,000 to end its case that dog food products that Evanger's Dog & Cat Food Co. advertised as "human grade" were actually dangerous to pets. The consumers alleged that pet food advertised as containing "human-grade USDA inspected meat" actually included pentobarbital, which was allegedly responsible for sickening several of the plaintiffs' furry friends. The federal district court judge denied Evanger's motion to dismiss last year, and the parties have been engaged in discovery since then. If approved, the settlement would permit class members to submit claims for out-of-pocket vet bills if the records indicate that their pet suffered an illness from pentobarbital poisoning.

In a separate case, putative class members—purchasers of Champion Petfoods—were not so lucky. Those consumers, who also filed suit over the contents of their canine's chow, were denied in their bid to certify a class of dog owners who allege that Champion Petfoods misled them about the presence of arsenic, mercury, lead, cadmium, and/or BPA in the food. The court found that there would be unique issues for each class member that would need to be determined because even though some common phrases appeared on every package, each different type of food contained additional labeling that would need to be examined. The disgruntled pet owners will have to continue to pursue their litigation individually.

Regulatory

The FDA and FTC Tag Team to Stop Out-of-Bounds CBD Marketing Stone Cold

Warning Letter, Center for Drug Evaluation & Research, to Rooted Apothecary LLC, MARCS-CMS 585312 (Oct. 10, 2019).

Regardless of federal regulators' actual views on the legal status of the use and sale of CBD in consumable products, they have consistently pursued regulatory enforcement against marketing and labeling that they consider beyond the pale. In this instance, the FDA and Federal Trade Commission (FTC) teamed up in a joint warning letter against Rooted Apothecary, which is a purveyor of products like Teeth/TMJ – Essential Oil + CBD Infusion and Ears – Essential Oil + CBD Infusion. Rooted Apothecary marketed these products with statements like "this blend uses the best of nature to help calm the inflammation and pain of teething, while also promoting sleepiness for your little one," "CBD oil may have neuroprotective properties and may protect against neurological conditions, such as Parkinson's and Alzheimer's disease," "possible uses for CBD include helping with skin problems such as acne, autism, ADHD, and even cancer," and "[c]hildren can use high amounts of CBD safely and without any risk."

The agencies took issue with the products' being positioned as having therapeutic or medical uses without the FDA having reviewed them for safety or effectiveness and without having the sufficient evidentiary support for these statements. The FDA viewed these products as unapproved new drugs, misbranded drug products, and mislabeled as dietary supplements that offer unsubstantiated advertising claims. The agencies were particularly concerned that Rooted Apothecary specifically marketed its untested drug products as appropriate for use in infants and children without sufficient scientific evidence that their use was truly safe. If anything, the FDA and FTC seem committed to continue policing against egregious therapeutic and health claims, particularly those that market to vulnerable populations, as the agencies attempt to craft a strategy to address the CBD industry as a whole.

Appeals

In Ducking Hemp Seizure Fracas, Ninth Circuit Misses Opportunity to Clear the Haze

Big Sky Scientific LLC v. Bennetts, No. 19-35138 (9th Cir. Sept. 4, 2019).

After the 2018 Farm Bill legalized the cultivation of hemp, demand for hemp products exploded. But though the 2018 Farm Bill offered a legal path for transporting certain hemp across state lines and though hemp notably *lacks* the psychoactive compound THC, the legal status of hemp in the 50 states remains unsettled.

This appeal highlighted these tensions. The appellant, Big Sky, was shipping 13,000 pounds of industrial hemp from Oregon to Colorado when the Idaho State Patrol seized the hemp in transit. Under Idaho's controlled substances laws, both hemp and marijuana are contraband. Idaho charged the truck driver with felony trafficking charges and publicized the hemp seizure as a major marijuana bust.

In response, Big Sky filed suit in federal district court, seeking declaratory and injunctive relief for the return of the hemp. The district court, however, rejected Big Sky's arguments that it would likely succeed in proving that the seizure of the hemp violated the 2018 Farm Bill or that the Commerce Clause preempted Idaho's controlled substances laws. It also reserved for a later date whether it must abstain from hearing the case under the U.S. Supreme Court's ruling in *Younger v. Harris*.

This case seemed primed for the Ninth Circuit to clarify a question of pure federal law. Surprisingly, however, the Ninth Circuit punted on the issue. In a three-page unpublished order, it found that the federal district court *abused its discretion* by not immediately abstaining in the case. The Ninth Circuit was persuaded by Idaho's commitment to move to lift a stay in the state case and the expectation that the state court would swiftly resolve

the case so that Big Sky could raise its federal arguments in the state forum. The decision stands as a missed opportunity to offer clarity to a burgeoning industry dependent on interstate commerce. Suffice it to say, the Ninth Circuit is out of the hemp business.

