ALSTON & BIRD

FOOD & BEVERAGE DIGEST

MARCH 2021

Edition Facts

5 Sections This Edition
Cases Per Section 1-5

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions for Class Certification	100%
Settlements	100%
Appeals	100%

New Lawsuits Filed

No Dad Jokes Here: These Pizza Bagels Lack Real (Mozzarella) Cheese

Marcinelli v. Kraft Heinz Foods Company, No. 7:21-cv-01075 (S.D.N.Y. Feb. 6, 2021).

To the plaintiff, Bagel Bites are no laughing matter. In fact, he claims that the favorite after-school snacks are false and deceptive. Under the plaintiff's telling, Bagel Bites represent that they are "Made with Real Cheese," have "mozzarella cheese," and are "mini bagels with mozzarella cheese." Based on these statements, reasonable consumers allegedly expect Bagel Bites to be made of cheese that consists only of real mozzarella cheese.

But the pizza bagel snacks, the complaint claims, are not made with real mozzarella. Rather, Bagel Bites are made of a "Cheese Blend" of not-so-cheesy ingredients like part-skim mozzarella and modified food starch. The plaintiff claims that these ingredients not only fail to satisfy the standard of identity for mozzarella under Food and Drug Administration (FDA) regulations, but also have less nutritional value than mozzarella cheese and impart a "cardboard-like" taste and rubbery mouthfeel. If anything, the complaint asserts, Bagel Bites should be labeled as containing "imitation mozzarella cheese." The plaintiff seeks to certify a New York class for claims under New York's consumer protection laws, breach of warranty, and New York common law.

Consumer Curdles at Cheesemonger's "No Antibiotics" Claims

Beyond Pesticides v. Sargento Foods Inc., No. 2021-CA-000178 B (Super. Ct. D.C. Jan. 22, 2021).
Phan v. Sargento Foods Inc., No. 5:20-cv-09251 (N.D. Cal. Dec. 21, 2020).

Following a consumer putative class filed in a California federal district court, a self-described consumer protection nonprofit has lodged a second complaint against a leading manufacturer of cheese products. The two lawsuits allege the company misleadingly labels its cheeses as "No Antibiotics**."

Citing a 2019 USDA publication ("Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions") and a 2018 Consumer Reports publication, the complaint alleges that consumers believe that "*no* antibiotics" means that no antibiotics were used in the production process, *including* with the cows that produce the milk used to make the cheese. In fact, the defendant's cheeses are made from cows that are treated with antibiotics, and detectable amounts of the antibiotic sulfamethazine appear in the finished cheese products. In addition, the defendant's disclaimer that "no antibiotics" means that "our cheese is made from milk that does not contain antibiotics" not only is ineffective but also is itself a false and misleading statement. The plaintiffs seek damages and declaratory and injunctive relief under various state consumer protection laws.

Sour Consumer Thinks Something's Fishy About "Sea Salt & Vinegar" Potato Chips

Schoonmaker v. Cape Cod Potato Chip Company, No. 7:21-cv-01224 (S.D.N.Y. Feb. 11, 2021).

According to a putative class action complaint filed in New York federal court, a consumer is a bit full of vinegar about Cape Cod's "Sea Salt & Vinegar" chips. The complaint alleges that the chips are labeled "No Artificial Flavors, Colors or Preservatives" and contain no disclaimer next to its "Sea Salt & Vinegar" flavoring statement. Consumers, therefore, believe that actual vinegar provides the characteristic vinegar flavor in the chips.

Not so, according to the complaint. The amount of vinegar is actually too small to flavor the chips. The complaint alleges that, instead, the vinegar taste is derived from artificial flavoring and that testing and analysis confirmed that artificial flavoring agents, dl-malic acid and citric acid, are included in the chips. To that end, the plaintiff alleges that the chip maker was required under FDA regulations to state that the chips were artificially flavored. Its failure to do so prevented the plaintiff (and putative class members) from discovering these allegedly deceptive practices. The complaint asserts putative class claims for violation of New York's consumer protections statutes, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

"No Artificial Flavors" Label on Grape Juice Spooks Consumer

Augustine v. Welch Foods Inc., No. 3:21-cv-00332 (S.D. Cal. Feb. 24, 2021).

Move over, monster under the bed. So long, creepy-crawly in the closet. There is a new bogeyman to plague kids and reasonable consumers alike. Instead of hiding in more traditional locales, this one lurks in the shadow of the ingredients list on grape juice. It is dl-malic acid, and as alleged in this putative class action, it is far more nefarious than anything going bump in the night.

Welch's Light Concord Grape and White Juice beverages are labeled as containing "no artificial flavors." The grape juices also disclose on their ingredients lists that the juices contain malic acid, which is found naturally in grapes. However, the complaint alleges, this labeling is false and deceptive. As alleged, the juices actually contain dl-malic acid, which is made in petrochemical plants from benzene or butane (which the plaintiff notes are components of gasoline and lighter fluid). The plaintiff alleges that, under federal and state law, the defendant should have disclosed the presence of this artificial flavor, and its failure to do so prevented the plaintiff and consumers from identifying this synthetic chemical. The plaintiff seeks to certify a nationwide class and California subclass of purchasers and asserts violations of Massachusetts and California law, breaches of warranties, fraud, and negligent misrepresentation.

Heavy Attention on Baby Food Manufacturers

Mays v. Hain Celestial Group Inc., No. 2:21-cv-00805 (E.D.N.Y. Feb. 12, 2021).
Micks v. Hain Celestial Group Inc., No. 1:21-cv-00835 (N.D. Ill. Feb. 13, 2021).
Jain v. Nurture Inc., No. 1:21-cv-01473 (S.D.N.Y. Feb. 18, 2021).

Following the highly publicized release of the report by the U.S. House of Representatives Subcommittee on Economic and Consumer Policy about the level of toxic metals in baby food, plaintiffs (and their counsel) have been quick to mount a consumer class action campaign against baby food manufacturers. Three more were brought by individuals who alleged that they purchased baby foods, unaware that they contained unsafe levels of heavy metals.

There may be more fallout from the House subcommittee report than just litigation exposure. Baby food manufacturers may face additional scrutiny from the FDA. On March 5, 2021, the FDA issued a letter to the manufacturers of baby foods reminding them of their existing manufacturing responsibilities under current law. The FDA also announced that it will soon implement a plan aimed to reduce toxic elements in foods for babies and young children. In the meantime, we expect the number of class actions against baby food manufacturers will continue to grow.

Motions to Dismiss

Procedural Posture: Granted

Another Vanilla Suit Goes Down in Vain

Cosgrove v. Oregon Chai Inc., No. 1:19-cv-10686 (S.D.N.Y. Feb. 22, 2021).

Another case has joined the growing list of failed vanilla-related suits. In this proposed class action, the plaintiffs alleged that Oregon Chai products were misleading because their labels claimed that they contained "vanilla," that "vanilla and honey combine with premium black tea and chai spices," and that they were "made with natural ingredients" when the products are actually flavored with vanillin and other artificial ingredients.

The federal district court was not swayed by these allegations, "agree[d] with the majority of district courts" that have dismissed similar suits, and dismissed the complaint. The plaintiffs first lacked standing to pursue injunctive relief because they alleged that they would not purchase Oregon Chai products absent assurances that the products had been reformulated to use only "real" vanilla. The plaintiffs, therefore, could not allege that they were likely to suffer future injury. The district court next found that the plaintiffs failed to state a claim for violations of New York's General Business Law, referring to other vanilla cases that found that the defendants' references to vanilla were not misleading or deceptive because, at best, they only referred to the products' *flavor*. The district court also took special note that the label did not make any reference to "vanilla bean" or "vanilla extract" or represent that the tea was "made with" or "made from" vanilla. The negligent misrepresentation, breach of warranties, fraud, and unjust enrichment claims, which all were premised on the misleading business practice theory that the district court rejected, were dismissed as well.

Procedural Posture: Denied in Part

Cracker Case Doesn't Quite Crumble

Campbell v. Whole Foods Market Group Inc., No. 1:20-cv-01291 (S.D.N.Y. Feb. 2, 2021).

Relying heavily on the Second Circuit's decision *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), a New York federal judge has permitted a consumer's claims that she was misled by the labeling of the store-brand honey graham crackers to go forward. "Graham," the consumer alleged, is a type of whole wheat flour, and she relied on her knowledge of the term "graham" when she bought the crackers, thinking that they were made mostly of healthy, whole wheat flour. The plaintiff also believed that, based on the box's representation, the crackers were predominantly sweetened with honey. When she realized that the crackers were made primarily with white flour and sugar, she filed this putative class action.

Despite admitting in his order that he did not know the term "graham" indicated a type of flour, the judge found that the plaintiff had plausibly alleged that the references to "honey" and "graham" were likely to lead a reasonable consumer to wrongly believe that the crackers contain more graham than white flour, and more honey than sugar. The judge did, however, trim the lawsuit by dismissing other claims brought by the consumer, including claims for negligent misrepresentation, fraud, breach of express and implied warranty, and unjust enrichment, for failure to state a claim.

Motions for Class Certification

Procedural Posture: Granted

Creaky Joints Make for a Creaky Lawsuit

Amavizca v. Nutra Manufacturing LLC, No. 8:20-cv-01324 (C.D. Cal. Jan. 27, 2021).

The plaintiff in this case purchased a bottle of glucosamine sulfate capsules, believing that the product (as the label indicated) actually contained the chemical compound glucosamine sulfate and would promote the health of his joints. He later discovered that the capsules consisted primarily of glucosamine hydrochloride and sodium sulfate, rather than glucosamine sulfate. The plaintiff sued the capsules' manufacturers for false advertising and sought to certify nationwide and California classes of consumers who purchased the glucosamine-sulfate-labeled products.

The court certified both classes as injunctive relief classes under Rule 23(b)(2) but rejected certifying a nationwide damages class under Rule 23(b)(3). For the injunctive relief classes, the court found that the plaintiff sought a single injunction preventing the defendants from

manufacturing products falsely advertised as glucosamine sulfate capsules that, in fact, were not and that their conduct applied uniformly to all class members. The court denied, however, the plaintiff's bid to certify a nationwide damages class under Rule 23(b)(3), finding that state law conflicted so much that individual issues (sifting through the applicable law for each putative class member) would predominate over common issues. But the court agreed to certify a California class under Rule 23(b)(3), rejecting the defendants' arguments that class members would be required to put on individualized proof of reliance on the labels. California's consumer protection laws, the court observed, judged materiality and reliance on a reasonable consumer standard, so common proof would predominate.

Settlements

A Sweet Deal for Cereal Lovers (and None of the Headaches)

Krommenhock v. Post Foods LLC, No. 3:16-cv-04958 (N.D. Cal. Feb. 24, 2021).

A California federal district court judge granted preliminary approval of a $15 million settlement between Post Foods and consumers who complained that it made misleading health claims in light of the added sugars in its cereals. The settlement requires the defendant to establish a nonreversionary common fund of $15 million to pay all settlement expenses and to remove certain health-related statements from its products' packaging if more than 10% of the product's calories per serving come from added sugar. The district court also conditionally certified a nationwide class for settlement purposes that includes consumers who purchased the defendant's cereals between August 29, 2012 and November 2, 2020. Class members must submit a claim to receive payment, and the final settlement approval hearing is set for June 23, 2021.

Noticeably absent from the district court's preliminary approval is any controversy. In another case involving similar sugary cereals and health claims (that we covered in our November 2019 and March 2020 editions), Judge Koh chastised the parties for submitting a proposed settlement that was not "fundamentally fair, adequate, [or] reasonable." Notable features of the settlement: a *reversionary* settlement fund and a possible attorneys' fees request up to $8.25 million. Here, the settlement fund is larger, is *non*-reversionary, and includes a potential attorneys' fees request that is over $3 million less than the one Judge Koh rejected. Perhaps it is not surprising that the parties here have learned from Judge Koh. The same firm represents the plaintiffs in both suits.

Dog Food Recall Case Nears Resolution

In re Hill's Pet Nutrition Inc. Dog Food Products Liability Litigation, No. 2:19-md-02887 (D. Kan. Feb. 3, 2021).

Hill's Pet Nutrition has agreed to pay $12.5 million to settle a consolidated class action brought by owners of animals affected by canned dog foods recalled in 2018 and 2019. This potential settlement agreement is for products that Hill's recalled between January 31, 2018 and March 20, 2019 (two recalls) involving approximately 675,000 cases of canned dog food. Pet owners alleged multiple varieties of Hill's Prescription Diet and Science Diet canned dog food were defective and deceptively marketed as healthful because they contained dangerously high levels of vitamin D that posed serious health risks to dogs. The preliminary settlement came after a Zoom hearing between Hill's and the plaintiffs and is scheduled for a final approval hearing in July. The settlement contains a release of claims limited to the specific dog food products named in the suit and does not end claims related to cat foods and other products made by Hill's. Class members making injury claims will be reimbursed for expenses related to the screening or treatment of their dogs for symptoms consistent with consumption of excess vitamin D. Documentation of these claims is required.

Appeals

PPIA Preemption Pecks at Plaintiff's Protest to Poultry

Leining v. Foster Poultry Farms Inc., No. B291600 (Cal. Ct. App. Feb. 23, 2021).

The plaintiff alleged that Foster Poultry Farms chicken products were deceptively marketed as carrying the American Humane Certified logo. Reading this logo, the plaintiff alleged, consumers expected that the defendant's chickens were raised under humane circumstances. In reality, American Humane Certified poultry allegedly are treated no better than any other chicken farmed for food. The defendant met American Humane's standards to obtain the certification, and the label for the chicken, which included the logo, was pre-approved by the USDA's Food Safety and Inspection Service, in accordance with the Poultry Products Inspection Act (PPIA).

The court of appeal affirmed the trial court's decision that the plaintiff's claims were preempted. The court of appeal observed that the PPIA contains an express preemption clause that bars the plaintiffs' claims that Foster Poultry Farms' use of the logo was deceptive under California state law. The result if the plaintiff were to prevail on her state-law claims that the labels were misleading? According to the court, the PPIA's purpose of ensuring national uniformity in labeling would be defeated.

Krusty, Krabby Dissent the Lone Highlight Against the Ninth Circuit's Increasingly Spongey Reasonable Consumer Standard

Kang v. P.F. Chang's China Bistro Inc., No. 20-55138 (9th Cir. Feb. 9, 2021).

When a sushi roll discloses such appetizing ingredients as "krab mix," what reasonable consumer would *not* be on high alert that it might not contain crab meat? Yet the Ninth Circuit found that question is not for the trial court to decide on a motion to dismiss. For some background, the plaintiff alleged that the defendant's use of the term "krab mix" to describe the contents of some of its sushi rolls was deceptive. "Krab mix" was likely to deceive reasonable consumers into thinking the rolls contained at least some real crab meat when they in fact contained none. The district court dismissed the complaint, concluding that these allegations were implausible on their face.

But the Ninth Circuit reversed. It found that, although no reasonable consumer confronted with the term "krab mix" would think the rolls contained *only* crab, it was plausible that reasonable consumers would believe that krab mix contained at least some crab meat. Consequently, the court could not conclude that the plaintiff's allegations were implausible on their face. Never mind that "crab" appears on the same menu and spelled correctly.

The dissent was less forgiving: "'Krab' with a 'k' should be a dead giveaway." The entire point of intentionally misspelling words is to humorously convey a different meaning. "The majority fails to give the ordinary California consumer enough (or any) credit"—they are not the "most gullible" of all consumers. According to the dissent, the real harm is that the Ninth Circuit's spongier reasonable consumer standard robbed the defendant of a squarely dismissible suit.

But the greatest travesty of all? Neither the opinion nor the dissent makes a single mention of the TV famous—yet equally contrived—krabby patties.

Ascertainability Is an Implicit Prerequisite of Rule 23, but "Administrative Feasibility" Apparently Is Not

Cherry v. Dometic Corporation, No. 19-13242 (11th Cir. Feb. 2, 2021).

Neither "ascertainability" nor "administrative feasibility" appears in Rule 23. But courts have debated whether they should read them into Rule 23 as prerequisites to certifying a class. To quote the Eleventh Circuit (which, in turn, quotes Justice Scalia and Bryan Garner), Rule 23 includes "what is implicit"—i.e., *necessary* prerequisites to that rule. But "what is implicit"? Where does a court draw the line between implicit and, well, not?

Notwithstanding its nod to the text, *Webster's Dictionary*, and Justice Scalia and Garner, the Eleventh Circuit ultimately ignored these tenets in favor of a bright-line rule that "administrative feasibility" has no place as a threshold requirement to Rule 23, joining five other circuits (the Second, Sixth, Seventh, Eighth, and Ninth Circuits). Ascertainability clearly exists within Rule 23. Although "no form of the word 'ascertainability' appears in the rule," the Eleventh Circuit noted that "the text includes 'what is implicit,'" and ascertainability is an "implied prerequisite to the requirements of Rule 23(a)." Ascertainability, the Eleventh Circuit observed, speaks to whether the class definition is adequate and uses objective criteria. Without it, a district court would not be able to assess who belongs in the proposed class or whether the proposed class meets the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. Practically, administrative feasibility should, too; it puts theory into practice by ensuring that the proposed class definition can actually ascertain class members.

The Eleventh Circuit, however, refused to acknowledge that administrative feasibility is a logical component of ascertainability and found in favor of a brighter line rule. But its Scalian, text-based "reasoning" for doing so is far more strained than had it simply stated it was adopting a brighter line rule. It held that administrative feasibility "does not follow from the text of Rule 23(a)" and has "no connection to Rule 23(a)." The Eleventh Circuit cited *Webster's* for the proposition that administrative feasibility is not an inherent aspect of ascertainability (even though the dictionary defines "ascertainable" as "to find out or learn *with certainty*"). Recently evicted, "administrative feasibility" must find its home within the manageability standard of Rule 23(b)(3)(D).

To be sure, in certain cases, whether an administratively feasible method for ascertaining class members existed is a difficult question. And clearly, bright lines and clear rules lessen the burden on district courts in ruling on motions for class certification. But by moving administrative feasibility under manageability, the Eleventh Circuit moved the line distinctly in favor of the plaintiff's bar. "[M]anageability problems will 'rarely, if ever, be in themselves sufficient to prevent class certification.'"

FOOD & BEVERAGE DIGEST

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Marcos Alvarez
404.881.4745
marcos.alvarez@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Katherine Wheeler Gamsey
404.881.7462
katie.gamsey@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Kathryn Clifford Klorfein
404.881.7415
kathryn.klorfein@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Rachel Naor
415.243.1013
rachel.naor@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD