ALSTON & BIRD

FOOD & BEVERAGE DIGEST

NEW YEAR'S 2022

Edition Facts

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New Lawsuits Filed	100%
Motions to Dismiss	100%
Settlements	100%

Happy New Year from the Alston & Bird Food, Beverage & Agribusiness Team! A Look Ahead to See What 2022 May Bring

Many year-end publications often feature a look back at the highlights of the previous year. Candidly, there are few things that we would rather put in our rearview mirrors more than all things 2021. We instead opted to look forward at what the food, beverage, and agribusiness industry can expect in 2022.

Few industries have adapted as well to meet the challenges presented by an ongoing COVID-19 pandemic and the truly remarkable supply chain issues that it presented. We are grateful for our clients, friends, and colleagues who still manage the time to read this publication while keeping a nation fed and refreshed. You have our gratitude and our sincerest thanks.

And without further ado, here's a toast to a prosperous (and punny) 2022!

A long-expected (hint hint FDA) New Year's gift: an update to the "healthy" definition?

Whether you've been naughty or nice, you are in luck: the FDA is expected to update its regulatory definition for "healthy," an implied nutrient content claim. The FDA's current definition is focused on specified levels of total fat, saturated fat, cholesterol, and sodium, but that is all subject to change. As of this writing, an updated definition of "healthy" is sitting with the Office of Management and Budget for review, and the FDA has indicated the proposed rule will reflect modified limitation for certain nutrients, including saturated fat, sodium, and added sugar. What's more, the FDA has already begun the process to develop a symbol that manufacturers can use for products that meet the updated definition.

Wait, those gingerbread cookies are not actually "nutritious" (or "healthy" or "good for you" or "wholesome")?!

The year 2021 witnessed landmark settlements in the "healthy cereal" and breakfast bars suits pending in California federal courts. These suits are not a flash in the pan, and we suspect "implied health" claims will remain a hot-button issue for all food and beverage products and alcohol products especially. We have already seen lawsuits challenging the labeling and marketing of alcoholic beverages that highlighted the inclusion of nutrients and ingredients perceived as "healthy." We expect this trend to continue as new products are introduced into the market that leverage the potential benefits of their ingredients.

Have yourself a merry … bioengineered food disclosure (starting January 1, 2022)!

January 1, 2022 is the mandatory disclosure deadline for the USDA's bioengineered food disclosure requirements. For the first time on the federal level, this will require manufacturers, importers, and certain retailers to disclose the presence of bioengineered food or food that contains bioengineered food ingredients on products labeled for U.S. retail sale. But are manufacturers ready? Only time will tell. Stakeholders should also monitor the current challenge to the USDA's final regulations pending in federal court in California: *Natural Grocers v. Perdue*, No. 3:20-cv-05151 (N.D. Cal.).

Is this **flavored** eggnog?

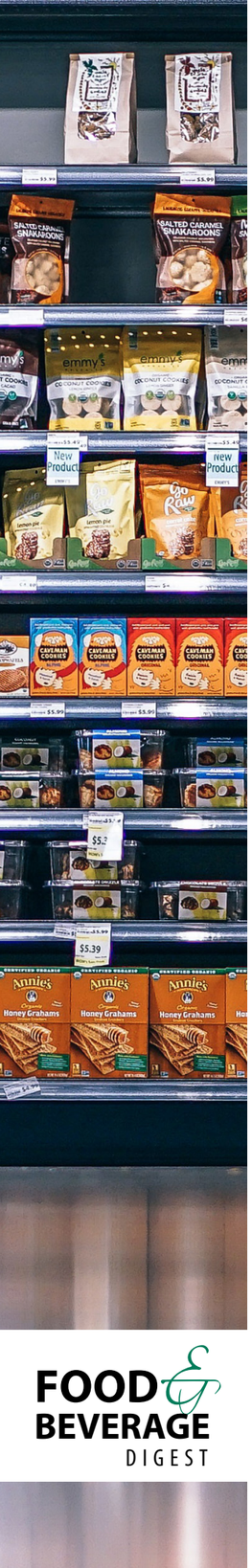
Last year saw a tremendous spike in the number of challenges to flavoring claims. Plaintiffs are taking several approaches, with some targeting "natural" claims when the product contains allegedly synthetic ingredients or alleging that products contain only a negligible amount of the characterizing flavor and are actually flavored by other ingredients. We do not expect these challenges to slow in 2022 and in fact expect to see an uptick in challenges to "made with," "contains," "real," and similar claims about the ingredients used to impart the flavors in a product.

Apple pie, pecan pie, or … frozen cherry pie?

Did you know that frozen cherry pie is the only fruit pie on the market subject to an FDA standard of identity? So don't worry, you can substitute brown sugar for cane sugar for your packaged pecan pie without FDA oversight. But the FDA's standard for frozen cherry pie may be no more in 2022 because the agency proposes to revoke it as part of its push to modernize standards of identity, some 75 and 80 years old, under its Nutrition Innovation Strategy. We expect additional activity on this front from the FDA, including potential clarity from the agency on appropriate nomenclature for plant-based foods.

New Year, new regulatory pathway for CBD?

In contrast to some states, including California, the FDA continues to take the position that CBD may not be used as an ingredient in food or dietary supplements unless the FDA promulgates a regulation permitting it. Nevertheless, unless health claims are made, the FDA has generally taken limited enforcement action against marketers of CBD as an ingredient in food and dietary supplements. Legislation is pending in Congress to legalize cannabis and products derived from cannabis, so we expect continued pressure to open up the market to CBD in food and dietary supplements in 2022.



New Lawsuits Filed

When You Didn't Ask for Preservatives for Christmas

Hezi v. Celsius Holdings Inc., No. 1:21-cv-09892 (S.D.N.Y. Nov. 23, 2021).

An inevitable part of the holiday season is receiving a gift you didn't ask for and didn't want, whether it be a gift card to a restaurant you dislike from a coworker or yet another knitted scarf from your aunt. That sentiment underlies the plaintiffs' allegations in a putative class action filed in New York federal court: consumers don't want preservatives in their drinks.

According to the complaint, the defendant's Live Fit drinks state that they contain "no preservatives." Yet a review of the ingredients list shows that the beverage includes citric acid, which (according to the plaintiffs) is a preservative. The plaintiffs cite their food science expert to claim that, even if citric acid was included in the drinks as a flavoring agent, the quantity of citric acid is more than enough to have a preservative effect. The plaintiffs also claim that consumers generally prefer food products free of preservatives and will pay a price premium for products they believe are preservative-free. The plaintiffs seek to represent a nationwide class for claims under New York's consumer protection law, breach of express warranty, and unjust enrichment.

0.0% Alcohol Beer: Lager Than Life?

Wilson v. Heineken USA, No. 3:21-cv-00628 (M.D. La. Nov. 1, 2021).

A plaintiff filed a complaint in Louisiana federal court challenging a global brewer's non-alcoholic beer product line. But what particularly ales this consumer?

As alleged in the complaint, the plaintiff purchased the defendant's "0.0" beer believing the beers are completely free of any alcohol. The defendant's packaging states that the beer is "Alcohol Free" and contains "0.0% alc. by vol." In reality, the plaintiff claims, the beers can contain as much as 0.03% alcohol by volume. The plaintiff raises various consumer protection and common-law claims to recover for the defendant's alleged deception. However, it remains unclear whether the plaintiff—an attorney proceeding pro se—seeks to pursue a putative action. She claims that the amount in controversy exceeds $75,000 but contains no other allegations of her damages or any allegations on behalf of a putative class.

All That Burns the Nostrils Is Not Wasabi

Ithier v. 7-Eleven Inc., No. 7:21-cv-09405 (S.D.N.Y. Nov. 14, 2021).

A consumer is bringing the heat against a wasabi-flavored snack mix in New York federal court, alleging the eye-watering snack misleads consumers into believing the product contains some real wasabi and no artificial wasabi flavors. The front label states that the snack mix is "Wasabi Delight Flavored Snack Mix" and depicts a pair of chopsticks holding, presumably, a wasabi pea. However, so alleges this peppery plaintiff, on closer inspection of the products ingredients list, the snack mix only uses artificial wasabi flavor, mustard seed, and other non-wasabi ingredients to impart the characteristic burn associated with wasabi.

The plaintiff claims that—notwithstanding the clear disclosure that the snack mix is wasabi *flavored*—reasonable consumers would expect the product both to contain some real wasabi and not to be flavored with artificial flavors. In a stretch, the plaintiff also claims that reasonable consumers should be excused from inspecting the ingredients list because the bright green peanuts and peas in the mix could be used to conceal the amount of real wasabi in the product. The consumer seeks to certify New York and multistate classes for various consumer protection and common-law claims to recover for this claimed deception.

Products Liability Suit Alleges CBD Drops Too Heady for Plaintiff

Agbonkhese v. Curaleaf Inc., No. 3:21-cv-01675 (D. Or. Nov. 19, 2021).

A plaintiff has lodged a products liability claim against a cannabidiol manufacturer in Oregon federal court, claiming its CBD drops are tainted because they contain the psychoactive agent THC. Eschewing more typical consumer-centric claims and relief—the class mechanism, a price premium theory of damages, or even consumer protection claims—the complaint claims that the plaintiff suffered a panic attack and psychosis shortly after ingesting the CBD drops. The plaintiff claims the defendant's CBD drops contain THC, "a foreign object" that rendered the drops unfit for "unintentional" human consumption without a proper warning label. In addition to a products liability claim, the plaintiff also claims that the defendant was negligent by failing to exercise appropriate quality control standards to detect the THC.

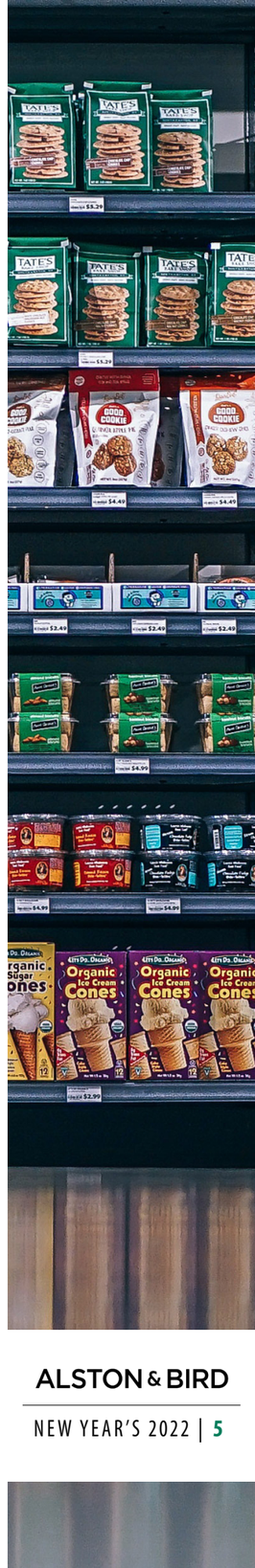
Curiously, the five-page complaint offers no details of the amount of THC in the drops or how the plaintiff ascertained the drops contain any amount of THC. Yet instead of testing these allegations at the pleadings stage, the defendant filed an answer responding to these allegations. Only time will tell whether these allegations are fully baked.

The Chances of Weight Loss During the Holidays: SLIM to None?

Kuciver v. KSF Acquisition Corp., No. 1:21-cv-05964 (N.D. Ill. Nov. 6, 2021).

As the temperature drops, hot chocolate is made, cookies are baked, and the post-holiday shopping rush commences, what could be better for the wallet and the waistline than an at-home portable shake that helps consumers lose weight and keep it off? According to one Illinois consumer, a portable shake that is *clinically proven* to assist in weight loss.

An Illinois consumer filed a putative class action against the corporation responsible for SlimFast shakes, bars, and snacks. The plaintiff alleges that she purchased the SlimFast products because they were held out to her as being clinically proven to help her lose



weight. But she claims she didn't, which she attributes to the fact that the "clinically proven" and "4Hour Hunger Control" claims on the SlimFast labels are based on clinical studies of outdated products no longer sold by SlimFast, weight loss plans no longer offered by the company, and skewed data. The complaint seeks to certify a class for claims for violation of Illinois consumer protection laws and various common-law claims for breaches of express warranty and implied warranty of merchantability, negligent misrepresentation, fraud, and unjust enrichment.

Fudge-Covered Deception (Allegedly)

Leonard v. Mondelēz Global LLC, No. 1:21-cv-10102 (S.D.N.Y. Nov. 28, 2021).

A New York putative class action claims that Oreo misleads consumers with statements and pictures on its "Fudge Covered Oreo – Mint Creme" to falsely imply that its fudge is composed of dairy ingredients containing milk fat. In fact, the plaintiff alleges, the Oreo cookies lack "essential fudge ingredients," like whole milk and milkfat. Moreover, he claims, the defendant replaced these essential ingredients with lower quality and lower priced palm and palm kernel oil and nonfat milk—all of which are disclosed on the product's ingredient list—while charging a price premium for the Oreo cookies.

The plaintiff claims that the value of the Oreos he purchased were materially less than its value as represented and that the defendant was able to sell more of the product and at higher prices than it would have been absent the misconduct. The complaint alleges that the plaintiff, and similarly situated consumers, would not have bought the Oreos, or would have paid less for them, had they known the truth about the fudge ingredients. The plaintiff seeks to certify both New York and multistate classes to pursue claims under state consumer fraud acts, breach of express and implied warranty of merchantability, negligent misrepresentations, fraud, and unjust enrichment.

Plaintiff Cries over Sugared Milk

Stevenson v. Maple Hill Creamery LLC, No. 1:21-cv-09559 (S.D.N.Y. Nov. 18, 2021).

A consumer of allegedly zero-sugar milk products sued the dairy manufacturer, alleging the products actually *do* contain sugar. As alleged in the complaint, the defendant's milk products are advertised as having "zero sugar," "no sugar," and "no sweeteners" because the sugar naturally found in milk is allegedly removed through a filtering process. However, the plaintiff contends that the milk does contain galactose, a simple sugar. The plaintiff seeks to certify New York, Missouri, and nationwide classes for damages and injunctive relief.

Is That Christmas Tree Organic?

Environmental Democracy Project v. IMM Group Inc., No. 21CV002429 (Cal. Super. Ct. Nov. 12, 2021); *Environmental Democracy Project v. CBD Organics LLC*, No. 21CV002444 (Cal. Super. Ct. Nov. 12, 2021); *Environmental Democracy Project v. Cannabliss Organic LLC*, No. 21CV002446 (Cal. Super. Ct. Nov. 12, 2021).

The Environmental Democracy Project has launched a California state court campaign against companies selling products in California that are touted as "organic." In three similar complaints, the group alleges that the California Organic Food & Farming Act (COFFA) imposes strict requirements that apply to a wide range of products sold in California. The products targeted in these three lawsuits include bedding, cosmetics, and various CBD-based products. The Environmental Democracy Project alleges that none of these products contain the percentage of organic ingredients required by COFFA but still are advertised as organic. All three lawsuits seek solely injunctive relief under COFFA (and, of course, attorneys' fees).

Consumers Salty over Canned Green Been Preservatives

Fleming v. Del Monte Foods Inc., No. 3:21-cv-01462 (S.D. Ill. Nov. 19, 2021).

Does salt often make things taste better? Yes. But is salt a preservative? Also yes. So if salt is added purportedly to enhance flavor rather than to preserve, does that bar advertising that same product as preservative-free? According to a class action filed in Illinois federal court, the two claims must be mutually exclusive.

The defendant manufactures, promotes, and sells Farmhouse Cut Green Beans, which it describes as containing "No Preservatives." But the plaintiff claims that the green beans product is also advertised as containing "Natural Sea Salt" for taste. As alleged in the complaint, salt's inherently preservative properties and its pervasive commercial use to extend shelf life means that the defendant cannot have its proverbial cake (salt and all) and eat it too. The complaint seeks to certify Illinois and multistate consumer fraud classes for consumer protection and common-law claims.

Plaintiffs Claim Consumers Should "Think" Twice Before Buying Non-GMO Food Products

Bergman v. Glanbia Performance Nutrition Inc., No. 1:21-cv-06315 (N.D. Ill. Nov. 24, 2021).

A lawsuit filed in Illinois federal court accuses a supplements maker of deceptively marketing its think! nutrition products as "GMO Free" or "Non-GMO," alleging that the products are actually derived from genetically modified food sources and genetically engineered ingredients. The complaint asserts that consumers perceive all-natural foods as better and, therefore, seek

to avoid GMOs. Despite representations to the contrary, the plaintiffs complain that think! products actually contain ingredients derived from genetically modified food sources as well as those genetically engineered in laboratories via biotechnologies. The plaintiffs seek to certify nationwide, New York, and California classes of consumers for claims for fraud, unjust enrichment, negligent misrepresentation, breaches of warranty, and violations of New York's and California's consumer protection laws.

New Lawsuits Take Issue with "All Natural" Claims

Vega v. Del Monte Foods Inc., No. 2122-CC09639 (St. Louis Cir. Ct. Nov. 2, 2021);
Thiel v. General Mills Inc., No. 2122-CC09651 (St. Louis Cir. Ct. Nov. 3, 2021).

Two companies face putative class action allegations in Missouri state court that the companies falsely advertise their products as containing only natural ingredients and fail to properly disclose the inclusion of artificial additives in their products. Each suit—brought by the same law firm—involves a different company's product that displays an allegedly improper label, featuring claims such as "No Artificial Flavors or Synthetic Colors," "NATURAL," in "100% PINEAPPLE JUICE," and a claim denouncing the inclusion of "artificial preservatives" as "unthinkable."

According to the complaints, however, the products contain artificial ingredients such as citric acid, sodium citrate, potassium sorbate, and other artificial flavoring agents and preservatives. The complaints challenge that the inclusion of these ingredients flies in the face of each product's labels, which deceive consumers into believing the products are all natural. The complaints allege claims for violation of the Missouri Merchandising Practices Act, breach of express warranty, and unjust enrichment and seek to recover compensatory damages, restitution, and attorneys' fees and costs.

Flavor-Enhancing Products in Hot Water

Boss v. The Kraft Heinz Company, No. 1:21-cv-06380 (N.D. Ill. Nov. 30, 2021).

The maker of the popular MiO-branded water-flavoring products faces a nationwide putative class action alleging that the products are falsely advertised to imply they contain only natural flavors. Part of the problem, states the complaint, is that the MiO products prominently display on their front labels fruit or berry characterizing flavors, which improperly convey to consumers that the MiO products are made exclusively from and flavored only with those natural fruit or berry flavors. However, according to the complaint, 18 of the MiO products also contain an "undisclosed artificial flavor"—dl-malic acid—that acts as the products' main flavoring agent.

The complaint seeks to certify a nationwide class and a California subclass for claims under Illinois's and California's consumer protection laws and for various common-law misrepresentation and unjust enrichment claims.

Protein Bars Alleged to Have Too Much Fat to Be Fit

Seljak v. Pervine Foods LLC, No. 1:21-cv-09561 (S.D.N.Y. Nov. 18, 2021).

A group of consumers have challenged that the defendant's FITCRUNCH protein bars falsely claim that the bars are healthy. The plaintiffs allege that the products are deceptively called "FIT" when, in fact, they contain between 8 to 18 grams of fat, depending on the flavor or size of the protein bar. The plaintiffs allege that this amount of fat exceeds what the FDA permits to be labeled as "healthy."

They further claim they would not have purchased the bars had they known that the protein bars did not meet the FDA's definition of "healthy." The plaintiffs have brought claims on behalf of themselves, a national class, and New York, California, and Illinois subclasses, alleging violations of those states' unfair trade practices and false advertising laws, as well as breach of warranty.

Motions to Dismiss

Procedural Posture: Granted

Court Churns Out Dismissal Order as Cracker Suit Crumbles

Kamara v. Pepperidge Farm Inc., No. 1:20-cv-09012 (S.D.N.Y. Nov. 9, 2021).

A New York federal district court dismissed with prejudice a challenge to "Golden Butter" crackers, concluding that the plaintiff's claim that reasonable consumers would expect the crackers to be made solely of butter—and not a combination of butter and vegetable oil—was too flaky to sustain a plausible claim for relief. The plaintiff claimed that prominently displaying the phrase "Golden Butter" on the crackers' packaging—with no other qualifying language—would mislead consumers into believing that the crackers are made only with butter and no butter substitutes.

In tossing the case, the district court noted that the ingredients list on the crackers accurately identifies both butter and shortening as ingredients and even that butter (the second ingredient listed) actually does predominate over other oils and fats. Even so, the district court also concluded that a reasonable consumer could interpret the phrase "Golden Butter" as referring to the butter flavor of the snack, rather than as referring to the amount of butter contained within it. Perhaps the "golden" rule for these "Golden Butter" crackers was this: without the packaging emphasizing any other virtues about the crackers or elaborating further on its ingredients, "the complaint does not plausibly allege why a reasonable consumer" would embrace the plaintiff's claimed understanding of the label.

Settlements

Visions of Sugarplums Dance … Right Off Biscuit Labels

McMorrow v. Mondelēz, No. 3:17-cv-02327 (S.D. Cal. Nov. 15, 2017).

As consumers cozy up by the fireside this winter, they'll have to do so with one less "nutritious" breakfast bar to jumpstart their day. The plaintiffs in the years-old suit alleged that the defendant's belVita breakfast biscuits—which were marketed as "NUTRITIOUS SUSTAINED ENERGY," "NUTRITIOUS STEADY ENERGY ALL MORNING," and "4 HOURS OF NUTRITIOUS STEADY ENERGY"—misrepresented the high sugar content of the biscuits. The plaintiffs brought claims of unfair competition, false advertising, and breach of warranty, alleging that they were misled to think that they were making a healthy choice and were unaware of just how much sugar was in the biscuits. While the district court initially denied class certification, an amended damages model resurrected the class claims.

On November 15, 2021, the parties agreed to a class settlement, and the court granted preliminary approval and set the final approval hearing for February 28, 2022. The settlement resolves all claims for individuals who purchased belVita breakfast biscuits between November 2013 and November 2021 and provides that the defendant will establish an $8 million settlement fund from which class members can make claims for $0.21 per purchase of the biscuits, up to two per month. The company will also refrain—for at least three years—from using the terms "nutritious" (or substituting "healthy," "balanced," or "wholesome") for labels that advertise steady energy if more than 10% of the product's calories come from added sugar. Oh sugar!

Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Taylor Lin
404.881.7491
taylor.lin@alston.com

Kristin M. Adams
404.881.7828
kristin.adams@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Katherine Wheeler Gamsey
404.881.7462
katie.gamsey@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Jamie George
404.881.4951
jamie.george@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Samuel Jockel
202.239.3037
sam.jockel@alston.com

Amanda Newton Wellen
404.881.4809
amanda.wellen@alston.com

Kathryn Clifford Klorfein
404.881.7415
kathryn.klorfein@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD