ALSTON & BIRD

FOOD & BEVERAGE DIGEST

JULY 2021

Edition Facts

3 Sections This Edition
Cases Per Section 1-9

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Transfer	100%
Appeals	100%

New Lawsuits Filed

No Mulligan to Sweet Tea Lemonade for Flubbed Calorie Scorecard

Schrode v. Arizona Beverages USA LLC, No. 1:21-cv-03159 (N.D. Ill. June 11, 2021).

Arnold Palmers are in the drink again after a consumer filed a putative class action in Illinois federal court challenging the "Zero / No Calories" labeling on some of an iced-tea company's beverages. Relying on Merriam-Webster to capture the true essence of "zero," the consumer claims that these labels are misleading and deceptive because the drinks contain more than zero—and as many as 15 (15!)—calories.

According to the complaint, after taking a stroke penalty, the half lemonade, half iced-tea summer favorite then found the bunker by using allegedly skewed reference amounts customarily consumed (RACCs) and nutrient facts panels to downplay the actual calorie content of the drinks. The defendant allegedly applied the RACC for noncarbonated beverages (12 oz.) so that it could round the calorie content down to "zero" under Food and Drug Administration (FDA) regulations. At another point, the consumer claims, the defendant used a misleading "dual column" nutrition facts panel purportedly to trick consumers into believing that they will drink only the serving size of the beverage. The consumer seeks to certify a multistate class of consumers for violations of Illinois consumer protection laws, breach of warranty, misrepresentation, and unjust enrichment.

Hemp Tea with 0.0% THC? Well, That's Just, Like, Your Opinion

Miller v. Total Life Changes LLC, No. 1:21-cv-00095 (S.D. Ga. June 15, 2021).

A lawsuit filed in Georgia federal court alleges that the defendant's Raspberry Lemonade Tea misleadingly claims that, though it contains "broad-spectrum hemp extract," it has 0.0% THC. After deciding to purchase and consume the Raspberry Lemonade Tea products, however, the plaintiff tested positive for THC during a random drug test at work. The consumer alleges that she specifically relied on the company's advertising and labeling of the Raspberry Lemonade Tea as THC-free, particularly since some of the defendant's other tea products are not advertised as THC-free.

We imagine the consumer would beg to differ with the Dude that these labels are just a matter of opinion. She seeks to certify a class of consumers and asserts claims for unjust enrichment, breach of express warranty, fraudulent concealment, and violations of the Georgia Fair Business Practices Act.

Yo Ho Ho and a Bottle of Too-Young Rum

Tedeschi v. Diageo North America Inc., No. 1:21-cv-04940 (S.D.N.Y. June 3, 2021).

A disappointed Illinois rum enthusiast claims that his $45 bottle of rum wasn't actually aged for 23 years as he had thought. In a new putative class action, he alleges he was duped by the number "23" and other allegedly misleading statements about the rum's aging process that appear on the label of Ron Zacapa 23 Centenario Rum. According to the complaint, the rum is marketed to convince consumers that it is aged for 23 years and using the traditional "Sistema Solera" aging process (which the reasonable and typical consumer is obviously well versed in). Despite recognizing that the product does not violate federal regulations mandating that statements of age for distilled spirits appear as "__ years old," the plaintiff claims that consumers expect prominent numbers on the front labels of spirits to refer to the age of the youngest spirit used. For this complaint, that number is "23."

In reality, the rum is a blend of rums aged between six and 23 years. The plaintiff claims that the product's blending of rums of different ages without disclosing that fact on the front label is misleading to consumers. He is pursuing causes of action for violations of Illinois's consumer protection law, breaches of warranty, negligent misrepresentation, and fraud.

Peeling Back the Layers of Onion Rings Snacks Labeling

Hiltz v. Inventure Foods Inc., No. 1:21-cv-03140 (N.D. Ill. June 10, 2021).

The maker of TGI Fridays Onion Rings snacks faces a putative class action alleging that the snacks' labeling is misleading because it gives the impression that the snacks are made with real onion. The plaintiff claims that the snacks instead are made with ingredients so lowly that they wouldn't even bring a tear to your eye: onion powder and onion flavor. These ingredients, so reasons our onion rings snacks fanatic, lack the "oniony" flavor that consumers love and the health benefits afforded by onions (that consumers presumably search out in chips, snacks, and onion rings).

Although the plaintiff concedes the snacks' label says "naturally and artificially flavored," he complains the font is very small and difficult to see. If he had known the truth about these snacks, the plaintiff contends, he would not have purchased them or paid as much as he did. The plaintiff seeks to represent classes of Illinois, Ohio, Texas, Virginia, Rhode Island, and Florida consumers and asserts claims for violations of Illinois's consumer protection statute, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Vanilla Litigators Not Taking Summer Vacation

Louis v. Simply Orange Juice Company, No. 3:21-cv-04596 (N.D. Cal. June 15, 2021).
Saldivar v. Nestlé USA Inc., No. 3:21-cv-04162 (N.D. Cal. June 2, 2021).
Javed v. Fairlife LLC, No. 3:21-cv-04182 (N.D. Cal. June 2, 2021).

The dog days of summer are upon us. Baseball, beach days, parades, picnics, and yes, a continued onslaught of new vanilla litigation from the plaintiffs' bar. As we've previously reported, a growing number of courts across the country have found that vanilla claims fail as a matter of law—reasoning that reasonable consumers have plain vanilla interpretations of the word "vanilla," not the unbelievably farfetched meanings that plaintiffs claim. Despite this, the plaintiffs' bar continues to seek out new venues, looking for a friendly ear.

Three new lawsuits in the Northern District of California target vanilla almond milk, vanilla coffee creamer, and vanilla high-protein milk shakes. Either these consumers compared notes beforehand or they made liberal use of their word processor's "copy/paste" function. Numerous paragraphs, pictures, allegations, and causes of action are copied verbatim in each of the complaints, which uniformly take issue with various "natural" and "vanilla" representations on the products' packaging. But plaintiffs may be disappointed with a bland—even vanilla—reception from courts in their new preferred venue.

Think Your Strawberry-Filled Pastry Is Not Full of Strawberries? There's a Lawsuit for That

Chiappetta v. Kellogg Sales Company, No. 1:21-cv-03545 (N.D. Ill. July 1, 2021).

According to a complaint filed in Illinois federal court, Kellogg's well-known "Unfrosted Strawberry Pop Tarts" do not contain filling solely from strawberries but also include non-strawberry ingredients in "greater amounts" than advertised. The product is purportedly deceptive and misleading because consumers are given the impression that the red fruit filling in the breakfast pastry contains only strawberries (or more strawberries than it contains in reality).

The complaint also alleges that the product's name, "Strawberry Pop Tarts," is itself misleading because it implies that only strawberries—and not other fruits—are used in the breakfast pastry, when in reality the ingredients list "in the small print" discloses that pears and apples are also included. Based on these allegations, the complaint asserts putative class claims for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, negligent misrepresentation, breach of warranties, fraud, and unjust enrichment.

Does the "Wrong" Fat in Fudge Make It Less Fudgy?

Spurck v. Demet's Candy Company LLC, No. 7:21-cv-05506 (S.D.N.Y. June 23, 2021).

A purchaser of Flipz White Fudge Covered Pretzels has brought a putative class action alleging that the company's claims are misleading based on the milk content in the so-called "white fudge." According to the plaintiff, fudge is made with milk fat, and vegetable oil is a poor substitute, included to cut costs, that leads to a "waxy" taste. The Flipz white fudge pretzels contain both milk and vegetable oil ingredients, but the plaintiff alleges that because there is *more* vegetable oil, the "fudge" moniker on the package is deceiving. She seeks to bring this melt-in-your-mouth case on behalf of a class of New York residents and alleges violations of New York's consumer protection statute, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

No Love Lost Between Consumers and Weight Loss Supplements

Barnes v. Iovate Health Sciences U.S.A. Inc., No. 5:21-cv-04978 (N.D. Cal. June 28, 2021).

Users of dietary supplements have brought a putative class action against their manufacturer, but not for the reason that one would think. Rather than complain that the weight loss supplements didn't work—as one might—the consumers instead allege that the defendant distributes and advertises the supplements in violation of federal law because the labels did not include the appropriate FDA disclaimers.

According to the plaintiffs, the law requires that any supplement that describes the role of how an ingredient is supposed to "affect the structure or any function of the body" contain a disclaimer that the supplement has not been evaluated by the FDA and is not intended to diagnose, treat, or prevent any disease. The disclaimer, the plaintiffs allege, must be on any panel of the product that contains such a description. The plaintiffs claim that the defendant's products did not contain these necessary disclaimers where they advertised with statements such as "Formulated with a scientifically researched key weight loss complex (green coffee extract)" and "Key Weight Loss Ingredient Tested in 2 Scientific Studies." The plaintiffs, who seek to certify a nationwide class and California subclass, have brought claims for unfair business practices and unjust enrichment.

Lawsuit Concentrates Really Hard on Supplements' Mental Performance Claims

Gomez v. Pure Nootropics LLC, No. 2:21-cv-03366 (E.D.N.Y. June 15, 2021).

A supplement maker faces a putative class action alleging that a number of representations on its dietary supplement products—about the products' effects on consumers' memory, learning, focus, energy, and overall mood—are false and unsupported by scientific evidence. Some of the challenged claims include references to "mental performance & brain support," "improves memory formatting and learning," and "reverse neurological decline," among others.

The plaintiffs also claim that the products are adulterated, pointing to a joint warning letter from the FDA and Federal Trade Commission finding that some of the defendant's products are regulated as drugs based on a review of the products' marketing claims. The plaintiffs seek to certify a nationwide class of purchasers and assert violations of New York law, unjust enrichment, and breach of implied warranty.

Motions to Transfer

Trading Spaces: Swapping Illinois Venue for California in Vanilla Granola Spat

Gierwatowski v. Trader Joe's Company, No. 1:21-cv-01119 (N.D. Ill. June 29, 2021).
Robie v. Trader Joe's Company, No. 4:20-cv-07355 (N.D. Cal. June 14, 2021).

Never a dull moment in the anything-but-vanilla world of vanilla litigation. In today's installment, an Illinois consumer clashed with Trader Joe's over whether his lawsuit in the Northern District of Illinois should be transferred and consolidated or coordinated with a similar, previously filed suit against the grocer in the Northern District of California. The court found that the plaintiffs' legal theories and claims were similar in both cases and that the convenience factors favored transfer since the grocer is headquartered in California and relevant witnesses and evidence would be located there. The plaintiff argued that the product at issue in the Illinois case (vanilla almond *granola* cereal) was distinct from the product at issue in the California case (vanilla almond *clusters* cereal), but the court didn't bite.

Practically speaking, the decision to transfer spelled the end for the Illinois case. The California suit had been dismissed—albeit without prejudice—earlier in the month. The Northern District of California found the state-law claims were preempted and that the use of the word "vanilla" would not suggest to a reasonable consumer that the flavor comes exclusively from the vanilla bean. It should come as no great surprise that the transferred Illinois case was voluntarily dismissed shortly after transfer.

Appeals

Gone Fishin': Ninth Circuit Affirms Dismissal of Chicken Labeling Claims Based on "Gross Speculation"

Webb v. Trader Joe's Company, No. 19-56389 (9th Cir. June 4, 2021).

Water weight can be hard during beach season. Here, the plaintiff attempted to pursue putative class action claims against Trader Joe's brand poultry products, claiming they retained more than the 5% maximum retained water claimed on the products' label. Rather than salting the chicken or using a dry rub (#cookingtips), the plaintiff decided to sue, claiming the product labels were false. Like many claims challenging USDA-reviewed labels before this, the trial court—unsurprisingly—held that the Poultry Products Inspection Act (PPIA) preempted them.

On appeal, the Ninth Circuit affirmed dismissal of the plaintiff's claims because she sought to "impose the requirements of her retained water protocol in addition to [the grocer's] FSIS-required protocol." The court explained that federal law does not allow the plaintiff "to impose a different data collection protocol," and she could not plausibly claim that she used the grocer's "exact data collection protocol and yet obtained different results." Because the plaintiff would first need to get information from the grocer to amend her complaint, the Ninth Circuit found she was on a fishing expedition and had "no basis other than gross speculation to claim" the grocer somehow misrepresented the data provided by its testing protocol.

Ninth Circuit Tells Honey Buyers to Buzz Off in "100% New Zealand Manuka Honey" Appeal

Moore v. Trader Joe's Company., No. 19-16618 (9th Cir. July 15, 2021).

Another consumer labeling class action got stung by the Ninth Circuit, which affirmed dismissal of the honey buyers' putative class action because their challenge was "not just unreasonable or fanciful. It is implausible." While the plaintiffs claimed that Manuka honey products falsely represented that they were "100% New Zealand Manuka Honey," the plaintiffs mistook these labels to mean the products contained honey that was 100% derived from Manuka flower nectar. In affirming dismissal of the complaint, a unanimous panel of the Ninth Circuit found the product conformed to FDA rules because Manuka was the "chief floral source" for the honey. And no consumer "of any level of sophistication" could reasonably interpret the labels as the plaintiffs asserted. The Ninth Circuit warned that a reasonable consumer must consider readily available information and the context in which that information is provided. Because bees literally buzz around, a reasonable consumer would not expect honey derived from a single flower. We covered this opinion and some key takeaways from the Ninth Circuit's order in much more detail in our recent advisory.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories 0

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

August 11, 2021

Major trends in food and beverage litigation

In this Alston & Bird webinar presented by members of our Food & Beverage team, Angela Spivey, Drew Phillips, Jamie George, and Alan Pryor will take you through the constantly shifting trends of the food and beverage litigation landscape.

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