ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

AUGUST 2019

Edition Facts

6 Sections This Edition
Cases Per Section 1-5

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions to Certify Class	100%
Motions to Decertify Class	100%
Settlements	100%
Appellate Cases	100%

New Lawsuits Filed

Whisk[e]y Business: Scotch Advocates Take Aim at Virginia Distillery

The Scotch Whisky Association v. The Virginia Distillery Co., No. 1:19-cv-01264 (D. Del. July 8, 2019).

The Scott Whisky Association sued a Virginia distillery claiming the name of one of the distillery's brands, Virginia-Highland Whisky, "falsely indicates to the public that [the distiller's] product is Scotch Whisky when it is not, and/or that it is whisky that originates in Scotland, which it does not." The association took offense at both Virginia Distillery's use of "Highland"—one of five protected localities and regions of Scotch production—and its spelling of "Whisky,"—a term protected under American law. "Scotch whisky" is defined as a distinctive product of Scotland.

The association bills itself as a protector of the "status of Scotch Whisky as a geographically distinct and quality product throughout the world" and asserted in the new suit that Virginia Distillery's use of the protected words "evoke an improper association with Scotland" to increase sales. The suit calls for injunctive relief, including a cessation of sales of the offending brand as well as a product recall. The association alleges violations of the federal false advertising, unfair competition, and deceptive trade practice laws.

Muscle Supplement Doesn't Lead to Sick Gainz, According to New Suit

Maroney v. BPI Sports LLC, No. 7:19-cv-06107 (S.D.N.Y. June 29, 2019).

A disgruntled skipper of leg day recently lodged a suit against BPI Sports, makers of the "Best BCAA" dietary supplement. According to the new suit, the dietary supplement actually *decreases* muscle growth, despite claims by BPI that it builds "lean muscle" by way of increased protein synthesis.

Independent, peer-reviewed research reveals, the suit alleges, the supplement "decreases muscle protein synthesis and is wholly incapable of causing an increase in muscle mass." The reason is that the supplement only supplies a portion of the necessary "essential amino acids" that the body requires to build muscle. Without the full slate of these essential amino acids, the body cannot build muscle. In fact, the plaintiff alleges, taking BPI's BCAA supplement will cause the body to catabolize the other essential amino acids stored in the body's muscles, "perpetuating a catabolic state of muscle protein breakdown"—a less than ideal scenario for athletes looking to bulk up.

The plaintiff sought to represent nationwide and New York classes of gainz-seekers in his pursuit of compensatory and punitive damages. Regrettably, we will not be able to see how this action plays out. The plaintiff filed a stipulation of dismissal without prejudice on August 7.

New Socially Responsible Consumer Suit Pecks at Large Chicken Food Manufacturer

Food & Water Watch Inc. v. Tyson Foods Inc., No. 2019-CA-004547 (D.C. Sup. Ct. July 10, 2019).

Two nonprofit groups have sued Tyson Foods under the District of Columbia Consumer Protections Procedures Act (CPPA), alleging that Tyson deceptively advertised that its chicken products are produced in an environmentally responsible way. To the contrary, the suit alleges, Tyson raises and slaughters chicken in inhumane, disease-ridden, factory-farm conditions. The complaint alleges that these conditions include raising and slaughtering birds in facilities contaminated with antibiotic-resistant pathogens, using toxic chemicals, and overcrowding the birds. The plaintiffs seek a declaration that Tyson's conduct violates the CPPA and an injunction not only discontinuing Tyson's deceptive advertising but also requiring corrective advertising.

Ice Cream Consumers Spoil Over "Natural" Claims with New Putative Class Action

Charles v. Friendly's Manufacturing & Retail LLC, No. 1:19-cv-06571 (S.D.N.Y. July 15, 2019).

A consumer filed a putative class action against Friendly's alleging that the ice cream maker deceptively advertises its vanilla ice cream product as having "natural flavors" when it is actually composed of synthetic ingredients.

In this lawsuit, the plaintiff alleges that the use of the term "natural flavors"—versus vanilla flavoring or vanilla extract—is in fact misleading because it falsely implies that Friendly's products have more natural vanilla in them than in reality. In addition, the plaintiff alleges, Friendly's includes other products to falsely enhance its products' coloring to make them appear as having more vanilla. Friendly's products are being marketed alongside other vanilla ice cream products that list vanilla flavoring "exclusively from vanilla beans" so that consumers pay a price premium for Friendly's products, deceived that they are purchasing products with as much vanilla as other competing products. The plaintiff seeks to certify a subclass of 50 states where Friendly's more than 57 vanilla products are sold. In addition to damages, the plaintiff seeks injunctive relief requiring the defendant to correct the mislabeling.

Motions to Dismiss

Procedural Posture: Granted

Court Finds Nationwide Sauce Claims Have No Meat

Kubilius v. Barilla America Inc., No. 1:18-cv-06656 (N.D. Ill. July 2, 2019).

The federal district court dismissed the plaintiff's putative nationwide class of consumers who purchased Barilla's pasta sauces. According to the plaintiff, Barilla had marketed its sauce as having "no preservatives," even though it contains the well-known preservative citric acid. The plaintiff filed a putative class action seeking damages for this "nationwide deception" and seeking other relief under 50 states' "substantively similar consumer protection laws."

The district court disagreed with this rosy, nationwide assessment. First, the district court reasoned that navigating through the multitude of differences in 50 states' consumer fraud statutes would present an unmanageable "logistical and procedural nightmare." Second, it concluded that Illinois's consumer protection law could not apply to the plaintiff's purchases of Barilla's products in New York. The district court preserved the plaintiff's New York consumer and common-law fraud class claims.

L'Oreal Escapes Cosmetic Bottle Mislabeling Lawsuit

Critcher v. L'Oreal USA Inc., et al., No. 1:18-cv-05639 (S.D.N.Y. July 11, 2019).

L'Oreal obtained the dismissal of a putative class action lawsuit alleging that the cosmetics maker falsely labeled its cosmetic products because the plaintiffs were unable to access all the product in each container sold. In particular, the plaintiffs alleged that because the products were sold in sealed bottles that dispense viscous fluid from a pump, consumers were necessarily unable to access all the product in a given container.

Finding these allegations did not withstand scrutiny, the court determined that the plaintiffs had failed to show that the labeling on the products was false or misleading. In addition to finding the claims were preempted by the Federal, Food, Drug, and Cosmetic Act, the district court held that a reasonable consumer would understand that a container that dispenses such cosmetics from a pump will not allow the consumer to extract "every bit of product." The plaintiff has appealed this ruling.

Court Nibbles at Plaintiffs' Claims in Parmesan Cheese MDL

In re 100% Grated Parmesan Cheese Marketing & Sales Practices Litigation, No. 1:16-cv-05802 (N.D. Ill. July 16, 2019).

An Illinois district court dismissed some claims against Kraft Heinz Co. and a wheel of cheese manufacturers and retailers alleging that the defendants' labels saying "100% Parmesan cheese" deceive customers into purchasing their cheese products.

The complaints state that the defendants' labeling was deceiving because the cheese products contain more than the federally allowed 2% cellulose. The court initially dismissed the consolidated MDL in 2017, but the plaintiffs then amended the complaint to claim that the ingredients label claimed cellulose was included to prevent "caking."

The district court largely denied leave to amend the claim, stating, "Plaintiffs have from the beginning of this litigation known what information they saw and relied upon at the time they purchased Defendants' products. Permitting them to amend those allegations at this late stage … would prejudice Defendants and waste judicial resources." The district court dismissed the consumer protection and the bulk of the express warranty and implied warranty claims against Kraft, but allowed the unjust enrichment claim to proceed.

Procedural Posture: Denied

Can't Toss Lawsuit Alleging Coffee Pods Are Mislabeled "Recyclable" at Pleadings Stage

Smith v. Keurig Green Mountain Inc., No. 4:18-cv-06690 (N.D. Cal. June 28, 2019).

A federal district court determined that the plaintiff's complaint sufficiently alleged violations of California consumer protection and warranty claims because Keurig's "recyclable" single-serve plastic coffee pods were mislabeled because they are not in fact recyclable. Keurig argued that the suit should be dismissed because the plaintiff had failed to demonstrate how a reasonable consumer would be misled by the labeling, in light of the disclaimer language on the pods stating that the products are "[n]ot recyclable in all communities." Keurig further argued that the plaintiff lacked standing because she had not alleged how she was harmed.

In rejecting these arguments, the district court reasoned that the allegations were sufficient to show a consumer could be deceived by the labeling insofar that pods labeled "recyclable" could not necessarily be recycled in all locations. In addition, the district court found that the plaintiff's allegations of having suffered economic injury were sufficient to establish standing requirements at the pleadings stage.

Heavy Metal Claims Weigh Down Pet Food Company's Motion to Dismiss

Zarinebaf v. Champion Petfoods USA Inc., No. 1:18-cv-06951 (N.D. Ill. July 30, 2019).

Champion Petfoods won a partial victory after an Illinois district court dismissed false advertising claims from a proposed class action suit that claimed the pet food company's products contain toxins and heavy metals. But the district court allowed the plaintiffs to pursue their fraud claims, based in part on the alleged presence of certain heavy metals in the food.

The district court determined that the plaintiffs could continue to pursue their common-law fraud and Illinois Consumer Fraud and Deceptive Business Practices Act claims. Champion argued that the plaintiffs' fraud claims should be dismissed because the plaintiffs failed to plead with particularity the levels at which BPA and heavy metals would be unsafe for dogs. But the district court ruled that the plaintiffs need not allege specific levels because "Plaintiffs have stated a plausible claim that they relied on Defendants' statements marketing their dog food as natural and high quality, but would not have purchased the dog food if they had known it contained heavy metals." According to the district court, the plaintiffs' theory did not require pleading that the "dog food contained enough heavy metals to be unsafe or dangerous."

This order follows a Central District of California order that similarly found Champion's motion to dismiss had little bite.

Motions to Certify Class

Procedural Posture: Denied in Part

Court's Certification Order Leaves Plaintiffs Feeling a Little Bland

In re McCormick & Co. Inc. Pepper Products Marketing & Sales Practices Litigation, No. 1:15-mc-01825 (D.D.C. July 10, 2019).

As the slack-fill pendulum swings, here it swung back to the defense bar's favor. The plaintiffs filed a putative class action claiming that they purchased black pepper in tins and grinders that allegedly contained nonfunctional slack-fill. The plaintiffs claimed that the sale of these products violated various state consumer protection statutes and unjust enrichment laws. The plaintiffs sought to certify a multistate class on their consumer protection claims covering 20 different jurisdictions, or, alternatively, four single-state classes covering California, Florida, Illinois, and Missouri. On their unjust enrichment claims, the plaintiffs sought to certify two multistate classes, covering 29 jurisdictions, or, alternatively, seven single-state classes.

However, the district court declined to certify the putative multistate classes, finding that the plaintiffs failed to show that common issues predominated due to material variations among the consumer protection statutes of the different jurisdictions. But the court found that certification under the consumer protection laws of California, Florida, and Missouri was appropriate because all the plaintiffs showed that common questions predominated as to the existence of slack-fill and the other elements of those statutes, such as causation and damages. The court did not certify any of the single-state unjust enrichment classes, however, finding that each state's unjust enrichment law would require an individualized inquiry into each purchaser's knowledge of the slack-fill and motivations for purchasing the product.

Motions to Decertify Class

Procedural Posture: Denied

Drink Maker's Attempt to Decertify Class Washes Out in False Advertising Suit

Hilsley v. Ocean Spray Cranberries Inc., No. 3:17-cv-02335 (S.D. Cal. July 10, 2019).

The plaintiff filed a putative class action for violations of California consumer protection laws claiming that the "no artificial flavors" labels on various Ocean Spray drinks were false and misleading because the drinks did in fact contain artificial flavors. In November 2018, the district court certified a class for the plaintiff's California Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act causes of action. Ocean Spray then moved to decertify the class because the plaintiff's pricing analysis and consumer survey were inadequate. Ocean Spray argued that the plaintiff failed to use actual retail sales data to determine a real-world price premium in her damages model and that her expert employed a flawed methodology in conducting his consumer survey.

The district court found Ocean Spray's challenges to the plaintiffs' damages model and survey methodology unavailing, finding that the plaintiff's damages model comported with *Comcast v. Behrend* and that any challenges to the survey methodology went to the weight, not the admissibility, of the survey. The court denied Ocean Spray's motion, declining to decertify the class.

Settlements

One Chapter in Allergy-Aiding Baby Formula False Advertising Saga Closes

Federal Trade Commission v. Gerber Products Co., No. 2:14-cv-06771 (D.N.J. July 15, 2019).

In the May edition of the *Food & Beverage Digest*, we reported on a consumer class action challenging Gerber's touting supposed allergy benefits with its Good Start Gentle line of baby formula. Now, in a related lawsuit, the district court approved Gerber's settlement with the FTC regarding the same advertising. The settlement concludes a five-year-long lawsuit.

Though Gerber still denies the FTC's allegations, under the settlement it agreed to no longer claim that its Good Start Gentle baby formula can prevent allergies or is effective at treating any disease. Gerber committed to make such claims only if they are supported by "competent and reliable scientific" evidence. In addition, Gerber agreed to keep records of any tests or studies it would rely on in making any health-related claim about the formula. Finally, Gerber agreed to remove a mark on its formula products suggesting that its allergy and health-benefit claims were approved by the FDA.

Plaintiff Finally Relieved After She Settles Stress Relief Lotion Suit

Sullivan v. Johnson & Johnson Consumer Cos., No. 1:19-cv-02803 (E.D.N.Y. July 31, 2019).

In an update to the June edition of our *Food & Beverage Digest*, the plaintiff can rest easy now that she has settled her suit against J&J's Aveeno Stress Relief moisturizing lotions and body washes. The plaintiff had alleged that J&J took advantage of a booming essential oils market by claiming its products contained purportedly stress-reducing aromatherapy ingredients and essential oils. Instead, the plaintiff alleged, these products only contain useless synthetics, and reliable studies show that consumers are buying nothing more than a placebo effect.

At a hearing on July 15, the parties informed the district court that they had reached a settlement, and the parties later filed a stipulation of dismissal with prejudice. The terms of the settlement are not available.

Appellate Cases

Ninth Circuit Relaxes Settlement Class Certification Inquiry

In re Hyundai & Kia Fuel Economy Litigation, No. 15-56014 (9th Cir. June 6, 2019).

In an 8–3 decision, the Ninth Circuit affirmed the approval of a projected $210 million class action settlement. The decision reversed an earlier decision by a three-judge panel that struck down the nationwide settlement because the district court failed to rigorously analyze potential variations among state laws before certifying the class for settlement.

The decision comes from multidistrict litigation where the plaintiffs asserted state-law claims based on the alleged falsely advertised fuel efficiency of the defendants' automobiles. A nationwide settlement was eventually reached, providing an estimated $210 million to class members. Following preliminary approval of the settlement, however, numerous class members objected to its final approval. Among other arguments, the objectors asserted that material differences in the state laws defeated the predominance requirement under Rule 23 and, therefore, foreclosed certification. Yet the district court still certified the nationwide class for settlement purposes and entered final approval. The objectors appealed that decision to the Ninth Circuit.

On appeal, a three-judge panel of the Ninth Circuit reversed the district court's order granting certification and settlement approval. In doing so, the three-judge panel reasoned that the court had failed to conduct the requisite analysis of potential differences among state consumer protection laws to determine whether common questions predominated. The three-judge panel also rejected the notion that certification standards are relaxed in the settlement context.

In July 2018, however, a majority of the Ninth Circuit vacated the three-judge panel decision and decided to rehear the case en banc. The en banc panel affirmed the district court's order granting certification and approving the nationwide settlement class. Departing from the three-judge panel's rationale, the Ninth Circuit recognized that the certification requirements are, in fact, "applied differently in litigation classes and settlement classes." When assessing predominance for "a settlement-only class, 'a district court need not inquire whether the case, if tried, would present intractable management problems.'" The court further distinguished its previous landmark decision in *Mazza v. American Honda Motor Company* as certified for *litigation* purposes and because the defendant there had detailed, with great specificity, the ways in which California law differs from the laws of the other jurisdictions at issue (which made a difference in the litigation).

The Ninth Circuit's ruling is a critical development for those seeking settlement of nationwide class actions in this jurisdiction.

FOOD & BEVERAGE DIGEST

Contributing Authors

Sean Crain
214.922.3435
sean.crain@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Marcus Sandifer:
212.210.9551
marcus.sandifer@alston.com

Rachel Naor
415.243.1013
rachel.naor@alston.com

Angela Spivey
404.881.7857
angela.spivey@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD

ATLANTA | BEIJING | BRUSSELS | CHARLOTTE | DALLAS | LOS ANGELES | NEW YORK | RALEIGH | SAN FRANCISCO | SILICON VALLEY | WASHINGTON, D.C.