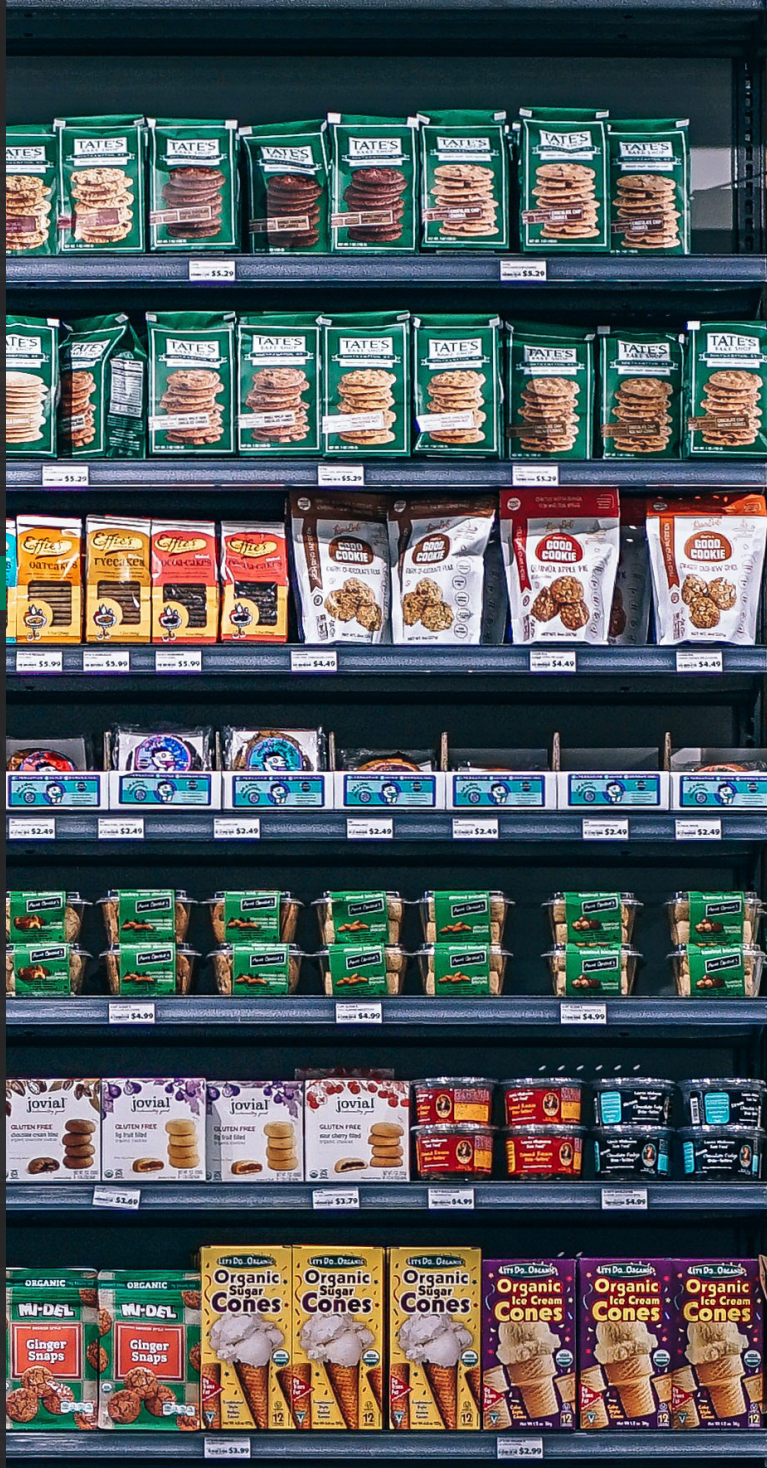
ALSTON & BIRD

FOOD & BEVERAGE DIGEST

NOVEMBER 2021

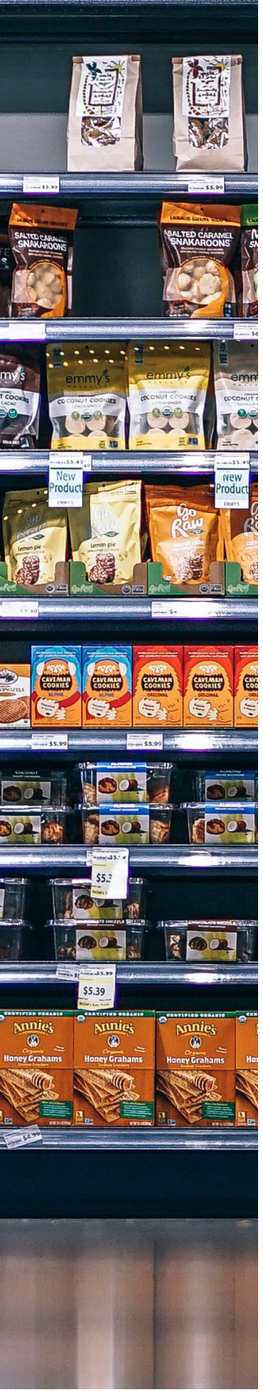


Edition Facts

5 Sections This Edition
Cases Per Section 1-10

Reading Calories 0

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



New Lawsuits Filed

Parent Wants to Send Baby and Toddler Food Manufacturer to Time Out

Sanchez v. Nuture Inc., No. 5:21-cv-08566 (N.D. Cal. Nov. 3, 2021).

A California mother recently filed a putative class action challenging nutrient content claims on certain Happy Baby and Happy Tot brands baby and toddler food products. One line of challenged products, Happy Tot Fiber and Protein pureed pouches, allegedly states that it contains 3 grams of protein and fiber per serving and that "PROTEIN is a key building block for little growing bodies & FIBER helps support the digestive system! Here's to a happy & healthy start!" She also challenges another line of baby foods labeled as "Super Smart" that claims that added DHA and choline are promising to "help support a healthy brain."

Unlike most nutrient content suits, the complaint does not allege that the defendant's products lack the advertised *amounts* of the nutrients. Instead, the plaintiff claims that she paid a premium for the baby foods because she believed that they would provide more benefits than competitors', despite the purported lack of evidence that increased protein or fiber intake are appropriate or recommended for infants and toddlers. The complaint points to FDA regulations, which prohibit nutrient content claims on food intended specifically for infants and children under two years of age. The plaintiff seeks to certify a class of similarly irked California parents to pursue claims under the state's consumer protection statutes, common-law fraud, and unjust enrichment.

One Tequila, Two Tequila, Three Tequila, Fl— Agave Syrup?

Khaimova v. Anheuser-Busch LLC, No. 1:21-cv-05268 (N.D. Ill. Oct. 5, 2021).

An Illinois consumer is taking shots at Bud Light Platinum Seltzer's use of the phrase "Made with Agave" on its label, alleging that the hard seltzer misleadingly suggests that the drink is made with distilled agave spirits (like tequila). In reality, the consumer claims, there is nothing neat about the seltzer's ingredients. The hard seltzer contains only agave syrup sweetener.

Nevertheless, the complaint alleges, the hard seltzers use premium language to mislead consumers into thinking that they contain distilled agave spirits. For instance, the seltzer's use of the word "Platinum" allegedly implies a type of tequila in the seltzers, and the relatively high alcohol content by volume, 8%, allegedly suggests the presence of distilled spirits. The seltzers are also advertised as "Made for the Night," which allegedly suggests that the seltzers contain premium spirits more appropriate for a night out. As a chaser, the complaint finally claims that the seltzer's packaging shows an image of the clear liquid being poured into a glass, which supposedly is similar to clear-colored spirits that are consumed in a glass. The plaintiff seeks to represent state classes of consumers for claims for violations of Illinois's consumer protection statute, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Vitamin C You Later, Hard Seltzers

Kuciver v. Fermented Sciences Inc., No. 1:21-cv-05668 (N.D. Ill. Oct. 24, 2021).

Striking a blow to crunchy tailgaters everywhere, one Illinois resident has alleged that a brand of hard seltzers and hard kombucha are not the cauliflower crust of the alcohol world. According to a putative class action, the defendant's "Flying Embers" products mislead consumers about the health benefits of its products, specifically about the addition of Vitamin C and probiotics to its alcoholic beverages.

The plaintiff, who purports to enjoy fruits and vegetables, contends that she purchased a watermelon hard kombucha and a pieapple cayenne hard seltzer because they allegedly highlighted the health benefits of the fizzy concoctions. But fortification with Vitamin C and probiotics, she alleges, violates FDA guidance and does not render an alcoholic beverage a source of nutrition. And in any event, she claims, the detrimental effects from consuming alcohol outweighed any benefit from including these nutrients and probiotics. She seeks to represent a class of Illinois consumers for violations of Illinois's consumer protection statute, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

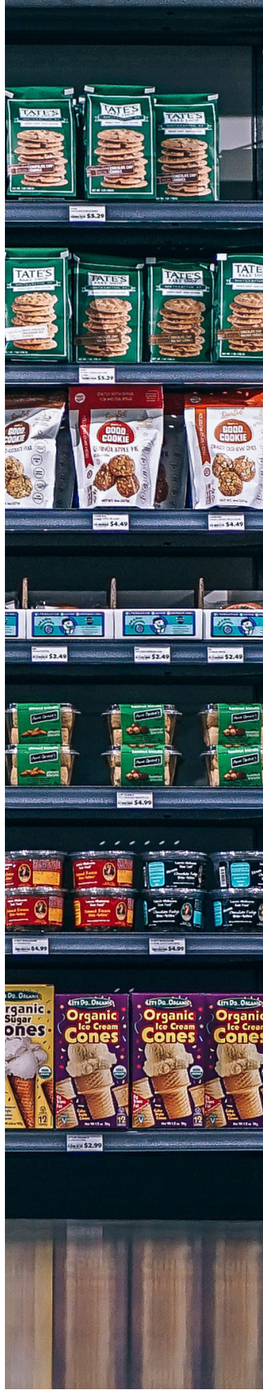
For Salty Consumer, X Missed the Spot for Himalayan Treasure

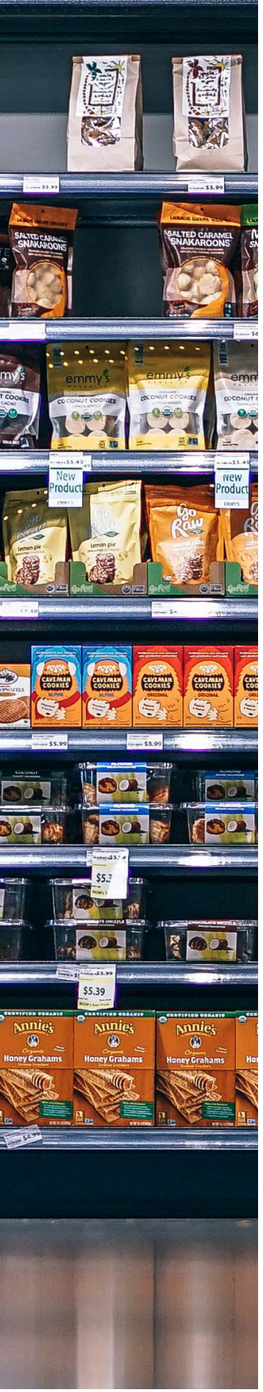
Mogollon v. Costco Wholesale Corporation, No. 1:21-cv-08361 (S.D.N.Y. Oct. 10, 2021).

It is salt. It is from the Himalayan mountains. It has hues of pink, red, and white. It is even ground. But is the defendant's "Ground Himalayan Pink Salt" deceptive? Relying on an *Indiana Jones* style map, a New York consumer alleges it is.

The plaintiff alleges that the labeling on the defendant's Himalayan salt deceives consumers into believing it is sourced from the Indian Himalayan mountains that border Tibet and Nepal. According to the complaint, it does so with the statement that the salt is sourced "from the heart of the Himalayan Mountains" and an "Indiana Jones-inspired map depicting Indian cities." Instead, the salt is a product of Pakistan. Although the consumer claims she was misled, this fact is disclosed on the product's label, and Pakistan is indeed a country that is home to portions of the Himalayan mountains. The consumer seeks to certify New York and Connecticut classes for claims under the states' consumer protection laws and for breach of warranty, misrepresentation, and unjust enrichment.

The defendant's responsive pleading is due January 18, 2022, so we will see whether the plaintiff "chose … poorly" in bringing this suit.





Consumers Aim to Toast Bakery's "No Preservatives" Claim

Simeone v. T. Marzetti Company, No. 7:21-cv-09111 (S.D.N.Y. Nov. 3, 2021).

A bakery faces a putative class action challenging its New York Bakery's Texas Toast products. According to the complaint, the defendant's Texas toast deceives consumers into believing the products contain "No Preservatives," even though it contains the allegedly "well-documented preservative" citric acid. The plaintiffs point to the FDA's regulatory definition of "chemical preservative" and the agency's classification of citric acid as a preservative to assert that citric acid serves as a stabilizer or preservative for the ingredients in the Texas toast. The plaintiffs seek to certify a New York class of purchasers for violations of New York law, breach of express warranty, and unjust enrichment.

Consumer *Can't* Agree with "Pizza on a Bagel's" Ingredients

Jackson v. Kraft Heinz Foods Co., No. 1:21-cv-05219 (N.D. Ill. Oct. 2, 2021).

Who can forget Bagel Bites' lovable tagline: "Pizza on a bagel – we can all agree with that"? Apparently a disgruntled Illinois consumer who has recently claimed that Bagel Bites feature label representations that mislead consumers into believing the bite-sized snack is made with real cheese and tomato sauce, when in reality it is not. The complaint claims that consumers are misled by label representations including "Three Cheese," "Made With Real Cheese," and the "Real" dairy seal because the label omits that the product contains starch, nonfat milk, and whey that are added to the "real" mozzarella cheese. The plaintiff complains that despite promises of "real cheese," Bagel Bites instead include a topping consisting of a "cheese blend" that includes the non-cheese ingredients. Because of these non-cheese ingredients, the complaint alleges the product's use of the "REAL" dairy seal is misleading and violates the National Milk Producers Federation (NMPF) guidelines that govern use of the seal. The complaint alleges that no reasonable consumer expects mozzarella cheese to have starch, nonfat milk, and whey, that the defendant knew its product did not meet the "rigorous and exacting certification process" of the NMPF to use the traditional "REAL" seal, and that only after consuming the Bagel Bites would consumers realize that they did not taste like mozzarella cheese but rather had a "flat cardboard-like taste and rubbery mouthfeel" as a result of the filler ingredients.

The complaint also takes issue with representations of the tomato sauce because it contains non-tomato thickeners including cornstarch, which is designed to give the impression that the product's sauce contains more tomatoes than it does. The plaintiff alleges that she paid higher prices for the Bagel Bites than she otherwise would have absent the allegedly misleading labeling representations and seeks to certify a class of similarly situated consumers in Illinois, Iowa, and Arkansas to pursue claims under the states' consumer protection statutes and for breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Plaintiff Gripes That She Cannot Believe It's Not Butter (Really)

Troutt v. Mondelēz Global LLC, No. 3:21-cv-01279 (S.D. Ill. Oct. 19, 2021).

According to a recent lawsuit, butter makes everything better. In fact, according to a complaint filed in Illinois federal court, butter is so integral to certain baked products—in this case, shortbread cookies—that a shortbread cookie made without butter may not even be a shortbread cookie at all. The plaintiff's major gripe here is that the defendant's Lorna Doone branded Shortbread Cookies mislead consumers with a "half-truth" into thinking they are purchasing a traditional shortbread cookie, when they are actually purchasing "Shortbread-Style Cookies."

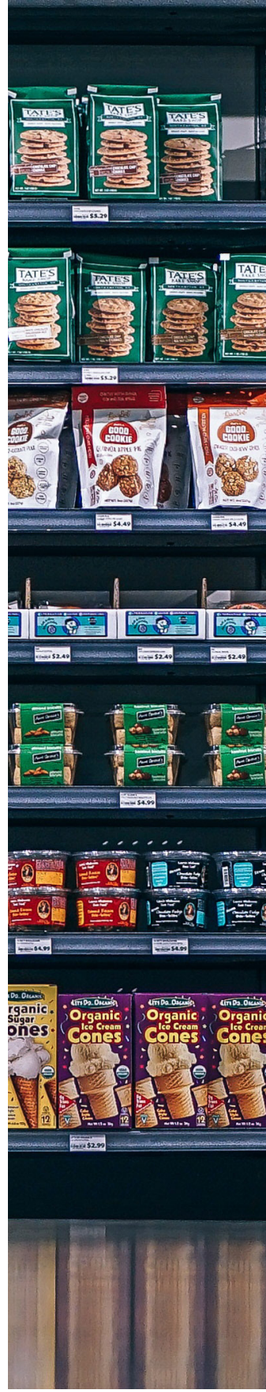
According to the complaint, consumers expect shortbread cookies to contain butter, and a shortbread cookie that is missing its characterizing ingredient should say so directly on its front label. However, the shortbread cookies allegedly fail to disclose that the cookies *lack* the characterizing ingredient consumers expect to find in a shortbread cookie (butter), but instead contain cheaper alternatives (vegetable oils and baking soda). The complaint also criticizes the packaging's "Melt In Your Mouth" claim, arguing that it falsely affirms the presence of butter in the snack because vegetable oil does not melt at mouth temperature (unlike butter). The complaint seeks to certify Illinois and multistate classes for damages and injunctive relief, emphasizing that large companies owe to consumers a duty to "honestly identify and describe" the actual components of their products relative to comparable products.

