ALSTON & BIRD

FOOD & BEVERAGE DIGEST

MAY 2022

Edition Facts

6 Sections This Edition
Cases Per Section 1-7

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Summary Judgment	100%
Injunctive Relief	100%
Appeals	100%
Settlements	100%

New Lawsuits Filed

Fruit-Flavored Vitamin Gummies Under Fire

Harmon v. Pharmavite LLC, No. 3:22-cv-50091 (N.D. Ill. Mar. 26, 2022).

A health-conscious consumer filed a putative class action in Illinois federal court that alleges her daily gummy multivitamin isn't delivering what she expected. No, it's not missing any crucial vitamins or minerals that it promises to deliver; instead, the complaint claims that the gummy vitamin's labeling is false and misleading because it features statements such as "Orange, Cherry & Mixed Berry With Other Natural Flavors" and "No Artificial Flavors – Natural Fruit Flavors" alongside images of orange, raspberry, cherry, and strawberry fruit, when in reality the product contains artificial flavoring ingredients—namely, malic acid.

The plaintiff claims that the product's labeling representations caused consumers to expect the gummies to only be made with natural fruit flavors and that by listing "malic acid" rather than "dl-malic acid," the defendant deceives consumers and violates labeling regulations for failing to use the specific name of the artificial ingredient. The plaintiff seeks to certify Illinois and consumer-fraud multistate classes and asserts claims under state consumer protection statutes, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

"Cold Pressed" Juice Labels Feeling the Squeeze

Cristia v. Trader Joe's Co., No. 1:22-cv-01788 (N.D. Ill. Apr. 7, 2022).

A popular grocery chain faces a putative class action alleging that its labeling of certain "Cold Pressed" juice products is false and deceptive because the products are not freshly made *or* cold pressed. Despite a disclaimer explaining that the product was subject to high-pressure processing after it was extracted from fresh vegetables and fruits, the plaintiff argues that consumers would expect the claim "cold pressed juice" to refer to juice that was extracted from fruits and vegetables and not processed or subjected to any preservation. The plaintiff seeks to certify Illinois and multistate classes of purchasers and asserts violations of state consumer protection laws, the Magnuson–Moss Warranty Act, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment.

Milk Fat or Bust

Biczo v. Ferrara Candy Co., No. 1:22-cv-01967 (N.D. Ill. Apr. 16, 2022).

A caramel-craving consumer filed a putative class action against a candy manufacturer in Illinois federal court alleging that the defendant's labels are false and misleading because they claim the caramel candies are "Made with Real Milk" and "Rich and Creamy." Interestingly, the complaint does *not* contend that the product is devoid of milk completely. Instead, the plaintiff takes issue that the fat content of the candy is entirely from vegetable fat in the form of "Hydrogenated Palm Kernel Oil" and claims that consumers will expect the references to "real milk" to refer to whole milk "because fat ingredients are central to caramel." According to the complaint, it is false, deceptive, and misleading for the defendant to substitute "the most valuable component of milk, milk fat, with lower cost vegetable oils." Based on these assertions, the plaintiff seeks to certify Illinois and multistate classes for claims for violation of Illinois and state consumer protection statutes, violation of the Magnuson–Moss Warranty Act, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment.

Trail Mix: Heart Healthy or Hardly?

Butts v. Cibo Vita Inc., No. 2:22-cv-00644 (E.D. Cal. Apr. 11, 2022).

Hoping to get outdoors, maybe take the dog on a hike, and finally get into shape this summer? According to one California plaintiff, you'll need to leave your trail mix at home if you're looking for a heart-healthy boost along the way.

In a putative class action filed in the Eastern District of California, the named plaintiff contends that she purchased various iterations of Nature's Garden trail mix because they were advertised as a "heart healthy" snack. But according to the complaint, the products contain between 80 and 200 grams of added sugar per package, even though medical guidelines advise that adults consume no more 38 grams of added sugar per day. While the plaintiff acknowledges that the products' suggested serving size is ¼ cup, or "roughly one handful of trail mix," the plaintiff claims that the defendant "is well aware that consumers typically eat more than the suggested serving size." Therefore, the complaint claims that the marketing of the trail mix as "heart healthy" is deceptive and misleading to consumers. The plaintiff seeks to certify California and nationwide classes of consumers and asserts claims for violations of California's consumer protection statutes, breach of express and implied warranty, and unjust enrichment.

