ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

MARCH 2022

Edition Facts

3 Sections This Edition
Cases Per Section 1-5

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Appeals	100%

New Lawsuits Filed

Plot Twist (Maybe Not)? Plaintiff Alleges That All That Sours Is Not Lemon

Alexander v. BlueTriton Brands Inc., No. 1:22-cv-00648 (N.D. Ill. Feb. 4, 2022).

In a putative class action sure to sour the taste in some manufacturers' mouths, an Illinois consumer alleges that naturally flavored water with a "Twist of Lemon" misrepresents the amount of real lemon actually present in the water.

The suit, filed in early February, claims the phrase "twist of lemon" refers to a portion of a lemon round and peel that is at least six inches in length and is twisted in order to release its juices and natural oils. Therefore, any product advertised as having a twist of lemon must contain lemon oil, lemon extract, or lemon juice. Yet Poland Spring with a Twist of Lemon purportedly contains only a negligible amount of lemon-derived ingredients and is instead chock-full of "natural flavors"—a mix of fruit and vegetables combined with additives and solvents—designed to approximate lemon flavor. The plaintiff contends that, had he known the product contained only a negligible amount of lemon that was not "equivalent in any way to a 'twist,'" he would not have purchased it at the same price. He seeks to represent a multistate class of plaintiffs in bringing claims for purported violations of state consumer protection laws, breach of contract, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Time will tell whether the plaintiff can make lemonade from these allegations (or, we suppose, the lemony water he now challenges), but we cannot but wonder: couldn't the plaintiff have saved himself the $402 filing fee and just looked at the clear plastic water bottle to see if it contained a lemon round and peel at least six inches in length and twisted?

Making Seltzer Lemon Water Without Lemons?

Matthews v. Polar Corporation, No. 1:22-cv-00649 (N.D. Ill. Feb. 4, 2022).

Riding the wave of recent class action complaints against the ever-burgeoning flavored seltzer water products, a new suit alleges that a carbonated beverage marketed as "Seltzer Lemon" is deceptive because it lacks the amount and type of lemons expected by consumers. Based on the product's references to "lemon" and the claim that the drink is "refreshingly natural," the complaint alleges that a reasonable consumer would expect the product to contain more than a de minimis amount of lemon ingredients, which it allegedly does not. Specifically, the complaint claims that in addition to carbonated water, the product contains only "natural flavors" that lack a sufficient amount of essential lemon compounds. The plaintiff seeks to certify an Illinois and a multistate class of purchasers and asserts violations of Illinois and various state laws, breach of contract, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment.

Consumer Claims Arnold Palmer Labeling Not Up to Par

Crawford v. Arizona Beverages USA LLC, No. 3:22-cv-00220 (S.D. Ill. Feb 6, 2022).

An Illinois consumer claims that a beverage maker's labeling of its "Lite" Arnold Palmer iced tea/lemonade drink is bog(ey)us. According to the complaint, the eponymous beverage is labeled as "lite"—which allegedly implied to consumers that it contains few calories and low amounts of sugar—when, in reality, it contains 31 added grams of sugar (62% of the Daily Value) (stroke 1). The consumer teed up several other issues as well, alleging that: the use of a dual column Nutrition Facts panel is misleading (stroke 2); a reference to the defendant's status as "An American Company – Family Owned and Operated" gives the false impression that the drink is made in the United States, when it allegedly is a product of Canada (stroke 3); and that there are certain other unidentified representations and omissions that are false or misleading (stroke 4). Plus, the product is (in) the drink, which is a stroke penalty.

The complaint asserts claims for violation of various consumer protection statutes, breach of contract, breaches of express and implied warranty, negligent misrepresentation, fraud, and unjust enrichment, and seeks to certify an Illinois-only class and a consumer fraud multistate subclass consisting of 14 different states. Whether this suit is a hole in one or the plaintiff takes a mulligan remains to be seen.

Whole Grain or Whole Hoax?

Hamidani v. Bimbo Bakehouse LLC, No. 1:22-cv-01026 (N.D. Ill. Feb. 26, 2022).

In a suit remarkably similar to Sheehan & Associates' December diatribe against the whole grain content in Ritz crackers, an Illinois consumer represented by the firm now contends that the manufacturer of Brown Bread, a Cheesecake Factory staple, is misleading customers about the bread's whole grain content.

According to the putative class action complaint, consumers select the Cheesecake Factory brand because they expect the product is "made with nutrient-rich ingredients that [are] good for them." And consumers purportedly believe that the Cheesecake Factory's Brown Bread is made primarily from whole grains because it is brown in color and contains visible grain pieces. Au contraire, says the plaintiff—whole grains are only the *third*-most-common ingredient in Brown Bread, after enriched wheat flour and water. Dried molasses purportedly causes the brown color, while oats and rye flakes, the complaint alleges, are added to the exterior of the bread to mislead consumers into believing that it is made from whole grain flour. According to the plaintiff, these misrepresentations have leavened into claims for violations of state consumer protection laws, breach of contract, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment. The plaintiff seeks to represent a class of Arkansas, Montana, Nebraska, Virginia, Georgia, and Iowa plaintiffs.

Chocolate Lover's ~~Sweet~~ *Healthy* Tooth Not Satisfied

Lee v. Mondelēz International Inc., No. 1:22-cv-01127 (S.D.N.Y. Feb. 9, 2022).

A self-described "lover of dark chocolate" who indulges in delicious treats—not just for their taste, but also for their associated health benefits—has filed a putative class action against a manufacturer of dark chocolate products for alleged unfair and deceptive advertising and marketing practices for two popular brands of dark chocolate candies. According to the complaint, the products advertise different levels of cacao content on their front labels (e.g., 60%, 70%, and 85%), but the products' back labels uniformly reveal that the products do not contain any *cacao* at all, but rather feature *cocoa* as the principal chocolate ingredient.

While cacao and cocoa may sound similar, the plaintiff claims that cocoa is actually an inferior, highly processed derivative of the cacao bean that has been stripped of the nutritional qualities that make dark chocolate appealing to its consumers. The plaintiff also takes issue with the products' representation that they are made from "the finest Trinitario cacao beans" because the nutritional qualities of the cacao beans are allegedly lost when the raw cacao is roasted and processed at high temperatures to become cocoa.

Despite acknowledging that the back label contains the truth—that the product is made with cocoa, *not* cacao—the plaintiff alleges that reasonable consumers are given no reason to suspect that representation is contradicted by the products' back label. And the plaintiff claims that competing products are honest in their labeling, informing purchasers that they are buying cocoa rather than cacao. As a result of these alleged misrepresentations, the plaintiff claims he was duped into paying more for the product than he otherwise would have and seeks to represent a nationwide class of consumers in pursuing deceptive trade practice and false advertising claims under the consumer protection laws of all 50 states and the District of Columbia, as well as claims for common-law fraud.

Motions to Dismiss

Procedural Posture: Granted

Silky Smooth Chocolate Slides Out of Putative Class Action

Beers v. Mars Wrigley Confectionery US LLC, No. 7:21-cv-00002 (S.D.N.Y. Feb. 17, 2022).

In an entirely expected turn, a New York federal district court rejected a suit by a Sheehan & Associates client who challenged the labeling of certain three-pack chocolate bars as "silky smooth milk chocolate" because the product also contains coconut oil and palm oil ingredients allegedly "not found in real chocolate." These admittedly delicious bars were allegedly worth less to the plaintiff because of the presence of vegetable oils. After counsel withdrew claims for fraud, warranty, and injunctive relief, the only claims at issue in the motion to dismiss were for violation of New York's General Business Law and unjust enrichment.

But the district court rejected the theory cooked up by the plaintiff—his argument that the "milk chocolate" representations communicated a false message to consumers given the presence of vegetable oil and other ingredients. It found that no reasonable consumer would be misled because the predominant ingredient in the product's coating was milk chocolate made with cocoa butter. The district court also rejected the plaintiff's reliance on the Second Circuit's *Mantikas v. Kellogg* opinion, presenting yet another case where courts stave off plaintiffs' lawyers trying to leverage *Mantikas* indiscriminately in cases involving consideration of a front and back label. In this case at least, *Mantikas* was toothless because there was no misleading statement on the front label; the district court dismissed the case without leave to amend.

Consumers Knocked Out on Preemption Grounds for Protein Measuring Technique

Nacarino v. Kashi Company, No. 3:21-cv-07036 (N.D. Cal. Feb. 9, 2022).

Although not quite on the level of a certain kid's karate "crane kick" technique, an FDA-sanctioned protein-measuring technique still proved impossible to block in a California putative class action. The consumers sued a snack bars and cereal maker, claiming its products make misleading protein content claims to consumers. They allege that these protein claims are misleading because they are *not* adjusted for digestibility and that, in reality, consumers actually ingest far less protein than they are led to believe.

However, the district court judge observed—and we are sure that Mr. Miyagi would agree—that the question of success or failure is all about technique. In this case: the FDA's measuring technique for protein. The district court concluded that the plaintiffs' claims are preempted because the defendant correctly applied the protein calculation technique prescribed by FDA regulations (protein content = 6.25 x the amount of nitrogen in a product). Although the district court acknowledged that the protein claim might be "misleading in a colloquial" sense, the plaintiffs' claims are preempted because the FDA has spoken on the issue.

Citing recent FDA industry guidance, the district court also rejected the plaintiffs' challenge to the protein claim on the *front label* because the FDA suggested that its regulations do not require adjusting protein claims for digestibility. Plus, the district court found, "it does not make sense to read the regulations as barring manufacturers from making identical statements elsewhere on their packaging."

We will not have long to wait for a sequel, however. The plaintiffs filed a notice of appeal on March 14 on the grounds that the district court "swept the leg" in its motion to dismiss order.

Procedural Posture: Denied

Almond Claims Roasting on an Open Fire

Rudy v. Family Dollar Stores Inc., No. 1:21-cv-03575 (N.D. Ill. Feb. 4, 2022).

An Illinois federal court significantly pared down a putative class action alleging that a brand of "Smoked Almonds" were mislabeled because they are not actually roasted over an open fire. The complaint alleges that the defendant misleads consumers because its almond packaging fails to disclose that the smoke flavor is in fact added, causing consumers to believe the nuts are smoked over an open flame. Based on this overarching allegation, the plaintiff brought claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, breaches of warranty, negligent misrepresentation, and fraud.

But the court cracked the plaintiff's claims for breach of express and implied warranties, dismissing them because the plaintiff failed to meet the pre-suit notice requirement and otherwise did not satisfy threshold elements necessary to support a warranty claim under the Magnuson–Moss Warranty Act. The court also dismissed the complaint's fraud-based claims under the economic loss doctrine and for including only conclusory and nonfactual allegations of fraudulent intent. The court did, however, allow the balance of the complaint to survive because there was nothing to inform consumers that the term "smoked" only refers to the product's flavoring (as opposed to the process by which it is made).

Real Vanilla Lovers Rejoice! Vanilla Suit Gets the Green Light in California

Nacarino v. Chobani LLC, No. 3:20-cv-07437 (N.D. Cal. Feb. 4, 2022).

Ah, the vanilla suit strikes again. And this time, a California district court gave the plaintiff a green light, denying a motion to dismiss in its entirety.

In her third amended complaint, a California-based plaintiff added a new allegation claiming that the defendant's "Greek Yogurt Vanilla Blended" product violates FDA regulations because the yogurt's vanilla flavor "is not independently derived" from a vanilla plant. Rather, the plaintiff alleges that the yogurt's flavor comes from other non-vanilla plant flavoring agents. The plaintiff's claim tweaks an earlier allegation (previously dismissed by court order) that claimed the defendant falsely represented its vanilla yogurt as being flavored *exclusively* with vanilla plant ingredients. The court tossed that claim, concluding that no reasonable consumer would understand the yogurt label's vanilla representations as representing that the vanilla flavor came exclusively from a vanilla plant without additional representations on the label, such as "100% vanilla" or "made with all-natural vanilla."

