ALSTON & BIRD

# FOOD & BEVERAGE

DIGEST

SEPTEMBER 2020

## Edition Facts

5 Sections This Edition
Cases Per Section 1-6

**Reading Calories 0**

| | % reading value |
|---|---|
| New Lawsuits Filed | 100% |
| Motion to Dismiss | 100% |
| Motion for Summary Judgment | 100% |
| Appeals | 100% |
| Settlements | 100% |


# New Lawsuits Filed

## Plaintiffs Still See the (Coffee) Cup Half Empty

*Sulzer v. The Kraft Heinz Co.*, No. 2:05-mc-02025 (W.D. Pa. July 31, 2020);
*Rocco v. Kraft Heinz Foods Co.*, No. 1:20-cv-04578 (N.D. Ill. Aug. 4, 2020).

Undercaffeinated plaintiffs are continuing the growing trend of lodging false advertising lawsuits against coffee makers for allegedly engaging in a bait-and-switch by mislabeling their coffee products as containing more servings of coffee than they actually do. Apparently believing that their last drop came too soon, plaintiffs in Pennsylvania and Illinois filed two more class actions, each alleging that they purchased Maxwell House ground coffee after relying on statements on the products' packaging that the products made up to 240 six fluid ounce cups. Only after purchasing the coffee did the plaintiffs allegedly discover that they could not make as many cups of coffee as advertised. The plaintiffs allege that Kraft, manufacturer of Maxwell House coffee, intentionally misrepresented the amount of coffee that can be brewed to induce consumers to purchase their products. The plaintiffs assert violations of various state consumer protection acts, as well as some additional tort claims, and seek compensatory and injunctive relief.

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## Carrot Cake New Target in Flavoring Suit

*James v. Hostess Brands LLC*, No. 1:20-cv-06259 (S.D.N.Y. Aug. 9, 2020).

While we have extensively covered vanilla-flavoring litigation in previous *Digests*, it appears Spencer Sheehan (the plaintiffs' attorney responsible for a majority of the vanilla litigation) has another new target – carrot cake-flavored products. Sheehan's new suit alleges that Hostess Brands' Carrot Cake Donettes' packaging misleads consumers because the product contains less carrots than consumers expect. Plaintiff claims that the product labeling is deceptive and misleading because it fails to disclose the percentage of carrots in the product and because consumers do not expect the carrot taste to come from artificial flavors, as opposed to real carrots. Due to this alleged deception, the plaintiff claims Hostess was able to sell more of the Carrot Cake Donettes and at higher prices than it otherwise would have. The plaintiff seeks to certify a class of New York consumers who allegedly paid more for the product as a result of Hostess' deceptive labeling.

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## Deodorant Packaging Smells Like Fraud

*Krause-Pettai, et al. v. Unilever U.S. Inc.*, No. 3:20-cv-01672 (S.D. Cal. Aug. 26, 2020).

A new putative class action in the Southern District of California serves as a reminder to food and beverage producers that slack-fill litigation is still being filed in federal courts and that any "non-functional" slack fill is still a target of the plaintiffs' bar. In the recently filed suit, purchasers of Unilever deodorant allege that the deodorant's packaging was fraudulent and misleading because it had approximately 40% nonfunctional slack fill. The plaintiffs claim that when shopping for deodorant, they noticed that the Unilever packages were bigger than competitors' and claim they relied on that packaging as a gauge of how much product they were receiving. Because the Unilever deodorant was priced similarly to competitors, the plaintiffs opted to purchase the larger product, believing it would give them more bang for their buck. But they were disappointed to discover that rather than containing additional sweat protection, the packages contained a significant amount of empty space and no more deodorant than competing brands. Plaintiffs allege that this non-functional slack fill violates California consumer protection statutes and seek compensatory and injunctive relief.

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## 12-Grain Snack Crackers Not All It's Cracked Up to Be

*Rosenfeld v. Trader Joe's Co.*, No. 1:20-cv-03717 (E.D.N.Y. Aug. 14, 2020).

Trader Joe's is facing a putative class action lawsuit that alleges the company's labeling of its 12 Grain Mini Snack Crackers is misleading because the product contains less of the 12-grain blend than consumers expect. Rather than consisting predominately of the 12-grain blend, as consumers argue the name implies, the suit alleges that the product is mainly comprised of enriched white flour and that this is only revealed "through the fine print of the ingredient list." The plaintiff claims that the product's branding and packaging is designed to – and does – deceive, mislead, and defraud consumers who seek out products comprised of "flours other than enriched white flour" for health, wellness, and nutrition reasons. As a result of the 12-Grain label, Trader Joe's was able to sell more of the crackers and at higher prices than it otherwise would have, according to the suit. The plaintiff seeks to certify a New York class of purchasers and seeks relief under New York's consumer protection law and common-law claims.

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## "Just Fruit" Fruit Spread Too Sweet to Be True

*Vitort v. The Kroger Co.*, No. 3:20-cv-01317 (D. Or. Aug. 6, 2020).

A new putative class action claims that Kroger's "Just Fruit" fruit spread contains much more than the name implies. Claiming to address a "troubling trend" of using deceptive product labeling to exploit consumer demand for minimally processed foods that avoid unhealthy added sugars, the new suit alleges that Kroger and other named defendants "uniformly represent that the product contains only the fruit identified" when, in fact, the ingredients list reveals that the product is made with a host of other ingredients. Specifically, the plaintiff complains that the back label of the product shows it is made primarily with "fruit syrup," and contains other sweeteners, added sugars, and additives such as pectin and calcium citrate. The plaintiff claims that reasonable consumers, like her, paid more for the product than they otherwise would have had they known it was made primarily of sugary fruit syrup.

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## Smoke on the Watson, Lawsuits on the Rise

*Watson v. Dietz & Watson Inc.*, No. 1:20-cv-06550 (S.D.N.Y. Aug. 17, 2020).

In a slight twist on the slew of "Made with Real" labeling suits that we have covered in previous *Digests*, there appears to be a growing trend of new suits attacking other characterizing flavors of products, including smoke flavoring. One of these new putative class actions that was filed in New York federal court alleges that Dietz & Watson misled consumers into thinking its Smoked Gouda cheese gets its taste from being smoked, when in fact, it really comes from added smoke flavor. The suit alleges that like other products claiming to be "Made with Real" ingredients the product's packaging deceives, misleads, and defrauds plaintiffs and consumers who expect and prefer foods that obtain their flavor through the "presence of a characterizing food ingredient"—here smoke. But because Dietz & Watson uses "natural smoke flavoring" rather than the actual process of smoking, the plaintiff alleges that the value of the product purchased was materially less than its value as advertised and that she paid a premium for the smoked gouda cheese. Plaintiff seeks certification of a class of New York consumers as well as injunctive relief and damages.

# Motion to Dismiss

**Procedural Posture:** Granted

## Where's the (American) Beef?

*Thorton v. Tyson Foods Inc.*, No. 1:20-cv-00105 (D. N.M. Aug. 27, 2020).

A recent ruling out of the District of New Mexico confirms that preemption arguments based on USDA's approval process for labeling meat products remain a strong basis for dismissal in federal court. In two consolidated putative class actions, customers and ranchers challenged the beef product labels of industry heavyweights Tyson, Cargill, JBS USA Food, and National Beef Packing Co. that claimed to be "Product(s) of the USA." The plaintiffs accused the food companies of falsely labeling their beef products because the cattle were raised outside the United States and only imported prior to being slaughtered and processed at U.S. facilities.

The court rejected each of the plaintiffs' arguments, finding that because the USDA approved each of the "Product of the USA" labels, all of plaintiffs' claims were preempted. The court explained that USDA's approval of the products' labels ended the inquiry because any state claim would "impose different or additional labeling requirements than those found under the Federal Meat Inspection Act." According to the court, even a wrong decision by the USDA that the labels were not misleading would not change the preemption analysis. The court also dismissed plaintiffs' false advertising and unjust enrichment claims, finding that there was "nothing unjust about using approved USDA labels." Not to be deterred, however, the plaintiffs appealed to the Tenth Circuit on the same day the district court issued its ruling.

**Procedural Posture:** Denied in Part

## Arizona Can't Shake "All Natural" Gummy False Ad Suit

*Silva et al. v. Hornell Brewing Co.*, No. 1:20-cv-00756 (E.D.N.Y. Aug. 10, 2020).

The Arizona Beverage Company must continue to face allegations that it violated 38 state consumer protection laws by falsely labeling its Arizona Fruit Snacks as "all natural." According to the putative class action complaint, the gummy snacks are mislabeled as "all natural" because they contain synthetic ingredients such as gelatin, citric acid, ascorbic acid, glucose syrup, and modified corn starch. Plaintiff claims that he only purchased the snacks because they were represented as "All Natural" and that defendants charged a premium price for the product.

Dismissed from the suit are claims that Arizona violated two state consumer protection laws: Wisconsin's – because that statute is meant to regulate consumer credit transactions – and Ohio's – because the plaintiff lacked standing there. But aside from those two states' statutes, the court rejected defendant's other arguments, including that the complaint failed to state a claim under New York's deceptive advertising laws because it failed to include allegations that the plaintiff relied on alleged misstatements. According to the court, that argument was "entirely without merit" because the complaint included an image of the packaging and alleged both that that the phrase "all natural" appeared on the packaging and that it was a misstatement due to the presence of synthetic ingredients in the gummies. The court also denied Arizona's motion to stay the suit while the FDA considers issuing guidance on the term "natural," explaining that there was no reason to believe that any guidance would be issued in the near future.

**Procedural Posture:** Denied

## Prop 65 Warning Challenge Lives On

*California Chamber of Commerce v. Becerra*, No. 2:19-cv-02019 (E.D.C.A. Aug. 26, 2020).

In October 2019, the California Chamber of Commerce filed a lawsuit challenging the state's Safe Drinking Water and Toxic Enforcement Act (Proposition 65) by alleging that its requirement that businesses post warnings about the presence of acrylamide (a chemical the state has identified as a cancer risk) violates the First Amendment's prohibition against compelled false or misleading speech. The complaint alleged that more than 250 companies were targeted with pre-litigation notices in connection with alleged exposures to acrylamide in their food products. California's AG, Xavier Becerra, moved to dismiss the lawsuit, claiming that the Chamber had not shown that private Proposition 65 enforcers are "state actors" for purposes of a violation under 42 U.S.C. § 1983. In denying the motion to dismiss, the court found that the Chamber presented sufficient evidence of a threat of enforcement by the attorney general to survive at the motion to dismiss stage. As this litigation proceeds, food producers and retailers should also be following the California Office of Environmental Health Hazard Assessment's (OEHHA) recently proposed regulation on acrylamide contained in food products. (See the Alston & Bird advisory "California OEHHA Moves to Implement New Proposition 65 Rules on Acrylamide.")


## Motion for Summary Judgment

**Procedural Posture:** Granted in Part and Denied in Part

### "Spring Water" Suit Flows On

*Patane v. Nestle Waters North America Inc.*, No. 3:17-cv-01381 (D. Conn. Aug. 12, 2020).

Thirsty plaintiffs will be able to continue pursuing claims against Nestle for fraudulently labeling and selling its Poland Spring bottled water as "spring water." Alleging violations of various state statutory and common laws, the plaintiffs claim Nestle's Poland Spring brand bottled water is not, in fact, "spring water," because it is sourced from springs that were not naturally occurring and may not be as pure as the name implies. This case was originally dismissed by the court in 2018 because it found the initial complaint contained only state law claims that were preempted by the federal FDCA. Not to be deterred, the plaintiffs filed a 300-plus-page amended complaint, alleging new causes of action, including for violations of various consumer protection statutes and state common law.

Nestle moved for summary judgment on all the plaintiffs' claims arising under the laws of eight different northeastern states. Nestle primarily attacked the plaintiffs' statutory causes of action, arguing that private citizens were unable to sue for alleged violations of the state's "spring water" standards and that applicable state safe harbor provisions foreclosed liability against it because of state regulatory approvals Nestle received to sell its "spring water." Nestle also argued that the entire suit was an impermissible collateral attack on the administrative approvals of state regulators for the sale of Nestle's product as "spring water." In a 51-page opinion, the court addressed each claim by state in alphabetical order, ultimately concluding that all of Nestle's arguments were futile and that at least a genuine issue of fact remained as to whether Nestle was entitled to the benefit of any regulatory safe harbor exemptions, save one. The court did grant Nestle summary judgment on claims brought under Rhode Island's consumer protection statute, finding that state's safe harbor provision to be "significantly broader in scope than the safe harbor exemption under the laws of the other states at issue." But the court allowed plaintiffs to proceed to trial on their common law fraud and breach of contract claims. Now, the plaintiffs will move toward trial where they will seek, among other remedies, money damages and a permanent injunction prohibiting Nestle from selling its Poland Spring water as "spring water."

## Appeals

### Full Throttle CAFA Removal

*Greene v. Harley-Davidson Inc.*, No. 20-55281 (9th Cir. July 14, 2020).

On July 14, 2020, the Ninth Circuit Court of Appeals issued another Class Action Fairness Act (CAFA) ruling reversing a remand to state court based on the amount in controversy. One of the key requirements for removal under CAFA is for the removing defendant to plausibly allege that the amount in controversy exceeds $5 million. In *Harley-Davidson*, the defendant reached the $5 million threshold, in part, by relying on punitive damages in a 1:1 ratio to the alleged compensatory damages. The Ninth Circuit held that the removing defendant "must show that the punitive damages amount **is reasonably possible**." According to the court, Harley-Davidson met that standard by showing that juries award punitive damages in a ratio of at least 1:1 to compensatory damages in cases involving the same causes of action, namely California's Consumer Legal Remedies Act (CLRA). The Ninth Circuit also said the trial court improperly relied on the strength of the defendant's statute of limitations defense in remanding – noting that to allow the merits inquiry would allow the plaintiff to rewrite his way out of federal court. This ruling suggests that removing defendants looking for adventure in federal court can rely on a 1:1 punitive damages ratio to get over the $5 million threshold for CAFA removal in actions involving a CLRA claim.

## Settlements

### Gingko Pill Producer Keeps Its Wits, Settles False Ad Suit with Consumers

*Sonner v. Schwabe North America Inc.*, No. 5:15-cv-01358 (C.D. Cal. Aug. 26, 2020).

Nature's Way Products recently filed a joint motion for preliminary approval in California federal court, agreeing to pay approximately $3.4 million to end a class action that alleged its ginkgo biloba pills don't improve cognitive health as advertised. Through the settlement, the putative class will be refunded the retail price for their purchases of Ginkgold or Ginkgold Max that were made in California after July 2011 or nationwide after January 2016.

The lawsuit, filed in 2015, alleged that the products' claimed ability to increase "mental sharpness" was not substantiated by scientifically credible evidence. After initially dismissing the lawsuit for failure to demonstrate breach of any promises through the challenged advertising, the Ninth Circuit revived the case on appeal, and the California class was certified in July 2019. Earlier this year, defendants moved to dismiss the case because certification of only the California class – as opposed to the nationwide class – meant the amount in controversy no longer satisfied the jurisdictional threshold. But in denying the defendants' motion, the court determined it was proper to include the amount in controversy of a national class in determining jurisdiction, even if the class does not end up being certified. Denial of defendant's dismissal bid set the table for the proposed settlement, which all parties agreed meets the preliminary approval standard.

## Checkout Lane

Upcoming Events | Click or Scan for Details

**Attendance Calories 0**

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

### September 30, 2020




Learn practical and up-to-date guidance for "Cleaning Up After COVID-19: What you need to know if your company plans to manufacture, import, sell – or use – disinfectants and sanitizers" with Elise Paeffgen, Kevin Minoli, Brendan Carroll, and Sam Jockel in this Alston & Bird webinar on September 30.

### November 12-14, 2020

Food manufacturers can explore the "National Bioengineered Food Disclosure Standard: Compliance Considerations for the Ag Industry" with Sam Jockel at the 2020 American Agricultural Law Association Annual Symposium, November 12-14.

## Contributing Authors


Angela Spivey
404.881.7857
angela.spivey@alston.com



Rachel Naor
415.243.1013
rachel.naor@alston.com



Marcos Alvarez
404.881.4745
marcos.alvarez@alston.com



Andrew Phillips
404.881.7183
andrew.phillips@alston.com



Sean Crain
214.922.3435
sean.crain@alston.com



Alan Pryor
404.881.7852
alan.pryor@alston.com



Samuel Jockel
202.239.3037
sam.jockel@alston.com



Troy Stram
404.881.7256
troy.stram@alston.com



Rachel Lowe
213.576.2519
rachel.lowe@alston.com


Learn more about our Food & Beverage Team

ALSTON & BIRD