ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

4 Sections This Edition
Cases Per Section 1-10

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Class Certification	100%
Appeals	100%
Voluntary Dismissals	100%

New Lawsuits Filed

Lawsuit Alleges That Healthy Tonic Is Anything But

Cummings v. Botanic Tonics LLC, No. 37-2023-00052818 (Cal. Sup. Ct. Dec. 6, 2023).

A California consumer filed a putative class action in state court against the manufacturer of a health and wellness tonic and the convenience stores and gas stations that sell it. According to the complaint, the manufacturer advertised the tonic as a safe, non-addictive, and healthy alternative to alcohol. But the manufacturer allegedly failed to disclose that the product contained concentrated amounts of kratom, a highly addictive drug that targets the same opioid brain receptors as morphine. The complaint contends that the FDA has characterized kratom as an opioid and that, in April 2023, U.S. marshals at the direction of the FDA seized 1,000 kg of powdered kratom from the manufacturer's plant in Oklahoma based on safety concerns. The defendant convenience store then directed its franchise stores to stop selling the product.

This lawsuit joins a growing number of other actions targeting manufacturers of products containing kratom. Certain plaintiffs previously filed a class action in federal court against the same product manufacturer (as well as several retailers). The manufacturer and one of the retailers filed answers instead of moving to dismiss, and another retailer's motion to dismiss was denied, indicating the defendants will have an uphill battle in shaking these allegations.

Pee-Dee-Kass, Pee-Dee-Kass, Pee-Dee-Kass!

Taylor v. Dave's Killer Bread Inc., No. 1:23-cv-016439 (N.D. Ill. Dec. 1, 2023).

Unlike the ever-popular movie *Beetlejuice*, saying "Pee-Dee-Kass" thrice will not summon any additional protein into allegedly mislabeled bread products. But it may still spread fear for manufacturers not including a percent daily value for protein when featuring prominent labeling representations about the amount of protein provided per serving. Known by its acronym PDCAAS (pronounced Pee-Dee-Kass and standing for the "Protein Digestibility Corrected Amino Acid Score"), according to the complaint, the FDA's required method of measuring protein quality combines a protein source's amino acid profile and its percent digestibility into a score that, when multiplied by the total protein quantity, shows how much protein in a product is actually digestible in an available form for humans. That score is used to find the "corrected amount of protein" able "to support human protein needs," which, as required by FDA regulations, is to be featured as part of the percent daily value on the nutrition facts panel of food products.

According to one protein-seeking plaintiff in Illinois, a popular manufacturer of a healthful line of bread products ignored those requirements and prominently labeled many of its products with claims that the products provide a specific amount of protein per serving but forewent the requisite percent daily values on its nutrition facts panel. According to the complaint, because the protein sources in the bread products are wheat and oats—ingredients with "low-quality proteins" that typically provide only 40–50% of the protein quantity claimed—the prominent front labeling statements are unlawful and deceptive because they lead consumers to believe they are actually receiving the total amount of protein advertised, when in fact, their bodies are only able to digest about half of it.

Based on those allegations, the plaintiff seeks to certify nationwide and Illinois classes to pursue claims under Illinois's consumer protection acts, common-law fraud, deceit, and misrepresentation and unjust enrichment. While these types of suits have been popping up across the country, we'll follow closely to see whether a motion to dismiss is able to put this one into the afterlife waiting room.

Jiggly Gelatin Allegedly Juiced with Artificial Preservatives

Pagan v. Kraft Heinz Foods Co., No. 1:23-cv-10945 (S.D.N.Y. Dec. 18, 2023).

A putative class action filed in New York accuses a defendant food manufacturer of mislabeling the ever-popular Jell-O gelatin products as containing "No Artificial Preservatives" when, in fact, the products contain citric acid—an allegedly "artificial preservative commonly used in food products." According to the complaint, the defendant's "No Artificial Preservatives" label deceives consumers into thinking the products do not contain artificial preservatives like citric acid and, therefore, induces them to purchase the products on this basis. The plaintiff asserts putative class claims for violation of New York's statutory consumer protection laws, breach of warranty, and unjust enrichment. The complaint prays for damages, restitution, injunctive relief, and attorneys' fees and costs.

Cocoa Powder: Chocolate / Potato: Potahto – What's the Difference?

Hackman v. Van Leeuwen Ice Cream LLC, No. 2023-CAB-007346 (D.C. Sup. Ct. Dec. 4, 2023).

A chocolate-loving plaintiff who is screaming about ice cream brought this action in D.C. Superior Court challenging the labeling of a "chocolate caramel cheesecake ice cream" product as deceptive on the grounds that it was allegedly manufactured using cocoa powder rather than chocolate. She alleges that reasonable consumers would interpret usage of the word "chocolate" on the label to mean the product actually contains chocolate. In a rather snarky complaint (potentially because this plaintiff didn't get her *real* chocolate fix), the plaintiff claims that to promote consumer understanding and comply with applicable regulatory requirements, the ice cream should have contained a declaration on the label and ingredient list indicating that it is "chocolate flavored." While the plaintiff argues that the product label violates federal regulations, she brings this consumer protection action individually based on alleged violations of the District of Columbia's Consumer Protection Procedures Act and allegations that the product label is likely to mislead a reasonable consumer.

In addition to the flavor declaration, the plaintiff also challenges the net quantity of contents statement on the ice cream product. The complaint specifically takes issue with the allegedly

deceptive and misleading marketing of the product as a "pint" while the nutrition facts panel allegedly reveals that the product contains only 14 fluid ounces of ice cream, rather than 16 fluid ounces. The difference "is common knowledge and is taught to American children in elementary schools across the country." Such snark. Here's hoping this plaintiff can find her extra two ounces of chocolatey goodness.

Raisin' a Stink in Latest Slack-Fill Lawsuit

Perez v. Mariani Packing Co., No. 23CV057139 (Cal. Sup. Ct. Dec. 19, 2023).

Move over wine and cheese—a lesser-celebrated grape and dairy pairing is having its own moment in the sun. A California consumer filed a proposed class action challenging the excess space, or slack-fill, in bags of yogurt-covered raisins. According to the complaint, filed in California state court, the manufacturer had no legitimate reason for leaving almost 60% empty space in the bags because the raisins are not at risk of breaking and the bags can hold more raisins, among other reasons. If that wasn't enough, the manufacturer allegedly sweetened its coating of deception by revealing the raisins through a window on the packaging while concealing the empty space with opaque labeling, suggesting a fuller bag. The plaintiff brings claims under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act.

Barking Mad Plaintiff Claims Dog Food Falsity

Price v. Blue Buffalo Co., No. 1:23-cv-11096 (S.D.N.Y. Dec. 21, 2023).

At least one plaintiff purportedly had the holiday blues this year after claiming she was duped by a dog food manufacturer. In a suit filed in the Southern District of New York just before the end of the year, the plaintiff alleges that a major kibble manufacturer formulates, advertises, and sells multiple types of wet and dry pet food, all of which the manufacturer claims are "natural" and merely "enhanced with added vitamins and minerals." But according to the complaint, the food is in fact stuffed with synthetics and naturally cannot be considered "natural." In other words, the dog food is purportedly faker than Fido's New Year's resolution to chase fewer cars.

In her suit, the plaintiff contends that the dog food manufacturer is seeking to capitalize on a growing market of health-conscious pet owners and that the "natural" representation is false and misleading. Had she known that the "natural" dog food contained multiple synthetic ingredients, the plaintiff contends she would not have purchased it or would have paid less per bag. The plaintiff initially sought to represent a nationwide class and a New York subclass on claims for alleged violations of New York's consumer protection laws and breach of express warranty, but she filed a notice of voluntary dismissal less than three weeks after filing the complaint.

Objection, Dosage! A Bitter Pill(s?) to Swallow

Yellin v. Nordic Naturals Inc., No. 7:23-cv-10681 (S.D.N.Y. Dec. 7, 2023).

A New York consumer filed a class action against a vitamin and dietary supplement manufacturer over alleged misrepresentations of the dosage amounts and unit representations on many of its products' labeling and packaging. According to the complaint, the manufacturer misrepresents the dosage amount of each capsule, tablet, or gummy by prominently advertising the dosage amount (e.g., "500 mg Omega 3") alongside the number of tablets, capsules, or gummies included in each product (e.g., "60 Soft Gels"). The plaintiff claims that labeling the products in this manner misleads reasonable consumers into believing that each tablet, capsule, or gummy contains the advertised dosage amount, but in reality, consumers must ingest multiple tablets, capsules, or gummies to obtain the advertised dosage amount.

The complaint includes numerous examples of the defendant's products, calling out the small font on the back label that discloses the "suggested use" of multiple tablets, capsules, or gummies to receive the advertised dosage amount. According to the plaintiff, that slight of hand causes consumers to "grossly overpay" for the products because they receive only half, or even less than half, of the advertised value.

Based on these allegations, the complaint asserts claims for violations of New York's Deceptive Acts and Practices Law and False Advertising Law.

The Slack-Fill Slayer

Reyes v. Morris National Inc., No. 23ST-cv-31682 (Cal. Sup. Ct. Dec. 27, 2023).

Long-time readers have likely seen our coverage and affectionate dubbing of the Vanilla Vigilante. Well, allow us to introduce the Slack-Fill Slayer. Last month, we introduced you to this true believer—a self-proclaimed "consumer rights 'tester'" surfing her way through SoCal, creating "public benefit" by ridding the streets of candy-coated slack-fill! Fear not candy lovers, the Slack-Fill Slayer is here to bring "serial litigation" (her words, not ours) to ensure "that companies comply with their obligations under California law."

The alleged offender in her flavor-of-the-month is a manufacturer of Jell-O branded gummies, which according to the new complaint only fills its bags of berry-flavored gummies approximately 40% full. The plaintiff claims that despite being a "dual motivated tester," had she known about the "nonfunctional slack-fill"—the empty space in packaging without a legitimate reason—she would not have purchased the product. She also boldly claims that even if a reasonable consumer were to "shake" or otherwise inspect the bag of gummies before opening it, there would be *no way* to discern how much candy—as opposed to empty space—was in the bag. Color us skeptical on that claim.

In any event, the plaintiff of course isn't out for money or fame, or even to represent a putative class. Like before, she files this action as an individual "with the hope that Defendant will accept responsibility for its actions and take all appropriate remedial measures." But if the defendant refuses, the Slack-Fill Slayer promises to be back with a class action!

Cereal Bar Madness

Wilcox v. Target Corp., No. 6:23-cv-02339 (M.D. Fla. Dec. 6, 2023).
Liquori v. Weis Markets Inc., No. 2023-5940 (N.Y. Sup. Ct. Dec. 14, 2023).
Day v. Tops Markets LLC, No. E70985 (N.Y. Sup. Ct. Dec. 26, 2023).
Kalman v. Southeastern Grocers Inc., No. 502023CA016978XXXAMB (Fla. Cir. Ct. Dec. 26, 2023).

A number of plaintiffs across the country are getting serious about what's in their cereal bars. Each plaintiff sued a different cereal bar manufacturer, alleging that the manufacturers' cereal bar products are mislabeled because they contain artificial flavors. According to each complaint (three of them filed by Spencer Sheehan and unsurprisingly recycle many of the same allegations), the product labels' claims such as "Naturally Flavored" and "No Artificial Flavors" are false and misleading because the products contain DL-malic acid, an alleged artificial laboratory-created flavoring, which is not a "natural flavor" as defined by federal and state regulations. The plaintiffs also allege that the products' "Made With Real Fruit" or "Made with Real Fruit Filling" claims are misleading because even if the cereal bars are made with actual fruit, the use of DL-malic acid supplies the fruit taste. Further, the plaintiffs take issue with the product labels' omissions that the artificial flavoring is part of the filling's taste. Because of those misrepresentations and omissions, the plaintiffs state they paid a premium for the cereal bars that they otherwise would not have.

The two New York–based plaintiffs seek to represent a New York class of purchasers alleging violations of the New York General Business Law and Agriculture & Markets Law and unjust enrichment. And the two Florida-based plaintiffs seek to represent a Florida class of purchasers, alleging violations of Florida's consumer protection laws and unjust enrichment.

O-Mg! Supplement Manufacturer Faces Elemental Challenge to Magnesium Content

Stonehart v. Now Health Group Inc., No. 1:23-cv-16604 (N.D. Ill. Dec. 8, 2023).

The plaintiff in this case might have exclaimed O-Mg! after purchasing a dietary supplement claiming to provide a whopping 400 mg of elemental magnesium (Mg) "derived from a 2,018 mg complex of magnesium citrate, magnesium glycinate, and magnesium malate." But despite those lofty representations, the plaintiff alleges it would be a mathematical impossibility for 400 mg of elemental magnesium to be present in one serving of the product (3 capsules) based on the percentages of elemental magnesium available in magnesium citrate, magnesium glycinate, and magnesium malate. Duh.

The complaint alleges that in misstating the actual amount of magnesium present in the products, the defendant violates federal law and regulations and breaches the express warranty created by its labeling. But hedging his seemingly sure-fire calculations, the plaintiff professes that to the extent the products *do* contain 400 mg of elemental magnesium, they couldn't possibly derive it from magnesium citrate, magnesium glycinate, and magnesium malate, and therefore it "must come from an alternative, undisclosed source of magnesium," such as magnesium oxide, a "cheaper" form of magnesium that is "less desirable to consumers."

Based on these allegations, the plaintiff seeks to represent a nationwide class of purchasers and a Utah subclass and alleges claims for fraudulent concealment, violations of Utah business laws, breach of express warranty, breach of implied warranty of merchantability, and violation of the Utah Consumer Sales Practices Act.

Class Certification

Procedural Posture: Denied

Court Finds Something Fishy About Plaintiff's Standing Allegations in Tuna Mislabeling Class Action

Craig v. American Tuna Inc., No. 3:22-cv-00473 (S.D. Cal. Dec. 21, 2023).

Seeing is believing, and unfortunately for one seafood connoisseur, he failed to convince a federal judge that he saw the allegedly deceptive advertising on tuna cans and believed it to be true. The plaintiff alleged that the defendant misrepresented that certain of its tuna products were "Caught and Canned in the USA," "Caught and Canned in America," "American Made," or "100% American Made," when the tuna was caught outside U.S. waters. When pressed at his deposition about what statements on tuna labels he believed were misleading or deceptive, the plaintiff responded, "Caught in American waters." That statement never appeared on the labels, and the "Caught and Canned in the USA" and "Caught and Canned in America" statements did not appear on the tuna labels at the time of the plaintiff's alleged purchases.

Moreover, he did not retain any labels or have any photographs or notes on what was on the labels he purchased. The only evidence he had of what was stated on the cans came from a label his attorney provided him. Accordingly, the court found that the plaintiff (who was the only remaining class plaintiff) had not satisfied his burden of demonstrating Article III standing—he failed to show an injury-in-fact because he provided no evidence he saw the challenged statements and was injured by them—and denied his motion for class certification. The court directed the plaintiff to show cause why the entire action should not now be dismissed for lack of standing. As a result, it seems the defendant is off the hook.

Appeals

Ninth Circuit Gives Glucose Control Drink Customers a Boost

Horti v. Nestlé Healthcare Nutrition Inc., No. 22-16832 (9th Cir. Dec. 13, 2023).

In an unpublished, four-page opinion, a Ninth Circuit panel reversed a December 2022 dismissal, boosting the plaintiffs' claim that the defendant's "Boost Glucose Control" drink product may mislead a reasonable consumer into thinking the beverage can treat diabetes. While the district court found that the labels made it clear the drink products weren't miracle medications, the Ninth Circuit wasn't satisfied and decided to give this legal concoction another shake.

The panel found the plaintiffs adequately alleged injury-in-fact to confer Article III standing based on allegations that they paid a price premium relying on the product packaging claims that it is "designed for people with diabetes," and that it "helps manage blood sugar." The Ninth Circuit determined that the plaintiffs sweetened their claims by also alleging the product placement in stores and online "alongside legitimate diabetes treatments and other health and nutritional supplement products" further supports their claim that the product could mislead a reasonable consumer.

The panel remanded the case to the district court for further proceedings consistent with its short-but-sweet opinion.

Unjust Desserts

Kamal v. Eden Creamery LLC DBA Halo Top Creamery, No. 21-56260 (9th Cir. Dec. 21, 2023).

The Ninth Circuit served up a decadent opinion for the plaintiffs' bar that threatens to expand the burden of litigation on defendants across industries. The plaintiffs filed their initial complaint in June 2018 against the owner and manufacturer of Halo Top brand ice cream, alleging that the defendant deliberately underfilled its ice cream pints, causing consumers to pay for more than they received. The plaintiffs first amended their complaint in September 2018, adding additional facts, parties, and causes of action, including a "fraud by omission" theory. After the defendants' motion to dismiss was denied, the court set a deadline to join additional parties or amend the pleadings.

More than eight months after that deadline passed, the plaintiffs moved to amend their complaint to incorporate a new theory and add another defendant. The district court denied the motion, finding that the plaintiffs were not diligent in seeking leave to file their proposed second amended complaint and that allowing amendment would prejudice the defendants. Shortly thereafter, the plaintiffs moved to voluntarily dismiss their claims without prejudice, acknowledging that they sought dismissal to pursue their new fraud theory in a new lawsuit. Again, the district court denied the motion and advised the plaintiffs they could either accept dismissal *with* prejudice or continue litigating the action on their first amended complaint. The plaintiffs appealed.

The Ninth Circuit affirmed in part and reversed in part, agreeing with the district court that the plaintiffs failed to show good cause to amend their complaint, preventing them from bolstering their fraud theory in the current lawsuit. However, the Ninth Circuit reversed the district court's dismissal with prejudice, finding that the lower court abused its discretion because the defendants failed to demonstrate that they would suffer legal prejudice if the case were dismissed *without* prejudice. The panel held that the prospect of additional litigation and the loss of any res judicata defenses did not amount to cognizable prejudice under the Federal Rules of Civil Procedure and remanded with instructions to dismiss the action without prejudice.

The Ninth Circuit's decision did not leave district courts in the circuit without tools to discourage these sorts of tactics. The panel recognized that a district court can award costs and attorneys' fees as a condition of dismissal without prejudice, and instructed the district court to consider whether any terms should be imposed as a condition of dismissal in the case. Still, the decision is a sweet treat for plaintiffs that make it to discovery without a fully churned theory of liability, and sour grapes for defendants in search of finality.

Voluntary Dismissals

Here is your monthly shortlist of the voluntary dismissals entered in some of the cases we've covered over the years:

Burke v. Tribucha Inc., No. 5:22-cv-00406 (E.D.N.C. Nov. 20, 2023) – Filed 10/6/2022.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories	0
	% engaging value
Knowledgeable Speakers	100%
Current Topics	100%
Alston & Bird Approved	100%

February 26–28




2024 CPG Legal Forum

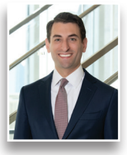
Angela Spivey, Rachel Lowe, Sam Jockel, and Andrew Phillips will speak at the Consumer Brands CPG Legal Forum, the premier gathering for legal professionals in the consumer packaged goods industry.

Angela will speak on the panel "In the Cross Hairs: The CPG Litigation Review" during a general session.

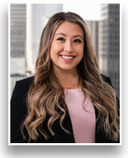
Rachel, Sam, and Andrew will speak on a roundtable focused on PFAS.

Contributing Authors

Angela Spivey
+1 404 881 7857
angela.spivey@alston.com



Jonathan Hermann
+1 404 881 7275
jon.hermann@alston.com



Samantha Burdick
+1 213 576 1190
sam.burdick@alston.com

Samuel Jockel
+1 202 239 3037
sam.jockel@alston.com

Sean Crain
+1 214 922 3435
sean.crain@alston.com

Barbara Jones-Binns
+1 202 239 3139
barbra.jones-binns@alston.com

Reagan Drake
+ 1 404 881 7150
reagan.drake@alston.com

Taylor Lin
+1 404 881 7491
taylor.lin@alston.com

Lauren Funk
+1 404 881 7648
lauren.funk@alston.com

Rachel Lowe
+1 213 576 2519
rachel.lowe@alston.com

Jamie George
+1 404 881 4951
jamie.george@alston.com

Andrew Phillips
+1 404 881 7183
andrew.phillips@alston.com

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Contributing Authors

[Alan Pryor](#)
+1 404 881 7852
alan.pryor@alston.com

[Jason Sigalos](#)
+1 404 881 7844
jason.sigalos@alston.com

[Troy Stram](#)
+1 404 881 7256
troy.stram@alston.com

[Amanda Newton Wellen](#)
+1 404 881 4809
amanda.wellen@alston.com

[Ashley Yull](#)
+1 202 239 3289
ashley.yull@alston.com

[Krupa S. Zachariah](#)
+1 202 239 3241
krupa.zachariah@alston.com

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