ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

SEPTEMBER 2019

Edition Facts

5 Sections This Edition
Cases Per Section 1-6

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions for Summary Judgment	100%
Settlements	100%
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FOOD & BEVERAGE DIGEST

New Lawsuits Filed

Consumer Swarms over Heated "Raw" Honey Labeling in New Suit

Wingate v. Barkman Honey LLC, No. 5:19-cv-04074 (D. Kan. Aug. 27, 2019).

A consumer filed a putative class action against a honey manufacturer alleging that it falsely labels its Naked Wild Great Lakes Raw Honey as "Raw and Unfiltered" and "100% Pure Raw Honey" when it is not actually raw. The plaintiff points out that the defendant's honey is heated beyond 105 degrees during packaging, causing natural enzymes in the honey to begin to permanently denature and break down. Truly raw honey, the plaintiff contends, does not have these denatured enzymes, and any suggestion that the honey is "raw" is false and misleading. Not to be outdone, the plaintiff contends, a trade organization that provides a "True Source Certified" label to the honey manufacturer is equally liable because it failed to ensure that the honey complied with the organization's testing protocol (which would have revealed that the honey was not, in fact, raw).

The plaintiff seeks to certify a nationwide class of all individuals or entities that purchased the honey in retail. Among other things, the plaintiff seeks compensatory and punitive damages and declaratory relief requesting the honey manufacturer establish a court-supervised program and protocol to test and inspect all of its 100% raw honey products for a period of five years.

Lawsuit Shows Raw Pet Food Manufacturer Won't Roll Over When the FDA Barks

Lystn LLC v. Food and Drug Administration, No. 1:19-cv-01943 (D. Colo. July 5, 2019).

In January 2019, the Food and Drug Administration (FDA) issued a public warning notice for A+ Answers Straight Beef Formula for Dogs after Lystn, d/b/a Answers Pet Food, refused a voluntary nationwide recall of the product that had tested positive for salmonella. (The company did pull the specific lot code of food in question from distribution and retail.) Answers Pet Food makes raw pet food using fermentation and other non-heat-based techniques to control bacteria.

Answers Pet Food filed a complaint in federal district court, claiming it is getting a raw deal from the FDA, HHS, Colorado's Department of Agriculture, the Association of American Feed Control Officials, and others enforcing the FDA's zero-tolerance policy on salmonella in pet food. Answers Pet Food claims the FDA is unlawfully targeting the raw pet food industry and that most salmonella strains do not cause illness. Answers Pet Food also challenges the FDA for impermissibly wielding its own policies to circumvent formal rulemaking and that its action constituted an impermissible end-run around the Administrative Procedure Act. Answers Pet Food not only seeks an injunction against the no-salmonella policy, but also relief prohibiting myriad state and federal agencies from "reintroducing similar Compliance Policy Guides that do not strictly follow the [Federal] Food, Drug and Cosmetic Act or attempt to circumvent the Administrative Procedures [*sic*] Act."

Animal Rights Group Doesn't Buy Happy Cows, Greener Pastures Advertising

Sonja Bohr v. Tillamook County Creamery Association, No. 19CV36208 (Or. Cir. Aug. 19, 2019).

An animal rights group and four individual plaintiffs filed a putative class action against Tillamook County Creamery. The new suit alleges that the dairy company deceptively markets its dairy products as being sourced from "small family farms whose traditional farming practices are better for the … local community, and of course the cows..." rather than large-scale industrial dairy facilities.

In the complaint, the plaintiffs allege that Tillamook's marketing campaign showing cows in open-air barns, fresh green pastures, and being looked after by owners of small farms is deceptive. According to the plaintiffs, those ads imply that Tillamook has distinguished itself as an ethically responsible provider of dairy products versus the "Big Food" dairy companies, when in fact, it has not. The complaint goes on to allege that rather than sourcing its dairy products from the cows grazing on Tillamook County pastures, up to two-thirds of Tillamook milk products are actually sourced from large factories in eastern Oregon, including from the country's largest industrialized dairy farms. Alleging that Tillamook milked consumers for premium prices because consumers would rather support local dairies, the suit seeks restitution on behalf of Tillamook purchasers as well as an injunction restraining Tillamook's continued ad campaign, among other relief.

Motions to Dismiss

Procedural Posture: Granted

Court Leaves a Clif-hanger After Dismissing White Chocolate Mislabeling Suit

Joslin v. Clif Bar & Co., No. 4:18-cv-04941 (N.D. Cal. Aug. 26, 2019).

The federal district court found wanting a putative class action claiming that the bar maker deceptively labeled certain bars to imply they contained actual white chocolate when they only used flavoring. The plaintiffs alleged that the bars' names—which included the words "White Chocolate"—explicitly represented that the bars contain white chocolate. In reality, the bars only contained "inferior" confectionary ingredients and derivative cocoa flavoring.

The district court concluded, however, that the plaintiffs need only look to the ingredients list to realize the bars did not contain white chocolate. The district court also found that the plaintiffs also failed to allege they have standing to pursue injunctive relief, observing

that it would be "hard pressed" to see how the plaintiffs could allege future harm if they did not want products that do not contain real white chocolate. Finally, the court rejected the plaintiffs' challenge to the "Natural Flavor" labeling on the bars, finding that this labeling only conveys that the white chocolate and macadamia nut taste comes from "flavor rather than the real ingredient."

Despite this stern analysis, the district court nevertheless granted the plaintiffs leave to amend their complaint, seemingly unconvinced that an amendment would be futile at the pleadings stage.

Plaintiffs Left Bitter After Failed Sugary Cereal Lawsuit

Truxel v. General Mills Sales Inc., No. 4:16-cv-04957 (N.D. Cal. Aug. 13, 2019).

A federal district court recently dismissed a putative class action against General Mills alleging that the company falsely advertised its cereal and snack products as healthy when, in fact, they contain large amounts of added sugar. The plaintiffs had alleged that the giant cereal maker had tricked consumers into thinking 52 of its best-selling products (such as Honey Nut Cheerios) were healthy when in reality they contained large amounts of added sugar.

The district court found, however, that after *four* attempts to do so, the plaintiffs could not plausibly claim they were misled about the sugar content of these products because the products' packaging contained information about the ingredients and sugar content (which was disclosed on the side panel of ingredients and front of the products' labeling). The court also recognized that the FDA has not set a daily recommended value for sugar intake and, therefore, there is no prevailing view "on just how much sugar is healthy."

Common Sense Prevails as Court Rejects Plaintiffs' Honeyed Claims

Lima v. Post Consumer Brands LLC, No. 1:18-cv-12100 (D. Mass. Aug. 13, 2019).

A Massachusetts federal court dismissed the plaintiffs' putative class action alleging that Post impermissibly created the impression that its Honey Bunches of Oats cereal is primarily sweetened with honey. According to the plaintiffs, television commercials and the giant cereal maker's branding and packaging led them to believe that honey was the main sweetener, when in fact it is sweetened primarily with sugar and corn syrup.

The court dismissed the plaintiffs' claims, finding that no reasonable consumer could have concluded that the cereal was primarily or exclusively sweetened with honey based on Post's use of the word "honey" and the related graphics depicting honey and bees appearing on the box. The court determined that these references and graphics instead could be a reference to a flavor—or even simply an ingredient—of the cereal. Either way, the court reasoned, Post's use of the word "honey" and the associated imagery on its packaging was permitted, and the plaintiffs had no reasonable basis for claiming that they believed that honey—which they conceded was an ingredient of the cereal—was its primary sweetener.

Accusers' Chirping Kills False Ad Suit over All "Natural" Chicken

Friends of the Earth v. Sanderson Farms Inc., No. 3:17-cv-03592 (N.D. Cal. July 31, 2019).

Sanderson Farms, the third-largest poultry producer in the U.S., won a motion to dismiss false advertising claims filed by Friends of the Earth and Center for Food Safety. The two nonprofits alleged that Sanderson's chicken was falsely labeled as "100 percent natural," despite containing antibiotics. But because the pair admitted in depositions that they would have advocated against Sanderson's use of antibiotics even if Sanderson hadn't run any "all natural" advertisements, the court found that the plaintiffs could not establish Article III standing.

Granting Sanderson's motion to dismiss, the district court found that the plaintiffs failed to "establish that their alleged injury is traceable to the challenged ads at issue." After running through a fulsome list of reasons showing that the plaintiffs were acting "in furtherance of their missions to address antibiotic use generally" rather than as a "reaction to Sanderson's advertising," the court noted that some of the "most damaging" evidence against the plaintiffs was uncovered during the groups' own depositions, where they admitted that they planned to oppose Sanderson's use of antibiotics regardless of any advertising campaign. That evidence helped to show the court that the plaintiffs "were incurring ordinary program costs regardless of Sanderson's advertising." Such expenses, the court held, "cannot be transformed into an injury-in-fact under Article III."

Procedural Posture: Denied

Court Asks for Another Helping of *In re Hyundai* in Dietary Supplement Suit

Capaci v. Sports Research Corp., No. 2:19-cv-03440 (C.D. Cal. Aug. 5, 2019).

In our August edition, we analyzed the impact of a recent Ninth Circuit opinion on the settlement of nationwide class actions. Now, a federal district court wants another serving of the Ninth Circuit's analysis in denying a sports nutrition company's motion to dismiss.

The plaintiffs alleged that the company's dietary supplements were falsely advertised as "a great way to support your overall weight management plan." To the contrary, the plaintiffs claimed, the supplements fare no better than a placebo because their active ingredients are incapable of providing weight loss benefits. The dietary-supplement maker moved to dismiss the complaint, raising a range of arguments for why the complaint should be dismissed.

But in a one-page order, the district court ignored these arguments, focusing solely on whether the nationwide class claims should be dismissed because of states' contrasting consumer protection laws. It concluded that the dietary-supplement maker failed to adequately account for the Ninth Circuit opinion in *In re Hyundai & Kia Fuel Economy Litigation*, which approved a nationwide settlement class. Nor was it persuaded that *In re Hyundai* was inapplicable because it involved a settlement class, not a litigation class. It denied the motion to dismiss without prejudice to allow the dietary-supplement maker a chance to more fully consider *In re Hyundai*'s implication in a renewed motion to dismiss, though we expect there will be a healthy serving of the other dismissal arguments the district court previously ignored.

No Clif-hanger Here: Sugary Bars Suit Gets a Boost After Court Denies Motion to Dismiss

Milan v. Clif Bar & Co., No. 3:18-cv-02354 (N.D. Cal. Aug. 20, 2019).

With heightened concerns of the adverse health impacts associated with a high-sugar diet, consumers are increasing their challenges to "healthy"—yet sugary—food products. Here, the plaintiffs assert that Clif Bar's Kid ZBars and "Classic" Bars' "health and wellness message" is false and misleading when 37% of the bars' calories comes from added sugar. Far from contributing to health and wellness, the plaintiffs allege, the sugary bars instead contribute to the dangers of excessive sugar consumption.

The bar maker moved to dismiss the plaintiffs' complaint, arguing that the plaintiffs' claims are preempted and fail to state a plausible claim for relief. The district court rejected these arguments. The district court pointed out that the plaintiffs have not challenged the nutrition information on the bars. In addition, the plaintiffs' theory that the bars' excessive sugar content renders its packaging deceptive does not conflict with the FDA's 2016 rule that *some* added sugars can be a part of a healthy diet. Finally, the district court was not impressed with the bar maker's argument that a reasonable consumer would see flavor names like "Chocolate Chip" and know the products contained added sugars. "Maybe so," the district court observed, but "the motion to dismiss stage is not the place to decide these questions of fact."

Motions for Summary Judgment

Vodka Maker's DNA Claims Unzipped by Court

Bellion Spirits LLC v. United States of America, No. 1:17-cv-02538 (D.D.C. August 1, 2019).

Bellion Spirits LLC lost a challenge against an agency ruling preventing the specialty distiller from selling vodka that claims to protect the consumer's DNA from alcohol-induced damage. Bellion is a specialty distiller that infuses its vodka with a compound called NTX, a "proprietary blend of ingredients that [Bellion] contend mitigates alcohol's damage to DNA." In 2016, Bellion asked the Alcohol and Tobacco Tax and Trade Bureau (TTB) to allow it to include claims on its bottles' labels that its liquor—which includes NTX—would help to "protect DNA from alcohol-induced damage" and would "reduce[ ] alcohol-induced DNA damage." After conferring with the FDA, the TTB drowned Bellion's purported "health" claims as "unsubstantiated and misleading" and for failing to comply with various regulations, including one "prohibit[ing] deception of the consumer."

Upset at having its DNA protection claims poured out by the TTB, Bellion filed suit, asserting multiple claims, including arguments that the TTB's actions violated the First Amendment as an unlawful restriction on commercial speech, and that the TTB's decision was "unconstitutionally vague in violation of the Fifth Amendment." The parties cross-moved for summary judgment, and a Washington, D.C., federal judge ruled in favor of the TTB on each of Bellion's claims. In rejecting Bellion's arguments, Judge James Boasberg found that the TTB "reasonably determined that Bellion's proposed claims are misleading; that alone is sufficient to render its decision lawful." Denying each of Bellion's remaining claims, Judge Boasberg couldn't refrain from infusing his 48-page opinion with some alcohol-related puns of his own, writing that "[w]hichever way the court tilts the wineglass, Bellion's vintage is wanting."

Settlements

Nature's Way Must Pay for "Healthy" Coconut Oil Label

Hunter v. Nature's Way Products LLC, No. 3:16-cv-00532 (S.D. Cal. Aug. 30, 2019).

After several years of litigation, Nature's Way has reached preliminary approval for settlement of a false advertising case arising from claims made about its coconut oil. In 2016, a consumer sued Nature's Way, alleging that she had relied on claims that the company's coconut oil was, among other things, "ideal for exercise and weight loss programs," and that it had a "Variety of Healthy Uses," when in reality the coconut oil was inherently unhealthy and contained 100% fat and 93% saturated fat.

The suit was paused in January 2018 by Judge William Hayes while the Ninth Circuit sorted out its ruling in *In re Hyundai & Kia Fuel Economy Litigation*. After the Ninth Circuit approved the nationwide settlement class in *In re Hyundai*, Hunter choose to move forward with the settlement as opposed to engaging in prolonged litigation. The $1.85 million deal provides that all individuals in the U.S. who purchased a product with a challenged label will be eligible for payment from the settlement fund. In addition, the settlement stipulates that Nature's Way cannot advertise its coconut oil products as "healthy," or "ideal for exercise and weight loss programs," for up to five years. A final hearing for the settlement is set for December.

Starbucks Serves Up a Sweet Deal in Energy-Drink Labeling Class Action

Marten v. Starbucks Corp., No. 1:18-cv-09201 (S.D.N.Y. August 6, 2019).

Coffee powerhouse Starbucks Corp. reached a settlement with consumers in a class action lawsuit that alleged Starbucks misleadingly advertised its White Chocolate Doubleshot Energy Drink as being made with "white chocolate," when in fact, it really contains cheap confectionery ingredients. The suit complained that Starbucks violated both state and federal regulations by engaging in deceptive trade practices.

Originally filed in October 2018, the complaint alleged that the 12-pack of energy drinks contained no cocoa butter in its ingredients list, in contrast to FDA regulations that require products marketed as white chocolate contain at least 20% cocoa butter by weight. Before the August 8, 2019 oral argument on Starbucks's motion to dismiss, the parties submitted a letter informing the court that they had reached a settlement. The court granted the parties' joint stipulation of dismissal on August 8, 2019, but neither the court nor the parties have disclosed any details of that settlement.

Appellate Cases

First Circuit Rejuvenates Coffee Buyer's Mislabeling Lawsuit

Dumont v. Reily Foods Co., No. 18-2055 (1st Cir. Aug. 8, 2019).

The First Circuit gave new life to a putative class action lawsuit filed against Reily Foods and New England Coffee alleging that the defendants misled consumers into believing their hazelnut crème coffee product contains hazelnuts. Below, the federal district court had dismissed the lawsuit because the back of the package did not list hazelnuts and the name of the product, Hazelnut Crème Coffee, did not necessarily imply those ingredients were included (especially when a consumer could check the ingredients list to confirm, and the packaging stated the product contained artificial flavoring).

Rejecting this reasoning, the First Circuit found that a reasonable consumer might find sufficient assurance in the product name to conclude that it did indeed contain hazelnuts, "much like one might easily buy a hazelnut cake without studying the ingredients list to confirm that the cake actually contains some hazelnut." In doing so, the First Circuit concluded that reasonable consumers may not actually check the ingredient list to confirm for themselves. The First Circuit also determined that the plaintiff's complaint sufficiently alleged deception and was not preempted as a matter of law.

Seventh Circuit Prescribes Reversal in Prescription Diet Pet Food Case

Vanzant v. Hill's Pet Nutrition Inc., No. 17-3633 (7th Cir. Aug. 20, 2019).

The plaintiffs purchased higher-priced Hill's Pet Nutrition Inc. Prescription Diet cat food for their cats, using prescriptions from their veterinarians. After purchasing the product for several years, the plaintiffs learned that the more expensive Prescription Diet cat food was not materially different from nonprescription cat food and did not actually require a prescription. The plaintiffs subsequently filed a class action lawsuit, asserting claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (CFA) and for unjust enrichment. The district court dismissed the plaintiffs' CFA claims, finding that they failed to allege fraud with the requisite specificity and that their claim was barred by a statutory safe harbor for conduct specifically authorized by the FDA. The judge dismissed the unjust enrichment claim because it was premised on the same conduct as the statutory claim. The Seventh Circuit reversed.

In analyzing whether the safe harbor provision of the CFA applied, the Seventh Circuit noted that the pet food that the plaintiffs purchased lacked FDA approval, as do most pet food products claiming to treat or prevent disease. In 2016, the FDA issued guidance acknowledging this longstanding noncompliance and identifying circumstances in which the agency may exercise its discretion against initiating an enforcement action. The safe harbor under the CFA covers actions "specifically authorized by laws administered by any regulatory body…." The defendants argued that the safe harbor applied because the 2016 FDA Compliance Policy Guide specifically authorized the prescription requirement and label for Hill's Prescription Diet pet food. The Seventh Circuit disagreed, finding that that the safe-harbor provision did not apply because the guide, which was not binding on the FDA or the public, only included factors that the FDA may consider in deciding not to institute an enforcement action, but did not specifically authorize any prescription requirement.

The Seventh Circuit also found that the plaintiffs adequately alleged that the defendants committed a deceptive practice under the CFA. The district court had agreed with the defendants that the plaintiffs did not allege that they relied on the deceptive representations when purchasing the cat food. The Seventh Circuit clarified that reliance is not an element of statutory consumer fraud, and that it was sufficient under Rule 9(b) that the plaintiffs alleged that they saw the prescription language when they purchased the food and suffered damages by paying a higher price for a product that was not materially different than nonprescription cat food. Because the fate of the unjust enrichment claim was tied to the CFA claim, which the Seventh Circuit revived, the plaintiffs' claim for restitution based on unjust enrichment was also revived.

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