This re-tooled complaint fared better. The district court concluded that the plaintiff sufficiently alleged actual reliance on the defendant's allegedly deceptive label. According to the district court, the plaintiff sufficiently argued that she "read and relied on" the yogurt label, believing that the product's characterizing flavor was vanilla and that the vanilla flavor came independently from the vanilla plant. Additionally, the district court held that the plaintiff demonstrated standing to pursue injunctive relief.

We'll add this suit to our collection of vanilla cases that are going forward to keep all of you vanilla lovers (and even vanilla haters) current on all things vanilla.

Appeals

Dog Food Claims Won't Leave the Dog House

Renfro v. Champion Petfoods USA Inc., No. 20-1274 (10th Cir. Feb. 15, 2022).

The Tenth Circuit Court of Appeals has quashed a group of plaintiffs' attempts to pursue claims against a dog food's alleged misleading representations. Pet owners originally filed a class action complaint attacking allegedly misleading representations on the products' packaging that described the dog food as "Biologically Appropriate" and made with "Fresh and Regional Ingredients." The packaging also claims that the dog food is "Trusted Everywhere" and contains "Ingredients We Love [From] People We Trust." The plaintiffs alleged that these phrases are misrepresentations that are particularly troubling because in 2018, the FDA notified the manufacturer that one of the dog food's ingredients had been contaminated by pentobarbital. The plaintiffs' claims for violation of the Colorado Consumer Protection Act, breach of express and implied warranties, fraudulent misrepresentation, fraudulent concealment, unjust enrichment, and negligence were dismissed by the district court.

The Tenth Circuit divided its analysis into two parts, focusing first on the alleged affirmative misrepresentations and then turning to the plaintiffs' omission-based claims. In examining the alleged misrepresentations, the court agreed with the district court that two of the phrases' bark was worse than their bite, ruling that "Trusted Everywhere" and "Ingredients We Love [From] People We Trust" are unactionable puffery because the claims were not falsifiable. The court also found the phrase "Fresh and Regional Ingredients" to be a vague generality that wouldn't mislead a reasonable consumer, particularly when the dog food's listed ingredients include non-fresh and non-regional ingredients.

Finally, the court affirmed the district court's holding that the plaintiffs lacked standing to assert claims based on the phrase "Biologically Appropriate" because the plaintiffs all purchased the dog food before it was actually contaminated and the risk of contamination was too speculative to create standing. The Tenth Circuit took this analysis one step further and held that even putting aside the pentobarbital claim, no reasonable consumer would interpret the phrase "Biologically Appropriate" to require the inclusion of specific ingredients. In fact, the Tenth Circuit explained, the only conclusion a reasonable consumer could draw from this phrase was that the dog food was fit for dogs to consume, and the plaintiffs failed to plausibly allege what amount of heavy metal would make the dog food unfit.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories 0

	% engaging value
Knowledgeable Speakers	100%
Current Topics	100%
Alston & Bird Approved	100%

March 30–31

2022 Food and Dietary Supplement Safety and Regulation Conference

Sam Jockel and fellow panelists will survey "Environmental Challenges and Impacts on Product Safety," including FDA's Closer to Zero: Action Plan for Baby Foods, the proposed Agricultural Water Rule, and EPA and state efforts to limit exposure to PFAS and pesticides, at this virtual conference hosted by the Food and Drug Law Institute.

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Katherine Wheeler Gamsey
404.881.7462
katie.gamsey@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Jamie George
404.881.4951
jamie.george@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Amanda Newton Wellen
404.881.4809
amanda.wellen@alston.com

Kathryn Clifford Klorfein
404.881.7415
kathryn.klorfein@alston.com

Taylor Lin
404.881.7491
taylor.lin@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD