ALSTON & BIRD

FOOD & BEVERAGE

UPDATE

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Edition Facts

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Cases Per Section 1-4

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions to Certify Class	100%
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New Lawsuits Filed

Plaintiffs Don't Buy Healthful Labeling Claims on Coconut Milk

Andrade-Heymsfield v. Danone US Inc., No. 3:19-cv-00589 (S.D. Cal. Mar. 29, 2019).

A recently filed complaint alleges that Danone's coconut milk products contain misleading health and wellness claims on its labeling even though the products contain unsafe levels of saturated fats.

The putative class action complaint alleges that Danone deceptively markets and sells its So Delicious Coconut Milk "to health conscious consumers using deceptive health and wellness claims." Despite Danone's claims that its coconut milk offers numerous nutritional benefits, the plaintiff alleges that the product contains dangerous amounts of saturated fat, which causes morbidity including heart disease and stroke. The plaintiff seeks to certify a California class.

Plaintiff Believes Cereals' "Real Cocoa" Claims Are Not So Vanilla

Lopez v. General Mills Sales Inc., No. 2:19-cv-01841 (E.D.N.Y. Mar. 31, 2019).

The plaintiff claims that General Mills cereals are mislabeled as containing "Real Cocoa" when they actually contain cocoa processed with alkali.

The putative class action complaint alleges that General Mills labels its chocolatey cereals as made with "Real Cocoa" to imply they are superior to other cereals containing basic "cocoa." In reality (and as the back ingredients panel reveals), General Mills processes its cocoa with alkali. The plaintiff believes this is misleading in two ways. First, no reasonable consumer would expect "real cocoa" to be modified or processed further with alkali. Second, the "real cocoa" label gives the false impression that General Mills cocoa is superior to that used in other cereals. The plaintiff seeks to certify a 40-state class and a New York class challenging this allegedly deceptive labeling.

Green Teas' False Ginseng Claim Invigorates New Lawsuit

Niles v. Beverage Marketing USA Inc., No. 2:19-cv-01902 (E.D.N.Y. Apr. 2, 2019).

The plaintiffs filed a putative class action against the producers of AriZona green tea, alleging that the claim on the tea's label that it contains ginseng is false.

The labeling on AriZona's green tea states that it contains ginseng—the popular plant used in traditional Chinese medicine to combat a number of ailments and fatigue—"for energy." But when the plaintiffs tested the tea, the results were draining: unlike other brands, AriZona green tea contained no traceable amount of ginseng.

The plaintiffs contend this omission was intentional. Ginseng takes years to mature, and strong demand has pushed some ginseng species to the edge of extinction. Ginseng now costs more than $1,000 per pound. The plaintiffs suspect that, to gain an edge in the highly competitive beverage industry, the producers of AriZona green tea chose to use a scientifically undetectable amount of ginseng (if any)—yet keep the "ginseng for energy" labeling—to reduce its costs and charge a price premium for its green teas. The plaintiffs seek to certify a New York class and a 49-state class.

Does the Term "Sustainably Sourced" Embrace Broader Human Rights and Environmental Principles?

Walker v. Nestlé USA Inc., No. 3:19-cv-00723 (S.D. Cal. Apr. 19, 2019).

Nestlé maintains that forced child labor has no place in its supply chain. But a new lawsuit challenges that claim and, in doing so, asks how far litigants may enforce consumer protection laws.

Nestlé labels its chocolate products with claims that the cocoa is "sustainably sourced," certified for ethical and sustainable farming, and improves the lives of farmers. The plaintiff contends these claims "couldn't be further from the truth." She alleges that Nestlé not only is aware its cocoa is harvested using forced child labor but also has no environmental standards in place for harvesting the cocoa. In fact, the plaintiff alleges, the chocolate industry is the driving force behind the rainforest disaster in Ivory Coast. She brings claims under California's Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA) and seeks to certify a nationwide class.

Motions to Dismiss

Procedural Posture: Granted with Leave to Amend

Plaintiff in Glyphosate-in-Dog-Food Suit Is Barking Up the Wrong Tree

Parks v. Ainsworth Pet Nutrition LLC, No. 1:18-cv-06936 (S.D.N.Y. Apr. 18, 2019).

Pushing back on the trend in similar "natural" labeling lawsuits, the court dismissed claims that premium dog food was deceptively labeled as "natural" because it contained trace amounts of the herbicide glyphosate.

The plaintiff filed a putative class action asserting that glyphosate was present in the defendant's Super Premium Food for Dogs. But the court rejected the claim that this fact rendered "natural" labeling deceptive under New York law. The court observed that the FDA's "natural" regulations were not intended to address food production methods, including the use of pesticides. It found that no reasonable consumer would require "natural" to mean that there is no glyphosate—or even trace or innocuous amounts—in a product, particularly

when the plaintiff did not allege that the amount of glyphosate was harmful. It dismissed the claims but granted the plaintiff leave to amend to assert facts (if true) that there was a material amount of glyphosate in the dog food.

Motions to Certify Class

Procedural Posture: Granted

Class Certification in Baby Food Labeling Action Is Nothing to Sneeze At

Hasemann v. Gerber Products Co., No. 1:15-cv-02995 (E.D.N.Y. Mar. 31, 2019).

The plaintiffs alleged that Gerber falsely advertises that its Good Start Gentle line of baby formula could reduce the risk of children developing allergies and is the "1st and Only" formula approved by the FDA to do so. To the contrary, the plaintiffs contended, the FDA issued a warning letter to Gerber and the FTC entered an enforcement action against Gerber for these claims. (The FTC and Gerber settled their dispute on April 30).

Of the proposed classes, the district court certified New York and Florida classes, finding those states' class members need not show that they relied on a particular misrepresentation in purchasing the Gerber products. In doing so, the district court rejected Gerber's commonality and typicality arguments, observing that the plaintiffs' price premium theory focuses on the same course of events (the challenged labeling and marketing). The district court also brushed away Gerber's adequacy argument, saying any inconsistency in the named plaintiffs' testimony at best is innocent and at worst fails to reach the heart of the action.

Procedural Posture: Denied

Class Claims Spread Thin in Butter Suit

Bowling v. Johnson & Johnson, et al., No. 1:17-cv-03982 (S.D.N.Y. Apr. 22, 2019).

The plaintiff's motion for class certification was denied by a New York federal judge because she was subject to "unique defenses" that outweighed her ability to serve as an adequate class representative.

The plaintiff contended that Johnson & Johnson's "No Trans Fat" label on its butter alternative spread, Benecol, is false and misleading because the product technically contains trans fat in the form of partially hydrogenated soybean oil. But the district court nixed all of the plaintiff's class claims, finding that she would necessarily devote considerable time rebutting a covenant not to sue that she executed with the defendants and that "substantial credibility issues" prevented her from serving as an adequate class representative. The court did not dismiss the action entirely, however, allowing the plaintiff to pursue her claims individually against the defendants.

Settlements

Procedural Posture: Other Settlements

"Viagra For Your Brain" Sellers Knocked Out by FTC

Federal Trade Commission v. Global Community Innovations LLC, No. 5:19-cv-00788 (N.D. Ohio Apr. 10, 2019).

The FTC resolved its charges against 12 companies and their owners that the companies used fake news sites to peddle "cognitive enhancement" supplements.

The FTC alleged that these companies marketed their dietary supplements to unsuspecting consumers under the guise that they could boost IQ by as much as 100 percent, increase focus by up to 121 percent, and improve long- and short-term memory. The companies allegedly marketed the products on their own websites and on dozens of third-party affiliate websites, some formatted to mimic real news sites. Other advertisements boasted false claims regarding clinical trials, supporting statistics, and bogus "as seen on" references to legitimate news sources like *The New York Times* and CNN. The companies settled these claims with the FTC through two suspended judgments of $14 million and $11 million, along with orders for permanent injunctive and equitable relief.

Appellate Cases

"Diet" Soft Drink Claims Go Flat with Another Second Circuit Decision

Excevarria v. Dr Pepper Snapple Group Inc., No. 18-1492 (2nd Cir. Apr. 17, 2019).

The plaintiffs lost their bid to salvage claims that the word "diet" in Diet Dr Pepper is false and misleading. The plaintiffs argued to the district court—and again to the Second Circuit—that the word "diet" promises that the fizzy drink assists in weight loss, when it in fact one of its ingredients (aspartame) likely causes weight gain. The district court found that these allegations failed to state a claim and did not permit an amended complaint.

The Second Circuit agreed with the district court. Assuming the word "diet" conveyed some promise about weight management, the Second Circuit nevertheless found that the plaintiffs could not raise a plausible inference that Diet Dr Pepper was false or misleading. It observed that not one of the studies that the plaintiffs relied on connected aspartame to weight gain. In doing so, the Second Circuit joined a sister panel and California and New York district courts that have dismissed substantially identical allegations.

Aphrodisiac Supplement Suit Not Rejuvenated by Rule 23(f) Equitable Tolling Argument

Nutraceutical Corp. v. Lambert, No. 17-1094 (U.S. Feb. 26, 2019).

In a unanimous opinion penned by Justice Sotomayor, the Supreme Court rejected an equitable tolling argument for interlocutory appeals of class-certification orders, overturning the Ninth Circuit.

The case stemmed from putative class allegations against Nutraceutical's sales and marketing of aphrodisiac supplements. After the district court decertified the class, the plaintiff unsuccessfully moved for reconsideration. Only after that attempt failed did the plaintiff seek appellate review under Rule 23(f), well beyond the defined 14-day limit. The Supreme Court rejected the plaintiff's argument that the time period for filing an interlocutory appeal is subject to tolling, holding that Rule 23(f) is a procedural—not jurisdictional—rule. That the plaintiff "otherwise acted diligently" was not enough to save the untimeliness of the appeal.

Brain-Booster Claims Given Second Chance to Pass Test

Korolshteyn v. Costco Wholesale Corp., No. 17-56435 (9th Cir. Mar. 7, 2019).

The Ninth Circuit vacated the district court's grant of summary judgment against claims that ginkgo biloba leaf extract and vinpocetine supplements improve "alertness," "mental clarity, and memory," finding that the lower court applied too tough an evidentiary standard in reviewing the plaintiffs' claims.

The complaint alleged that the defendants falsely advertised the benefits of their TruNature Ginkgo Biloba with Vinpocetine product. But the Ninth Circuit vacated summary judgment and remanded the case to the district court, holding that the more lenient evidentiary standard for California consumer protection claims (the UCL and CLRA) should apply. Now, to survive summary judgment, the plaintiffs need only provide expert testimony and other scientific data showing ginkgo biloba or vinpocetine has no more of an effect on mental acuity than a placebo. The Ninth Circuit's evidentiary decision leaves open the substantive question of whether ginkgo biloba leaf extract and vinpocetine supplement makers can even make these brain-boosting claims.

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