ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

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Cases Per Section 2-11

Reading Calories 0

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

New Lawsuits Filed

Avocadon't Even Get Me Started with These Allegations

Aliav v. Smart Foods LLC, No. 21STCV35748 (Los Angeles Super. Ct. Sept. 29, 2021).

A California plaintiff has leveled some "guac"-ing allegations about a 100% avocado oil product: it actually contains only 10% avocado oil and 90% canola oil. The plaintiff seeks to certify a California-only class, asserting claims for violations of California's False Advertising Law, Unfair Competition Law, and Consumers Legal Remedies Act, as well as common-law fraud. But without further details in the complaint—the plaintiff does not include any images of the product packaging or any description of the ingredient list—it's difficult to tell if the plaintiff's claims will ripen into a delicious payday or turn to brown mush.

Frozen "Veggies" Feeling the Heat

Brown v. Kellogg Company, No. 3:21-cv-07388 (N.D. Cal. Sep. 22, 2021).
Kennard v. Kellogg Sales Company, No. 3:21-cv-07211 (N.D. Cal. Sep. 17, 2021).

The manufacturer of the popular Morningstar Farms brand of "veggie" burgers and other "veggie" food products is facing scrutiny in two different class actions. In one lawsuit, the plaintiffs allege that the labels of the defendant's Morningstar Farms products (and other brands) misrepresent the amount of protein in the product. The plaintiffs—who claim they have tested the products—argue the products contain less protein than advertised, and the protein that is in the product is of a low "biological value" and thus not metabolized well.

The veggie woes, however, do not stop there. The company is also facing a putative class action challenging the "VEGGIE" representations on Morningstar Farms products. The plaintiffs claim that this representation is false or misleading because the predominant non-water ingredient in the veggie products is grain or oil, not vegetables.

In both cases, the plaintiffs are seeking to bring a class on behalf of California purchasers based on these misrepresentations that, they allege, caused them to pay a premium for the product.

Cereal's Protein Claims Leave Consumers Soggy

Nacarino v. Kashi Company, No. 3:21-cv-07036 (N.D. Cal. Sept. 10, 2021).

A pair of Kashi-consuming cereal enthusiasts filed suit against the popular health-food brand for allegedly overstating the amount of protein per serving in its Kashi Go Cinnamon Crisp cereal. While the boxes of Kashi Go prominently advertise that the cereal contains 11 grams of protein per serving, the plaintiffs allege that Kashi is juicing that number in an attempt to capitalize on the trend of increasingly health-conscious consumers seeking foods higher in protein. Pressed between an extensive background and educational overview of protein function and use in the human body, the complaint really puts the squeeze on Kashi, claiming that amino acid content testing revealed that the Cinnamon Crisp cereal contained only 9.37 grams (an overstatement by 18% per serving), but that due to Kashi using proteins of "low biological value to humans, such as oat protein," even that number is overstated. In reality, the cereal only provides 7 grams of digestible protein, according to the complaint.

The consumers claim that Kashi's marketing and labeling violate both state and federal food labeling laws and seek to certify a nationwide class as well as California and Illinois subclasses to pursue claims for relief for violations of state consumer protection laws, common-law fraud, and unjust enrichment. According to the complaint, the ordinary, reasonable consumer would have had no way of uncovering the truth of the actual protein content in the cereal because "its discovery requires investigation well beyond the grocery store aisle and knowledge of food chemistry beyond that of the average consumer." Luckily, these two cereal sleuths are working the case.

Out of the Frying Pan and into the Courtroom: Consumer Sizzles at Bacon Label

Dakin v. Hormel Foods Sales LLC, No. 3:21-cv-06085 (N.D. Cal. Aug. 6, 2021).

It is said that bacon is God's gift to humanity—and at least one of our contributors vehemently agrees. Well, a putative class action claims that the defendant's Black Label Center Cut Bacon deprived consumers of a little bit of the divine. The complaint alleges that the defendant deceptively labels the bacon as containing "25% Less Fat Than Our Regular Bacon." The reason? Math, of course.

According to the complaint, on a gram-to-gram comparison, the bacon contains 0.333 gram of fat per gram of bacon, when the defendant's original bacon contains a mere 0.389 gram of fat per gram of bacon. With math, the consumers compute that only results in a 14% reduction of fat. The plaintiffs apparently believe that a "25% Less Fat" label means more bacony goodness and claim they were charged a price premium. The consumers also allege that the defendant tweaked the bacon products' serving and packaging sizes to further conceal this gram-for-gram deception. They seek to certify a class of California consumers for violation of California's consumer protection statutes and breach of warranty.

The defendants will see if they can save their bacon (literally)—their motion to dismiss is due October 29.

Consumer Dons Yellow Cellophane, Casts Aside Rose-Colored Glasses, in Sparkling Water Spat

Angeles v. Nestlé USA Inc., No. 1:21-cv-07255 (S.D.N.Y. Sept. 10, 2021).

A consumer—represented by plaintiff's lawyer Spencer Sheehan—claims that she is seeing red because the defendant's sparkling water has a distinctly yellow tint about it. In a putative class action filed in New York federal court, the consumer claims that the lemon-flavored sparkling water—part of a brand of Italian sparkling waters—misrepresents that it contains an appreciable amount of lemon that imparts the water's zesty, lemony flavor.

Yet the primary feature that left the consumer feeling sour is the water's yellow cellophane wrapping, which allegedly suggests that lemons are used in the product. As is becoming increasingly the rage in Sheehan's lawsuits, in an effort to make the point, the complaint claims that history is on the consumer's side, this time in the form of a 1933 traveling exhibit about cellophane-wrapped noodles. The consumer also alleges that the yellow cellophane obscures a disclosure at the bottom of the water that the product is "flavored mineral water with natural CO2 added." The consumer seeks to certify New York and consumer fraud multistate classes for violation of New York's consumer protection laws, state consumer fraud acts, fraud, breach of warranty, negligent misrepresentation, and unjust enrichment.

Plaintiff Claims Mixed Berry Breakfast Bars Are All Mixed Up

Harris v. Kashi Sales LLC, No. 3:21-cv-50376 (N.D. Ill. Aug. 16, 2021).

According to a putative class action complaint filed in Illinois federal court, the labeling on the defendant's "Mixed Berry" Soft Baked Breakfast Bars is false and misleading because it gives consumers the false impression that the bars' fruit filling contains a greater amount of mixed berries and honey than it actually does. The complaint takes issue with a host of representations on the products' packaging, including the statements "Mixed Berry," "3g Fiber*,""Made with Wildflower Honey, "10g Whole Grains,""Non-GMO Project Verified,""Simply Delicious," and "Delightfully Nutritious," along with images depicting a variety of berries and oats.

The complaint alleges, however, that in reality the breakfast bars' fruit filling contains more pears and apples than berries and derives its sweetness mostly from sugar. Among other things, the suit complains that it is unlawful to label the product as "Mixed Berry" when berries are not its characterizing ingredients. Based on these allegations, the complaint seeks to certify classes under various states' consumer protection laws and asserts claims for breach of warranties, negligent misrepresentation, fraud, and unjust enrichment.

Lawsuit Alleges "0g Total Sugars" Scheme to Reel in Unwary Consumers

Cleveland v. Campbell Soup Company, No. 3:21-cv-06002 (N.D. Cal. Aug. 3, 2021).

A lawsuit filed in the Northern District of California alleges that the makers of Goldfish products deceptively represent that the smiling, golden fish snacks are healthy. Relying on predicate violations of FDA regulations, the plaintiffs maintain that the defendants label their products as containing "0g Sugars" but fail to include any disclosure that the Goldfish are not a low-calorie food. These purported misrepresentations, the plaintiffs claim, deceived them into purchasing Goldfish or paying more than they otherwise would have. The plaintiffs are angling to represent a nationwide class (along with California and New York subclasses) of individuals who bought the Goldfish with the "0g Sugars" label.

Unlike their fishy counterparts, the defendants are not smiling. They filed a motion to dismiss on August 31, 2021, arguing the district court should not be baited by the plaintiffs' allegations.

Complaint Pitches New Name for Hard Seltzer for Flat Fruit Claims (Possibly)

Galvez v. The Boston Beer Company, No. 3:21-cv-01508 (S.D. Cal. Aug. 25, 2021).

For once, plaintiffs represented by counsel *not* named Spencer Sheehan are challenging a product's flavor and ingredient claims. Led by a New York and California law firm tag team, two consumers have taken aim at an entire line of fruit-flavored hard seltzers, asserting the seltzers falsely suggest that they contain real fruit. The suit claims that the seltzers contain no fruit ingredients but rather are flavored only with "lab synthesized ingredients described as 'natural flavors.'" The complaint also alleges that the seltzers violate FDA regulations because their front labels do not disclose they are "flavored products," even though they identify and use realistic pictures of their characterizing fruit flavors. The plaintiffs seek to certify nationwide, California, and New York classes for breach of warranty, unjust enrichment, and violation of the California and New York consumer protection laws.

Consumer Sours on Applesauce's 100% Real Fruit Claim

Schneider v. Mott's LLP, No. 21-L-0884 (20th Jud. Cir., St. Clair Cnty., Ill. Sept. 7, 2021).

A particularly saucy Illinois consumer sued an apple products maker, alleging that its "made from 100% real fruit" claim on its applesauce products are deceptive. The plaintiff alleges that the claim leads consumers to believe that the applesauce does not contain ingredients other than apples or other fruit when in fact, it contains a number of non-fruit ingredients, such as high fructose corn syrup. The plaintiff seeks to certify an Illinois and nationwide class of purchasers and asserts violations of Illinois law, breach of express warranty, and unjust enrichment.

No Honey, No Graham, So Just … Crackers?

Hauger v. Dollar General Corporation, No. 1:21-cv-01270 (C.D. Ill. Sept. 23, 2021).

According to an Illinois consumer, crucial ingredients in her beloved s'mores are not what they appear to be. The plaintiff alleges that even the name of the defendant's Honey Graham Crackers is misleading because neither honey nor graham flour is a predominant ingredient. Instead, the plaintiff alleges, the crackers contain more enriched flour than graham flour and more sugar than honey.

Consumers, the complaint claims, apparently believe graham flour and honey are healthier, more natural, and more valuable, making the true distribution of those ingredients problematic. The plaintiff seeks to represent a class of Illinois consumers and a "Consumer Fraud Multi-State Class" consisting of Iowa and Arkansas consumers for violations of Illinois's consumer protection statute, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Not Living the High Life

Beyond Pesticides v. Summitt Labs LLC, No. 2021 CA 002743 (D.C. Super. Ct. Aug. 6, 2021).

A nonprofit group that in recent years has sued companies such as Monsanto, TruGreen, and ExxonMobile and even the Environmental Protection Agency for a range of environmental issues has challenged the defendant's line of Kore Organic CBD products. The nonprofit claims that the defendant harshed its mellow by deceptively advertising its products as organic in violation of the District of Columbia Consumer Protection Procedures Act.

The group asserts that the defendant does not appear in the U.S. Department of Agriculture's (USDA) Organic Integrity Database and that it does not identify any organization overseeing its organic claims. Beyond Pesticides also claims that the USDA has stated it does not intend to regulate the use of the claim "organic" on CBD products except when the products claim to be certified organic by a USDA-accredited certifier. Rather than get a contact high by proceeding as a class or seeking damages, the nonprofit seeks to do the public a solid by pursuing only declaratory and injunctive relief.

It's not just paranoia: this suit comes one year after the defendant recalled certain of its Kore Organic products due to high lead levels, which allegedly tipped off the nonprofit and its investigative arm, Organic Eye, to look into the company further.

Motions to Dismiss

Procedural Posture: Granted

Think Social Media Hashtags Matter to Reasonable Consumers? #HoldMyBeer

Jackson v. Anheuser-Busch InBev SA/NV LLC, No. 1:20-cv-23392 (S.D. Fla. Aug. 18, 2021).

A complaint challenging the craft nature and origin of a Miami-based beer recently met its fate before a district court flexing its social media knowledge. The complaint alleges that a multinational brewer has hoodwinked craft beer aficionados by founding a brewery in Miami and positioning it as having significant ties to Miami and Latin American roots. It is even alleged that the brewer branded using the Spanish shorthand for "beer" (Veza) and uses the slogan "hecha en Miami" (made in Miami) on social media.

The district court didn't fall for the clickbait, concluding that this alleged conduct would not mislead reasonable consumers. Why? According to the district court, facts. It noted that even the complaint conceded that the defendant's ownership of the brewery has been widely publicized since the brewery's inception. Under a safe harbor, the Florida consumer protection claim also was not actionable because the defendant obtained a certificate of label approval from the U.S. Treasury's Alcohol and Tobacco Tax and Trade Bureau for the beer. Finally, the district court didn't think much of the plaintiffs' challenge to the hashtag #HechaenMiami, reasoning that it was nonactionable puffery because reasonable consumers would not place any stock in "social media marketing tools that streamline data categorization."

In a procedural quirk, while the defendants' motion to dismiss was pending, the case kept progressing through discovery. In granting the defendants' motion to dismiss, the district court rendered moot months of discovery and a pending motion for class certification. Talk about a high cost per click.

Will Defendant-Friendly Reception in New York Help N.D. Cal. Regain "Food Court" Title?

Parham v. Aldi Inc., No. 1:19-cv-08975 (S.D.N.Y. Sept. 21, 2021).

A New York federal district court dismissed a putative class action challenging a grocer's Friendly Farms vanilla milk without leave to amend. The court rejected the plaintiff's implausible theory that reasonable consumers believe that the vanilla flavor in the organic milk products bearing the label vanilla is derived exclusively from the vanilla plant. The wind is at the product manufacturers' backs in seeking the dismissal of these cases on the pleadings—numerous courts in the Southern District of New York and Northern District of California have reached the same conclusion on nearly identical facts in other cases filed by the duo of Michael Reese and Spencer Sheehan.

Here, the court rebuffed three different arguments. One, the district court held that the alleged consumer survey the plaintiff relied on did not salvage his implausible claims. A plurality of respondents allegedly responded to the survey that they understood the vanilla taste in a product bearing the word vanilla to come from the vanilla bean. But the survey did not support the plaintiff's theory that the consumers believed the vanilla taste came *exclusively* from the vanilla plant. This case reflects that relying on a consumer survey does not equate to clear sailing past a motion to dismiss challenge, just as the Ninth Circuit in *Beccera v. Dr. Pepper* concluded that consumers are not plausibly misled by the word "diet" in "diet" products despite a consumer survey. Two, the district court also rejected any link between the plaintiff's interpretation of FDA flavor regulations (which many discount) and market practices that would inform consumers' understanding of vanilla product labeling. This argument, the district court reasoned, was conclusory and devoid of facts to claim that FDA regulations regarding vanilla flavoring actually have primed consumers' understanding. Three, the dictionary definition of vanilla did not assist the plaintiff in demonstrating consumers' understanding of vanilla taste in the product in question.

What readers really want to know is this: the Northern District of California arguably lost its claim to the "Food Court" title when well over 100 of these vanilla and similar flavor and ingredients suits were filed in New York federal courts. Now with this latest dismissal in a round of vanilla case dismissals, will NorCal be able to overtake New York in 2021 filings?

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