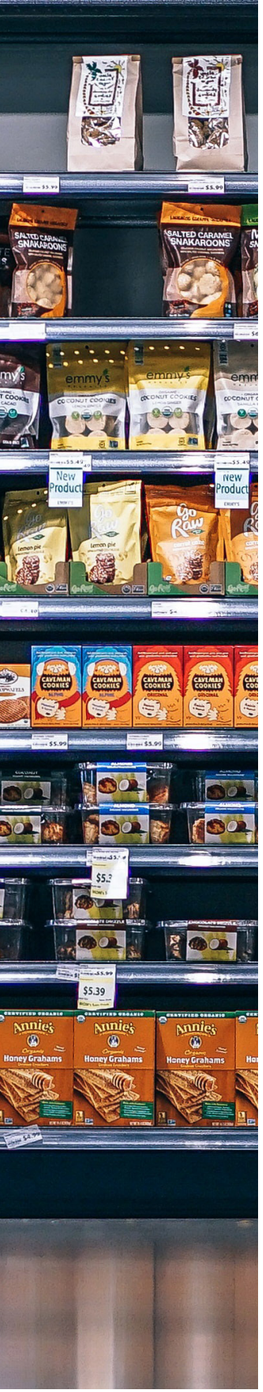
Hot Cocoa in Hot Water

Goodwin v. Whole Foods Market Inc., No. 21STCV40456 (Los Angeles Super. Ct. Nov. 3, 2021).

The plaintiff, Jennifer Goodwin (presumably not the acclaimed actress), claims that a national grocer is in hot water for its 365 Organic Hot Cocoa Flavor Mix, alleging the 12 oz canisters contained 44% slack-fill (the difference between the capacity of a container and the volume of product contained in it). She alleges violations of California's consumer statutes and also negligent misrepresentation.

She also claims that the grocer "had exclusive knowledge" of unspecified material facts not known or reasonably accessible to her, such as: the clearly listed serving size and total number of servings? Or that powders settle? Perhaps that the hot water contemplated for mixing is hot? Among other things, she is suing for special and punitive damages on behalf of a California class—perhaps she is seeking enough money to buy mini-marshmallow toppers that the front label discloses are not included. It is early days yet, and the defendant has not yet had a chance to respond to these theories.





Complaint Fizzes That Kombucha Has Lost Its Fizzle

Johnson-Jack v. Health-Ade LLC, No. 3:21-cv-07895 (N.D. Cal. Oct. 7, 2021).

A California kombucha drinker has challenged that the branding and marketing of the defendant's kombucha and kombucha-inspired drinks—specifically, their use of the name "Health-Ade"—are misleading given the amount of sugar in the beverages. The plaintiff describes the evils of sugar-sweetened drinks, including the various diseases they are associated with, and then claims that given the amount of sugar in the defendant's beverages, any representation that the drinks aid health is false and misleading. The plaintiff seeks to represent a nationwide class in bringing claims for violations of California's consumer protection laws and for breach of express and implied warranties.

Fishy "High Potency Fish Oil"?

O'Leary v. The Stop & Shop Supermarket Co., No. 7:21-cv-08918 (S.D.N.Y. Nov. 1, 2021).

A putative class action filed in New York federal court alleges that a supermarket's "High Potency Fish Oil" product is not, in fact, fish oil. The complaint contends that the product is subjected to a manufacturing process that strips it of its essential constituent components, including the omega-3 fatty acids eicosapentaenoic acid (EPA) and docosahexaenoic acid (DHA).

The lawsuit further alleges that the "high potency" labeling is deceptive because it lacks a reference point to comparable products. The plaintiff seeks to represent a New York–based class of consumers and alleges claims for violations of New York's consumer protection laws, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment. The complaint seeks injunctive relief, monetary damages, and attorneys' fees and costs.

Motions for Preliminary Injunction

Rise Brewing Opens Up a Can of … Coffee in Trademark Fight

Riseandshine Corporation d/b/a Rise Brewing v. PepsiCo Inc., No. 1:21-cv-06324 (S.D.N.Y. Nov. 4, 2021).

It's a classic David and Goliath story. A small—albeit increasingly successful—coffee and tea drinks company against the second-largest food and beverage company in the world. Our David in this story not only had his weapon of choice—a motion for preliminary injunction—but also came to this fight fully caffeinated. The plaintiff, ably represented by an Alston & Bird team, filed suit challenging that the defendant's "Mtn Dew Rise Energy" drinks infringes on the plaintiff's "Rise Brewing Co." registered trademark and, later, moved to enjoin the defendant from selling the offending drinks. The district court agreed, concluding that the plaintiff would likely prevail under a "reverse confusion" theory—where consumers wrongly think that the plaintiff's goods are made by the much larger, better-known defendant.

The district court observed that the defendant's products were likely to cause confusion with the plaintiff's protected marks, particularly given the two companies operated in the same trade channels. It also rejected the defendant's counterargument that its house mark "Mtn Dew" on the drinks cured any confusion as lacking in high-quality persuasive octane. The entire point of a reverse confusion claim is that the defendant's brand overpowered the plaintiff's mark, and on the whole, the marks are confusingly similar. Finally, the district court chided the defendant in its balance of hardships analysis. The district court observed that the plaintiff sent a cease and desist letter to the defendant two months before the product launched but that the defendant continued to invest heavily in its product while prolonging the suit. In other words, the defendant can't take credit for shaking up its own carbonated drinks before opening them.

The upshot? Only time will tell. We recommend readers brew a second cup because the case now is up on appeal to the Second Circuit.

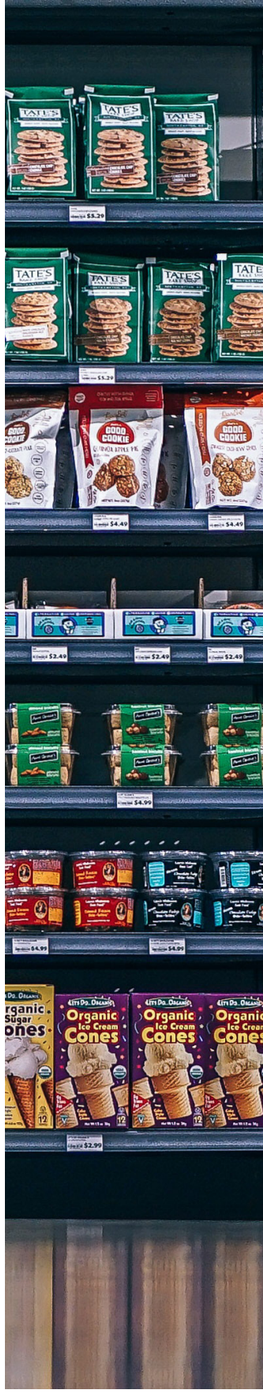
Motions to Dismiss

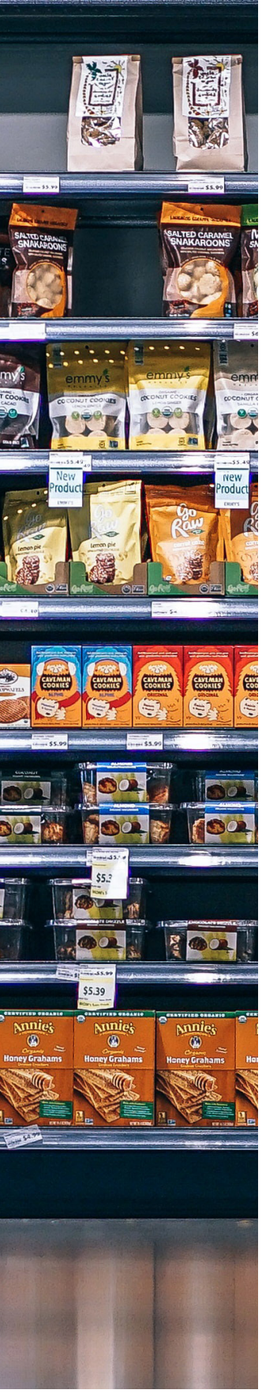
Procedural Posture: Granted

Far from Buttered Up, Court Churns Out Dismissal Order Against "All Butter" Putative Class Action

Boswell v. Bimbo Bakeries USA Inc., No. 1:20-cv-08923 (S.D.N.Y. Nov. 4, 2021).

A national bakery successfully moved to dismiss a putative class action filed in New York federal court alleging the company falsely advertised its Entenmann's pound cake as "All Butter." The district court found that reasonable consumers check the ingredients list and know that the cake is "obviously not a stick of butter" and contains "other ingredients commonly found in cake." In doing so, the district court rejected the plaintiff's argument that the "All Butter" label deceives consumers into believing that the product contains no butter alternatives, including vegetable oils. That is because the ingredients list informs consumers that the product contains non-butter ingredients, like soybean oil and artificial flavors. In tossing the suit, the court also noted that the case was part of a wave of class actions brought by Spencer Sheehan of Sheehan & Associates P.C. that allege that a popular food item is false and misleading. As this wave of orders grows, it's becoming increasingly clear that using similar allegations to survive a motion to dismiss is no cakewalk.





Procedural Posture: Granted with leave to amend

Court Doesn't Bite on Floundering Tuna Sandwich Allegations

Amin v. Subway Restaurants Inc., No. 4:21-cv-00498 (N.D. Cal. Oct. 7, 2021).

This lawsuit at first made quite the splash, reeling in readers with allegations that a national sandwich chain's tuna sandwiches and wraps "entirely lack any trace of tuna as a component, let alone the main or predominant ingredient." But the plaintiffs recently cut bait on their fake fish claim and now are trawling with claims that the defendant misleadingly labels its tuna products as containing *100% sustainably caught* skipjack and yellowfin tuna. Seems a little fishy, doesn't it?

Equally skeptical, the district court dismissed the plaintiffs' claims under Rule 9(b)'s heightened pleading standard. It concluded that the plaintiffs failed to specify the specific statements they saw, when they saw them, and where they saw them. The plaintiffs' reliance allegations, the court reasoned, also flopped. The case also did not warrant a relaxed pleading standard because the plaintiffs—*not* the defendants—supposedly possessed the missing information of the statements that they saw and relied on. However, the district court granted the plaintiffs leave to amend their complaint, and they filed their third complaint in the case on November 8, 2021. Maybe the third time will be the charm for the plaintiffs to land the big one.

Motions for Class Certification

Procedural Posture: Denied

Vanilla Expert Survey Puts Class Cert Bid on Ice

Vizcarra v. Unilever United States Inc., No. 4:20-cv-02777 (N.D. Cal. Oct. 27, 2021).

Readers of this Digest know that judges are increasingly likely to give implausible vanilla suits the cold shoulder. Many have already been dismissed on the pleadings. Now, one vanilla suit challenging the labeling of Breyer's branded natural vanilla ice cream—that survived a pleadings challenge—failed at class certification.

At this point, the allegations should sound familiar. The plaintiff alleged that the defendant misleadingly labels its ice cream as "Natural Vanilla," when in reality some of the vanilla flavor allegedly is derived from non-vanilla sources. The plaintiff moved to certify the class, relying on an oft-relied-upon survey expert to show that common issues (like materiality and consumer perception of the label) predominated in the case. The defendant moved to exclude the expert, arguing that the expert's survey and proposed conjoint analysis could not test for deception, test for materiality because it does not measure consumer purchasing decisions in market conditions, and could not match the plaintiff's theory of liability (i.e., the effect of the so-called "Vanilla Representations").

Though the district court declined to strike the expert report, it naturally concluded that "the opinions of [the plaintiff's expert] … have no persuasive value in the context of the class certification analysis, because [he] did not specifically test the effect of the Vanilla Representations on consumers' beliefs or purchasing decisions, or on whether consumers paid any price premium attributable to such alleged misrepresentations." In finding the commonality requirements for certification were not met, the court also noted that there is no fixed meaning for "natural" and that the plaintiff did not show the representations could be deceptive as a matter of law.

The district court's order, however, will offer only cold comfort to the defendant. Rather than have the suit melt away, the district court denied class certification *without* prejudice, and the plaintiff has advised the court she intends to move for class certification again by June 2022.

Settlements

A Bittersweet End for Chocolate Origin Suit?

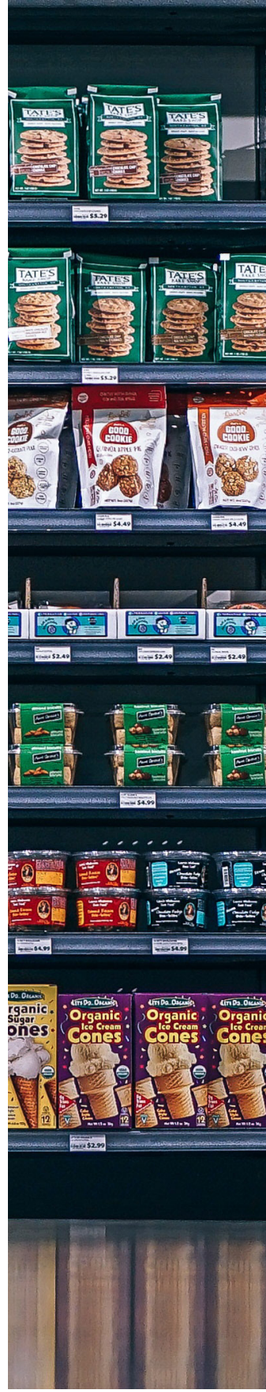
Hesse v. Godiva Chocolatier Inc., No. 1:19-cv-00972 (S.D.N.Y. Oct. 12, 2021).

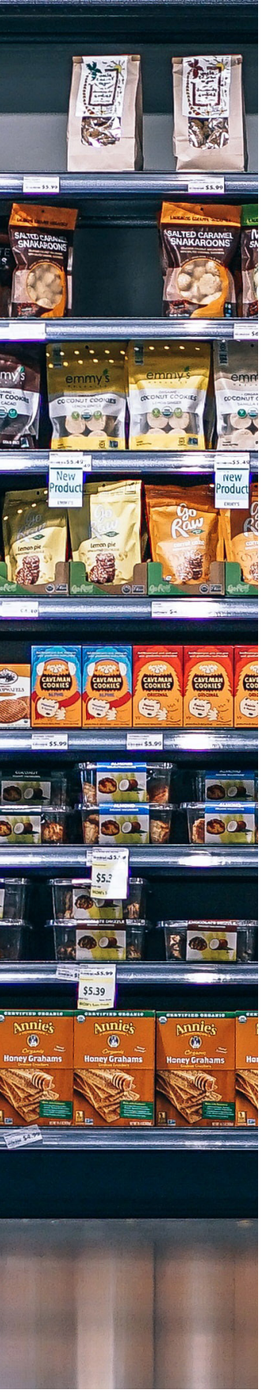
Candy lovers who alleged that they were deceived by a chocolatier have reached a deal with the company to settle their claims. In 2019, consumers who had purchased the company's chocolate filed suit, alleging that the chocolatier deceptively promoted its chocolate products as made in Belgium through the inclusion of "Belgium 1926" on the label—when in reality, the candy is made in Pennsylvania. Godiva moved to dismiss the case, arguing that a reasonable consumer would understand that the reference to Belgium was only an indication of the place and year of the company's founding. A federal judge, however, declined to dismiss the suit, prompting the parties to strike this settlement, which, if approved by the district court, will provide up to $15 million for all valid claims and $5 million in attorneys' fees.

Parties Agree to Stop the Bleeding in "Healthy Heart" Challenge

Hanson v. Welch Foods Inc., No. 3:20-cv-02011 (N.D. Cal. Oct 4, 2021).

Consumers challenging the labeling on the defendant's grape juice products recently filed a motion for preliminary approval of class settlement. That challenge, filed in March 2020, alleged that the defendant's grape juice representations misled consumers into believing the products supported heart health when they in fact increase the risk of heart disease. Under the proposed settlement, the defendant will agree to pay $1.5 million and refrain for at least two years from using the challenged "helps support a healthy heart," "helps promote a healthy heart," or substantially identical claims on the challenged products. Through the settlement, the putative class will be entitled to claim $1 per product purchased, for up to 12 products, for products purchased between March 23, 2016 and October 1, 2021.





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