ALSTON & BIRD

FOOD & BEVERAGE DIGEST

OCTOBER 2023

Edition Facts

3 Sections This Edition
Cases Per Section 2-9

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Voluntary Dismissals	100%

New Lawsuits Filed

Coffee Consumer Says Trouble's a Brewin'

Durant v. Big Lots Inc., No. 5:23-cv-00561 (M.D. Fla. Sept. 11, 2023).

A consumer is apparently feeling depresso about how many cups of joe her coffee cannister can make. The plaintiff filed a class action complaint alleging that a retailer's coffee cannister label misleads consumers about the amount of servings it yields. The product labeling claims that it "makes up to 210 suggested strength 6 fl oz servings." This claim is positioned next to the brewing instructions.

According to the complaint, when the plaintiff followed the brewing instructions, she could only make 152 servings, 58 fewer servings than the product claim promised. Based on this discrepancy, the plaintiff claims that the defendant failed to accurately calculate or disclose the number of servings based on the product's contents and brewing instructions. The plaintiff alleges that the 210-serving claim is misleading because consumers like the plaintiff could not know the product was unable to make "anywhere near the promised number of cups." The plaintiff seeks to represent a Florida class, bringing claims for violations of Florida consumer protection laws, breach of express warranty, and fraud.

Natural Hydration Sticks? More Like *Feaux-Naturale* (Allegedly)

Scheibe v. Drink Nectar Inc., No. 3:23-cv-04754 (N.D. Cal. Sept. 15, 2023).

Apparently hoping to make a big splash, a California consumer claims in a putative class action that the maker of flavored "stick packs" of hydration powders deceive consumers because the stick packs allegedly contain artificial ingredients. Paying little heed to the fact that he has challenged a crystallized powder, the consumer alleges that the defendant conveys a deceptive message that the products contain only natural ingredients by including images of fruits alongside claims that the products are "All Natural," "clean," and "flavored with real Organic Fruit."

The plaintiff claims that the defendant is in hot water because the products allegedly "are flavored using an artificial flavoring, DL-malic acid." Further, the plaintiff alleges that DL-malic acid is present in the products in "substantial amounts—in some cases exceeding more than 10 of every 100 grams." The complaint alleges violations of California consumer protection laws, unjust enrichment, and breach of express warranties.

Fired Up About "Smoked" Gouda Labeling?

Coburn v. The Kroger Company, No. 23SL-CC04045 (St. Louis Cnty. Cir., Mo. Sept. 25, 2023).

The plaintiffs' bar apparently believes that where there's liquid smoke there's fire. After federal courts have left the motion to dismiss landscape rather hazy—granting some but denying other motions to dismiss similar allegations—yet another putative class action alleges that a "smoked" gouda product is deceptively labeled.

The defendant's Private Selection Smoked Gouda Sliced Cheese product is said to have a "distinctive, smoky flavor." But the complaint alleges that the product misleads consumers into believing the cheese is smoked over hardwoods, when it allegedly contains added liquid smoke flavor. This alleged deception, continues the complaint, contrasts the defendant's products with other gouda products, which purportedly disclose the presence of added liquid smoke on the front label instead of relegating it to the product's ingredient list. Based on these allegations, the plaintiff pursues a Missouri class for claims under Missouri's consumer protection laws and for breach of express warranty.

Alleged PFAS Sours 100% Premium Orange Juice Claims

Foster v. Citrus World Inc., No. 3:23-cv-04785 (N.D. Cal. Sept. 18, 2023).

A putative class action in California federal court claims that the defendant's orange juice, which is advertised as "Florida's Natural" and "100% Premium," contains synthetic chemical per- and polyfluoroalkyl substances (PFAS). The complaint relies on its allegations about independent testing that detected "material levels," "significant levels," and "concerning levels" of PFAS in the defendant's orange juice product. However, factual allegations detailing this testing are practically nonexistent, and the complaint remains tightlipped about what "material," "significant," and "concerning" precisely mean.

The complaint nevertheless presses on to allege that consumers relied on the defendant's "representations" that the orange juice was "safe, unadulterated, and free of any potentially harmful ingredients … not listed on the label." Based on these allegations, the plaintiffs seek to represent a nationwide class and California subclass of purchasers of the product. The complaint alleges claims for: (1) violation of the Magnuson–Moss Warranty Act; (2) violation of California's Consumers Legal Remedies Act; (3) breach of express warranty; (4) fraud; (5) constructive fraud; and (6) unjust enrichment. Among other relief, the complaint seeks compensatory and punitive damages, restitution, attorneys' fees and costs, and civil penalties.

Editor's Note: PFAS remains a hot-button topic in the current legal environment. For more information, please check out our PFAS Primer and consider registering for our upcoming PFAS CLE Webinar.

"Protein" Problems

Heyning v. Quinoa Corporation, No. 3:23-cv-04755 (N.D. Cal. Sept. 15, 2023).

This month features a protein protest against a producer of pasta products containing lentil and quinoa flour. In her class action complaint, the plaintiff alleges that the defendant misrepresents the amount of protein consumers receive per serving. According to the plaintiff, manufacturers making protein content claims must disclose on the nutrition facts panel a "corrected" amount of protein per serving using the FDA's Protein Digestibility Corrected Amino Acid Score (PDCAAS) method. Lest there be any confusion, the complaint helpfully provides a phonetic pronunciation of PDCAAS ("Pee-Dee-Kass").

The plaintiff complains that the pasta maker passed on this "corrected" protein calculation, rendering its protein quantity claim unlawful and deceptive. Additionally, the plaintiff claims, the protein content claims mislead reasonable consumers because the pastas contain "low quality proteins" such that consumers receive only about 50% of the claimed amount of protein. Seeking to represent both a nationwide class and California subclass, the plaintiff brings claims for common-law fraud and unjust enrichment on behalf of the nationwide class and for violations of California consumer protection laws on behalf of the California subclass.

Preservative-Free or Pie in the Sky?

Thompson v. Schwan's Consumer Brands Inc., No. 159215/2023 (N.Y. Sup. Ct. Sep. 17, 2023).

By her account, a New York consumer purchased a popular dessert company's frozen chocolate creme pie believing it contained "no preservatives." Yet according to the complaint, the pie contained a variety of artificial substances with preservative functions (with appetizing household names like sodium pyrophosphate, sodium tripolyphosphate, polysorbate 60, polysorbate 65, and polysorbate 80).

The plaintiff contends that she paid a premium for the pie and would not have purchased the pie—or would have paid less for it—had she known it contained preservatives. Based on these allegations, she asserts claims for violation of the New York General Business Law, the New York Agriculture and Markets Law, and breach of express warranty. The plaintiff seeks to represent a class of New York consumers who purchased the pies.

Alleged Protein Ponzi Scheme

Mccausland v. PepsiCo Inc., No. 5:23-cv-04526 (N.D. Cal. Sept. 1, 2023).

Two California plaintiffs and one New York plaintiff are alleging that the defendant markets its protein bars as nutritious foods that would help consumers build muscle and promote athleticism. The plaintiffs allege that the defendant's marketing of the bars as a "Protein Bar" and description of it as a "Protein Bar Provider" that "Help[s] Muscles Rebuild" created a "health halo around the Bar" that misled consumers into believing the products were healthy when, in fact, they contained excessive added sugar. The plaintiffs further pointed to marketing for the product present on Amazon.com, which included statements such as "Backed by Science," "Used by the Pros," and "Formulated and tested by the Gatorade Sports Science Institute."

The plaintiffs seek to represent two classes of consumers who live in California and New York. The plaintiffs have alleged six different claims, including violations of California's Unfair Competition Law, False and Misleading Advertising law, and Consumers Legal Remedies Act and violations of New York's General Business Law.

Motions to Dismiss

Procedural Posture: Granted

Hoosier Popcorn Made By and Where Are They From?

Gibson v. Eagle Family Foods Group LLC, No. 1:22-cv-02147 (S.D. Ind. Aug. 29, 2023).

We've seen an uptick in geographic origin food labeling cases over the past few years—from King's Hawaiian rolls made outside the Aloha State to Texas Pete hot sauce manufactured in North Carolina to pink Himalayan sea salt sourced not from "the heart of the Himalayan Mountains." Courts have found that some managed to state plausible claims for relief, but most have air-balled. As the next up in this line of cases, one disgruntled consumer challenged the defendant's "Popcorn Indiana" brand after finding out that the corn (although grown in Indiana) is not popped in Indiana. Could Sheehan & Associates channel their inner Gene Hackman? Or was this case always destined for a similar fate as the Monstars?

While many decisions analyzed the precise geographic origin claim—often distinguishing between geographic-themed products (Hawaiian punch or New England clam chowder) and specific representations of origin (such as by including a map or invitation to visit a certain locale)—we do not have to make it even that far to sound the buzzer on this underdog story. The district court dismissed the consumer protection and fraud-based claims in the complaint because the plaintiff failed to sufficiently plead scienter. The plaintiff's conclusory allegations about the manufacturer's alleged misrepresentations and general awareness that consumers preferred foods with a connection to a place known for those foods, reasoned the court, did not allege facts showing an intent to defraud consumers.

Milk Suit Gone Sour

Garza v. Nestlé USA Inc., No. 1:22-cv-03098 (N.D. Ill. Sept. 20, 2023).

A district court has left a plaintiff crying over spilled milk, dismissing a putative class action challenging the defendant's milk-based drink powder for toddlers. According to the complaint, the defendant markets its toddler milk products to align with its infant formula product lines. But the complaint alleges that because the toddler formula is *not* regulated by

the Food and Drug Administration (and the infant formulas are) consumers are left believing that the toddler milk products are nutritionally appropriate for their little tykes when they contain unhealthy amounts of added sugar. The plaintiff, an Illinois citizen who purchased the powder-based formula, filed putative class claims seeking damages and injunctive relief on behalf of a class of Illinois consumers and a multistate class.

The court dismissed the operative complaint sua sponte, apparently concluding these allegations had turned. Specifically, the court concluded that it lacked subject-matter jurisdiction because the plaintiff had not adequately pleaded the amount in controversy under the Class Action Fairness Act. The plaintiff was not a member of the multistate class of consumers, and while the Illinois class sought damages over $5 million, the court found the amount in controversy remained unmet because the plaintiff did not allege that the powder-milk product was worthless.

The court granted the plaintiff leave to file a second amended complaint—accompanied by a warning that it would not permit a third such amendment. The plaintiff didn't file a second amended complaint by the court-noticed deadline, so this one was dismissed without prejudice.

Thin Teething Wafer Allegations Granted a Second Bite

Barnett v. The Kroger Company, No. 1:22-cv-00544 (S.D. Ohio Sept. 11, 2023).

Following a February 2021 report on levels of metal in certain baby food products, plaintiffs have been busy cooking up complaints. In this mash up, three plaintiffs challenged several private-label baby food wafers, alleging that the defendant grocery stores failed to warn customers that their baby food products contained "elevated levels" of various heavy metals.

In dismissing the complaint, however, the district court found that the plaintiffs may have bitten off more than they could chew in negotiating various states' laws. First, the court found that the Indiana claim failed because the plaintiff did not adequately allege that she provided pre-suit notice required under the statute, that the deceptive acts were "incurable," or that the defendants engaged in any deceptive conduct. Second, the Washington claims crumbled because the plaintiff failed to allege a sufficient injury to property. Third, it was unclear whether the Texas consumer protection claims had cleared the prerequisite "procedural hurdles" to bring them.

Although each of the baby food claims were put to bed, the court granted the plaintiffs leave to amend. And the court found the defendant's primary jurisdiction argument a bit too mushy, particularly since the FDA has waited more than two years since announcing its Closer to Zero plan without proposing any final regulations. Stay tuned for more in this case: on October 2, the plaintiffs filed their motion to file an amended complaint.

Procedural Posture: Denied

Shining a Light on the Second Circuit's False-Labeling Bogeyman: *Mantikas*

Reyes v. Upfield US Inc., No. 7:22-cv-06722 (S.D.N.Y. Sept. 26, 2023).

Forget creaky boards, disembodied voices, and things that go bump in the night. The thing that (arguably) makes one of our contributors clutch his Bluebook in mild terror is *Mantikas v. Kellogg Company*. There, the Second Circuit concluded that a large "Made With Whole Grain" claim could mislead a reasonable consumer to think that whole grain was the predominant ingredient in Cheez-Its. If you thought that was scary, hold on to your garlic and crucifix: the plaintiffs' bar has used *Mantikas* to allege that all sorts of ingredient claims are deceptive because—shock horror—the products contain additional ingredients.

Before you dive under the covers and cancel Halloween, though, courts in the Second Circuit have clarified that *Mantikas* is more Gizmo and less gremlin. Recently, one court explained that *Mantikas* does *not* apply when the claim concerns "an ingredient that obviously was not the products' primary ingredient," arguably making *Mantikas* the exception and not the rule.

Still, the same court applied *Mantikas* to deny a motion to dismiss a suit challenging a "made with almond oil" claim on a plant-based buttery spread. It observed that a reasonable consumer could be deceived into thinking that almond oil was the predominant ingredient used to make the spread, even if such a belief was chemically impossible. Reasonable consumers, observed the court, are "not expected to have an intimate understanding of the chemical properties of [almond oil] vis-à-vis the other vegetable oils."

We suppose that, like any good scary movie, the bogeyman has to have the last laugh. You should keep those Cheez-Its and buttery spreads close, friends.

I (Allegedly) Spy with My Little Eye: Artificial Flavors!

Tatum v. The Kraft Heinz Co., No. 1:23-cv-00073 (N.D. Ill. Sept. 7, 2023).
Boss v. The Kraft Heinz Co., No. 1:21-cv-06380 (N.D. Ill. Sept. 7, 2023).

Can you spot the difference between these two putative class actions? To give you a taste, they name the same defendant, challenge similar products (water enhancers), and raise nearly identical claims (that the product labels allegedly fail to disclose they contain the artificial flavor DL-malic acid). They even have one of the same plaintiffs. Still stumped? A federal judge assigned to both cases apparently spied the difference in the promises made on the labels, and it was so significant that the judge reached opposite conclusions on the defendant's motions to dismiss.

On one hand, the district court dismissed the *Boss* case because the MiO water enhancer product represented only that it contained "Natural Flavor with Other Natural Flavors." This limited claim, reasoned the district court, did not equate to a representation that the water enhancer was utterly devoid of artificial flavors, and it was not plausible that consumers would otherwise be misled into thinking there were no artificial flavors in the product.

On the other hand, the district court denied the motion to dismiss in the *Tatum* case, observing that the defendant's Crystal Light products *did* make a "No Artificial Sweeteners, Flavors, or Preservatives" claim on their labels. In the court's eyes, it was plausible that reasonable consumers would be misled because this claim went further than "merely omitting the disclosure of artificial flavors."

The two orders reaffirm a growing trend in Illinois federal court that judges are reluctant to spy deception without an explicit claim. And that trend leaves our plaintiffs eyeing class discovery in one case but only regret in the other.

Battle of the Bagel Grain's Name

Schleyer v. Starbucks Corporation, No. 1:22-cv-10932 (S.D.N.Y. Sept. 12, 2023).

Have you ever walked into your corner coffee shop, ordered a sprouted grain bagel, excitedly took your first bite and thought, "Hmm, my sprouted grain spidey senses are tingling. This tastes like an ordinary grain bagel, not a sprouted grain bagel!" Well, two plaintiffs alleged just that, claiming that they were misled while buying regular grain bagels from the largest coffee chain in America (and not from their local bagel bodega).

A federal district court found that these allegations stated a plausible claim for relief. First, the court held that the "context" of the bagels' labels supports the plaintiffs' claim that the grain is plain (not sprouted). Even if the defendant was right that at least four sprouted grain ingredients are in the bagels, the court observed, a label may still be misleading if it has a "large portion of unsprouted grain." Second, the court likewise was not persuaded by the defendant's argument that the label would dispel any confusion of the product's ingredients, particularly for a product most often sold as a "loose bagel in a store."

Third, the court found that the New York plaintiff adequately alleged a price premium by claiming he paid more for this sprouted grain bagel compared to other retailers' sprouted grain bagels (rather than, as the defendant contended, compared to the defendant's other bagel offerings). Finally, the court sustained the New York and California breach of implied warranty claims because the complaint sufficiently alleged that the bagels "do not conform to the label's promise that the bagel's primary ingredient is 'sprouted grain.'"

If other courts hop on a similar grain train, you'll be the first to know.

Cuckoo About Cocoa But Livid About Lead

Grausz v. The Hershey Company, No. 3:23-cv-00028 (S.D. Cal. Sept. 11, 2023).

It has been a rocky road for a major chocolate manufacturer in the past year following reports that the manufacturer's dark chocolate products contain unsafe levels of cadmium and lead. In this suit, the plaintiff alleges that the manufacturer has been on notice of its heavy metal leanings since 2014, but has yet to effectively reduce or remove heavy metals from the products. According to the complaint, the plaintiff and the purported class relied on the products' labeling, which did not disclose the presence of heavy metals, and they would not have purchased the products or would have paid less for them had they known of the products' alleged toxicity.

The defendant moved to dismiss the complaint on several Mounds, arguing (1) the plaintiff lacked Article III standing; (2) the plaintiff failed to comply with Prop 65 notice requirements; (3) the claims do not survive a consent judgment entered by the manufacturer with the California attorney general; (4) the complaint should be dismissed in favor of the FDA's jurisdiction; and (5) each of the plaintiff's claims fail to state a claim under Rule 12(b)(6).

The court agreed that the plaintiff was in truffle when it walked in, but it concluded the plaintiff plausibly pleaded a threat of future injury sufficient to establish standing and survived many of the defendant's other challenges. Nevertheless, the court granted the defendant's motion to dismiss as to the plaintiff's (1) Unfair Competition Law claim for failure to show a duty to disclose; (2) implied warranty claim for failure to adequately allege that the chocolate products were unfit for their "ordinary purpose" as food products; and (3) equitable relief claim for failure to show an inadequate legal remedy.

Federal Court Leaves a Little Juice Left for the Squeeze

Kominis v. Starbucks Corporation, No. 1:22-cv-06673 (S.D.N.Y. Sept. 18, 2023).

A New York district court largely sustained a proposed class action claiming that the defendant's fruit beverages mislead consumers because they lack their self-described fruits. The beverage-loving plaintiffs alleged that reasonable consumers would assume that the fruit beverages contain all the fruits listed in their names, while they are in fact made predominately with less-premium and less-nutritious ingredients such as water, grape juice concentrate, and sugar. For example, the Mango Dragonfruit Lemonade and Mango Dragonfruit beverages allegedly contain no actual mango.

These allegations, held the district court, stated plausible claims for relief under the reasonable consumer test. It found it plausible that a significant portion of reasonable consumers could be misled because they would expect the beverages to actually contain each of the fruits mentioned in the beverage's name. The district court was not persuaded by the coffee giant's arguments that: (1) the beverages' names accurately describe the *flavors* as opposed to the *ingredients* of the products; (2) its advertising accurately represents the beverages' fruit content; and (3) that any potential consumer confusion would be dispelled by information available to consumers from the beverage chain's baristas.

Nevertheless, the court did ap-*peach*-iate some of the defendant's arguments and dismissed the plaintiffs' fraud claim for failure to show that the defendant intended to defraud consumers and dismissed the plaintiffs' unjust enrichment claims under New York law (as duplicative of other New York consumer protection claims) and under California law (as being barred from assertion in conjunction with an express warranty claim).

California Bench Presses Forward with Protein-Packed Claims

Klammer v. Mondelēz International Inc., No. 4:22-cv-02046 (N.D. Cal. Sept. 6, 2023).

Last month, we saw the Ninth Circuit weigh in on federal regulations for protein claims on product labels in *Nacarino v. Kashi Company*. A quick recap! While the quantity of protein in two foods may be the same (e.g., 11 grams), the quality of that protein can vary based on how much of that type of protein the body can absorb and how well it fulfills nutritional needs. The Ninth Circuit observed that under applicable FDA regulations, a manufacturer can include a front-of-label protein claim *as long as* the nutrition facts panel contains a "corrected" percent-daily-value protein measure, adjusted by the PDCAAS to reflect the quality of protein. (Thanks to the *Heyning* case earlier, we now know PDCAAS should be pronounced "Pee-Dee-Kass").

With the Pee-Dee-Kass stage set, our plaintiff filed suit alleging that the defendant made deceptive implied nutrient content claims that its products contain "high protein lentils" and are "protein-packed." The district court agreed with the plaintiff, reasoning that implied nutrient content claims describe ingredients in a manner that suggests a nutrient is absent or present "in a certain amount." The court concluded that, at the pleadings stage, the plaintiff had plausibly alleged that these statements implied a level of protein was contained in the product—particularly because FDA regulations define "high" claims to mean 20% or more of a recommended daily value and because "packed" is synonymous with "high." This case is a reminder to be aware that even label descriptions of protein that do not specify a particular quantity may be construed as implied nutrient content claims and trigger the "corrected" protein disclosure requirement.

Voluntary Dismissals

Here is your monthly shortlist of the voluntary dismissals entered in some of the cases we've covered over the years:

Santiago v. Campbell Soup Co., No. 3:23-cv-03295 (N.D. Cal. Sept. 26, 2023) – Filed 6/30/2023.

Tatum v. Talking Rain Beverage Co., No. 3:22-cv-03525 (N.D. Cal. Oct. 11, 2023) – Filed 6/15/2022.

Checkout Lane

Upcoming Events | Click or Scan for Details

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

November 16

[FoodNavigator USA: Futureproofing the Food System Digital Summit]

Rachel Lowe and Sam Jockel will present the session "Navigating the Legal Minefield of Sustainable & Environmental Market Claims" at the digital Futureproofing the Food System summit hosted by FoodNavigator.

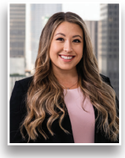
December 6

[PFAS: What In-House Counsel Need to Know About Forever Chemicals]

Join the Environmental, Industrials & Manufacturing, and Food & Beverage Teams for this cross-practice webinar on all things PFAS.

Contributing Authors

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



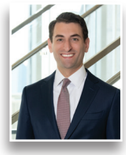
Samantha Burdick
+1 213 576 1190
sam.burdick@alston.com

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

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

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

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



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

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

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

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

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

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

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

ALSTON & BIRD