ALSTON & BIRD

FOOD & BEVERAGE DIGEST

NOVEMBER 2023

Edition Facts

4 Sections This Edition
Cases Per Section 2-10

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Removal	100%
Motions to Dismiss	100%
Motion for Sanctions	100%

New Lawsuits Filed

Can You Smell What Preservatives Are Cooking?

Gershzon v. Zoa Energy LLC, No. 3:23-cv-05444 (N.D. Cal. Oct. 23, 2023).

A California plaintiff filed suit against an up-and-coming energy drink brand over its preservative-free marketing. The plaintiff alleges that he was looking for a healthier alternative to the traditional energy drink and that he relied on packaging claims that the product has "0 Preservatives. 0 Artificial Flavors. 0 Synthetic Colors." Despite these representations, the plaintiff alleges the product contains the preservative citric acid. The plaintiff contends that he paid a premium for the energy drink and would not have purchased it, or would have paid less, if he had known that it contained preservatives. The plaintiff brings claims on behalf of a nationwide class and California subclass for breach of express warranty and violations of various California consumer protection statutes.

Candy's "Clean Label" Criticized for Covering Up Lab-Created Chemicals

Trammell v. KLN Enterprises Inc., No. 3:23-cv-01884 (S.D. Cal. Oct. 16, 2023).

A candy-crushing consumer has alleged that his not-so-guilty pleasure may not be as innocent as he believed. The plaintiff—a student who seeks out naturally flavored candy in pursuit of a clean lifestyle—claims that a brand of licorice deceived him and a class of plaintiffs by advertising its "natural" berry flavor. While the label evokes flavors derived from sun-kissed fields, the plaintiff's alleged testing reveals the synthetic flavoring compound DL-malic acid, which the plaintiff alleges is not found on any known berry farm. His complaint brings a claim for violation of California's Consumers Legal Remedies Act for failure to reveal the licorice's synthetic flavoring, as well as claims for unjust enrichment and for breach of express warranty.

Plaintiff Zeroes In on Monkfruit Sweetener's Labeling Claims

Cohen v. Saraya USA Inc., No. 2:23-cv-08079 (E.D.N.Y. Oct. 30, 2023).

A putative class action filed in New York federal court accuses the defendant of falsely advertising its "Lakanto Monkfruit Sweetener" product as having zero net carbs and zero calories. According to the complaint, neither of these representations is true because the products are marketed using "unreasonably small serving sizes" and do not confer any of the purported nutritional and health benefits to consumers. Based on these allegations, the plaintiff seeks to represent a class of all New York residents who purchased the products within the statute of limitations period. The complaint asserts putative class claims for violation of New York's statutory consumer protection laws and seeks damages, injunctive relief, and attorneys' fees and costs, among other relief.

Butter Up!

Davis v. Schwan's Consumer Brands Inc., No. 1:23-cv-08866 (S.D.N.Y. Oct. 9, 2023).

Despite warnings from a growing number of federal judges, plaintiffs' attorney Spencer Sheehan continues to keep himself occu-*pied*, filing putative class actions against a host of food and beverage manufacturers. This time, Sheehan takes aim at the manufacturer of Mrs. Smith's brand of frozen apple pies. The complaint alleges the product's labeling is false and misleading because its claims that the pies have a "Flaky Crust" and are "Made with Real Butter" mislead consumers into thinking butter would be the predominant ingredient in the pie.

