ALSTON & BIRD

FOOD & BEVERAGE DIGEST

OCTOBER 2022

Edition Facts

3 Sections This Edition
Cases Per Section 1-9

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions To Dismiss	100%
Other Orders	100%

New Lawsuits Filed

Too *Sweet* to Be True?!

Scott v. Saraya USA Inc., No. 5:22-cv-05232 (N.D. Cal. Sept. 13, 2022).

Sugar-free maple syrup. Sugar-free drinking chocolate. Sugar-free chocolate syrup. Those are just a few of the products that a California consumer challenges in a new class action against the manufacturer of a line of sugar-free and keto products. According to this clean-eating consumer, those products, as well as 33 others, feature false and deceptive front-of-pack claims like "Sweetened with Monk Fruit" that supposedly mislead consumers into believing that the sole or primary sweetener in these products is monk fruit, a so-called "premium sweetener" that consumers allegedly value for its nutritional values and lack of impact on blood sugar. As a result of these marketing representations, the plaintiff claims she and other consumers paid a premium.

The crux of the plaintiff's complaint is that despite those front-of-pack claims, the products are actually predominantly sweetened with erythritol, a highly processed sugar alcohol that "can lead to multiple side effects, including digestive problems, diarrhea, bloating, cramps, gas, nausea, and headaches." Those claims sounded a little extreme to us, so we fact-checked the consumer's source, and it turns out you'd have to consume *more than 18 grams* of erythritol to experience such side effects. We also checked out what was glaringly missing from the complaint—any information about other ingredients or other disclosures on the packaging. Not surprisingly, the plaintiff left out a great deal of information, including that the packaging also explains that the products include "a *touch* of sweetness from monk fruit" or "the perfect amount of monk fruit sweetness" and that the ingredients label lists "Non GMO Lakanto Monkfruit Sweetener (Erythritol and Monk Fruit Extract)," highlighting the disclosure of erythritol.

Given that information, we'll keep any eye out for the defendant's likely forthcoming motion to dismiss the plaintiff's claims for violation of California's consumer protection statutes, breaches of warranty, unjust enrichment, and common-law fraud.

Blowing Smoke in the Windy City

Forlenza v. Herr Foods Inc., No. 1:22-cv-05278 (N.D. Ill. Sept. 27, 2022).

There are three things everyone from Chicago can agree on: ketchup doesn't belong on a hot dog, it will always be the Sears Tower, and *of course*, jalapeño popper flavored cheese curls are meant to have entire jalapeños filled with melty cheese on the inside. So it's no surprise that the infamous Spencer Sheehan has brought the alleged injustice to the attention of the Northern District of Illinois on behalf of the aggrieved plaintiff.

The plaintiff's false advertising suit claims that the packaging on a popular snack-food manufacturer's Jalapeño Poppers cheese curls leads consumers to believe that (1) the baked snacks are actually filled with an intact (and perfectly preserved) pepper and contain cheese; and (2) the snacks get their southwestern flavor from real cheese and pepper ingredients. And do the defendant's cheese curls contain real cheese and pepper ingredients? Well yes, but that's not the point.

According to the complaint, the representations of "flavored cheese curls" and cheese and jalapeños are false, deceptive, and misleading because they omit that the product's taste is due *in part* to artificial flavoring that is contained in the product's seasoning—something one surely wouldn't expect from jalapeño popper snacks sold in bags from convenience stores and gas stations.

The complaint alleges violations of multiple states' consumer fraud statutes, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment, and purports to bring claims on behalf of the plaintiff, a class of Illinois consumers, and a multistate subclass. While no motions have been filed yet, we expect a *chili* reception to these claims by the defendant.

Where Have All the Mermaids Gone?

Jackson v. Kervan USA LLC, No. 2:22-cv-01237 (N.D. Ala. Sept. 22, 2022).

An Alabama plaintiff wants more mermaid fruit snack gummies for her and all those poor children! The plaintiff alleges that upon opening a box of Mermaids Fruit Snacks gummies candy, she was shocked to see what was inside—or what wasn't, as she claims. According to her complaint, the size of the Mermaids Fruit Snacks box is deceiving to consumers because it contains a whole lot of space and not a lot of mermaid gummies. "Those poor, unfortunate souls," as Ursula would say.

The complaint alleges that the defendant consistently included up to 80% nonfunctional slack-fill in the boxes of its gummy candies. And because the defendant individually wraps its gummy snacks inside the box, a reasonable consumer would not have understood the package's other representations to translate the amount of candy actually contained within the box. And of course it's not just parents that might have been hoodwinked by the defendant's packaging. According to the plaintiff, the defendant also placed a cartoon mermaid on the boxes' front panel in order to "lure[] children to select" its bigger boxes of candy. The plaintiff claims that because of this, the defendant "is effectively deceiving reasonable consumers (especially children)"! Because, of course, all children are "reasonable consumers."

In light of her "empty" allegations, the plaintiff seeks to certify a nationwide class of consumers who purchased the Mermaids Fruit Snacks and asserts claims under the consumer protection statutes of all 50 states, as well as for breach of warranty, breach of contract, negligence, wantonness, and injunctive relief.

Consumer Allegedly Burned by Hot Sauce Labeling

White v. T.W. Garner Food Co., No. 2:22-cv-06503 (C.D. Cal. Sept. 12, 2022).

A class action complaint filed in California federal court alleges the defendant's Texas Pete brand hot sauce products are mislabeled because they deceive consumers into believing the products hail from Texas. According to the complaint, although the products are branded "Texas Pete" and contain distinctive "Texan imagery"—including a Texan flag and cowboy—there is "**nothing** Texas about them." The complaint emphasizes that Texas Pete is actually Louisiana-style hot sauce, made with ingredients sourced outside Texas, and made in a factory in North Carolina (at least it's not New York City).

According to the plaintiff, the defendant engaged in its false marketing scheme because it knows "the state of Texas enjoys a certain mysticism and appeal in the consumer marketplace" and was able to capitalize on "consumers' desire to partake in the culture and authentic cuisine" of Texas. But because the hot sauce is not actually made in Texas, the plaintiff alleges that the defendant intentionally misleads consumers and that had he known the truth about the product, he would not have purchased it or would have paid significantly less for it.

Based on these allegations, the complaint asserts class claims for violation of California's consumer protection statutes, breach of warranty, and unjust enrichment. Among other relief, the complaint seeks injunctive relief, compensatory and punitive damages, restitution, and attorneys' fees and costs.

Spicy-Jalapeño-Flavored Peanuts Leave Consumer with Bad Taste

Wilim v. 7-Eleven Inc., No. 1:22-cv-04886 (N.D. Ill. Sept. 9, 2022).

A new class action filed in Illinois federal court alleges the labeling on a large convenience store's spicy-jalapeño-flavored peanuts is false and misleading because it fails to disclose that the spicy jalapeño taste is partially attributable to artificial flavoring. In support of its theory of liability, the complaint cites federal and state laws that allegedly require products to disclose the source of its jalapeño flavor on the front label. But by representing the product only as "flavored," according to the complaint, consumers allegedly expect that the taste comes only from the identified ingredients or natural flavors. The complaint asserts claims for violation of Illinois and various other states' consumer protection statutes, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment. The complaint also prays for injunctive relief, compensatory and punitive damages, and attorneys' fees and costs, among other relief.

Not Everyone's Flavor

Smith v. The Coca Cola Co., No. 0:22-cv-61643 (S.D. Fla. Sept. 2, 2022).

As Guy Fieri once said, "We're riding the bus to Flavortown!" But according to a soda-sipping consumer in Florida, her ride was fueled by some artificial ingredients as opposed to "100% Natural Flavors." As a result, she sued the beverage manufacturer for allegedly including artificial ingredients in its dragon-fruit-flavored soda, as opposed to "100% Natural Flavors," as allegedly promised. The complaint contends that the drink contains more malic acid than natural flavors and that dl-malic acid is an artificial ingredient that imparts dragon-fruit flavoring to the product. According to the complaint, while the ingredient list does disclose the presence of malic acid, it does not disclose that the malic acid used is an artificial ingredient, and thus the representations and omissions on the soda's labeling are allegedly false and misleading.

The plaintiff seeks to certify a Florida and multistate class of purchasers and asserts violations of Florida and multistate law, breach of warranties, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment. Ironically, if you drop a class action about soda, it may still hurt even though it is a soft drink—though, ultimately, time will tell whether the lawsuit will bear fruit.

Certifiable Hummus

Rabbinical Council of Massachusetts a/k/a KVH Kosher v. International Food Products Inc. d/b/a Sabra Foods, No. 1:22-cv-11460 (D. Mass. Sept. 9, 2022).

A kosher certification agency hit a Massachusetts food manufacturer with a federal lawsuit claiming that the defendant falsely labels its hummus products as "kosher" when the products have not been determined to meet the strict standards sufficient to bear the kosher claim on the product's label. The plaintiff contends that the kosher claim on a food product label communicates to consumers that "all of the ingredients and sub-units in a food product" meet the standards of Jewish dietary laws. According to the plaintiff, permission for the defendant's use of the plaintiff's kosher label on its hummus products was revoked several years ago due to the defendant's alleged "inability to comply with the terms and conditions of their license," and "for adding new ingredients to their products without informing [plaintiff] and for failing to take corrective actions in a timely manner as required by [plaintiff]." This suit highlights the power that certifying bodies wield—from environmental to organic to kosher claims. The plaintiff filed suit in Massachusetts federal court alleging violations of the federal Lanham Act and violations of Massachusetts state law related to labeling food products as kosher. The plaintiff seeks actual damages as well as injunctive relief.

Oh [No] Baby!

Frederick v. Perrigo Co., No. 3:22-cv-01333 (S.D. Cal. Sept. 6, 2022).

A California-based plaintiff filed a class action complaint against the defendant manufacturer of baby formula, alleging that the defendant falsely advertises just how many bottles of formula the defendant's products actually yield. The plaintiff fusses that the defendant's *not* ready-to-use baby formula instructs purchasers to mix the product with water to prepare the formula for infant consumption. The product's "dilution instructions" allegedly reduce the number of bottles the product makes after mixing with water. According to the complaint, the formula's packaging falsely claims to yield 63 4-fluid-ounce bottles, when the product apparently only yields 56 bottles. The plaintiff seeks to represent a California class of purchasers, asserting violations of California consumer protection statutes, breach of express and implied warranty, intentional and negligent misrepresentation, and unjust enrichment. Hopefully, this fussy plaintiff can be pacified, but we'll keep an eye out for updates.

Fibs About Fiber?

Moore v. Kellogg Sales Co., No. 3:22-cv-03172 (C.D. Ill. Sept. 5, 2022).

Hunting for fiber, one plaintiff claims she was hoodwinked by the twinkling "specks" of grains on the defendant's "Harvest Wheat" Toasted Crackers front packaging. The trickery—according to the plaintiff—apparently lurks on the label's display of dark brown cracker coloring and visible grains alongside the words "Harvest Wheat" that allegedly mislead consumers to believe the crackers predominantly contain whole grain as opposed to refined grain ingredients. (A "Sheehan Tale as Old as Time," if you will.) Our fiber-fanatic plaintiff contends that representations such as these mislead consumers to expect more whole grains than they actually get from the toasted crackers.

Yet despite the alleged chicanery on the product's front packaging, the complaint concedes that the snack's Nutrition Facts reveal the cracker's predominant ingredient is enriched flour and that the crackers have a fiber content of less than 1 gram per serving. Despite her crumbly pursuit, this Illinois-based plaintiff seeks certification of an Illinois class of purchasers (curiously defined as "[a]ll persons *in the State of New York* [*sic*] who purchased the Product during the statutes of limitations for each cause of action alleged" even though the plaintiff is a citizen of Illinois and made her alleged purchase in Illinois), as well as a consumer fraud multistate class. The plaintiff asserts violations of state consumer protection laws, breach of express and implied warranty, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment.

Motions To Dismiss

Procedural Posture: **Granted**

Another Ice Cream Suit Melts in Illinois Federal Court

Rice v. Dreyer's Grand Ice Cream Inc., No. 1:21-cv-03814 (N.D. Ill. Aug. 30, 2022).

Another ice cream suit met its demise in an Illinois federal court that granted the defendant ice cream manufacturer's motion to dismiss. The sweet-toothed plaintiff (represented by one Spencer Sheehan) alleged that the defendant's "Vanilla Milk Chocolate Almond" ice cream bar misleads consumers because the product also contains vegetable oil along with the product's "milk chocolate" ingredient. The federal court first dismissed the plaintiff's prayer for injunctive relief, reasoning that the plaintiff "faces no risk of future harm from being deceived" because the plaintiff "is aware of the presence of vegetable oil in the product." The federal court also held that on the merits, the plaintiff failed to identify a misleading statement on the product's front label, finding that "a reasonable consumer would not understand the front label to convey that the ice cream's coating consists *only* of chocolate and almonds."

The plaintiff proffered a tried and failed argument in support of his allegations of deception, relying on "opinions of chocolatiers and dictionary definitions suggesting that chocolate should not contain vegetable oils." However, the court rejected the plaintiff's allegations, reasoning that "what matters for the purposes of [the plaintiff's Illinois consumer protection claim] is how consumers actually behave, not what experts in the pertinent field understand or believe." The federal court dismissed the complaint, granting leave to amend.

Procedural Posture: **Granted in part**

Consumer's Claims Not All Ripe for Dismissal

Johnston v. Kashi Sales LLC, No. 3:21-cv-00441 (S.D. Ill. Sept. 8, 2022).

An Illinois federal judge handed down a split decision on a popular breakfast bar manufacturer's motion to dismiss claims that it misleadingly markets and labels its Soft Baked Breakfast Bars as "Ripe Strawberry." According to the complaint, the strawberry cereal bars featured misleading images and statements, including pictures of strawberries and the words "Ripe Strawberry" and "Made with Wildflower Honey" because the fruit filling was made of a concoction of ingredients including pear juice concentrate rather than the named fruit ingredient—which the plaintiff expected to receive in more than a non–de minims amount—and because honey was not actually the primary sweetener. Based on those facts, the consumer claimed she would not have purchased the bars or would have paid less for them had she known the truth, and she asserted multiple consumer fraud claims and causes of action for unjust enrichment, breaches of warranty, negligent misrepresentation, and injunctive relief.

Out of the gate, the judge kicked the plaintiff's injunctive relief claims, relying on other district court decisions within the circuit that held that allegations of deceptive practices do not support standing for injunctive relief. But the judge found that because the phrase "Ripe Strawberry" is subject to different plausible interpretations, including that it might be describing the flavor, smell, or ingredient, the plaintiff's interpretation that the product would contain more than a non–de minims amount of strawberry ingredients was reasonable enough to survive. The judge did, however, dismiss the consumer's honey claim as "fanciful" because reasonable consumers would not be misled into thinking that the primary sweetening ingredient in fruit-filled cereal bars is honey—not fruit. But given that one of the plaintiff's consumer fraud claims survived, the judge explained that her unjust enrichment claim must also survive because it is not a separate cause of action under Illinois law.

The rest of the decision wasn't as sweet for the plaintiff. The court dismissed the breach of warranty claims due to a lack of privity with the defendant and for failing to provide pre-suit notice. Her Magnuson–Moss Warranty Act claims were tossed for lack of jurisdiction because she failed to identify a sufficient number of named plaintiffs and failed to satisfy the requisite individual amount in controversy. The court also dismissed the negligent misrepresentation claim based on the economic loss doctrine, which denies tort remedies in Illinois to parties whose complaints are rooted in "disappointed contractual or commercial expectations." And the court found the fraud claim failed from the start because her allegations failed to support the requisite level of fraudulent intent and featured only conclusory allegations. Only the consumer fraud and unjust enrichment claims were left to proceed past the motion to dismiss stage. We'll stay tuned to see whether the plaintiff is able to cobble together a class for her fruit-filled claims.

Other Orders

Consumer Tastes Semi-Sweet Redemption, for Now

Salazar v. Target Corp., No. E076001 (Cal. Ct. App. Sept. 19, 2022).

A California court of appeal reversed a lower court's demurrer of claims brought by a consumer under California's consumer protection statutes against a large retailer's private label White Baking Morsels. The underlying complaint alleged that the defendant falsely advertised and misleadingly labeled its White Baking Morsels, causing him to believe that the product contained real white chocolate because of the product's labeling and in-store placement near products made with real chocolate. While the lower court dismissed those claims, finding as a matter of law that no reasonable consumer would believe the White Baking Morsels contain white chocolate, the court of appeal found that decision was half-baked and reversed, pointing predominantly to the White Baking Morsels' price tag, which described the product as "WHT CHOCO," a description that the court explained could lead a reasonable consumer to reasonably believe the product contained white chocolate.

The court held that the plaintiff stated viable claims under all three California consumer protection statutes and distinguished four federal district court cases involving other "white" baking products, finding those cases were not applicable because they did not attack labeling and advertising that suggested the products at issue contained white chocolate. Here, the court specifically called out the price tag, describing the product as "WHT CHOCO," which the court found suggests precisely what the plaintiff alleged—that the White Baking Morsels contain white chocolate. At a minimum, the court explained, a reasonable consumer could be confused about whether the morsels were made with white chocolate given the wording used on the price tag.

While the order was mostly raw dough for the defendant, the appellate court did bake one of the plaintiff's claims, finding that he lacked standing to assert claims based on representations made on the defendant's website because he did not see or rely on those claims before purchasing the product. We'll continue to follow along to see whether the defendant can whip up some additional defenses to these semi-sweet claims.

Kind of a Big Deal: Summary Judgment and Decertification of "All Natural" Challenge

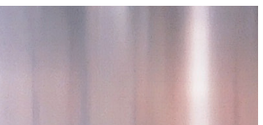
In re KIND LLC "Healthy & All Natural" Litigation, No. 1:15-md-02645 (S.D.N.Y. Sept. 9, 2022).

In March 2021, things were not looking so hot for a popular snack bar company's defense of claims pending in the Southern District of New York. Class certification had been granted to a three-state class proceeding on claims that the snacks' "Non-GMO" and "All Natural" labels were deceptive in a tough ruling where the judge (arguably incorrectly) held "If a product contains a GMO, it by definition cannot be natural." Fast forward about 18 months and everything's coming up almonds. The court granted the company's motion for summary judgment and also decertified the classes.

Why? The plaintiffs had abandoned their non-GMO theory, focusing the case on the all-natural theory. Naturally, that theory was fraught. The court noted that the plaintiffs could not establish that a reasonable consumer would consider all natural divorced from non-GMO when the statement appeared as "All Natural/Non GMO." And each plaintiff testified that "All Natural" means something else, reflecting the fact that there is no objective view of the statement.

The court held that the opinion of the plaintiff's expert was inadmissible because his survey was biased and leading, including because it was designed to support the plaintiff's theory and because he never tested the statement "All Natural" without "Non-GMO." Unwrapped, the plaintiffs failed to demonstrate the all-natural claim is deceptive or misleading and, with that, their claims went nuts. For this reason too, the plaintiffs could not demonstrate that common issues predominated, and their classes were decertified. Sticking it out for the long haul paid more than peanuts here.

FOOD & BEVERAGE DIGEST



Contributing Authors

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

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

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

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

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

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

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

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

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

Alan Pryor
+1 404 881 7852
alan.pryor@alston.com

Troy Stram
+1 404 881 7256
troy.stram@alston.com

Amanda Newton Wellen
+1 404 881 4809
amanda.wellen@alston.com

Krupa S. Zachariah
+1 202 239 3241
krupa.zachariah@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD