ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

4 Sections This Edition
Cases Per Section 1-3

Reading Calories 0

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

New Lawsuits Filed

Canned Exec Sues Beverage Maker over False BPA-free Claims

Dejewski v. National Beverage Corp., No. 2:19-cv-14532 (D.N.J. removed July 1, 2019).

A former LaCroix sales and marketing executive sued the beverage maker's parent company and president for wrongful termination. The suit alleges that National Beverage Corporation and its president, Joseph Caporella, fired Albert Dejewski in retaliation for voicing objections to Caporella's plans to make false statements that LaCroix's cans were free of an allegedly toxic chemical known as BPA.

Dejewski alleged that he was fired just a day after raising concerns about the "ethics and legality" of LaCroix's communication plan for the BPA-free cans. Dejewski claims that by firing a whistleblower, National Beverage Corp. violated New Jersey's Conscientious Employee Protection Act. The suit also alleges that Caporella planned to announce that LaCroix was selling BPA-free cans several months before that was actually the case and that other executives within the company were aware of and disapproved of the plan. Dejewski seeks an award of compensatory damages for lost wages and pain and suffering, punitive damages, and attorneys' fees.

Consumers Call Out Keurig for Knowingly Selling Arsenic-Laced Bottled Water

Pels v. Keurig Dr. Pepper Inc., No. 3:19-cv-03052 (N.D. Cal. June 3, 2019).

A new class action complaint alleges that Keurig Dr. Pepper Inc. misled the public by not disclosing that its Peñafiel brand of bottled water contained unsafe levels of arsenic—the poisonous element that can lead to kidney disease and diabetes, as well as lung, bladder, and skin cancer. Consumers claim that Keurig was aware of the contaminants as early as 2012 and received FDA warnings in 2015 and 2018 that Peñafiel water can contain unsafe levels of arsenic.

The putative class action complaint filed in the Northern District of California alleges that Keurig has "concealed that thousands of its customers have ingested bottled water which contains unsafe levels of arsenic, a known poison," and that Keurig knew of and "disregarded the danger" after receiving multiple warnings from the FDA. The plaintiffs also allege that Keurig only undertook remedial measures to address the high toxicity in its bottled water after an exposé in *Consumer Reports*. The complaint asserts claims under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act and seeks restitution and injunctive relief.

Lawsuit Claims There Is Nothing Natural About Shikai Shampoos, Lotions, and Soaps

Turner v. Trans-India Products Inc., No. 2:19-cv-03422 (E.D.N.Y. June 10, 2019).

Trans-India Products Inc. faces a putative class action lawsuit that alleges that the company's Shikai natural shampoos, lotions, and soaps are misleadingly advertised because they contain synthetic ingredients.

The plaintiff claims that consumers have been deceived by the company's "natural" advertising because the products contain glycerin, dimethicone, phenoxyethanol, sodium benzoate, panthenol, and ethylhexylglycerin, among other synthetic ingredients. According to the plaintiff, reasonable consumers do not understand that such ingredients are synthetic since the products are advertised and labeled as "natural" and would not have paid as much had they known the products were not composed solely of natural ingredients. Based on these allegations, the lawsuit seeks certification of a nationwide class and New York subclass on claims for violations of various consumer protection statutes, breach of warranty, and unjust enrichment.

Motions to Dismiss

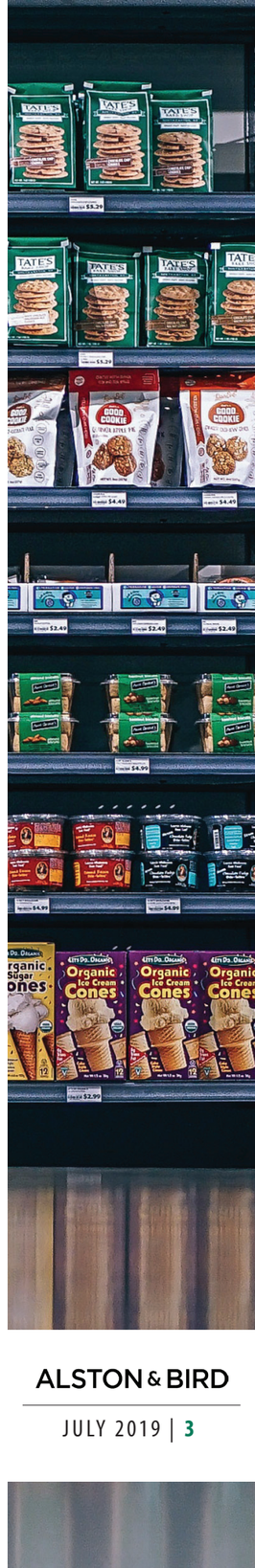
Procedural Posture: Granted

It's No Cereal Killer: Glyphosate Danger "Purely Speculative"

Doss v. General Mills Inc., No. 0:18-cv-61924 (S.D. Fla. June 14, 2019).

In yet another glyphosate-related cereal ruling, a Florida federal court dismissed a nationwide class action against General Mills based on its Cheerios and Honey Nut Cheerios products. The plaintiff had alleged that Cheerios had trace levels of glyphosate (ranging from 470 to 1,125 parts per *billion*). Moving to dismiss the complaint, General Mills pointed out that Cheerios fell far below the EPA-set tolerance levels for oats, which permits residual glyphosate levels of up to 30 parts per *million*.

But the district court sidestepped this preemption argument, ruling instead that the plaintiff lacked standing because she failed to allege an injury-in-fact. Though the plaintiff claimed she suffered economic injury because she did not receive the benefit of her bargain, she did not specifically claim she had bought or consumed Cheerios with glyphosate. Even if she had, the court wondered, "At what level, exactly, does glyphosate, in oats, cause harm?" The court concluded that the plaintiff's mere conjecture that glyphosate in trace amounts *may* be harmful and her reference to the World Health Organization's classification of glyphosate as a *probable* carcinogen were not sufficient. Similarly, the plaintiff failed to explain the significance of a "health benchmark" for glyphosate issued by the nonprofit Environmental Working Group or link that benchmark to her alleged economic injury. The court also noted that the plaintiff failed to allege any facts demonstrating that General Mills had a duty to disclose that Cheerios may contain trace amounts of glyphosate.



Preemption Argument Prevails as Glucosamine Suit Grinds to a Halt

Kroessler v. CVS Health Corp., No. 3:19-cv-00277 (S.D. Cal. May 16, 2019).

In the latest of a series of actions claiming that glucosamine supplements do not provide the advertised benefits to joint health, a California federal district court dismissed a putative class action asserting that CVS Health's glucosamine supplements were falsely labeled. The plaintiff had alleged that the supplements' labels stating that glucosamine supported "joint health" and "flexibility and range of motion," and that "glucosamine and chondroitin work to support joint comfort while helping to promote joint mobility," were false and misleading.

The district court dismissed the lawsuit, ruling that the plaintiff's "structure/function" claims were preempted by the Federal Food, Drug, and Cosmetic Act. Though the plaintiff claimed to have clinical studies demonstrating that glucosamine was ineffective at supporting joint health, the district court ruled that federal law requires only that a structure/function claim have "substantiation that the statement is truthful and not misleading" or have "competent and reliable scientific evidence" supporting it. The district court also took notice of the FDA's guidance on acceptable structure/function claims and rejected the plaintiff's argument that the claims either expressly or impliedly represented that the products would treat osteoarthritis symptoms. Nor could the plaintiffs pursue a claim based on inadequate substantiation because California law does not provide a private right of action for lack of substantiation claims. The plaintiff has now appealed the dismissal to the Ninth Circuit.

Busy Bees Not Enough to Prove Adulteration Claims in False-Ad Suit

Moore v. Trader Joe's Co., No. 4:18-cv-04418 (N.D. Cal. June 24, 2019).

Trader Joe's obtained dismissal of a false-ad suit alleging that the company misled consumers about the purity of its manuka honey. The district court dismissed all claims *without* leave to amend, ruling that the plaintiffs had made no argument that the manufacturer purposefully mixed manuka honey with non-manuka honey.

The suit claimed that the honey was mislabeled because the product did not contain 100% manuka honey and alleged that it contained honey of different floral sources. The suit did not allege that any human added additional ingredients to the honey, but instead argued that it could not be labeled as 100% manuka honey because the bees collected pollen from various floral sources. Because honey is a single-ingredient food and FDA guidance allows a producer to label its product with the chief floral source for the honey, when known, the court found the labeling to be accurate and held that a reasonable consumer "could not find it misleading." The court likewise tossed the plaintiffs' fraud claim that was predicated on a valid adulteration theory—a theory that would require that "humans (not bees) purposefully mix non-manuka honey with manuka honey." Because the plaintiffs could not allege that humans engaged in any adulteration of the product, there was no actionable claim for fraud.

The court also dismissed the plaintiffs' state-law causes of action as preempted under the Federal Food, Drug, and Cosmetic Act.

Motions to Certify Class

Procedural Posture: Granted

Joint Pain Supplement Lawsuit Ambles On with Partial Class Certification

Yamagata v. Reckitt Benckiser LLC., No. 3:17-cv-03529 (N.D. Cal. June 5, 2019).

As lightly reasoned certification orders grow increasingly in vogue, another California federal judge needed only three pages of analysis to certify class claims against Reckitt Benckiser's joint-pain supplements. According to the plaintiffs, the maker's "Move Free Advanced" glucosamine and chondroitin-based supplements were falsely advertised because overwhelming evidence showed that they did not treat joint pain and stiffness.

The district court certified New York and California state classes, concluding that liability is susceptible to classwide proof because materiality is measured with objective criteria. It rejected the defendant's arguments that individualized issues predominated, purportedly because the defendant failed to explain how the individual issues—like individual consumers' reasons for purchasing the products, their subjective interpretation of the challenged ads, and their satisfaction with their purchase—were relevant to the plaintiff's theory of liability or the objective materiality question. The district court similarly dispatched the defendant's challenge to the proffered "full refund" damages model, noting that although the plaintiffs may fail on the full-refund theory at summary judgment, they "may be able to present an alternative, more modest" model applicable to the class.

Court's Amendment to Slack-Fill Certification Order Is—Again—a Little Empty

Escobar v. Just Born Inc., No. 2:17-cv-01826 (C.D. Cal. June 19, 2019).

As an update to an article in our April *Digest*, in June the district court certified class claims against the manufacturer of Mike & Ikes and Hot Tamales alleging that boxes of the candies contain nonfunctional slack-fill. Notably, the court certified the class in a scant, four-page order.

Just Born recently moved the district court to reconsider this class certification order, arguing that the court erred by: (1) failing to consider survey data presented with Just Born's opposition to the plaintiff's motion for class certification; and (2) finding that the

plaintiff had standing and was an adequate class representative for a class of Hot Tamales consumers even though the plaintiff did not purchase Hot Tamales. The court rejected Just Born's first argument, finding that the "court's brevity or lack of explicit analysis" of Just Born's arguments and evidence in opposition to class certification "does not equate to insufficient, or lack of, consideration." But the court did agree that the plaintiff could not represent a class of purchasers of Hot Tamales since she never purchased that product. The court chalked up its inclusion of Hot Tamales in the class to "a scrivener's error" and issued an amended certification order that excluded Hot Tamales.

Procedural Posture: Denied

Court Takes Juice Out of Putative Class Action Mislabeling Lawsuit

In re Tropicana Orange Juice Marketing & Sales Practices Litigation, No. 2:11-cv-07382 (D.N.J. June 19, 2019).

A New Jersey federal court declined to certify class claims challenging various labeling on Tropicana's orange juice packaging—including "100% pure and natural orange juice," "100% pure," "100% natural," "100% juice," "pasteurized," and "fresh"—reasoning that the company's label variations require individualized inquiries inappropriate for classwide resolution. The plaintiff had alleged that Tropicana products were mislabeled because the company removes solids and oils from the extracted juice, treats the mixture, and then adds other oils, colors, or flavoring in violation of FDA standards and consumer protection laws. In addition, finding individual issues predominated, the court also determined that the proposed class failed to meet the ascertainability requirement under Rule 23 or demonstrate that the labels were material to consumer purchasing decisions. The court further determined that the plaintiff's damages model did not match her theory of liability as to any of the challenged labels. The renewed motion was the plaintiff's third attempt to move for class certification.

Appellate Cases

Toothpaste Maker All Smiles After Ninth Circuit Affirms Denial of Class Certification

Deal v. Colgate-Palmolive Co., No. 18-55982 (9th Cir. June 24, 2019).

The plaintiffs lost their bid to salvage countrywide class claims applying California law against Colgate's Optic White toothpaste. The plaintiffs had alleged that the toothpaste was ineffective, taking hours to change tooth color instead of minutes as advertised. The plaintiffs originally sought to apply California law to a nationwide class.

Though the district court below observed that many factors favored certification, the plaintiffs failed to show that California had sufficient involvement in each class member's claims to justify applying California law classwide under *Mazza v. American Honda Motor Co.* Specifically, that some class members are located in California and that Colgate conducted studies in the state were not sufficient to meet the threshold for class certification.

On appeal, the Ninth Circuit held that the district court did not abuse its discretion in making this finding. Nor did the district court err in refusing to amend a scheduling order to allow the plaintiffs leave to file a renewed class certification motion.

Supreme Court Raises a Glass to Out-of-State Alcohol Retailers

Tennessee Wine and Spirits Retailers Association v. Thomas, No. 18-96 (S. Ct. June 26, 2019).

Tennessee requires applicants for an initial retail liquor store operator's license to have resided in the state for the prior two years and requires an applicant seeking renewal of a license to reside in the state for 10 consecutive years. Tennessee also prohibits a corporation from obtaining a license unless all its stockholders are residents.

Two businesses that did not meet these residency requirements applied for licenses to own and operate liquor stores in Tennessee. The Tennessee Alcoholic Beverage Commission (TABC) recommended approval of the applications, but the Tennessee Wine and Spirits Retailers Association, a trade association of in-state liquor stores, threatened to sue the TABC if it did not enforce the residency requirements. The TABC filed a declaratory judgment action to settle the question of the residency requirements' constitutionality. The U.S. Supreme Court held that Tennessee's two-year durational-residency requirement for retail liquor store license applications violates the Commerce Clause of the Constitution because the durational residency requirement favored Tennesseans over nonresidents.

Turning to the issue of whether the requirement could be saved by the Twenty-First Amendment—which repealed Prohibition and gave each state some leeway in imposing alcohol-related public health and safety measures—a majority of the court found that the Twenty-First Amendment did not save the residency law because it had "little relationship to public health and safety." The Court concluded that the residency law was unconstitutional as a violation of the Commerce Clause and could not be enforced.

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