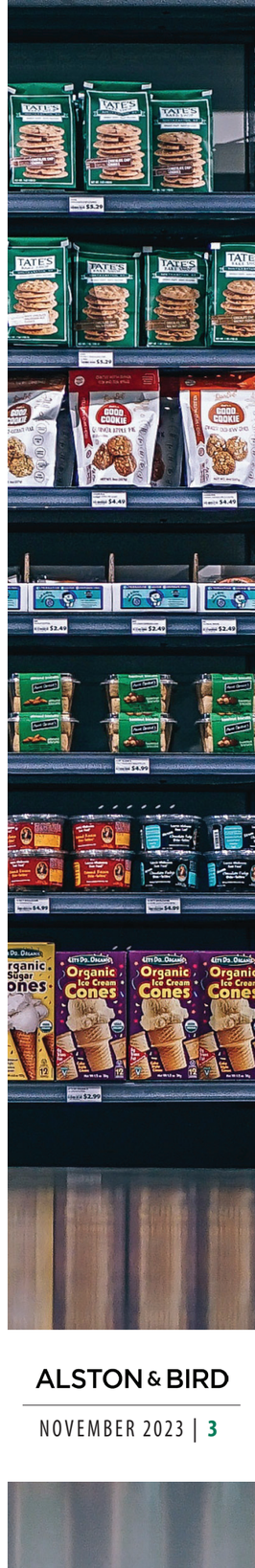
Despite those labeling claims, the complaint alleges that the actual amount of butter in the pie is "negligible or de minimis" because the ingredient "Butter" is listed after "Palm Oil" on the product's ingredient list. The complaint also alleges that by using the combined ingredient name "Shortening Butter Blend" for the combination of palm oil and butter ingredients and listing the combined ingredient name first, the manufacturer has misled consumers into thinking there is more butter in the pie than there is palm oil.

The complaint naturally alleges that consumers value butter over its alternatives and that had they known the truth, they would not have purchased, or would not have paid as much for, the frozen desserts. Based on those allegations, the complaint asserts violations of New York's consumer protection laws, fraud, and unjust enrichment.

Consumer Says, "No Honey? Not Funny."

Tobin v. The Procter & Gamble Co., No. 4:23-cv-05061 (N.D. Cal. Oct. 3, 2023).

Cold and flu season is in full swing, and honey is all the rage, according to a consumer who brought a putative class action for alleged lack of honey in liquid medicine products he purchased. The complaint alleges the products' label claims, "MADE WITH REAL HONEY" and "FLAVORED WITH REAL HONEY," in addition to its placement below the claim "COATS AND SOOTHES" were false and misleading because the products either do not contain honey or are made with "such an insignificant amount of honey that it does not 'COAT and SOOTHE' or provide real honey flavor." Instead, the products allegedly contain artificial flavors, sweeteners, and additives that "mimic" the taste of real honey. The plaintiff alleges that honey provides nutritional benefits and is promoted as the "superior, natural treatment for coughs and colds," and that he would not have purchased the products or would have paid less for them if he had known the truth. As the adage goes: *No honey, no money*. The plaintiff seeks to represent a California class, bringing claims for violation of California's consumer protection laws, breach of express warranty, and quasi contract.



Champagne Problems

West v. Molson Coors Beverage Company USA, No. 1:23-cv-07547 (E.D.N.Y. Oct. 10, 2023).

It's not real champagne unless it comes from the Champagne region of France, and it's not a real Mimosa Hard Seltzer unless it comes from … the Champagne region of France? At least, that's what one plaintiff's new complaint wants you to believe. The plaintiff alleges that the defendant's Vizzy brand Mimosa Hard Seltzer misleads consumers into believing that it is made with real champagne (like the classic mimosa), when in reality its bubbles come from sparkling water and its alcohol is from fermented sugar. The plaintiff brings claims for a violation of New York's General Business Law, breach of express warranty, and unjust enrichment, and seeks to represent a class of New York purchasers.

For a case pending before an Article III judge, the complaint is surprisingly cavalier. It begins with a historically dubious anecdote crediting Napoleon Bonaparte with the invention of the mimosa—complete with picture of a fake Napoleon (Joaquin Phoenix) from the recent eponymous movie. Following the Napoleon Bona-not, the complaint gives a gratuitous linguistics lesson on the origins of the word *brunch* ("a portmanteau of breakfast and lunch," for the curious) to pop the cork on the defendant's Mimosa Hard Seltzer. Recently, a New York federal judge found that similar allegations against a margarita hard seltzer had decidedly lost their fizz. We'll be watching this case closely to see if this case is similarly exiled to the annals of history.

Consumer Claims Protein Drinks Had *Plenty* He Didn't Need

Julian v. Only What You Need Inc., No. 7:23-cv-09522 (S.D.N.Y. Oct. 30, 2023).

A New York consumer is suing a supplement company that manufactures and sells protein shakes and powders that are marketed as healthy and claim they contain "only what you need," and "nothing you don't," because the purportedly healthy drinks allegedly contain plenty that consumers do not need—or even want—unsafe levels of per- and polyfluoroalkyl substances, a.k.a. "PFAS" or "forever chemicals." The plaintiff claims that when he made his purchases of the products, he saw and believed that the products were healthy based on the fact that the products were marketed as containing "only what you need," because "what's inside matters." But according to the plaintiff, those claims were all hooey, because laboratory testing has allegedly shown the likely presence of PFAS, and "no reasonable consumer would expect" a product marketed as healthy to contain dangerous PFAS chemicals.

Based on those allegations, the plaintiff claims he suffered and continues to suffer economic injuries as a result of his purchases, and that had the defendant disclosed on the label that the products contained PFAS chemicals, he would not have purchased the products or would have paid less for them. The suit asserts claims under New York's consumer protection statutes, breaches of warranty, and unjust enrichment.

Is the Juice Worth the Squeeze?

Bell v. PepsiCo Inc., No. 7:23-cv-08600 (S.D.N.Y. Sept. 29, 2023).

A New York consumer *juice* could not take it anymore and filed a class action over a large beverage manufacturer's "100% Juice Blend" juices. The complaint alleges that the labels of the relevant juice products contain representations "that they: (1) are made from a '100% Juice Blend' and (2) contain 'No Preservatives.'" The complaint alleges that despite those representations, the juice products all share a common ingredient: "ascorbic acid—a well-documented synthetic ingredient." Ascorbic acid is also known as Vitamin C, and while the complaint acknowledges that the food additive could be derived from natural sources, it suggests that all commercial ascorbic acid is synthetically derived. Additionally, the complaint cites FDA regulations to allege that the inclusion of ascorbic acid in the relevant products has a preservative effect on the juice component of the products.

The complaint juxtaposes the beverage manufacturer's product labels against its competitors' product labels for similar products that contain "100% Juice" claims; the competitor products' labels contain disclosures that the products contain additional ingredients. The plaintiff alleges that he relied on the beverage manufacturer's representations and that he would not have sipped on the relevant products had he known the representations were (allegedly) not true. The plaintiff seeks to certify a nationwide class to pursue claims under consumer protection statutes of the class states and also seeks to certify a California subclass to pursue claims under California's false advertising law, Consumers Legal Remedies Act, and Unfair Competition Law.

Preservative-Free Claims Are Getting Juicy

Bullock v. Ocean Spray Cranberries Inc., No. 1:23-cv-12557 (D. Mass. Oct. 27, 2023).
Wright v. Ocean Spray Cranberries Inc., No. 3:23-cv-05627 (N.D. Cal. Oct. 31, 2023).

A pair of consumers, sour over the defendant's "No Preservatives" claims on certain juice products, filed class actions in Massachusetts and California courts, claiming that they were misled by the product's labeling.

The Massachusetts consumer claimed she relied on the beverage manufacturer's allegedly "false, misleading, and deceptive marketing of the Product containing 'NO ARTIFICIAL FLAVORS OR PRESERVATIVES.'" The complaint alleges that the cited products contain ascorbic acid, commonly known as Vitamin C. The complaint primarily cites FDA and USDA regulations and statements to claim that the ascorbic acid contained in the beverage manufacturer's products is (allegedly) a chemical preservative. The complaint alleges violations of New York's General Business Law, Massachusetts Unfair and Deceptive Business Practices Act, breach of express warranty, and unjust enrichment.

Just four days after the defendant was hit with the Massachusetts suit, a California consumer filed a similar class action complaint challenging the "No Preservatives" claim on two specific juice products. The complaint alleges that the claims are false because "the Products are made with citric acid." Despite acknowledging that citric acid is found naturally in certain citrus fruits, the complaint alleges that many food manufacturers use a form of citric acid

derived from chemical processing. Similar to the Massachusetts lawsuit, this complaint cites FDA and USDA regulations and statements to allege that citric acid functions as a preservative in the specific juice products. The complaint further alleges that reasonable consumers are deceived by the beverage manufacturer's "No Preservatives" labeling statements. The complaint alleges violations of California's Consumers Legal Remedies Act, California's Unfair Competition Law, and breach of express warranty.