Uninjured Class Members Miss Class Certification Train in Rail Freight Case

In re Rail Freight Fuel Surcharge Antitrust Litigation, No. 18-7010 (D.C. Cir. Aug. 30, 2019).

In a case that promises to be instructive for future food and beverage litigation, the D.C. Circuit refused to certify a putative class of individuals who were assessed a rail surcharge for transportation due to a small fraction of injured class members. The plaintiffs filed a complaint asserting that the defendants conspired to fix rate-based fuel surcharges for shipping goods. The plaintiffs' damages expert submitted a damages model to the court that found 12.7% of the class were impacted by negative overcharges only, and not surcharges. The district court reasoned that these uninjured class members' claims would need to be carved out from the liability determination, requiring individualized inquires to segregate claims of injured versus uninjured class members. The district court recognized that other courts have held that a class action may proceed if there is a de minimis number of uninjured class members; however, those cases were limited to instances where the number of uninjured class members was capped at 5% – 6%. This class, however, was "beyond the outer limits of what can be considered de minimis" and barred a finding of predominance.

On appeal, the circuit court affirmed the district court's decision, finding that the district court was within its discretion to deny certification, particularly when the plaintiffs presented no solution to resolve the predominance issue. Although this case pertained to antitrust claims, the D.C. Circuit's holding addresses the question of whether a court can certify a class when a small fraction of the class members are uninjured and is similarly applicable to consumer product class actions involving a significant number of uninjured class members.

Courts Continue to Enforce *Bristol-Myers Squibb* in Finding Absent Class Members Lack Personal Jurisdiction

Closing in on two-and-a-half years since the U.S. Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017), courts continue to apply *BMS* due process principles in the class action context to find that absent class members lack personal jurisdiction to pursue claims that arose from conduct occurring outside the forum district. The *BMS* Court determined that in order for a state court to exercise specific personal jurisdiction over an out-of-state defendant, the alleged conduct must "arise out of or relate to the defendant's contacts with the forum." *BMS* reversed a dangerous and decades-long trend in personal jurisdiction jurisprudence that incentivized forum-shopping, particularly in mass tort litigation. Though initially unclear, recent cases suggest that courts will apply *BMS* principles to class actions and enforce the specific personal jurisdiction standards articulated in *BMS*.

These recent cases should give potential defendants reassurance that they won't be hauled into court in states where they are not "at home" for personal jurisdiction purposes unless the conduct giving rise to the claims actually took place in that state. *BMS* principles will continue to require class claims to be filed only in courts of districts where the alleged conduct giving rise to the claims occurred.

Andrade-Heymsfield v. Danone U.S. Inc., No. 3:19-cv-00589 (S.D. Cal. Aug. 14, 2019).

Here, a group of consumers took issue with Danone's marketing tagline, "nutrition in every sip," on which the consumers allegedly relied in making purchases of Danone's coconut milk. The suit was filed in California but also included a New York class representative and putative class. Because Danone's principal place of business was in New York, not California, the court determined that Danone was not "at home" for personal jurisdiction purposes in California; the court dismissed the New York class claims, agreeing "with the line of cases that held [*BMS*] should apply where, as here, non-resident class representatives assert state-law claims against non-resident defendants on behalf of multistate classes."

In re Nissan North America Inc. Litigation, No. 4:18-cv-07292 (N.D. Cal. Sept. 23, 2019).

In another California district court case, a group of purchasers and lessees of Nissan or Infiniti vehicles lodged a putative class action alleging that the defendants concealed a defect in the class vehicles' braking system. Even though one of the defendants was headquartered in California, venue was not proper because the defendant's offices were not and he was therefore not "at home" in that judicial district according to the state's venue statute. Because the defendant's principal place of business and manufacturing plant were located in Tennessee, no general jurisdiction could exist either. Additionally, because the plaintiffs could not produce any evidence that their claims arose from conduct in the district, the court held that "Plaintiffs … fail[ed] to meet their burden of establishing that [the defendant's] presence in this district is a basis for personal jurisdiction."

Chavira v. OS Restaurant Services LLC, No. 1:18-cv-10029 (D. Mass. Sept. 30, 2019).

Finally, a class action filed under the federal Fair Labor Standards Act (FLSA) also dismissed out-of-state plaintiff claims based on a lack of personal jurisdiction under *BMS* standards. Because the FLSA only allows opt-in class claims and has no separate jurisdictional provisions, FLSA actions are governed by state-law standards. Accordingly, the court determined that because the nonresident-plaintiff class members did not collect any wages from the defendant in the forum state, personal jurisdiction did not exist. In applying *BMS* to the FLSA claims, the court adopted the "conclusion that the personal jurisdiction analysis applies to all opt-in plaintiffs in a collective action in the same way that the Supreme Court found that the personal jurisdiction analysis applies to each plaintiff in a mass tort action."

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