ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

6 Sections This Edition
Cases Per Section 1-7

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Stay	100%
Motions to Intervene	100%
Motions to Dismiss	100%
Appeals	100%
Legislation	100%

New Lawsuits Filed

Consumers Got Beef with Country of Origin Labeling

Thornton v. Tyson Foods Inc., No. 1:20-cv-00105 (D.N.M. removed Feb. 5, 2020).

A carnivorous New Mexico resident filed a putative class action suit against Tyson, Cargill, and other leading beef manufacturers alleging that they make false and misleading statements about their beef's country of origin on the labeling of their beef products. According to the plaintiff, consumers actively seek products that provide certain assurances about animal welfare and food safety standards that accompany domestic products. Accordingly, those consumers are willing to pay more for products marketed in this way than for competing products that do not provide these assurances.

The plaintiff claims that the meat packers "breached consumer trust" by representing that some of their beef products are "Product[s] of the U.S." when, in fact, the products are not derived from domestic cattle. The complaint alleges that the defendants' labeling is false and misleading and violates New Mexico's unfair business practices act because the labeling includes claims such as "USDA Choice" and "Product of the U.S." These labels lead consumers to believe that the beef they purchase was born and raised on American ranches. In addition to asserting claims under New Mexico law, the plaintiff also seeks nationwide certification to pursue breach of express warranty and unjust enrichment claims. The plaintiff is seeking monetary relief as well as an injunction requiring the producers remove and refrain from falsely representing that their beef is not exclusively a product of the U.S.

Plaintiff Nips at Synthetic Ingredients in Pet Treats Suit

Scandore v. Nylabone Corp., No. 2:20-cv-00254 (E.D.N.Y. Jan. 15, 2020).

A disgruntled pet owner has filed a putative class action against a pet toy and treats manufacturer claiming the "natural" labeling on 46 of its pet dental products, edible treats, and other toys is false, misleading, and deceptive. With increasing concern over products that contain synthetic ingredients, consumers place a price premium on "natural" pet products and have spurred on the "natural" pet foods industry to sales topping $8.2 billion in 2017 alone.

Despite the "natural" labeling on the manufacturer's products, the plaintiff claims they actually contain a range of synthetic ingredients, including the usual suspects like glycerin, folic acid, citric acid, gelatin, ascorbic acid, and sodium benzoate. The plaintiff alleges that these ingredients render the "natural" labeling misleading and deceptive, never mind the fact that the manufacturer—Nylabone—started out by making nylon-based chew toys. The plaintiff seeks to certify nationwide and New York classes, raising claims for violations of New York's consumer protection laws and the federal Magnuson–Moss Warranty Act, breach of warranty, and unjust enrichment. The plaintiff seeks injunctive relief and damages to buy ever more chew toys for class members' pets to destuff.

Athletes Complain Sports Drink Is Too Sugar Heavy to Realize Gainz

Silver v. BA Sports Nutrition LLC, No. 3:20-cv-00633 (N.D. Cal. Jan. 28, 2020).

Consumers of BodyArmor SuperDrink have brought a proposed class action against the manufacturer of the product, BA Sports Nutrition, arguing that the so-called sports drink is nothing more than a "soda masquerading as a health drink." The consumers allege that despite being marketed as "superior" and "better" hydration, the sports drink has a whopping 36 grams of sugar in a single 16-ounce serving—which exceeds or matches the recommended total daily amount for adults and children. The consumers complain that they would not have purchased or paid as much for the drink if they had known it was not more natural or nutritious for them than other drinks. They also allege that they would not have purchased the drink if they had known that the drink was an "unlawfully fortified junk food" because it contained added vitamins and minerals. The plaintiffs contend that the U.S. Food and Drug Administration (FDA) prohibits junk food from being fortified in this way in order to prevent the foods from being falsely advertised as healthy.

The plaintiffs seek to represent California, New York, Pennsylvania, and nationwide classes of consumers who purchased one or more BodyArmor sports drinks. Seeking unspecified damages, the plaintiffs have brought claims based on violations of California's, New York's, and Pennsylvania's unfair trade practices and consumer protection laws, as well as a claim for unjust enrichment.

Dog Food Manufacturer in the Dog House for Carb-Loading Its Food

Walton v. Blue Buffalo Co., No. 7:20-cv-00001 (S.D.N.Y. Jan. 1, 2020).

A dog owner in New York has sued Blue Buffalo for false advertising arising out of Blue Buffalo's representations about its Blue Wilderness dog food. According to the dog owner, the promotional language on the food touting that the products are part of "Nature's Evolutionary Diet" and that the food is "inspired by the diet of wolves" is misleading. The plaintiff contends that Blue Wilderness is more expensive than other pet foods, but that the manufacturer justified the costs for "health and evolutionary-based diet reasons." According to the plaintiff, the high levels of carbohydrates in the food actually cause health problems for the dogs and are not a part of a natural diet for a dog.

The plaintiff seeks to represent a class of New York purchasers of Blue Wilderness dog food. She alleges violations of New York law regarding false and misleading advertising, as well as unjust enrichment, and estimates that the aggregate claims by members of the class exceed $5 million.

Chocolatier in a Sticky Situation over Fudged Sugar Content

Sebastian v. One Brands LLC, No. 3:20-cv-00009 (S.D. Cal. Jan. 2, 2020).

One Brands labels its bars as having 1 gram of sugar, 5 milligrams of cholesterol, and 9 grams of dietary fibers. Not so, claims the plaintiff, who filed a putative class action against One Brands and parent Hershey in a California federal district court. In fact, the plaintiff alleges, independent laboratory testing confirms that the bars contain all of 40% more grams of sugar (a total of 1.4 grams), 96% more milligrams of cholesterol (a total of 9.8 milligrams), but 96% *less* the advertised amount of dietary fiber (a total of 0.36 gram). But the plaintiff made sure to emphasize the harmful effect of "excess" sugar and "high cholesterol" in claiming the defendants' labeling is false, misleading, and deceptive. The plaintiff seeks to certify California and nationwide classes, raising claims for unjust enrichment, breach of warranty, and violations of California's consumer protection laws.

Nothing but High-Quality H2O … and Ozone

McSwain v. CG Roxane LLC, No. 37-2020-00002724-CU-FR-CTL (Cal. Super. Ct. Jan. 15, 2020).

Consumers of Crystal Geyser Water recently filed a putative class action in California Superior Court alleging that the defendant falsely advertises its alpine spring water as "natural" when it contains ozone—a synthetic disinfectant. According to the complaint, Natural Alpine Spring Water is treated with ozone gas, which produces a type of advanced oxidation process, involving reactive oxygen that attacks a range of organic compounds and microorganisms. Although no residual by-products are generated by ozone itself, the complaint cites concerns about by-products of the disinfecting process, including bromide ions (a suspected carcinogen) and other by-products not naturally occurring in the water like dead and decaying organisms.

The plaintiff alleges that the term "Natural Alpine Spring Water" is misleading to reasonable consumers who believe that the term "natural," when used to describe products, means that the product is free from additional synthesized chemical additives. The plaintiffs paid a premium for the product based on the defendant's alleged misrepresentation. The consumers seek damages as well as a court order requiring corrective advertising for the allegedly deceptive advertising.

Sugarcoating Nutritional Labels

Fahey v. Perfect Bar LLC, No. 2020-CA-000308-B (D.C. Super. Ct. Jan. 14, 2020).

Consumers of Perfect Bars, a brand of nutritional bars, filed a putative class action alleging that the defendant's products claim to be "healthy" when in reality they are not. The new suit claims that to qualify as "healthy" under FDA regulations, the ingredient must be either "specifically listed" under the regulations or qualify under a three-part standard, which requires a product to be "low fat," "low saturated fat," *and* contain "at least 10 percent of the RDI [recommended daily intake] per RACC [reference amount customarily consumed] of one or more vitamin A, vitamin C, calcium, iron, protein or fiber." The defendant's products, however, cannot be considered "healthy" under FDA regulations.

The plaintiff alleges that the defendant nonetheless engages in a strategic marketing campaign targeted toward consumers interested in healthful foods and has charged a price premium as a part of its deceptive campaign. The consumers seek damages, as well as a court order requiring the company to conduct a corrective advertising campaign.

Motions to Stay

CBD Case Idles, Waiting for the FDA to Take a Stance on CBD Regulations

Snyder v. Green Roads of Florida LLC, No. 0:19-cv-62342 (S.D. Fla. Jan. 3, 2020).

At least one federal district court believes that federal regulators will finally address the issue of cannabidiol (CBD) products, which the FDA has avoided since the 2018 Farm Bill was enacted. In this case, the plaintiffs allege that the defendant's CBD products—including CBD oil, gummies, capsules, topicals, syrups, tea, and coffee—did not contain the advertised amount of CBD. The defendant moved to dismiss the complaint, arguing that the plaintiffs lacked standing to pursue class claims on products they did not purchase. The defendant also moved in the alternative to stay the case pending the FDA's issuance of a comprehensive regulatory scheme for CBD products.

In a multifaceted ruling, a Florida federal district court dismissed some claims, declined to dismiss others, and stayed the entire case pending further guidance from the FDA regarding the treatment of CBD products. Working through the elements of the primary jurisdiction doctrine, the district court focused on whether the FDA had shown any interest in the issues presented in the case. It concluded that the FDA had. Surprisingly, the district court even found that the FDA is "properly exercising [its] regulatory authority," citing FDA actions dating back to April and June of 2019 as support. It rejected the plaintiffs' arguments that there may be further delays by the FDA, characterizing the FDA as "actively" engaged in the rulemaking process. This case may be waiting for some time.

Motions to Intervene

Court Squeezes Juice out of Massachusetts Plaintiffs' Motion to Intervene

Hilsley v. Ocean Spray Cranberries Inc., No. 3:17-cv-02335 (S.D. Cal. Jan. 29, 2020).
Froio v. Ocean Spray Cranberries Inc., No. 1:18-cv-12005 (D. Mass. Jan. 29, 2020).

A California federal court barred a pair of plaintiffs suing Ocean Spray Cranberries Inc. in Massachusetts for allegedly misrepresenting artificial flavors in its juice products from intervening in a California case with similar allegations. As we covered in our December 2019 edition of the *Food & Beverage Digest*, Ocean Spray recently agreed to pay $5.4 million and change the labeling of certain juice-based beverage products to end a putative class action suit filed in California accusing the company of misrepresenting those products as containing "no artificial flavors."

The Massachusetts plaintiffs had moved to intervene in December 2019, arguing that the California settlement had capitalized on the work they and their attorneys had done in the Massachusetts case and, as a result, they were entitled to a portion of the attorneys' fees and incentive awards. Reasoning the plaintiffs did not have a protected interest in the deal, however, the court determined that the request for attorneys' fees and service awards in the California settlement would be better placed as an objection to the settlement itself. In addition, the court found there was a dispute over whether the proposed settlement in the Massachusetts case had any impact on the California settlement. The court also determined that permitting intervention could throw a wrench in the settlement and prejudice the parties.

Motions to Dismiss

Procedural Posture: Denied

Tomato Lovers' Suit over Rotten Labeling Survives Motion to Dismiss

Snarr v. Cento Fine Foods Inc., No. 4:19-cv-02627 (N.D. Cal. Dec. 23, 2019).

A California federal district court denied Cento Fine Foods' motion to dismiss a putative class action alleging that its packaging and labeling representations on its "Certified San Marzano" tomato products were false and misleading. As we covered in our June 2019 edition of the *Food & Beverage Digest*, the plaintiffs originally sued after they relied on Cento's labeling when purchasing Cento's Certified San Marzano tomatoes, thinking that they were "true San Marzanos." According to the plaintiffs' suit, the term "San Marzano" refers to canned tomatoes grown specifically in the Agro Sarnese-Nocerino region of Campania, Italy, that must have a "Denominazione di Origine Protetta ('D.O.P.') marking" from the Consortium—"the only entity which can certify and approve a San Marzano tomato" as one grown, harvested, and processed according to specific guidelines. But Cento's tomatoes do not feature a DOP marking or meet other required criteria of the real-deal tomatoes.

The district court found that the plaintiffs had made sufficient allegations that Cento's packaging was false and misleading to survive a motion to dismiss. Cento's primary defense—that its website disclosed that the products' "certification" did not come from the Consortium—was not enough to convince the district court that it should preclude the plaintiffs' claims of deception. Because the packaging did state that the tomatoes were "certified" and "produced with the proper method to ensure superior growth," the district court found that the packaging did not "clearly disclose that the independent third-party agency was not the Consortium" and that Cento relied on consumers visiting its website to learn that Cento's products received certification from a non-Consortium entity—a disqualifying factor for a "true San Marzano."

Nestlé Unable to Trim Suit over Trans-fat in Creamer

Beasley v. Lucky Stores Inc., No. 3:18-cv-07144 (N.D. Cal. Jan. 24, 2019).

A federal judge has determined that Nestlé USA Inc. and other defendants must face a lawsuit that they misrepresented the trans-fat content of Coffee-mate brand coffee creamers, reasoning that the allegations in the plaintiff's second amended complaint were articulated with sufficient particularity. In his suit, the plaintiff alleged that the creamer, which he said claimed to have no trans-fats, instead had partially hydrogenated oil (i.e., an artificial form of trans-fat).

As we covered in the October 2019 edition of the *Food & Beverage Digest*, the court previously dismissed the plaintiff's first amended complaint, finding it was too vague about when he bought Nestlé's Coffee-mate creamer. While the court dismissed with prejudice the plaintiff's allegations that using partially hydrogenated oil was unlawful, the plaintiff was provided leave to amend on the labeling counts. After considering Nestlé's challenge to the second amended complaint, the court found this iteration of the pleading sufficiently alleged reliance on the packaging's claims. In addition, the second amended complaint narrowed the class period to between January 2010 and December 2014 and better alleged when and where the plaintiff bought the creamer. Finally, the court determined that the plaintiff's allegations were sufficient to circumvent a statute of limitations challenge because the additional factual details concerning the plaintiff's lack of awareness of pertinent medical publications on partially hydrogenated oils, among other things, could toll his claims through delayed discovery.

Procedural Posture: Granted in Part

Big Box Labeling Suit Largely Survives Motion to Dismiss

Morris v. Walmart Inc., No. 2:19-cv-00650 (S.D. Ala. Jan. 29, 2020).

The plaintiff purchased pediatrics shakes from Walmart, which marketed the product to mothers or expectant mothers with labels like "Naturally Flavored, "Balanced Nutrition to Help Kids Thrive, "No Synthetic Color, Flavor, or Sweeteners," and "Nutrition to Help Kids Grow." The plaintiff claimed that these statements were false and misleading because the shakes had synthetic and artificial ingredients and also did not provide the nutrients her child needed and instead incorporated sweeteners and sugars. Walmart moved to dismiss the plaintiff's claims, arguing that they were either preempted by the Federal Food, Drug, and Cosmetic Act or not sufficiently pled; that the labels were not a written warranty; and that the claims under the Alabama Deceptive Trade Practices Act had been waived.

The district court agreed with Walmart that the "Naturally Flavored" statements were preempted, but it also found that the plaintiff's claim challenging the statements "No Synthetic Color, Flavor, or Sweeteners" survived a motion to dismiss because the products contained maltodextrin, a synthetic sweetener. The district court also found that these statements constituted a sufficient written warranty and rejected Walmart's argument that the plaintiff had waived the Alabama Deceptive Trade Practices Act claims. Finally, the district court found that the plaintiff's claims that the labels "Balanced Nutrition to Help Kids Thrive" and "Nutrition to Help Kids Grow" must be dismissed because the plaintiff did not explain how these statements were either false or misleading.

Procedural Posture: Granted

Claims Against Bacardi Were Ginned Up

Marrache v. Bacardi U.S.A. Inc., No. 1:19-cv-23856 (S.D. Fla. Jan. 28, 2020).

Bacardi and retailer Winn-Dixie won dismissal with prejudice of a case challenging their use of "grains of paradise" in the distilling process. Contrasting the case with *Brown v. Board of Education* as an example of a class action serving society, the district court explained, "Numerous class actions have greatly benefited society …. This is **not** one of those class actions." The plaintiff sued the gin maker and retailer, claiming the composition of Bombay Sapphire gin violates Florida's deceptive trade practices act, predicated on an underlying violation of an obscure 1868 Florida statute. Indeed, Florida law prohibits liquor makers from "adulterating" their drinks with grains of paradise, which are botanical spices in the ginger family and include spices like cardamom.

Not surprisingly, the district court found Florida's law was preempted because the FDA has determined that grains of paradise are a generally recognized as safe (GRAS) food additive. And, while the Twenty-First Amendment to the U.S. Constitution grants states the right to regulate liquor, it does not diminish the Supremacy Clause and the FDA's broad regulatory authority controls. The district court also found that although the plaintiff claimed the gin was "worthless," he did not allege that he could not drink the gin, allege that he suffered any side effect from the grains of paradise, or claim that the resale value of the gin depreciated.

Appeals

"Diet" Lawsuits Quickly Thinning Out as Ninth Circuit Upholds Dismissal of "Diet" Soft Drink Challenge

Becerra v. Dr Pepper/Seven Up Inc., No. 18-16721 (9th Cir. Dec. 30, 2019).

A consumer who purchased Diet Dr Pepper alleged that Dr Pepper violated various California consumer-fraud laws by using the word "diet" to describe the soda. According to the consumer, the term "diet" misled Diet Dr Pepper consumers by promising that the product would "assist in weight loss" or at least "not cause weight gain." After earlier versions of the complaint were dismissed for failure to state a claim, the consumer filed a third amended complaint, seeking to bolster her allegations with the likes of the dictionary definition of "diet," a consumer survey, and other indicia of supposed support. After the court dismissed the third amended complaint without leave to amend, the consumer appealed.

The Ninth Circuit affirmed the dismissal, finding that no reasonable consumer would find that the word "diet" contained the implicit promises about weight loss that the consumer alleged. The Ninth Circuit observed that the consumer, in citing dictionary definitions of "diet," neglected to cite definitions of "diet" as an adjective, and that dictionary definitions of the word "diet" as an adjective generally tended to define the term as "reduced in or free from calories." According to the Ninth Circuit, reasonable consumers would understand the term "diet" in a soft drink's brand name as a relative claim about the calorie content of the drink compared to the brand's regular option. The Ninth Circuit also rejected the consumer's argument that she had stated a claim because her interpretation of the word "diet" was still plausible, finding that her interpretation was unreasonable and therefore could not satisfy the reasonable-consumer standard. The Ninth Circuit also rejected the other evidence the consumer cited, including articles and a survey, because none of that evidence made the consumer's interpretation reasonable.

Limit on Alcohol Ads in Missouri Violates First Amendment

Missouri Broadcasters Association v. Schmitt, No. 18-2611 (8th Cir. Jan. 8, 2020).

The Eighth Circuit Court of Appeals held that the state of Missouri cannot enforce a statute and two related regulations that restrict certain types of advertisement of alcoholic beverages. The appeal came from a group of broadcasters that challenged that the Missouri statute and regulations violated their right to freedom of speech under the First Amendment to the U.S. Constitution. Examining the broadcasters' argument, the Eighth Circuit explained that the statute runs afoul of the First Amendment because the practical operation of the statute restricts speech based on content and the identity of the speaker. Specifically, the statute limited what producers and distributors could say in their advertisements. It also allowed retailers, but not producers or distributors, to run certain advertisements. While the law is ostensibly designed in that way to prevent "undue influence" of alcohol producers and distributors over retailers, in reality, Missouri failed to show that the harm of undue influence is real or that the statute helps address it.

The Eighth Circuit also struck down two related regulations that dealt with advertisements for discount or below-cost alcohol. The court found that Missouri had not shown that the regulations were no more extensive than necessary to further its stated interest of decreasing alcohol consumption.

Legislation

Bipartisan House Bill Would Greenlight FDA to Regulate CBD as a Supplement

Bipartisan legislation was introduced in the U.S. House of Representatives that would provide the FDA with the authority to regulate CBD as a dietary supplement. The bill would also remove federal prohibitions on the entry of CBD-infused foods into interstate commerce. H.R. 5587 would amend the Federal Food, Drug, and Cosmetic Act to allow "hemp-derived cannabidiol or a hemp-derived cannabidiol containing substance" to be classified as a "dietary supplement." The sponsor, House Agriculture Committee Chairman Collin Peterson (D-MN), lauded the bill as a means of "providing a pathway forward for hemp-derived products" and to "identify barriers to success for hemp farmers, informing growers and policy makers of the challenges facing this new industry."

The bill would amend 21 U.S.C. § 331(11) to allow hemp-derived CBD and hemp-derived CBD-containing substances to be introduced into interstate commerce. In addition to the proposed legislative amendments, the bill would also require the U.S. Department of Agriculture (USDA) to implement a study and issue a report on certain market and regulatory barriers that exist in the hemp industry. The CBD industry has been booming since the passage of the 2018 Farm Bill, which legalized hemp, but the industry still faces numerous regulatory uncertainties. The proposal of H.R. 5587 is an encouraging step forward for those invested in this burgeoning industry.

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Contributing Authors

Angela Spivey
404.881.7857
angela.spivey@alston.com

Rachel Naor
415.243.1013
rachel.naor@alston.com

Marcos Alvarez
404.881.4745
marcos.alvarez@alston.com

Andrew Phillips
404.881.7183
andrew.phillips@alston.com

Sean Crain
214.922.3435
sean.crain@alston.com

Alan Pryor
404.881.7852
alan.pryor@alston.com

Kathryn Klorfein
404.881.7415
kathryn.klorfein@alston.com

Troy Stram
404.881.7256
troy.stram@alston.com

Rachel Lowe
213.576.2519
rachel.lowe@alston.com

Learn more about our Food & Beverage Team

ALSTON & BIRD

ATLANTA | BEIJING | BRUSSELS | CHARLOTTE | DALLAS | LONDON | LOS ANGELES | NEW YORK | RALEIGH | SAN FRANCISCO | SILICON VALLEY | WASHINGTON, D.C.