Consumer Puckers over Lack of Lemon

Conley v. Nonni's Foods LLC, No. 23-cv-6128223 (Conn. Sup. Ct. Oct. 19, 2023).

A consumer has filed a putative class action complaint in Connecticut state court alleging the defendant's limone biscotti cookie products are mislabeled because they only contain a negligible amount of lemon and derive their taste from "non-lemon sources." The plaintiff alleges she reasonably believed the products contained more than a "de minimis amount of lemon" because she read and relied on the representations "Limone (Lemon) Biscotti," "Made with Real Sugar, Butter and Lemon Zest Oil," "Real Ingredients," "No Artificial Flavors," and pictures of lemon rind and lemon peel. The plaintiff seeks to represent a class of all Connecticut residents who purchased the product within the statute of limitations period. The complaint asserts claims for violation of Connecticut consumer protection statutes and breach of express warranty. The complaint further prays for various forms of damages and attorneys' fees and costs.

Removal

Growing Number of Defendants Smoking Out the Competition Through Removal

Grimes v. Ralphs Grocery Co., No. 2:23-cv-09086 (C.D. Cal. Oct. 27, 2023).

Over the past few months, readers might have noticed coverage of a greater number of state court suits in the *Digest*. That's because an increasing number of plaintiffs' attorneys are choosing to file new suits in state, rather than federal, court. One reason for this noticeable shift may be the growing number of defense-friendly decisions in the food and beverage space by the federal judiciary. And as avid readers are keenly aware, notorious plaintiffs' attorney and mass-filer Spencer Sheehan has been chased and chastised by numerous federal judges—likely providing additional motivation for his latest spate of state court filings.

But if a food or beverage manufacturer is hit with a state court suit, all is not lost. As one large grocery store chain recently showed, defendants are able to take advantage of the federal Class Action Fairness Act of 2005 (CAFA) and *smoke* plaintiffs out of state court and into federal court. Faced with a putative consumer class action alleging that the front label of its "Smoked Gouda" cheese with its "distinctive smoky flavor" fails to disclose the addition of liquid smoke flavoring, the defendant availed itself of its federal jurisdictional rights and moved to remove the complaint to the Central District of California, citing CAFA. CAFA extends federal jurisdiction over class actions when: (1) any member of the proposed class is a citizen of a state different from any defendant; (2) there are at least 100 members in all proposed plaintiff classes combined; (3) the amount in controversy exceeds $5 million; and (4) no exception to jurisdiction applies.

The defendant argued that each applies in this case and that removal is proper. Refusing to be kicked to federal court without a fight, the plaintiff recently filed a motion to remand, arguing that the defendant failed to plausibly allege the requisite amount in controversy to avail itself of CAFA's removal requirement because the defendant impermissibly relied on sales for products not at issue to allege the jurisdictional requisite of $5 million to satisfy CAFA.

Defendant Salty over State Court Suit

Espinoza v. B&G Foods Inc., No. 2:23-cv-09096 (C.D. Cal. Oct. 27, 2023).

As another example of a defendant food manufacturer removing state court claims to federal court, a manufacturer of taco seasoning mixes recently moved to remove claims about its "Salt-Free" labeling representations on its product packages. Originally filed in California state court, the complaint alleges that the product actually contains sodium despite the "salt-free" claim and the declaration of 0g sodium on the nutrition facts panel. The plaintiff allegedly performed laboratory testing of the product to support her allegations. The plaintiff seeks to represent a California class of purchasers and asserts violations of California law and breach of warranties.

Motions to Dismiss

Procedural Posture: Granted

Feta Cheese Claims Crumble Away

Gallagher v. Lactalis American Group Inc., No. 1:22-cv-00614 (W.D.N.Y. Sept. 21, 2023).

A New York federal judge has dismissed one of Mr. Spencer Sheehan's consumer class action complaints that alleged that consumers were misled into believing that the defendant's feta cheese product was made in Greece due to the label's statement "Europe's leading cheese expert," depiction of a "gold olive branch wreath," and the word "feta" stylized in "ancient-Greek font." The judge quickly noted that the label states that the product was distributed in "Buffalo, NY" and was made by "a family of artisan cheesemakers with over 80 years of French heritage." Ultimately, each of the plaintiff's claims crumbled before the judge's gaze.

First, the judge held that no reasonable consumer would "expect that a mass-produced cheese product was made in Greece based on little more than a font style," so the plaintiff

could not maintain a claim under the Florida Deceptive and Unfair Trade Practices Act. Second, the plaintiff lacked Article III standing to assert claims under non-Florida consumer protection statutes because she failed to allege that she purchased the feta cheese products in states other than Florida.

Third, her express warranty claim failed because she did not give the defendant pre-suit notice of the claim, and her implied warranty claim failed because she did not purchase the feta cheese product directly from the defendant, and so lacked contractual privity with the defendant. Further, the failure of her express and implied warranty claims meant the plaintiff could not maintain a claim under the Magnuson–Moss Warranty Act.

Fourth, the plaintiff's negligent misrepresentation and fraud claims failed because she did not allege that the defendant acted with deceptive intent. Fifth, and finally, her unjust enrichment claim was dismissed because it was supported by only "a single sentence" and lacked any factual detail.

Cold Relief Medication Complaint Finds Stuffy Reception in Federal Court

Kampmann v. The Procter & Gamble Co., No. 1:23-cv-01021 (C.D. Ill. Oct. 24, 2023).

A plaintiff challenging the "convenience pack" of DayQuil and Super C vitamin supplement was undoubtedly inconvenienced by the recent dismissal of her claims. The class action complaint—one of numerous we have discussed that target the bundling of nonprescription cold and flu medications with vitamin C products—alleges that the sale of Super C alongside DayQuil misleads customers into believing that Super C independently treats cold and flu symptoms. Had she been aware that vitamin C is ineffective at treating the cold and flu, she alleges, she would have paid less for the bundle or not purchased it at all. The drug manufacturer moved to dismiss the complaint in its entirety.

The court, with little throat clearing, granted the motion to dismiss. Turning first to the plaintiff's claims under numerous states' consumer fraud statutes, it held that the threshold requirement of a "statement" is nothing to sneeze at, and that the co-packaging of DayQuil and Super C is not an actionable communication. It dismissed the plaintiff's claims for breach of express warranty, negligent misrepresentation, and common-law fraud for the same reason. (The court rejected the plaintiff's claim for unjust enrichment as a side effect of the fraud claim unable to stand on its own.)

It also dismissed the plaintiff's claim for the breach of an implied warranty for failure to provide pre-suit notice to the defendant—a prerequisite to suit. Finally, in holding that the plaintiff lacked standing to pursue injunctive relief, the court saved its bitterest pill for plaintiff's counsel, whom it noted has filed a "barrage of consumer fraud claims," calling "nonsensical" the possibility of the plaintiff's further confusion by the convenience pack. Although the court expressed skepticism that the plaintiff could plead a colorable claim for injunctive relief, it allowed her the opportunity to cure her pleading deficiencies in an amended complaint.

Procedural Posture: Granted in Part

Amino Acid Drink Suit Broken Down by Court

Daly v. FitLife Brands Inc., No. 1:22-cv-00762 (N.D. Ill. Sept. 28, 2023).

The Northern District of Illinois broke down parts of a plaintiff's allegations that the defendant's prominent "All Natural Amino Drink" label was false and misleading. The plaintiff alleges that the label on the amino drink product is false and misleading because the product is not "all natural"; rather, it contains synthetic DL-malic acid. The defendant moved to dismiss, claiming the plaintiff lacked standing to represent a class based on a drink flavor he did not purchase, lacked standing to seek injunctive relief, and failed to satisfy the heightened standard for pleading fraud claims.

The court rejected the defendant's flavor-based standing argument, explaining that because the labeling and claims at issue between two flavors of the product are substantially similar, the plaintiff does have standing to seek relief on behalf of customers who purchased each flavor. The court also rejected the company's argument that the "all natural" label was intended to convey that the product provides "all natural" amino acids, not that the entire product is all natural. In rejecting this argument, the court highlighted that the product does not say "all natural amino *acids*." Rather, the court found the company "actively preferred that its label retain some level of ambiguity" through its "all natural amino *drink*" label and so the ambiguous label could mislead a reasonable consumer.

It wasn't all good news for the plaintiff, however—the court permanently tossed the plaintiff's claim for injunctive relief, holding he lacks standing to bring such a claim because he couldn't be deceived again in the future. The court also found that the plaintiff failed to adequately allege his common-law consumer fraud claim because he failed to allege that the company intended to defraud its customers, but granted leave to amend that claim.

Motion for Sanctions

Motion for Sanctions, Motion for Class Cert Prove Fruitless in Fruit Snacks Fight

Marino v. YummyEarth Inc., No. 3:22-cv-02739 (N.D. Cal. Oct. 11, 2023).

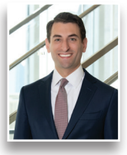
The Northern District of California issued a short but scathing order denying the defendant's motion for sanctions and the plaintiff's request for relief from failure to timely file a class certification motion in a case over the defendant's marketing of its fruit snacks. The plaintiff initially filed a complaint in May 2022, alleging that the defendant engaged in a deceptive marketing campaign to convince consumers that its fruit snacks contained the actual fruits or their juices shown and referenced in the products' marketing and labeling. The plaintiff defeated a motion to dismiss in November 2022—and that's when things got juicy.

The defendant filed a motion for case-terminating sanctions in July 2023, claiming that the plaintiff twice failed to sit for a noticed deposition. The plaintiff shot back in a vitriolic filing that the defendant's counsel was "known in many federal districts" for "raising phantom sanctions issues and related discovery motions as part of its 'scorched-earth practice.'" The judge was not bananas about either party's position: he denied the motion for sanctions, noting (without further elaboration) that he did not appreciate how either party conducted themselves in discovery. At the same time, he observed that the deadline to file a motion for class certification had long passed and blasted the plaintiff's counsel for not realizing they had missed the deadline or filing a motion for relief from the failure to meet the deadline after discovering their oversight.

The judge also noted that he was likely to deny class certification anyway on adequacy of representation grounds based on counsel's performance thus far. Nevertheless, his ruling did not preclude the plaintiff from pursuing her individual claims or prevent some other plaintiff from filing a separate lawsuit seeking classwide relief. The moral of the story? Stay professional during contentious discovery proceedings, don't cross the *lime*, and hopefully you'll live *apple*-y ever after.

Contributing Authors

Angela Spivey
+1 404 881 7857
angela.spivey@alston.com



Jonathan Hermann
+1 404 881 7275
jon.hermann@alston.com

Samantha Burdick
+1 213 576 1190
sam.burdick@alston.com

Samuel Jockel
+1 202 239 3037
sam.jockel@alston.com

Sean Crain
+1 214 922 3435
sean.crain@alston.com

Barbara Jones-Binns
+1 202 239 3139
barbra.jones-binns@alston.com

Reagan Drake
+ 1 404 881 7150
reagan.drake@alston.com

Taylor Lin
+1 404 881 7491
taylor.lin@alston.com

Lauren Funk
+1 404 881 7648
lauren.funk@alston.com

Rachel Lowe
+1 213 576 2519
rachel.lowe@alston.com

Jamie George
+1 404 881 4951
jamie.george@alston.com

Andrew Phillips
+1 404 881 7183
andrew.phillips@alston.com

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Contributing Authors

[Alan Pryor](#)
+1 404 881 7852
alan.pryor@alston.com

[Jason Sigalos](#)
+1 404 881 7844
jason.sigalos@alston.com

[Troy Stram](#)
+1 404 881 7256
troy.stram@alston.com

[Amanda Newton Wellen](#)
+1 404 881 4809
amanda.wellen@alston.com

[Ashley Yull](#)
+1 202 239 3289
ashley.yull@alston.com

[Krupa S. Zachariah](#)
+1 202 239 3241
krupa.zachariah@alston.com

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

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