ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

OCTOBER 2019

Edition Facts

6 Sections This Edition
Cases Per Section 1-6

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions for Preliminary Injunction	100%
Motions to Certify Class	100%
Motions for Summary Judgment	100%
Settlements	100%

New Lawsuits Filed

Grocery in a Sticky Mess over Honey Labels

Pope v. The Kroger Co., No. 1:19-cv-00817 (S.D. Ohio Sept. 25, 2019).

The Kroger Company is facing a putative class action lawsuit that alleges the grocery giant misleadingly labeled and advertised its "Private Selection Raw and Unfiltered Wildflower Honey" and "Simple Truth Organic Raw and Unfiltered Honey" products as raw when they are, in fact, not raw. The suit claims that the grocer instead heats these honey products to over 105 degrees during bottling and packaging, which breaks down and denatures the honeys' enzymes.

The suit alleges that consumers nevertheless paid a price premium for the honey products, expecting to receive the health benefits provided by true "Raw and Unfiltered" honey. The suit alleges not only that the grocer's labels are "inaccurate, incorrect, deceptive, and misleading" but also that the grocer knew or should have known that its "raw" honey products were heated to the point of being cooked and destroying the enzymes that people seek out and expect from the raw-honey products. In addition to counts for fraudulent concealment and misrepresentation, the plaintiff alleges that the grocer also violated the Illinois Consumer Fraud Act. She seeks declaratory and injunctive relief as well as compensatory and punitive damages.

More Disgruntled Lifters Blame Supplements for Lack of Sick Gainz in Gym

Sabatano v. Iovate Health Sciences U.S.A. Inc., No. 7:19-cv-08924 (S.D.N.Y. Sept. 25, 2019).

In the August 2019 edition of our *Food & Beverage Digest*, we wrote about a lawsuit against BPI Sports that alleged its "Best BCAA" dietary supplement did not support muscle growth as advertised. Now, the same law firm that filed the BPI suit is trying out supersets—it now represents two disgruntled lifters taking aim at Iovate Heath Sciences' claims about its own BCAA supplements. The new suit similarly alleges that Iovate's "Muscletech" brand of supplements, sold as Platinum 100% BCAA, lacks the necessary branched-chain amino acids required to "promote muscle protein synthesis" and that Iovate's claims to the contrary are false and misleading.

Like the earlier suit, the new pleading cites to scientific studies to support its statement that the body requires all nine essential amino acids for proper protein synthesis to support muscle growth. And according to the new complaint, Muscletech's Platinum BCAA provides only three, which, as a result, puts swole-seekers at a big disadvantage. This is because when all the necessary BCAAs are not provided by the supplements, the body will actually break down muscle to get those missing amino acids. The plaintiffs allege that Iovate's claims that its products ensure users' "muscles are primed for musclebuilding" and provide users with the "key building blocks of muscle" are false and misleading. They assert state-law claims in New York for false advertising and deceptive business practices as well as federal breach of warranty and fraud claims.

Plaintiff Claims That CBD Products' Advertised Dosages Are All Haze and Mirrors

Ahumada v. Global Widget LLC, No. 1:19-cv-12005 (D. Mass. Sept. 24, 2019).

After a surprisingly quiet summer, the first labeling class action suits challenging the budding cannabidiol (CBD) industry are beginning to appear. CBD is a non-psychoactive derivative of cannabis and is widely marketed for its supposed calming and pain-relieving effects. However, as many states move to legalize its sale, CBD's legal and regulatory status before the FDA remains uncertain.

Largely sidestepping this controversy, the plaintiff here filed a suit against the owner of the Hemp Bombs brand, claiming that its products do not contain the advertised dosages of CBD. The defendant manufactures an array of CBD products, such as lotions, tinctures, oils, candies, syrups, and vaping products and, as the plaintiff alleges, markets them as "high potency" to induce consumer purchases. The plaintiff claims that she purchased two packages of Hemp Bomb gummies that represented each package contained a total of 75 milligrams of CBD. The products purportedly do not contain the advertised amount of CBD, though the plaintiff does little to explain this assertion other than vague references to "laboratory testing." The plaintiff seeks to certify nationwide and Massachusetts classes and seeks damages, restitution, and injunctive relief.

Foodies Cry Foul over "Fake White Chocolate" Baking Products

Cheslow v. Ghirardelli Chocolate Co., No. SCV-265203 (Cal. Super. Ct. Sep. 19, 2019).
Prescott v. Nestlé USA Inc., No. 19CV02857 (Cal. Super. Ct. Sep. 19, 2019).

In a seemingly coordinated strike using the same law firm, the same co-plaintiffs filed nearly identical putative class actions against the Ghirardelli Chocolate Company and Nestlé USA, alleging the famous chocolate makers deceptively pass off "fake white chocolate" baking chips as the real thing. The plaintiffs claim that, despite their stately names and packaging, Nestlé Toll House "Premier White" morsels and Ghirardelli premium "Classic White" in fact contain no white chocolate, cocoa butter, or other cocoa derivative to qualify as white chocolate.

And the plaintiffs claim they are not alone. In fact, they point to multiple consumer complaints on the defendants' company websites that their "white chocolate" products failed to melt when heated—a clear indication the product was not real white chocolate. The plaintiffs seek to certify nationwide and California classes, asserting that the defendants' sale of these products violate various state consumer-protection statutes and unfair competition laws.

I Scream, You Scream, Plaintiffs Scream for More (Vanilla) Ice Cream

Clarke v. Tillamook County Creamery Association, No. 7:19-cv-08207 (S.D.N.Y. Sept. 3, 2019).
Musikar v. Cumberland Farms Inc., No. 7:19-cv-08410 (S.D.N.Y. Sept. 10, 2019).

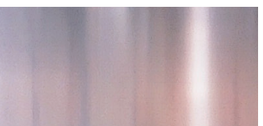
As part of a wave of copycat lawsuits filed by the same law firm, two new putative class actions were filed in New York federal court against Tillamook and Cumberland Farms that allege the companies deceptively advertise their vanilla ice cream products as having "natural flavors" when, in fact, they are made up of other ingredients. The new lawsuits, which largely duplicate a complaint filed earlier this year against Friendly's Manufacturing & Retail LLC (covered in the August 2019 edition of our *Food & Beverage Digest*), allege that the companies' use of the term "natural flavor" deceives consumers into believing the products have more natural vanilla in them than they actually do.

Like the *Friendly's* complaint, the newly filed actions also allege that the products are being marketed alongside other vanilla ice cream products that list "vanilla extract" in their ingredients, for example, so that consumers pay a price premium for the defendants' products and are deceived into thinking they contain as much vanilla as the competing products. Both complaints seek to certify a nationwide class for violation of consumer protection laws. The complaints also ask for compensatory and punitive damages, as well as injunctive relief ordering the defendants to correct the challenged labeling.

Plaintiffs Sour on Vanilla-Flavored Almond Milk

Cicciarella v. Califia Farms LLC, No. 7:19-cv-08785 (S.D.N.Y. Sept. 22, 2019).
Parham v. Aldi Inc., No. 1:19-cv-08975 (S.D.N.Y. Sept. 26, 2019).

The same law firm has also recently filed numerous putative class action lawsuits in the Southern District of New York against various makers of vanilla flavored almond milk. The lawsuits allege that the use of the term "vanilla" on the almond milk's labeling is false and misleading. According to the plaintiffs, the labels give consumers the impression that the products contain enough vanilla to independently characterize the products as vanilla, when that is not the case. Though the plaintiffs admit that they do not know the amount of vanilla in the products, they assert that the almond milk products are not primarily flavored with vanilla because it identifies only vague "natural flavors"—not vanilla ingredients, such as vanilla flavoring or extract—on the products' ingredient lists. The plaintiffs further allege that despite knowing their products do not contain much (if any) real vanilla, the manufacturers take advantage of the fact that vanilla is the second-most expensive flavoring in the world by charging a price premium for these deceptively marketed products. The plaintiffs assert claims for violations of every state's consumer protection statutes and for negligent misrepresentation, breach of warranty, and fraud.



Motions to Dismiss

Procedural Posture: Granted

A Beginning with No End Creams False Ad Lawsuit

Beasley v. Lucky Stores Inc., No. 3:18-cv-07144 (N.D. Cal. Sept. 16, 2019).

A California federal court dismissed a putative class action against Nestlé alleging that consumers were deceived into buying Coffee-mate creamer with "unauthorized nutrient content claims." The plaintiff alleged that Coffee-mate labels proclaim that the coffee creamer contained 0 grams of trans fat per serving. In reality, according to the complaint, the creamer contains partially hydrogenated oil, which is an "artificial source of trans fat."

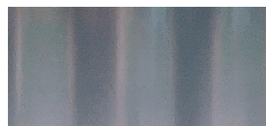
Dismissing the suit without prejudice, the court reasoned that the complaint was too vague about when the plaintiff allegedly bought Nestlé's Coffee-mate creamer because it only stated the beginning of the proposed class period without giving an end date—the court could not determine whether the claims were barred by the applicable statutes of limitations. The court also explained that the complaint did not establish when and how the plaintiff allegedly relied on the purportedly fraudulent zero trans-fat representation. Although the plaintiff was given leave to amend the labeling claims, the court dismissed *with* prejudice allegations of the unlawful use of partially hydrogenated oil in the creamer as preempted by federal law. The court also granted Nestlé's motion to strike certain paragraphs from the complaint that included allegations about Nestlé's conduct unrelated to Coffee-mate, finding those allegations only served to prejudice the company.

Procedural Posture: Denied

Is Non-GMO Project Verified the Only Legal No-GMO Claim Now?

Latiff v. Nestlé USA Inc., No. 2:18-cv-06503 (C.D. Cal. Sept. 19, 2019).

While clean labels, supply-chain disclosures, and transparency on GMOs are in vogue, a plaintiff in a California suit essentially would have the ubiquitous Non-GMO Project Verified label program preclude companies from making their own no-GMO claims, even when verified by a third party. At least for now, a federal district found this theory could proceed to discovery.



The plaintiff alleged that Nestlé's "No-GMO Ingredients" label tricks consumers into believing it is third-party verified when it is not. But the "No-GMO Ingredients" label includes an asterisk and statement that Nestlé's product is verified by SGS, a third-party verifier. Even though Nestlé's label lacks the unique pastoral imagery of the Non-GMO Project Verified seal, including its butterfly and grass checkmark, or the words "Non-GMO Project Verified," the plaintiff also claims that the defendant created consumer confusion by using a seal similar to the Non-GMO Project's seal when Nestlé's standards are less stringent than those required by the Non-GMO Project.

In denying a bid to dismiss these thin allegations, the court curiously cited a case considering the term "natural" for the proposition that "if products are made with milk from animals fed with GMO feed and contains [*sic*] a No GMO Ingredients Label, it is plausible that consumers would be misled." But the complaint did not raise a natural claim. And there are many cases holding that GMO feed does not make a by-product from the animal consuming the GMO feed a GMO food. Perhaps for all these reasons, Nestlé now has moved for reconsideration, focusing, in part, on the judicially noticed facts pertaining to organic and USDA-approved labels that give rise to preemption challenges.

There's No Cracking This Coconut(milk) Lawsuit

Marshall v. Danone US Inc., No. 3:19-cv-01332 (N.D. Cal. Sept. 13, 2019).

A district court judge has denied Danone's attempt to dismiss a complaint brought by a consumer of Silk Coconutmilk. This lawsuit is one of several copycat lawsuits, which have been filed by the same plaintiffs' attorneys, that makers of coconut products have faced over their labels. The consumer here sued the coconut-milk producer for an allegedly misleading label that promotes Silk Coconutmilk as "cholesterol free." He contends this label creates a false impression of the health benefits of Silk Coconutmilk, given the amount of saturated fat in the product.

The district court found that these claims plausibly alleged deceptive conduct. It observed that the FDA has expertise in (and is responsible for) determining what labeling practices may mislead consumers, and the amount of saturated fat per serving of Silk Coconutmilk exceeded the FDA's guidelines for cholesterol-free labels. Since the FDA apparently believes consumers will draw unwarranted conclusions about the illusory health benefits of high-saturated-fat yet cholesterol-free products, the court reasoned, an allegation that a product violated these standards should proceed.

Motions for Preliminary Injunction

Procedural Posture: Modified

Beer Giants Continue Months-Long Crusade over "Corn Syrup" Brewhaha

MillerCoors LLC v. Anheuser-Busch Companies LLC, No. 3:19-cv-00218 (W.D. Wisc. Sept. 4, 2019).

Nearly eight months ago, MillerCoors took great offense to an Anheuser-Busch Super Bowl ad campaign that contrasted Miller Lite's and Coors Light's use of corn syrup in brewing with Bud Light's use of rice. For its part, Anheuser-Busch maintains that its ads are literally true—and they are.

In our June edition, we wrote that MillerCoors would find little solace in the district court's first preliminary injunction prohibiting any Anheuser-Busch ad that implies corn syrup is actually present in MillerCoors's beer. The district court recently extended that injunction to include Bud Light's packaging, which prominently displays "No Corn Syrup" without any disclaimer that corn syrup is only used in brewing. It reasoned that when displayed next to Miller Lite and Coors Light packaging, the tag line "no corn syrup" is likely to be misleading, particularly in light of Bud Light's prior advertising campaign. However, the district court's order allows Anheuser-Busch to exhaust the packaging it had on hand as of June 6, 2019 or to phase out the offending packaging by March 2, 2020 (whichever occurs first). In doing so, district court acknowledged that though MillerCoors is technically correct on the merits, in eight months of litigation it has yet to point to any discernable consumer harm.

The district court suggested that MillerCoors may move to modify the preliminary injunction, an offer that MillerCoors will undoubtedly oblige. However, much like other hapless crusaders of yore, MillerCoors's dogged campaign is likely due to be taunted for a second time.

Motions to Certify Class

Procedural Posture: Denied

Plaintiffs' Failure to Submit State-Law Analysis Dooms All-Natural Case

de Lacour v. Colgate-Palmolive Co., No. 1:16-cv-08364 (S.D.N.Y. Sept. 12, 2019).

The plaintiffs brought a consumer class action against Tom's of Maine Inc. and its parent company, Colgate-Palmolive Co., asserting several causes of action related to the defendants' use of the word "natural" on the labels and packages of its products, including deodorants and toothpastes. The plaintiffs alleged that the defendants' products were not natural because they contained synthetic and chemically processed ingredients and that the defendants' false advertising constituted a breach of express warranty and violated several state consumer-protection statutes.

The plaintiffs moved to certify a nationwide class of consumers who purchased the defendants' products and California, Florida, and New York state subclasses. The court denied the plaintiffs' motion without prejudice, finding that the plaintiffs failed to meet the requirements of either Rule 23(b)(2) or 23(b)(3). The plaintiffs failed to meet Rule 23(b)(2) because their claimed injury was economic and thus not "incidental" to the requested injunctive relief. The plaintiffs also could not satisfy Rule 23(b)(3) because they did not conduct a choice-of-law analysis regarding the material differences in state breach of express warranty laws and how any such material differences would bear on predominance in certifying a nationwide class. Without this analysis, the court concluded that it could not assess whether common issues predominated, and thus class certification was not appropriate.

Motions for Summary Judgment

Procedural Posture: Granted

Things Are Getting Hairy in Biotin Supplement Suit

Greenberg v. Target Corp., No. 3:17-cv-01862 (N.D. Cal. Aug. 29, 2019).

A federal district court granted Target's motion for summary judgment and dismissed a case alleging that the retailer's labeling for its Up&Up brand of biotin dietary supplements was misleading. According to the district court, the plaintiffs' claims were preempted by the Federal Food, Drug, and Cosmetic Act (FDCA) in light of the Ninth Circuit's recent decision in *Dachauer v. NBTY Inc.*

Biotin is a "nutrient that plays a cellular and biochemical role in the support of healthy hair, skin, nails, and energy." The plaintiff, who suffers from an unspecified disease that causes hair loss, purchased the Up&Up brand biotin supplement in the hopes that it would help "foster[] hair growth" and in order to receive "the benefits that were advertised on the label." But those stated benefits included a disclaimer that states: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease."

The reason the plaintiff's claims fell on preemption grounds has to do with the way the FDCA distinguishes between "disease claims" and "structure/function claims" in dietary supplement labels. Disease claims are claims that the supplement may be used "to diagnose, mitigate, treat, cure, or prevent disease," while structure/function claims describe "the role of a nutrient or dietary ingredient to affect the structure or function in humans." In *Dachauer*, the Ninth Circuit held that allegations that a supplement's label was misleading were preempted because the plaintiff sought to support his allegation that the manufacturer's structure/function claims were false with evidence about the supplement's inability to treat or prevent disease. But this standard only applies to disease claims. Because the evidence that the plaintiff relied on here—that any amount of supplemental biotin is superfluous—was similarly not required to state a valid structure/function claim under the FDCA, his claims were preempted. The court acknowledged that the plaintiff's claims regarding the superfluous nature of the supplement may have been true but noted that "this is a form of puffery the statute and regulations allow."

Settlements

Burrito Lovers Reach Appetizing Settlement

Schneider v. Chipotle Mexican Grill Inc., No. 4:16-cv-02200 (N.D. Cal. Sept. 11, 2019).

Burrito purveyor Chipotle Mexican Grill Inc. has reached a settlement with consumers in a class action lawsuit challenging use of non-GMO labeling. The consumers alleged that Chipotle falsely advertised that its food had "non-GMO" ingredients, when in fact its meat and dairy ingredients were produced by animals that had eaten genetically modified feed. The suit alleged, among other things, that Chipotle's advertising violated the consumer protection laws of California, Maryland, and New York.

The suit was originally filed in April 2016, but after years of litigation and with only three months before trial, the class representatives moved the California federal court to approve the settlement. The proposed settlement would provide refunds on food purchases for class members and consolidate three state classes for California, Maryland, and New York. The court has set a hearing for a final determination on the settlement for January 16, 2020.

FOOD & BEVERAGE DIGEST

Contributing Authors

[Sean Crain](#)
214.922.3435
sean.crain@alston.com

[Alan Pryor](#)
404.881.7852
alan.pryor@alston.com

[Kathryn Klorfein](#)
404.881.7415
kathryn.klorfein@alston.com

[Marcus Sandifer](#)
212.210.9551
marcus.sandifer@alston.com

[Rachel Lowe](#)
213.576.2519
rachel.lowe@alston.com

[Angela Spivey](#)
404.881.7857
angela.spivey@alston.com

[Rachel Naor](#)
415.243.1013
rachel.naor@alston.com

[Troy Stram](#)
404.881.7256
troy.stram@alston.com

[Andrew Phillips](#)
404.881.7183
andrew.phillips@alston.com

[Learn more about our Food & Beverage Team](#)

ALSTON & BIRD

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