Is It Time to Say "Pass" on Puree?

Thomas v. Nurture Inc., No. 3:22-cv-02501 (N.D. Cal. Apr. 22, 2022).

Baby food lawsuits are proliferating across the class action landscape these days, but one Californian consumer contends that a different "additive" is unlawfully permeating pureed baby food. According to the complaint, the defendant markets its baby and toddler snacks as nutritious, healthy, wholesome, and designed to support a healthy brain and immune system, when in reality, the mechanism for processing these snacks into juice or puree destroys the insoluble fiber of the fruits and draws out the "free" sugars present in the fruit—sugars that are associated with causing diabetes and cavities. Therefore, the plaintiff alleges, healthy foods—like, say, an apple—are transformed into unhealthy foods—more akin to fruit juices, like apple juice—when they are processed for consumption by babies and toddlers. According to "compelling evidence" cited in the complaint, pureeing foods frees the "intrinsic sugar" of fruits and vegetables and exposes the young consumer to high concentrations of free sugars that may quickly be absorbed as opposed to eating whole fruits and vegetables that package those sugars within the cell walls of insoluble fiber to help protect the gut during digestion and reduce the impact of the food's sugar content.

The plaintiff seeks to represent a class of California consumers who purchased the snacks after having been allegedly misled about their health benefits. She brings claims under California's consumer protection statutes and state and federal food, drug, and cosmetic acts and seeks both equitable relief and damages on behalf of the class.

Consumer Claims "Sustainably Sourced" Tilapia Labeling Is Fishy

Spindel v. Gorton's Inc., No. 1:22-cv-10599 (D. Mass. Apr. 21, 2022).

A pair of pesky pescatarians filed a putative class action in the District of Massachusetts for equitable relief and damages against the manufacturer of frozen tilapia filets for its allegedly false and deceptive marketing and sale of tilapia products labeled with the phrase "sustainably sourced." According to the complaint, consumers were duped—hook, line, and sinker—because those products are not in fact sustainably sourced but are instead made from tilapia that is industrially farmed using unsustainable practices that are environmentally destructive and inhumane.

Attempting to haul in major damages, the plaintiffs claim that the labeling was intended to, and did, deceive consumers about the nature and sourcing of the products, which allowed the defendant to sell a greater volume of product, charge higher prices, and take away market share from competing products. According to the complaint, the plaintiffs and other consumers purchased the products when they otherwise would not have, and/or purchased more of the products than they otherwise would have had they known the truth about the product's production and sourcing.

The complaint casts a wide net, claiming that the allegedly false and deceptive representations violate the consumer protection statutes of New York, California, and other states within the proposed multistate subclass, as well as the common laws of all states where the products are sold. Hoping to help other consumers from allegedly being floundered, in addition to seeking damages, the plaintiffs want an order enjoining the allegedly deceptive marketing activity.

Big Beef with Burger Wrapping

Hussain v. Burger King Corp., No. 4:22-cv-02258 (N.D. Cal. Apr. 11, 2022).
McDowell v. McDonald's Corp., No. 1:22-cv-01688 (N.D. Ill. Mar. 31, 2022).

PFAS (per- and polyfluoroalkyl substances, which are a group of synthetic chemicals known to be harmful to the environment and humans) litigation is heating up nationwide. In the latest round, the packaging of two of America's most popular fast-food burgers is on the grill. In Illinois and California federal courts, the plaintiffs have cooked up claims that the two fast-food chains misrepresent their burgers as being "safe" and "sustainable," despite the alleged presence of PFAS in the burgers' packaging.

Both complaints are piled high with accoutrements and allege that the defendants would have known that they could manufacture product wrapping without raised levels of unsafe PFAS because the defendants' competitors have successfully done so. According to the complaints, both defendants use PFAS in their packaging as a "cost saving" measure, concealing the truth about their products' packaging with misrepresentative claims about the "sustainability" and "safety" of their products on their websites and on the burgers' packaging itself.

The suits bring claims under California state consumer protection statutes, as well as claims for fraud, negligent misrepresentation, unjust enrichment, breach of express warranty, and negligent failure to warn. PFAS suits aren't going away anytime soon. We'll keep you updated on the latest claims and trends.

Motions to Dismiss

Procedural Posture: Granted

Baby Food Lawsuit Can't Find Legs, Dismissed for Lack of Standing

Kimca v. Sprouts Foods Inc., No. 2:21-cv-12977 (D.N.J. Apr. 25, 2022).

A New Jersey federal judge granted a baby food manufacturer's motion to dismiss a challenge to its marketing and advertising of certain baby food products that allegedly contained dangerous levels of heavy metals. The lawsuit stemmed from allegations that the company failed to disclose the presence of heavy metals in its products and instead touted the products as clean, healthy, and organic.

In its order granting the defendant's motion to dismiss, the court found that the plaintiffs lacked standing, in part, because they failed to allege that the products contained heavy metals in amounts sufficient to establish injury. The plaintiffs' theory of injury was that their children had an increased risk of adverse health consequences as a result of consuming the defendant's baby food products that allegedly contained heavy metals.

But the court explained that to satisfy standing based on an increased risk of future harm, the future harm must be "certainly impending." As further justification for its conclusion, the court rejected various standards for acceptable amounts of heavy metals in drinking water that were cited by the plaintiffs because they failed to explain how those standards applied to baby food. The court also concluded that the plaintiffs failed to allege that they suffered an economic injury because they did not adequately prove that the defendant's alleged misrepresentations and omissions caused them to pay an unfair premium price for the baby food products or that the products were worth less than what the plaintiffs paid for them.

No More Screaming About Ice Cream

Cerretti v. Whole Foods Market Group, No. 1:21-cv-05516 (N.D. Ill. Apr. 8, 2022).

Creamy and slightly melted, anchored by a popsicle stick, encased in a crisp chocolate shell, and … made of palm oil? Last October, an Illinois consumer challenged the sale of certain ice cream bars sold at a large grocer under its private-label brand, claiming that she was misled about the amount of chocolate in the grocer's Organic Chocolate Ice Cream Bars because the label described the bars as smooth and decadent "Organic Vanilla Ice Cream Dipped in Organic Chocolate." According to the plaintiff, the label led consumers to expect the outside of the ice cream bars to be made only of chocolate. Alas, the plaintiff alleged, they contained some cacao ingredients but are also chock-full of chocolate substitutes like palm oil.

An Illinois judge recently rejected those claims and dismissed the suit. The court found that the ice cream bar's label, which described the bars as "smooth and decadent" and as containing "chocolate" was not likely to deceive reasonable consumers because it did not advertise that it was 100% chocolate. Because the bars contained some cacao ingredients and because consumers would not expect the bars to contain only cacao ingredients (absent some affirmative representation to the contrary), the fact that other ingredients were present as well did not give rise to a misrepresentation claim.

The court also dismissed the plaintiff's breach of express and implied warranty claims, finding that the filing of her suit did not satisfy Illinois's notice requirement for such claims. The plaintiff, who sought to represent a class of consumers and brought claims for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, breach of express and implied warranties, negligent misrepresentation, fraud, and unjust enrichment, was permitted to replead her claims within two weeks. But the misrepresentation claim was dismissed with prejudice—the court found any amendment would be futile.

Court Cooks Half-Baked Consumer Fraud Case Over Premier White Morsels—Again

Prescott v. Nestlé USA Inc., No. 5:19-cv-07471 (N.D. Cal. Apr. 8, 2022).

For the second time, a pair of California consumers' putative class action challenging the labeling of Toll House Premier White Morsels was cooked by a judge in the Northern District of California. The second amended complaint accused the morsel's manufacturer of attempting to pass off the product as "fake" white chocolate chips—but the court didn't bite on that theory, finding that a reasonable consumer would not have been misled. Judge Freeman reiterated that she had previously found that "premier" and "white" do not denote "chocolate"—"premier" is non-actionable puffery and "white" is a color. And all the new allegations failed to sway the court. For instance, to address the court's prior observation that a third-party retailer's placement of a product cannot support a claim against a manufacturer, the plaintiffs added an allegation that upon information and belief, the defendant maintains control over the placement of the products within retail stores (and places them in the baking aisle with chocolate chips). Even looking past the plaintiffs' failure to provide a factual basis for that belief, Judge Freeman easily tossed that half-baked concept, noting that baking aisles contain a wide variety of non-chocolate baking chips.

Procedural Posture: Denied In Part

Consumer Enriched by Whole Grain Claims Beats Out Dismissal Bid

Wargo v. The Hillshire Brands Co., No. 7:20-cv-08672 (S.D.N.Y. Apr. 22, 2022).

A New York consumer (probably) now can delight in his breakfast sandwich and coffee a little bit more in the mornings, knowing that a federal district court has allowed his lawsuit challenging Jimmy Dean "Delights English Muffin" to continue. The plaintiff claimed that the breakfast sandwiches are misleading because they claim that they are "made with whole grain*," when, in reality, the muffins' predominant ingredient is enriched wheat flour.

Following a line of "made with whole grain" cases originating with the Second Circuit's decision in *Mantikas v. Kellogg Company*, the district court concluded that the plaintiff stated a viable claim for violation of New York's consumer protection laws. According to the district court, based on the "made with whole grain*" claim, a reasonable consumer could expect that the muffins are made predominantly with whole grain. In addition, the district court found that neither the asterisk on the label nor the ingredients list helped the defendant at the pleadings stage. Fine print in an ingredients list or a disclosure on the side packaging, observed the district court, cannot cure a potentially misleading front label claim on a motion to dismiss.

However, it isn't likely that the plaintiff will be enjoying this result over a Jimmy Dean "Delight English Muffin." In dismissing the plaintiff's claim for injunctive relief, the district court observed that he would not have purchased the breakfast sandwiches "had he known the truth" and, therefore, could not show he had standing. The district court cleaned up the rest of the complaint with little fanfare, dismissing the plaintiff's claims for negligent misrepresentation, breach of warranty, fraud, and unjust enrichment.

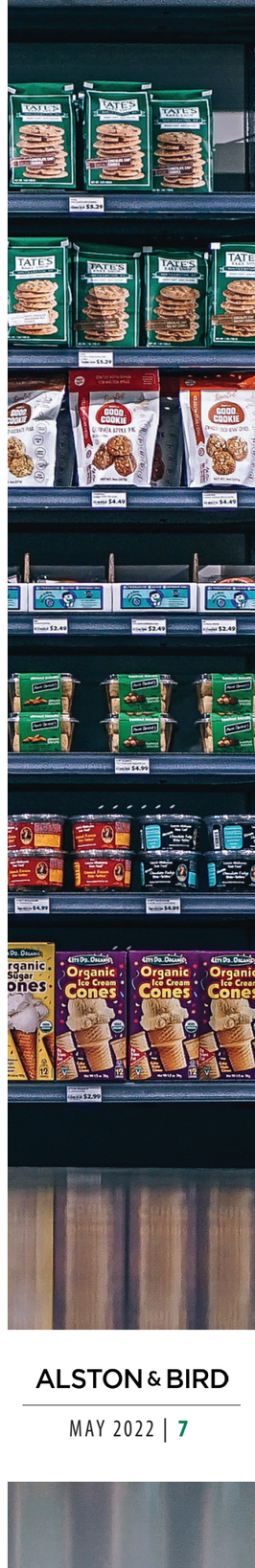
Class Certification: Denied

Consumers Can't Squeeze Class Together from Juice Claims

Gross v. Vilore Foods Co. Inc., No. 3:20-cv-00894 (S.D. Cal. Apr. 8, 2022).

A group of California consumers lost their class certification bid over claims that the labeling of various juice-based beverage products was deceptive and misleading for failing to disclose on the front label that the beverages included the artificial flavoring ingredient dl-malic acid. The consumers argued in their third amended complaint that the defendants violated various state and federal consumer protection laws by failing to disclose the artificial flavoring ingredient on the front label of the products despite including claims such as "100% Natural" or "Made with Whole Fruit." But the consumers' decision to focus on the failure to disclose rather than affirmative misrepresentations featured prominently in the court's opinion denying class certification.

The plaintiffs moved to certify a nationwide class and California subclass for a variety of claims on behalf of all those who purchased the fruit juices between 2016 and 2019. In



analyzing the Rule 23(a) factors, the court quickly found that wholesale data easily showed that numerosity was satisfied. But the consumers couldn't squeeze past on any of the other 23(a) factors. Commonality was not satisfied because "beyond their conclusory statement that commonality exists," the plaintiffs failed to point to any "evidence demonstrating that the question of likelihood of deception can be resolved on a classwide basis." And the consumers' expert's survey did not even assess whether customers would be led to believe the products did not contain artificial flavors when considering the front label. Even the named plaintiffs' own testimony did not establish that they were all deceived by a failure to disclose the presence of the artificial flavoring on the products' front labeling because they asserted that they relied on the affirmative representations like "100% Natural" or "Made with Whole Fruit" when making their purchasing decisions.

The court noted that it did not need to address typicality and adequacy since the plaintiffs failed to show commonality, but still went on to explain how the plaintiffs failed to satisfy typicality for the nationwide class claims because they were all California residents and the claims would arise under the consumer protection laws of the states where the purchases were made. Therefore, the court determined that the plaintiffs failed to demonstrate "how their claims are typical of or 'substantially similar' to claims under other states' laws."

Summary Judgment

Denied In Part

Court Denies MSJ, "Creatine" a "Monster" Showdown in Energy Drink Row

Monster Energy Co. v. Vital Pharmaceuticals Inc., et al., No. 5:18-cv-01882 (C.D. Cal. Apr. 19, 2022).

A California federal judge rejected (in large part) competing motions for summary judgment in a false advertising suit targeting the defendant's BANG energy drink, which contains creatyl-l-leucine (CLL), a novel ingredient marketed under the trademark "Super Creatine." The complaint alleges that the defendant falsely advertises the drink's Super Creatine as a source of creatine and also touts numerous health benefits attributable to creatine. But according to the plaintiff, "creatine" is generally understood to mean creatine monohydrate—not creatine analogs like CLL or Super Creatine—and there is no peer-reviewed study examining the benefits of CLL or whether it is an effective source of creatine.

The court determined that "source of creatine"—an implied representation that did not expressly appear in commercial advertising for BANG—was vague and ambiguous because there were multiple meanings of creatine (naturally occurring creatine, creatine monohydrate used in sports nutrition, and novel forms of creatine) and multiple meanings of "source" of creatine (a product that contains creatine or a creatine supplement). Accordingly, the judge poured out the plaintiff's summary judgment bid. The court also crushed the defendant's summary judgment motion, finding that there was a genuine issue of disputed fact as to whether Super Creatine is creatine and whether it provides the same health benefits of creatine. Looks like we'll have to wait until trial to see which company's creatine arguments can out-muscle the other.

Injunctive Relief

It's Not Meat and That's Okay in La.

Turtle Island Foods SPC v. Strain, No. 3:20-cv-00674 (M.D. La. Mar. 28, 2022).

A federal judge in Louisiana enjoined the state's Truth in Labeling of Food Products Act because it was unconstitutional on commercial free speech grounds. The Louisiana law prohibited, among other things, "[r]epresenting a food product as meat or a meat product when the food product is not derived from a harvested beef, pork, poultry, alligator, farm-raised deer, turtle, domestic rabbit, crawfish, or shrimp carcass." The plaintiff produces and packages plant-based meat products in packaging that clearly states its products are plant-based, meatless, vegetarian, or vegan and accurately lists the product's ingredients.

After the Act took effect in 2020, the plaintiff claimed it refrained from using certain words and images on marketing materials and packages but claimed it would be "incredibly expensive" to create specialized labels for products sold in Louisiana or to make a nationwide labeling and marketing change. The Louisiana Department of Agriculture and Forestry claimed that the plaintiff's labels did not violate the Act and that the plaintiff had not been cited for violating the Act or threatened with enforcement, a fact the plaintiff disputes based on the plain language of the statute, claiming its existence is itself an enforcement threat.

The judge agreed with the plaintiff, finding that its use of the term "meat" to define non-meat products is arguably proscribed conduct according to the plain language of the Act. In finding the Act unconstitutional, the district court concluded that it did not advance the state's interest in avoiding consumer confusion because there was substantial evidence in the record that the plaintiff's labeling of its plant-based meat products was *not* misleading. The court also found that the absolute prohibition on using the term "meat"—before attempting any less restrictive measures like a disclaimer or asterisk—was far more restrictive than necessary.

Appeals

Preemption Sends Beef "Product of the U.S.A." Case Out to Pasture

Thornton v. Tyson Foods Inc., No. 20-2124 (10th Cir. Mar. 11, 2022).

Passing without comment whether it would do so to the cows themselves, the Tenth Circuit tipped over an appeal asserting that the defendants' labeling of its beef products was misleading under New Mexico law.* In their complaint, the plaintiffs alleged that the beef products were misleading for claiming that they are "Products of the USA" because the defendants imported the beef and only processed it in the United States. The district court, however, dismissed the claims with prejudice because they were preempted under federal law.

In a 2–1 decision, the Tenth Circuit agreed. It observed that the Federal Meat Inspection Act (FMIA) contains a broad preemption provision prohibiting states from imposing labeling

requirements "in addition to, or different than" the federal requirements. The FMIA prohibits false or misleading labeling and charges the Food Safety and Inspection Service (FSIS) with reviewing meat-product labeling to ensure compliance with this mandate. At bottom, the court concluded, no label may be used on a meat product unless the FSIS has given its blessing through "preapproval" of that label.

The court found both that the FSIS approved the defendants' labels *and* that doing so aligned with FSIS policy. According to an FSIS Food Standards and Labeling Policy Book, the term "Product of the U.S.A." can be used for products that are processed or "prepared in the United States." The term does *not* mean that the "product is derived only from animals that were born, raised, slaughtered, and prepared in the United States." Based on the FSIS's clear guidance and preapproval of the labels, the majority found that the plaintiffs *were* seeking to impose requirements that departed from federal law.

The court also rejected the plaintiffs' and dissent's suggestions, first that the requirements under state and federal law did not conflict, and second that states had concurrent jurisdiction with federal regulators. At least with this panel, making these arguments till the cows come home would not have made a difference given the plain meaning of the FMIA preemption provision that any state law *must* be consistent with the requirements under the FMIA.

(*No cow tipping occurred in the making of this summary.)

Settlements

The Juice Was Worth the Squeeze: Court Approves Class Settlement of Grape Juice Row

Hanson v. Welch Foods Inc., No. 3:20-cv-02011 (N.D. Cal. Apr. 15, 2022).

After a little over two years of litigation, a California federal judge approved a class settlement resolving challenges to the labeling and advertising of 100% Grape Juice Concord Grape, 100% Juice Red Sangria, and 100% Black Cherry Concord Grape Juice products. The plaintiff alleged that the defendant deceptively labeled these grape juices as helping support or promote a healthy heart. In reality, the plaintiff alleged, consumers' typical consumption of the juices actually *increased* the risk of cardiovascular disease, type 2 diabetes, and all-cause mortality. The final, no-liability settlement provides for a common fund of $1.5 million, an award of nearly $400,000 in attorneys' fees and litigation expenses, and temporary injunctive relief prohibiting the defendant from making these claims in its labeling and advertising for two years.

Depending which side of the "v." you fall on, not all heroes—or villains—wear *grapes* it seems. Representing the plaintiff in the case is Jack Fitzgerald of Fitzgerald Joseph LLP, the attorney and the law firm notable for bringing lawsuits challenging implied health claims on breakfast cereals. As we reported, two of those cases recently ended in $15 million and $17 million class settlements. Although he can't necessarily claim that he came, he saw, he *concord* this grape juice case, it appears that litigating against food and beverage health claims is his *jam*.

Consumers Milk Settlement Out of False Ad Claims

In re Fairlife Milk Products Marketing and Sales Practices Litigation, No. 1:19-cv-03924 (N.D. Ill. Apr. 27, 2022).

The cows might not have been happy, but now the consumers who were allegedly duped by advertisements for milk as coming from humanely treated dairy cows should be. An Illinois federal judge said a proposed settlement agreement for the multidistrict litigation—which consolidated nine potential class actions from 19 named plaintiffs—could *mooove* along. The plaintiffs had originally alleged that they purchased milk based on promises that the companies treated their dairy cows humanely. Now they can cash in on that alleged deception to the tune of $100 each (composed of 25% of their purchase price for the milk with caps at $20 for claims without a proof of purchase and $80 for claims with one). Named plaintiffs and appointed class counsel are also set to recover a portion of the $21 million settlement fund if the award is granted final approval after the final fairness hearing in September. In addition to the monetary relief, the settlement agreement includes a requirement that the companies create monitoring and compliance programs to ensure their dairy cows are treated humanely. Here's hoping that everyone involved can find some greener pastures.

FOOD & BEVERAGE DIGEST

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Jamie George
404.881.4951
jamie.george@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Barbara Jones-Binns
202.239.3139
barbra.jones-binns@alston.com

Kathryn Clifford Klorfein
404.881.7415
kathryn.klorfein@alston.com

Taylor Lin
404.881.7491
taylor.lin@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Amanda Newton Wellen
404.881.4809
amanda.wellen@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD