ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

OCTOBER 2020

Edition Facts

5 Sections This Edition
Cases Per Section 1-6

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Injunctive Relief	100%
Motion to Dismiss	100%
Class Certification	100%
Appeals	100%

FOOD & BEVERAGE DIGEST

New Lawsuits Filed

Slack-Fill Suit Claims There Aren't Enough (Swedish) Fish in the Sea

Coleman v. Mondelēz International Inc., No. 2:20-cv-08100 (C.D. Cal. Sept. 3, 2020).

A new putative class action complaint alleges that defendant Mondelēz International deceptively sells its Swedish Fish candy in opaque containers, failing to inform consumers that they are buying a more-than-half-empty box. The lawsuit claims the popular theater candy's box dupes consumers into paying a price premium for empty space by representing the box as adequately filled when, in fact, it contains an unlawful amount of slack-fill. What's more, the complaint alleges, the front of the product's packaging fails to include any information to apprise consumers of "the quantity of candy relative to the size of the box, such as a fill line or an actual size depiction…."

Based on these allegations, the plaintiff asserts claims for violations of California's consumer protection laws, as well as causes of action for unjust enrichment, fraud, and intentional and negligent misrepresentation.

The Proof Is in the Ritas: Consumers Peeved That Beermakers' Ritas Drinks Are Only Flavored Beer

Cooper v. Anheuser-Busch LLC, No. 7:20-cv-07451 (S.D.N.Y. Sept. 11, 2020).

Two consumers have distilled their ire against Anheuser-Busch into a complaint filed in federal district court, alleging that the mega beer maker deceives consumers into believing that its Ritas brand drinks contain tequila, rum, wine, or other spirits. In reality, the plaintiffs allege, the grab-and-go happy hour drinks are only flavored malt beverages.

Relying on scholastic resources like the Merriam-Webster dictionary, IBA World, and Wikipedia, the plaintiffs allege that reasonable consumers expect products bearing names like "Sparkling Margarita," "Sangria Spritz," "Rosé Spritz," or "Mojito Fizz" to actually contain tequila, wine, or rum befitting the products' names. They don't. The plaintiffs also contend that, compounding this alleged deception, the lone disclosure of the actual alcoholic contents of the beverages is at a place where no reasonable consumer would look: the bottom panel of packaging. Because of this allegedly false and deceptive labeling, the plaintiffs seek to certify a New York class and raise claims for violations of New York's General Business Law, breach of warranty, fraud, and unjust enrichment.

Gainz Seekers Claim They Want Only the Real Thing in Vanilla Protein Supplements

Figueroa v. Fairlife LLC, No. 1:20-cv-04584 (E.D.N.Y. Sept. 26, 2020).

There is no denying that consumer class action firms are getting their reps in with "real vanilla" legal challenges. One such firm can only hope it has not maxed out with a recent suit leveled against the makers of Core Power vanilla high-protein shakes.

The working set for this suit is familiar. The front label of the defendant's high-protein shake includes the word "vanilla," which the plaintiff alleges indicates that the product's vanilla flavor is provided by vanilla beans from the vanilla plant. The plaintiff contends, however, that this representation is false and misleading because the product's ingredients list only discloses "natural flavors" instead of "vanilla." This fact, the complaint reasons, presumably means the product (1) gives the impression that it has more real vanilla than it actually does; and/or (2) contains ingredients from non-vanilla sources that contribute to the product's vanilla flavor. The plaintiff contends that the defendant should have disclosed or corrected this false and misleading labeling. He seeks to certify a New York class, raising claims for violations of New York's General Business Law, breach of warranty, misrepresentation, and unjust enrichment.

Consumers Sour on Potato Chip Packaging

LaRocca v. Frito-Lay Inc., No. 1:20-cv-04245 (E.D.N.Y. Sept. 11, 2020).

A consumer of Frito-Lay's Cheddar & Sour Cream Ruffles brand baked potato chips claims he was duped by the wedge of cheddar cheese, bowl of sour cream, and "orange and white color pattern reflective of the colors associated with cheddar cheese and sour cream" found on the bag. Those images, the complaint alleges, combined with the representation that the product was cheddar and sour cream flavored were false and misleading because they give consumers the impression that actual sour cream is the source of the flavor. Because sour cream is one of the product's characterizing flavors, the complaint alleges that consumers are misled by the product's representation as "Flavored" because "reasonable consumers do not expect a product which only uses the term 'flavored' to contain artificial flavors." As a result, the plaintiff claims he was tricked into paying a higher price for the products or making purchases he otherwise wouldn't have made. Asserting claims for violations of New York's General Business Law, negligent misrepresentation, breach of warranty, fraud, and unjust enrichment, the plaintiff seeks to certify a class of New York consumers and recover monetary damages and disgorgement costs.

"*Slightly* Sweet" May Be Understatement of the Year

Nelson v. ITO EN Inc., No. 7:20-cv-07496 (S.D.N.Y. Sept. 12, 2020).

A consumer recovering from gastric bypass surgery and in search of products low in sugar claims that he was duped when he relied on the "Slightly Sweet" representation on the defendant's Teas'Tea product. Rather than containing a "low amount of sugar" as expected, the plaintiff alleges the tea contained nearly half the recommended daily value (which was clearly set out on the back label). Aside from being misleading and deceptive, the complaint alleges that the phrasing constitutes an unlawful nutrient claim because "low sugar" claims are barred by federal regulation and that the 20 grams of sugar in the product *just miss* the qualifying 0.5 gram cutoff to legally advertise as containing a trivial or negligible amount of sugar.

The plaintiff claims the product's branding and packaging is designed to deceive, mislead, and defraud consumers who are tricked into paying higher prices for products they believe to be low in sugar than they otherwise would. The plaintiff seeks to certify a class of New York consumers and is pursing claims for violations of New York's consumer protection statute, negligent misrepresentation, breach of warranty, fraud, and unjust enrichment.

Breakfast Company in a Jam over "Misleading" Strawberry Filling

Brown v. Kellogg Sales Co., No. 1:20-cv-07283 (S.D.N.Y. Sept. 5, 2020).

A consumer of Pop-Tarts has filed a putative class action in New York, alleging that the Kellogg Company misleadingly represents its "Frosted Strawberry" Pop-Tarts as containing only strawberries as the fruit ingredient, when in fact the breakfast staple of every middle-schooler also contains pears and apples. The complaint alleges that the branding of the Pop-Tarts, which shows a photo of half of a strawberry and an open Pop-Tart with red filling, is designed to mislead and defraud consumers, who obviously would not expect their *strawberry* Pop-Tarts to include fruit-filling ingredients *other than* strawberries. What's more, the plaintiff argues, the frosted strawberry product does not disclose the percentage of strawberries—the characterizing ingredient—in the product, as legally required. The plaintiff further alleges that the red 40 food coloring increases the redness of the filling, as seen on the photo on the label, further misleading customers into believing that the product contains more strawberry than it really does. The plaintiff seeks to certify a class of other New York consumers who were similarly duped by the Pop-Tarts' misleading red filling and has alleged claims for violations New York's consumer protection statutes, negligent misrepresentation, fraud, unjust enrichment, and breaches of warranty.

Injunctive Relief

Does Vegan Butter Make It Better Too?

Miyoko's Kitchen v. Ross, No. 3:20-cv-00893 (N.D. Cal. Aug. 21, 2020).

Reminiscent of other recent cases challenging vegan products and dairy standards of identity, like those concerning soy and almond milks and vegan mayo, a vegan butter case is playing out in the Northern District of California. In late August, the district court granted Miyoko's Kitchen's motion for a preliminary injunction seeking to enjoin state government enforcement action on its use of the phrases "butter," "lactose free," and "cruelty free." The California Department of Food and Agriculture had ordered Miyoko's Kitchen to bring itself into compliance with state and federal laws. The state primarily relied on the federal standard of identify for butter requiring dairy ingredients to have 80% fat content (which is why it is delicious) to argue the "vegan butter" product labeling and marketing was false and misleading. Miyoko's Kitchen brought suit, claiming that "the State's enforcement posture" violated Miyoko's Kitchen's First Amendment right to engage in truthful commercial speech and was part of a dairy industry conspiracy to edge out vegan products. In rejecting the state's reliance on the federal standard of identity, the court held that "the government's opinion of what words mean is not, by itself, especially compelling." The court also relied on a single academic report that indicated that the public accurately identifies the source of animal-based milks and cheeses at about the same rate as plant-based products to determine that Miyoko's Kitchen's use of the challenged terms was not misleading. This suit provides a potential road map for those wanting to make non-misleading commercial claims in violation of the applicable standard of identity (at their own peril).

Motion to Dismiss

Procedural Posture: Granted

CBD Challenge Gets Dismissed with a Bhang

Ballard v. Bhang Corporation, No. 5:19-cv-02329 (C.D. Cal. Sept. 25, 2020).

A California federal judge granted a motion to dismiss a challenge to CBD chocolate products alleging that the products did not contain the advertised amount of THC or CBD. The plaintiff claimed that the offending chocolate was labeled to contain a specific quantity of THC and CBD, but independent lab testing revealed that the product did not contain the amount of CBD advertised.

In granting the motion to dismiss, the federal district court agreed that the plaintiff failed to state a claim by not addressing which chocolates he bought, when he bought them, how they were advertised, and how that advertising fell short. While other federal district courts have stayed similar challenges pending FDA regulatory action on the legal status of CBD-containing food, the court concluded that a stay was not appropriate in this case because

FOOD & BEVERAGE DIGEST

the plaintiff "does not claim to have been defrauded or hoodwinked by the legal status of CBD; he simply got less CBD than he thought he was paying for." The court explained that it didn't need FDA guidance to rule on simple false advertising claims that the chocolates contained less CBD than advertised. While the court allowed the plaintiff to file an amended complaint, the parties filed a Notice of Settlement on October 2, 2020.

Procedural Posture: Denied

Protein Bar False Ad Suit Muscles Its Way Past Dismissal Bid

Sebastian v. One Brands LLC, No. 3:20-cv-00009 (S.D. Cal. Sept. 10, 2020).

A California federal district court denied a motion to dismiss a putative class action alleging that One Brands falsely labels and advertises its protein bars as containing less sugar and cholesterol than they really do. The plaintiff's complaint alleged that the protein bars were mislabeled and falsely advertised as containing just 1 gram of sugar and low levels of cholesterol, despite laboratory testing proving those claims false. The complaint alleged violations of California's consumer protection statutes as well as breaches of express warranty and quasi contract. In its motion to dismiss, the protein bar maker sought to have the court toss all claims against it, arguing that the state-law claims were preempted by the Federal Food, Drug, and Cosmetic Act and that the plaintiff's laboratory testing was not conducted pursuant to FDA regulations.

The district court summarily dismissed each of the defendant's arguments, finding that there was no binding authority requiring the plaintiff to allege that she had conducted testing in accordance with FDA regulations and that plaintiffs are not generally expected to provide evidence in support of their claims to survive a preemption argument at the pleadings stage. The district court also rejected the defendant's argument that the plaintiff failed to satisfy the heightened pleading standard of Rule 9(b), explaining that the flavor of the bar purchased was not relevant at the pleading stage because the plaintiff alleged she relied on representations (the sugar, cholesterol, and fiber content) common across all flavors. Likewise, the defendant's argument that the plaintiff failed to satisfy Article III standing requirements was unsuccessful; the court determined that the plaintiff's allegations that she spent money for the product that, absent the defendant's actions, she would not have spent was "a quintessential injury-in-fact." The case will now proceed to discovery, where it is likely the defendant will continue to push the argument that the laboratory testing did not comply with FDA regulations.

Hustle Play Sinks Bid to Dismiss Amended Complaint in Sports Drink Bout

Silver v. BA Sports Nutrition LLC, No. 3:20-cv-00633 (N.D. Cal. Sept. 5, 2020).

A California federal district court denied a bid to dunk on allegations that the labeling on Body Armor sports drinks misleads consumers. The plaintiffs allege that the sports drinks' display features flavors such as "Strawberry Banana," includes images of the identified fruits, and advertises the drinks as natural to dupe consumers into thinking that the drinks had significant amount of fruits and promote "superior hydration." In reality, the complaint alleges, these sports drinks contain none of the displayed fruits.

Body Armor moved to dismiss the plaintiffs' complaint, arguing that sports drinks are not "commonly expected" to contain fruit juice and therefore its labels did not violate FDA regulations or consumer protection statutes. The district court, however, rejected this argument, noting that whether a sports drink is "commonly expected" to contain a fruit was a factual question that the court could not resolve on the pleadings. Body Armor will look to snap its one-game losing streak as the parties proceed to discovery.

Class Certification

Procedural Posture: Granted

A Jolt of Caffeine for Recycling Class Action

Smith v. Keurig Green Mountain, No. 4:18-cv-06690 (N.D. Cal. Sept. 21, 2020).

A federal court has certified a class of Keurig coffee drinkers who purchased Keurig's "K-cup" coffee pods that are not recyclable. Keurig sells single-serve plastic coffee pods, which it labels as "recyclable." A consumer of the K-cups filed the putative class action after realizing that the K-cup pods actually could not be recycled due to their size.

Keurig argued against class certification, contending that the plaintiff was not a typical or adequate class representative because she admitted that she had not seen a disclaimer on the product packaging that the cups may not be recycled in all areas. The district court, however, certified the class because the plaintiff's theory of liability for Keurig is not whether individual communities can recycle the K-cups, but rather that they are not recyclable under guidance from the Federal Trade Commission. The newly caffeinated case will now continue into discovery.

FOOD & BEVERAGE DIGEST

Appeals

Going Against the Grain, Eleventh Circuit Decision Prohibits Class Rep Incentive Award

Johnson v. NPAS Solutions LLC, No. 18-12344 (11th Cir. Sept. 17, 2020).

Reversing a district court's approval of a recent class action settlement, the Eleventh Circuit has determined that a class representative incentive award was improper based on established U.S. Supreme Court precedent. A common occurrence in the current class action landscape, incentive awards compensate class representatives for serving their representative roles during litigation. Consequently, they are generally approved so long as the incentives are fair and reasonable.

In this case, however, the majority relied on two Supreme Court decisions from the 1880s holding that "a plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." The court reasoned that the type of incentive award in the case below—$6,000—violated this maxim and impermissibly afforded "class representatives preferred treatment." Conversely, the dissent noted that the majority's ruling was inconsistent with current class action jurisprudence and highlighted the potential chilling effect its ruling could have on litigants serving as class representatives.

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 5, 2020

Companies can tune in to the "Class Action Litigation Development" panel with **Angela Spivey** at the Food & Beverage Litigation Conference: A Look at Hospitality, Liquor & Food Liability on November 5.

November 13, 2020

Don't be afraid of the "National Bioengineered Food Disclosure Standard: Compliance Considerations for the Ag Industry," presented by **Sam Jockel** at the 2020 American Agricultural Law Association Annual Symposium on Friday, November 13.

FOOD & BEVERAGE DIGEST

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