ALSTON & BIRD

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Edition Facts

6 Sections This Edition
Cases Per Section 1-4

Reading Calories 0

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

Not So Crystal Clear

Noohi v. Kraft Heinz Co., No. 2:19-cv-10658 (C.D. Cal. Dec. 17, 2019).

Thirsty for more than just a juice fix, consumers of the popular Crystal Light recently filed a putative class action suit in California federal court alleging that the beverage was falsely advertised as having "no artificial flavors" when it actually contains the allegedly synthetic malic acid. According to the complaint, L-malic acid naturally appears in some fruits, but by adding the artificial DL-malic acid to a natural chemical combination of sugar and L-malic acid, Crystal Light can no longer be considered to have all-natural flavors. The new suit claims that under the Federal Food, Drug, and Cosmetic Act (FDCA), artificial flavors are clearly defined, and DL-malic acid would not be considered natural. The plaintiffs alleged that by deliberately mislabeling its Crystal Light products, the defendant was able to dupe consumers into paying for a product they otherwise would not have purchased. The consumers are seeking various forms of damages and a court order requiring corrective advertising for the allegedly deceptive labeling.

CBD Chocolate Manufacturer Receives Reality Choc

Ballard v. Bhang Corp., No. 5:19-cv-02329 (C.D. Cal. Dec. 04, 2019).

A Florida manufacturer of chocolate candies infused with cannabidiol (CBD) was recently hit with a new class action that alleges its chocolatey treats do not contain the advertised amounts of THC and CBD. According to the complaint, the chocolatier was able to charge a premium for its CBD chocolates by claiming that the candies contained far greater amounts of THC and CBD than they actually did. The complaint alleges that the amounts of THC and CBD in edible products are not only material to consumers' decisions, but also the "primary reason consumers purchase THC and/or CBD products." Piling on, the plaintiffs also allege that 25 unidentified individuals, including shareholders, executive officers, and managers, knowingly misrepresented the amounts of THC and CBD in the products in order to induce consumer purchases. The plaintiffs seek to certify national and California classes as well as to recover up to $5 million in damages and a permanent injunction enjoining the CBD chocolatier from continuing to engage in the alleged deceptive advertising. Similar proposed class actions claiming that certain CBD products do not contain the advertised amounts of THC or CBD have recently cropped up in other states, including Florida and Massachusetts.

Quelle Horreur! Canadian-Made Mustard Sued Because French Words on Label

Culver v. Unilever United States Inc., No. 2:19-cv-09263 (C.D. Cal. Oct. 28, 2019).

In yet another geographic origin case pending in California district court, the plaintiff is complaining that Unilever's Maille brand mustard products allegedly appear to be made in France, but are made instead in Canada! The plaintiff alleged that, as decreed in 1390, the French standard for mustard requires that it be nothing more than "good seed and suitable vinegar." The plaintiff acknowledges that Maille is a brand of mustards that indeed originated in France in the 1700s and that its fancy mustards can be bought in boutiques in Paris and Dijon, France. The plaintiff alleges that the brand imagery and French language descriptions on the (Dijon) mustard that admittedly originated in France hundreds of years ago tricked him into believing the product was made in France. A quick Internet search suggests at least some product labels state the products are made in Canada, whose official languages are French and English. The plaintiff cites an alleged online survey that says 63% of respondents thought the product was made in France, which raises the question of whether 63% of consumers believe that any dijon mustard originates in France. Unilever's motion to dismiss hearing is set for April 2020. Bonne chance!

Vanilla Suits Continue to Pile Up in New York

Cartelli v. Danone US, No. 7:19-cv-11354 (S.D.N.Y. Dec. 12, 2019).

New York law firms Sheehan & Associates and Reese LLP continue to file volley after volley of putative class actions in New York district court against manufacturers of vanilla-flavored products, challenging representations on those products' labels about the amount, quality, and/or source of vanilla flavoring. Now numbering over two dozen, these suits have thus far targeted a variety of products, including vanilla ice cream and non-dairy milk beverages or creamers.

In this case, the plaintiff alleges that she purchased "Dairy-Free Soy Creamer" that was marketed as vanilla flavored and that the label gave her the impression that the creamer contained sufficient vanilla to independently characterize the products as vanilla, when that is not the case. The plaintiff claims that she does not know the actual amount of vanilla in the creamer but does know that the creamer is not primarily flavored with vanilla because no vanilla ingredients appear on the ingredient list. Instead, the ingredient lists some ambiguous "natural flavor" that is not vanilla. The plaintiff alleges that the labels are misleading in violation of New York's consumer protection statutes. She also asserts causes of action for negligent misrepresentation, breach of warranty, and fraud.

Other Motions

Hemp Processor Ducks Motion to Attach Assets in CBD Suit

Commodigy OG Vegas Holdings LLC v. ADM Labs, No. 1:19-cv-03182 (N.D. Ohio Dec. 10, 2019).

An Ohio federal district court recently rejected a plaintiff's attempt to attach more than a half-million dollars of a Colorado hemp processor's assets pending the outcome of a breach of contract suit. That suit alleges that the processor's 13,500-pound hemp shipment did not contain as much CBD as promised. The complaint claims that various tests of the company's industrial hemp shipment showed CBD percentages of 3.7%, 4.5%, and 4.7%, which, according to the plaintiff, was well below the 10.3% the processor promised that the batch would contain. On that basis, the plaintiff sought to recover the $540,000 it paid for the shipment and attach that amount in assets during the pendency of its lawsuit and in the event of a judgment. According to the court, however, "Ohio's prejudgment attachment statute cannot reach the assets plaintiff wishes to attach," because, among other reasons, the plaintiff "failed to identify any property or assets in Ohio over which the court has jurisdiction."

Motions to Dismiss

Procedural Posture: Denied in Part

Clif Bar Still Left Hanging After Failed Attempt to Squash White Chocolate Labeling Lawsuit for Good

Joslin v. Clif Bar & Co., No. 4:18-cv-04941 (N.D. Cal. Dec. 2, 2019).

In the September edition of the *Food & Beverage Digest*, we wrote how Clif Bar was left hanging after the a California federal district court granted the plaintiffs leave to amend a deficient complaint. Now, Clif Bar cannot dodge an amended putative class action complaint accusing the company of misrepresenting its energy bars as "white chocolate" when they do not, in fact, contain any white chocolate. Finding that the plaintiffs had bolstered their allegations just enough to avoid dismissal, the district court deemed the pleadings "sufficient to allege the products' labels would be likely to deceive a reasonable consumer." Clif Bar had previously won a dismissal of the plaintiffs' original 2018 suit after arguing that the "natural flavor" indications on the labeling showed the white chocolate taste comes from flavoring (and not real white chocolate) and that the products' ingredients lists convey the bars contained no actual white chocolate.

But after taking advantage of the court's leave to amend their original complaint, the plaintiffs were able to withstand Clif Bar's latest motion to dismiss by arguing that the inclusion of "natural flavor" on the products' labels only further confused consumers, because white chocolate was the "most obvious 'natural' source of the white chocolate flavor." The amended complaint also alleged the bars were sold alongside other energy bars that do contain real white chocolate, which exacerbated consumer confusion. While the court found these allegations were sufficient to proceed with the lawsuit, it denied the plaintiffs' injunctive relief claims because the plaintiffs had not alleged they intended to purchase the products in the future.

Procedural Posture: Denied

District Court Puts Bumble Bee Tuna's "Dolphin Safe" Labeling Suit on Ice

Duggan v. Bumble Bee Foods LLC, No. 4:19-cv-02564 (N.D. Cal. Dec. 2, 2019).

In our June edition of the *Food & Beverage Digest*, we wrote about a trifecta of putative class actions challenging tuna giants' use of the "dolphin safe" label. A California federal district court recently denied Bumble Bee's motion to dismiss claims that the company deliberately misleads consumers by labeling its tuna as "dolphin safe." The putative class action, filed in August 2019, alleges that Bumble Bee mislabels its canned tuna because the fish are caught using fishing methods that are known to be harmful to dolphins. The plaintiffs alleged that the dolphin-safe label on Bumble Bee's products requires all the tuna to meet numerous standards, including those set by the dolphin-safe labeling law, which it does not.

According to the complaint, despite recognizing that tuna schools congregate with dolphin schools, Bumble Bee continues to indiscriminately trap tuna by using purse sein nets and fish-aggregating devices, which often capture and kill many dolphins in the process. This case isn't Bumble Bee's only ongoing legal battle over its massive tuna business. The company has recently been tagged with criminal fines and a number of civil price-fixing lawsuits for its role in a conspiracy to fix the price of canned tuna. Over the last few years, the company has amassed millions of dollars in fines and legal fees that prompted the tuna giant to file for Chapter 11 bankruptcy. As a result of this bankruptcy filing, the court opted to deny Bumble Bee's motion to dismiss without prejudice, vacate all filing deadlines, and stay the case until the bankruptcy filing is resolved.

Motions for Class Certification

Procedural Posture: Denied

Once You Pop, the Fun Can Stop

Marotto v. Kellogg Company, No. 1:18-cv-03545 (S.D.N.Y. Dec. 5, 2019).

In an order that may well serve as a blueprint for numerous food and beverage manufacturers fighting class certification battles, a New York federal district court denied a pastry chef's motion for class certification *before* even receiving the chef's reply brief. The suit complained that Kellogg Company falsely advertised Pringles salt-and-vinegar chips as having no artificial flavors, when they really did.

Skipping over what the district court deemed "dubious" arguments for typicality and adequacy (including the fact that Marotto's wife was the one to inform him that Pringles contain artificial flavors and also works at one of the firms seeking to represent the class), it denied class certification after finding that Marotto "plainly failed to satisfy the predominance requirement of Rule 23(b)(3)." Among the "unwieldy individual issues" that predominated over common questions was the fact that the Pringles chips at issue used 20 different labels over the alleged class period, only four of which included the "no artificial flavors" language. The district court identified additional individual issues, such as how to determine which potential class members actually saw those labels and whether those would-be class members were actually motivated to purchase the product or pay a premium price for the product because of the allegedly misleading label. In the end, the district court explained that "common sense dictates" that purchasers who do not care whether Pringles contain artificial flavors "cannot make out a claim for fraud, misrepresentation, or breach of express warranty."

Enforcement/Regulation

Procedural Posture: FTC

Red, White, and *Who?* – FTC Flexes Muscle on Misleading Claims of U.S. Origin

The Federal Trade Commission (FTC) recently sent a number of closing letters to various companies signaling that the commission is keeping a close eye on possible false and misleading claims about U.S. origin. Originating with its 1997 Policy Statement on "Made in USA" and Other U.S. Origin Claims, the FTC reminded certain businesses that "unqualified U.S.-origin claims in marketing materials – including claims that products are 'Made,' 'Built,' or 'Manufactured' in the USA – likely suggest to consumers that all products advertised in those materials are 'all or virtually all' made in the United States." While the FTC's recent focus on U.S. claims has looked at marketing claims for lighting, audio equipment, LED products, and fitness equipment, manufacturers of food and beverage products should heed the warnings set out in these closing letters. The FTC is keeping a close eye on U.S. origin claims and, in order to avoid violating Section 5 of the FTC Act, food and beverage manufacturers should continue to closely monitor how they advertise the origin of their products.

Bank Regulators Relax SARs Filing Requirements for Hemp-Related Businesses

Federal and state bank regulators recently issued a statement clarifying the relevant requirements under the Bank Secrecy Act (BSA) for banks providing services to hemp businesses. The statement clarifies that because hemp is no longer a Schedule I controlled substance under the Controlled Substances Act, banks are no longer required to file a suspicious activity report (SAR) for customers solely because they are engaged in the hemp business in accordance with applicable laws and regulations. Now, for hemp-related customers, banks are expected to follow standard SAR procedures and only need to file a SAR "if indicia of suspicious activity warrants." On serving hemp-related businesses, the new guidance states:

> When deciding to serve hemp-related businesses, banks must comply with applicable regulatory requirements for customer identification, suspicious activity reporting, currency transaction reporting, and risk-based customer due diligence, including the collection of beneficial ownership information for legal entity customers. In the context of marijuana-related businesses, banks should continue following FinCEN guidance FIN-2014-G001 – BSA Expectations Regarding Marijuana-Related Businesses.

This statement will likely come as welcome news to hemp growers and processors as well as banks and lawmakers who have been calling for the much needed clarification.

Appeals

Chocolate Buyers Not Entitled to a % Refund Based on % Slack-fill

Benson v. Fannie May Confections Brands Inc., No. 19-1032 (7th Cir. Dec. 9, 2019).

Christmas came early to chocolatier Fannie May Candies when the Seventh Circuit Court of Appeals affirmed dismissal of a slack-fill putative class action pending against it in the Northern District of Illinois. The opinion is notable not only for its affirmance, but also because the Seventh Circuit began with a bang: "Proving that almost anything can give rise to litigation, this case concerns chocolates." The district court had granted a motion to dismiss a complaint alleging that certain Fannie May products were underfilled, finding the plaintiffs' Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) claims were preempted by the FDCA. The Seventh Circuit did not agree with the preemption finding, but it nevertheless affirmed dismissal.

Applying the ICFA's "actual damage" standard, the court explained that the plaintiffs asserted "that they would not have purchased the candy if they had known the amount of slack-fill, and they seek damages in the amount of the percentage of the purchase price equal to the percentage of nonfunctional slack-fill." From the Seventh Circuit's perspective, these allegations were "quite vague" because there was no explanation of "how a percentage refund of the purchase price based on the percentage of nonfunctional slack-fill corresponds to their alleged harm." Even if a box of chocolates is 33% underfilled, the court reasoned, that does not necessarily directly translate to a right to a 33% price reduction as compensation for some perceived harm (indeed, economists would note it does not). The Seventh Circuit also noted that the existence of net weight and number of chocolate pieces on the outside of the opaque box called out for a Rule 12(c) motion.

No More High Flying: CBD Companies on Putative Class Action Lists

Products containing CBD oil are becoming more and more popular, with CBD now found in everything from food products, like chocolate and tea, to oil drops, capsules, syrups, topical lotions, and creams. The Food and Drug Administration (FDA), however, has its doubts about the safety of CBD and is making those doubts known: in late November, it issued warning letters to 15 companies for marketing CBD products in ways that violate the FDCA. The FDA also indicated that it could not conclude that CBD is "generally recognized as safe" among qualified experts for use in human or animal food.

Part of the FDA's impetus in reiterating this position was its concern that many people think that the myriad of CBD products available on the market means that the FDA has determined them to be safe. The agency stressed that there are unanswered questions and gaps in the data about CBD. The FDA is in charge of regulating drug products that are intended to affect the structure or function of the body of humans or animals. But the FDA has approved CBD as a drug to treat a rare form of epilepsy, and it therefore should not be used in conventional food or dietary supplements without the FDA's blessing. The FDA explained that there has been no evaluation of whether unapproved CBD products are effective for their intended use, whether they have dangerous side effects or safety concerns, or how they interact with drugs the FDA has approved. The warning letters issued in November informed companies that their CBD products were, among other things, unapproved new drugs, that they contained labeling that was not in compliance with the FDCA, or that their labeling was misbranded.

It did not take long for consumers to notice. Lawsuits against companies marketing CBD products have been piling up since the FDA's November warning letters.

As one example, a purchaser of CBD products in California brought a class action, *Davis v. Green Roads of Florida LLC*, No. 2:19-cv-10194 (C.D. Cal. Dec. 2, 2019), against a producer of a variety of CBD-containing products, including oils, capsules, syrups, and gummies, alleging that its products are illegal to sell yet the company has continued to market its mislabeled and illegal products. Like other CBD litigation we have analyzed, plaintiffs, like Davis, are pursuing these "illegal" products for causes of action under various consumer protection statutes, false advertising laws, and breach of express and implied warranty claims.

The same firm that represents Davis in his suit against Green Roads has also filed a number of other class claims against various CBD manufacturers in California, each purporting to allege violations of the FDCA based on the defendants' labeling.

The outcome of the suits and the fallout from the FDA's warning letters remain to be seen, but this will certainly be a trend to watch this year.

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