ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

AUGUST 2021

Edition Facts

3 Sections This Edition
Cases Per Section 2-9

Reading Calories 0

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

New Lawsuits Filed

Plaintiff Can't Believe It's Not Butter (Seriously)

Shelton v. Kraft Heinz Foods Company, No. 3:21-cv-00799 (S.D. Ill. July 11, 2021).

A purchaser of Cracker Barrel brand cheese bites with "butter crackers" has brought a putative class action alleging that the company's claim of "butter" crackers is misleading because the fat used in the crackers is actually oil—not actual butter made from real milk or cream. (For a bullet notes version, the complaint simply alleges: "Butter Crackers Misleading Because No Butter.")

According to the complaint, "butter" crackers are preferable to consumers over synthetic substitutes for their flavor and health benefits. The complaint claims that the oil substitutes do not impart the "smooth like butter" sensations but instead can leave "beany, powdery, or fishy" flavors and contribute to a "waxy mouthfeel." Butter is also more expensive. The named plaintiff contends it was misleading to label the crackers as "butter" crackers without a disclaimer that the crackers were artificially flavored. He seeks to represent a nationwide class, alleging claims of breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

He-Man Hopeful Harbors Hostility for Paleo Bars

Telemaque v. Caveman Foods LLC, No. 37-2021-00028528 (San Diego Cnty. Super. Ct. July 2, 2021).

The quest to become the master of the universe is not for the faint of heart. Without the right diet, a He-Man protégé can easily just become the next "wimp villain." But eat like a hunter-gatherer from days gone by, and you too can have the wherewithal to wield a power sword. That's one possible—albeit unlikely—reason why Caveman Foods has a line of "paleo" labeled snack and protein bars.

There's just one problem, or so alleges a complaint filed in California state court. The paleolithic-style snacks and bars are alleged to contain ingredients—like agave syrup—that no hunter-gatherer would encounter 10,000 years ago. The agave syrup in the products, according to the complaint, is so processed that the "paleo" label is false and deceptive. The plaintiff seeks to certify a California class of purchasers for California consumer protection claims. We suppose this means Skeletor can no longer be considered the Overlord of Evil. Talk about "wimp lash."

Smoking Out What's Real and What's Not

Rudy v. Family Dollar Stores, No. 1:21-cv-03575 (N.D. Ill. July 5, 2021).

Just another case to add to the growing list of smoke-flavored-product lawsuits. In this case filed in the Northern District of Illinois, the plaintiff challenges the labeling of smoked almonds. Although the product's ingredient list includes "natural smoked flavor," the plaintiff alleges that calling the products "smoked almonds" gave the false impression that an appreciable amount of their smoked taste resulted from having undergone a smoking process. And even if the product had undergone smoking, the inclusion of natural smoke flavor is a tacit admission that the almonds were not smoked enough to impart a characterizing smoke flavor, the plaintiff alleges. The plaintiff seeks to represent certain state subclasses asserting claims under the Illinois Consumer Fraud and Deceptive Business Practices Act and for breaches of express warranty, breaches of the implied warranty of merchantability, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment. We will keep a watchful eye on this recent trend of flavoring cases to see if the old adage holds true that where there's smoke, there's fire.

Coffee-Mate Creamer Comes Up Short, Leaving Consumer in Perilous Uncertainty

Ivory v. Nestlé USA Inc., No. 1:21-cv-01193 (C.D. Ill. July 13, 2021).

A sweet-toothed coffee consumer has lodged a putative class action complaint alleging that Coffee-Mate Caramel Latte Powdered Coffee Creamer shortchanges consumers by overstating its servings per container. The lawsuit alleges that despite labeling stating the product contains enough creamer for 140 cups of coffee at one teaspoon per serving, the product actually contains closer to 107 teaspoons of creamer. The plaintiff complains she would have not paid as much for the creamer had she known the actual amount contained in the product. Based on these allegations, the complaint asserts claims for violations of Illinois consumer protection statutes, breach of warranties, negligent misrepresentation, and fraud. The complaint seeks to certify a class of all Illinois residents who purchased the product, as well as injunctive relief and compensatory and punitive damages.

The suit comes the same day as a settlement resolving similar allegations against Maxwell House (covered below). With allegations like these, imbibing in the morning cup of joe comes with a new peril: will they run out of creamer first, or coffee? And that, readers, is the ultimate cliffhanger.

Consumer Sour on Lemon Snap Cookies

Rudy v. D F Stauffer Biscuit Company, No. 1:21-cv-03938 (N.D. Ill. July 24, 2021).

When life hands you lemons, one bakery apparently does not use them to make lemon snap cookies. Or at least that is the case according to a new putative class action. Instead, the plaintiff claims that the cookies are made with food coloring and natural and artificial flavors to imitate the look and taste of lemons. In addition, the plaintiff alleges that the lack of lemon ingredients deprives cookie consumers of the health benefits associated with lemons.

This alleged realization apparently left a sour taste in the plaintiff's mouth. The complaint seeks to certify an Illinois class for violations of Illinois's consumer protection statute, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment.

Granola's Juiced Up Protein Content Deflates Consumers' Gainz Goals

Brown v. Nature's Path Foods Inc., No. 3:21-cv-05132 (N.D. Cal. July 2, 2021).

A group of consumers aren't realizing gains on leg day—possibly—and they have found a target on which to project their underperforming ire. They have filed suit against a granola product line labeled "10g PROTEIN per serving with milk prepared with ½ cup of skim milk" on the front but is lacking the percent Daily Value declaration on the Nutrition Facts Panel. The plaintiffs allege, however, that amino acid content testing establishes that the granola products actually contain 3.87g protein without milk and 7.87g protein with milk. When correcting for digestibility, the complaint alleges the amount will be even less. The label also is deceptive, according to the plaintiffs, because no % DV for protein was included on the Nutrition Facts Panel, as allegedly required by the FDA. The plaintiffs seek to certify a California class of purchasers and a subclass of all purchasers and assert violations of California law, fraud, misrepresentation, and unjust enrichment.

Chocolate Is the New Vanilla

Rice v. Dreyer's Grand Ice Cream Inc., No. 1:21-cv-03814 (N.D. Ill. July 18, 2021).

By now, our readers are used to seeing updates on the torrent of vanilla litigation filed over the last few years. Well, it looks like those cases have become a little bland. Vanilla even. Because a number of new suits are starting to target chocolate products.

One such suit has been lodged against the maker of chocolate-dipped ice cream bars. The plaintiffs allege that the ice cream bars claim to be covered in chocolate when the ingredient lists reveal that the chocolate in part is made of vegetable oils, a supposedly cheaper substitute for cacao beans. The complaint claims that this substitution makes the ice cream products' labels misleading and that consumers shouldn't be forced to read the ingredients lists to confirm whether the chocolates in these products are wholly derived from cacao beans. The plaintiff seeks to represent a class of Illinois consumers and brings claims for violations of Illinois's consumer protection statute, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment.

Consumer Claims Fruit "IN 100% JUICE" Is Not Worth the Squeeze

Stamelos v. Schnuck Markets Inc., No. 2122-CC08859 (St. Louis. Cir. Ct. July 16, 2021).

A putative class action filed in Missouri state court claims that Schnuck Markets' fruit bowls and cans are falsely advertised as containing fruit "IN 100% FRUIT JUICE" because they mislead consumers to believe that the juice is actually 100% juice with no other added ingredients. According to the complaint, the fruit juice also contains ascorbic acid and citric acid "in direct contravention to its express representation" that the fruit is "IN 100% JUICE." Based on these allegations, the complaint asserts putative class claims on behalf of all Missouri citizens who purchased the fruit products. The complaint alleges claims for violations of the Missouri Merchandising Practices Act, breach of express warranty, and unjust enrichment. The complaint also seeks compensatory damages, restitution, and attorneys' fees and costs.

A Sham Process or Legitimate Standards? Fair Trade Claims Challenged

Austin v. Chobani LLC, No. 7:21-cv-05949 (S.D.N.Y. July 12, 2021).

A yogurt maker faces a putative class action alleging that its "fair trade" representations on its products are misleading. The plaintiffs challenge the defendant's third-party certification through Fair Trade USA, citing reports documenting exploitation of immigrant workers in the dairy industry throughout Upstate New York. The complaint also describes various challenges to the Fair Trade Certified Dairy standards as being a "sham process" and "filled with 'loopholes that leave out the most at-risk workers on dairy farms.'" The plaintiffs seek to certify a class of Florida and New York purchasers and assert violations of New York and Florida law, violations of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, unjust enrichment, and breach of warranties.

Motions to Dismiss

Procedural Posture: Denied in Part

No Fruit in Here? You've Guava Be Kiddin' Me, Say Consumers

Ruiz v. Celsius Holdings Inc., No. 3:21-cv-00128 (S.D. Cal. July 28, 2021).

As food manufacturers continue to challenge the reasonableness of consumers' beliefs at the motion to dismiss stage, plaintiffs scored a recent victory in a case out of the Southern District of California. The plaintiffs alleged they were misled into believing the defendant's energy drink products contained real fruit based on the products' names—e.g., "Sparkling Orange," "Peach Mango Green Tea," and "Sparkling Strawberry Guava"—and the vignette on the products' labels. Energized, the defendant punched back, arguing that reasonable consumers would understand there is no fruit juice in a drink advertised as 0 sugar and minimal calories and using sucralose as its primary sweetener. The district court concluded that the defendant's argument was a "factual assertion" that depended on whether it is commonly known that it is not possible to make a sugar-free, low-calorie drink that contains fruit. Which raises the question, just how reasonable are reasonable consumers after all?

Court Finds That Wine Drinker's Origin Claims Have Aged Well

Kay v. Copper Cane LLC, No. 3:20-cv-04068 (N.D. Cal. July 14, 2021).

A Napa Valley winemaker attempted to cork a consumer's suit claiming that its labels mislead consumers into thinking its Elouan pinot noir wines are made in Oregon. The labeling on the wine describes the wine as an "Oregon Pinot Noir," referencing the "coastal hills" of Oregon as an "ideal region to grow" the grapes used for this type of wine, and includes a map of Oregon with leaves denoting the locations of three well-known wine-growing valleys in the state. The labels also contained the phrase "Purely Oregon, Always Coastal."

The district court determined that whether the label's references to Oregon growing regions and the grapes' purported coastal roots were misleading presented a question of fact. While the winemaker argued that its labels disclose that the wine is bottled in California, the district court found that it was "too close a call" to determine whether the disclosure was sufficient.

Procedural Posture: Granted

Consumers Flavor Allegations Cheesin' a Bit Too Much

Wallace v. Wise Foods Inc., No. 1:20-cv-06831 (S.D.N.Y. July 26, 2021).

A New York federal court has curdled at claims that chips labeled "Cheddar & Sour Cream Flavored" are anything other than true. Guided by a perennial flavor and vanilla suit monger, the plaintiff filed suit, claiming that the defendant's chips are deceptively labeled because they are not labeled as artificially flavored. The plaintiff claimed that she read this omission to mean that the products did not contain any artificial flavors, including artificial diacetyl (which apparently mimics or bolsters the "buttery aroma of sour cream").

The argument didn't pass the smell test. The district court found that the chips are labeled as "Cheddar & Sour Cream *Flavored*," which "by all indications" is true. It observed that nothing in the label states that the flavors are derived entirely from cheddar and sour cream. In addition, the district court pasteurized the plaintiff's claim that the defendant violated FDA regulations that a label must disclose artificial flavors, observing that unilateral reliance on purported violations of FDA regulations cannot provide a foundation for a consumer protection claim.

Settlements

Consumers Ready to Cash In on Breadcrumb Trans Fat Suit

Hawkins v. The Kroger Company, No. 3:15-cv-02320 (S.D. Cal. July 2, 2021).

A certified class of consumers that purchased Kroger breadcrumbs are primed to cash in after a California federal judge granted preliminary approval of their settlement deal. The plaintiff filed her initial lawsuit in 2015, alleging that the grocer's breadcrumbs' labels falsely represented the amount of trans fats in the products. The breadcrumbs featured labels reading "0g Trans Fat" despite containing partially hydrogenated vegetable oil (dubbed "PHO") as an ingredient and, consequently, "trace amounts" of trans fat. The grocer toasted the plaintiff's first complaint, but that win went moldy quick as the Ninth Circuit reversed and remanded the case. On remand, it was the grocer's turn to feel the heat, as its second motion to dismiss was denied and the district court granted class certification in November 2020.

Now the parties appear ready to break bread after the plaintiff filed an unopposed motion for preliminary approval of class action settlement. The $800,000 settlement is set to dish out up to $17.50 for claims without documentation and up to $100 for claims with documentation. But in order to shelve the matter for good, the parties will have to answer a few additional questions from the court. The judge wants some additional information about the proposed payouts to the class as well as the $400,000 slated to be awarded in attorneys' fees, a number well above the traditional benchmark of 25% of the settlement fund.

Consumers Brew Final Settlement Approval in Coffee Serving Suit

Ferron v. Kraft Heinz Foods Co., No. 0:20-cv-62136 (S.D. Fla. July 13, 2021).

The puns seem to be catching on in the food and beverage space. This month, a Florida federal district court found that "after careful consideration," consumers' settlement deal with Kraft Heinz to resolve claims over the purported mislabeling of the amount of ground coffee in its Maxwell House and Yuban brands coffee was "good to the last drop." The price tag on this deal, $16 million, is sure to perk up other coffee distributors that have been burned by copycat lawsuits over the last year.

The deal is set to scoop out $0.80 per unit and up to $25 per household with proof of purchases for either coffee brand. Under the settlement, the defendant has also agreed to remove or revise its challenged labeling to make its upper and lower limits of the serving ranges correspond to the number of cups of coffee that can actually be brewed when following the labels' directions. Class counsel will be awarded nearly $4 million for its part in poring through the litigation, which included a substantial, months-long pre-suit investigation to determine the actual amount of coffee in the challenged products.

Checkout Lane

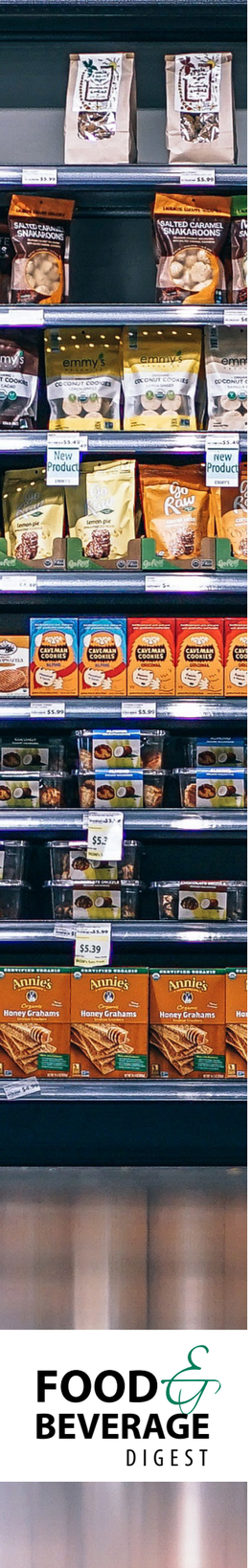
Upcoming Events | Click or Scan for Details

Attendance Calories 0	
	% engaging value
Knowledgeable Speakers	100%
Current Topics	100%
Alston & Bird Approved	100%

September 27 – 29, 2021

2021 Food Advertising, Labeling, and Litigation Conference: For the Food and Dietary Supplement Industries

At this virtual conference presented by the Food and Drug Law Institute, Sam Jockel and a panel will take you through upcoming labeling requirements and potential new legislation related to the bioengineered food disclosure.



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