ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

3 Sections This Edition
Cases Per Section 1-5

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motion for Class Certification	100%

To our readers:

The year 2020 has many of us feeling like the Chicxulub crater after the asteroid that wiped out the dinosaurs hit. We are both emptier, having run on fumes for most of the year, yet somehow heavier, having put on the COVID-19 (the new Freshman 15). So let us focus on one remarkable, positive aspect of this year: the amazing food, beverage, and agribusiness industry that we all support in one way or another. This industry kept an entire nation (and, indeed, other countries too) fed in the midst of a pandemic without really missing a beat. While there may have been lines for toilet paper and intermittent blank spaces on shelves, you, our clients, friends, and dear readers, have accomplished a Herculean task by keeping the lights on and the healthy foods and comfort foods alike supplied. We are grateful, and we celebrate you. Best wishes for a safe and happy holiday!

Happy Holidays

From the Alston & Bird Food, Beverage & Agribusiness Team!

For those of you cannot remember the words to "Jingle Bells" right now, much less the key cases and regulatory actions of 2020, here are some things you may have missed:

"It is a fair, even-handed, noble adjustment of things. . ." Charles Dickens, A Christmas Carol.

While Dickens went on to discuss the importance of humor, 2020 has provided a much-needed fair adjustment of things. *In Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), the Ninth Circuit held that federal courts cannot adjudicate equitable claims when an adequate legal remedy exists, even if a state court would allow both equitable and legal claims to proceed. Before this ruling, district courts had spottily applied the rule that equitable claims should not proceed if there is an adequate legal remedy in diversity cases. The circuit court based its opinion on long-standing Supreme Court authority. Since *Sonner*, district courts throughout California have dismissed claims seeking restitution and other equitable relief under California's consumer statutes if the plaintiff cannot establish that an adequate remedy at law does not exist. If you are facing consumer statutory claims on the West Coast, read this case.

Your class action settlement got run over by a reindeer.

When considering whether to certify an injunctive relief class under Federal Rule of Civil Procedure 23(b)(2) for settlement, the Second Circuit held that, in false advertising cases, "past purchasers of a consumer product who claim to be deceived by that product's packaging … have, at most, alleged a past harm." *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020). They "are not likely to encounter future harm of the kind that makes injunctive relief appropriate." The *Berni* decision is a strong opinion against finding Article III standing for injunctive relief. Defendants beware—it also applies to attempts to reach a settlement.

Bring us some figgy pudding!

In the November 3, 2020 election, voters in Arizona, Montana, New Jersey, and South Dakota approved ballot measures on adult, recreational marijuana. Around 100 million Americans now live in states where they have voted in favor of "legal weed." Here's your reminder that marijuana is still classified as an illegal drug. And while the Hemp Act loosened the reins on cannabidiol (CBD), the FDA is still studying it. The FDA has approved only one CBD product and maintains it is illegal to market CBD by adding it to food or labeling it as a dietary supplement.

Was Grandma drinking too much eggnog?

In the Beer Wars of 2020 and ensuing Lanham Act litigation, the Seventh Circuit reversed an injunction against Bud Light enjoining its packaging or advertising stating that Miller Lite or Coors Light "contain" corn syrup. In an opinion authored by Judge Easterbrook, the court held "It is enough for us to hold that it is not 'false or misleading'… for a seller to say or imply, of a business rival, something that the rival says about itself. Whether that 'something' is good because it improves flavor (Miller and Coors's take) or bad (Bud's) is for consumers rather than the judiciary to decide. If Molson Coors does not like the sneering tone of Anheuser-Busch's ads, it can mock Bud Light in return. Litigation should not be a substitute for competition in the market." *Molson Coors Beverage Co. USA LLC v. Anheuser-Busch Cos. LLC*, 957 F.3d 837, 839 (7th Cir. 2020). This is an important case to cite in favor of commercial speech protection.

Chestnuts roasting—by the subway.

The reasonable consumer standard is alive and well in New York district courts. While some questionable false advertising cases survived motions to dismiss, in a handful of opinions, the courts applied common sense and the law to dismiss claims that should never have been filed. *Chen v. Dunkin' Brands Inc.*, 954 F.3d 492 (2d Cir. 2020), affirmed dismissal because "a reasonable consumer purchasing one of the Products from Dunkin Donuts in that context would not be misled into thinking she was purchasing an 'unadulterated piece of meat.'" *Kennedy v. Mondelēz Global LLC*, No. 1:19-cv-00302 (E.D.N.Y. July 10, 2020), was dismissed because "a reasonable consumer could not be misled into thinking that 'made with honey' means the grahams contain more honey than sugar, because honey is not the primary ingredient in grahams." *Cosgrove v. Blue Diamond Growers*, No. 1:19-cv-08993 (S.D.N.Y. Dec. 7, 2020), held, in one of three New York district court opinions dismissing vanilla cases in 2020, that "the Product makes one representation—that it is vanilla flavored—and Plaintiffs do not allege that the Product did not deliver on that representation. This alone is fatal to Plaintiffs' case." For keeping it real in a year filled with so much artifice, we salute you.

New Lawsuits Filed

Consumer Claims Protein Chips Pack No Punch

Wightman v. Beanfields PBC, No. 2:20-cv-10731 (C.D. Cal. Nov. 24, 2020).

A disgruntled consumer of Beanfields brand Bean Chips has alleged that the snacks are boxing below their weight class when it comes to protein and fiber content, despite the products' labeling disclosing *exactly where* they tip the scales with those two nutrients. The new lawsuit, filed in the Central District of California, alleges that Beanfields deceptively, misleadingly, and unlawfully markets its Bean Chips as being "PACKED WITH PROTEIN & FIBER" despite being neither high in protein nor high in fiber. In light of such allegations, one would expect the products to obscure their actual protein and fiber content—not so. The products' front panel clearly shows that each flavor of Bean Chips contains "4 Grams Protein" and "4 Grams Fiber" per serving.

But those clear representations didn't stop the plaintiff from coming out swinging. She alleges that the products are deceptively labeled and advertised because Beanfields stresses the importance of protein consumption and the high-protein and high-fiber nature of its products, but fails to disclose the Daily Recommend Value (DRV) for protein on the nutrition facts panel of the product, in violation of federal regulations. While the complaint admits that generally, manufacturers are not required to include the DRV for protein, but when a product's label makes a nutrient content claim related to protein, the manufacturer *is required* to include the applicable DRV. The plaintiff also alleges that that the products' labeling violates federal regulations by boasting that the chips are "PACKED WITH PROTEIN" because such labeling leads reasonable consumers to believe that the chips are "high" in protein or constitute an "excellent source" of protein, and applicable FDA regulations set a threshold level of 10 grams of protein for products seeking to make such claims. As a result, the plaintiff alleges that she and other consumers were rope-a-doped into buying the chips, believing they were accurately represented. The plaintiff seeks to represent a national and Pennsylvania subclass and is seeking damages against Beanfield as well as monetary and injunctive relief.

Too Sweet to Be True

Brown v. Kerry Inc., No. 1:20-cv-09730 (S.D.N.Y. Nov. 18, 2020).

A putative class action filed in New York alleges that Kerry Inc. misleadingly markets its Oregon Chai brand Chai Tea Latte as "slightly sweet" when, according to the complaint, the beverage is not at all low in sugar. Sour on the beverage company's labeling representations, the plaintiff claims that certain label statements such as "slightly sweet" and "A Less Sweet Twist on our Authentic Chai" are false and deceptive because consumers understand such representations to indicate that a product is low in sugar content. The chai tea at issue here, however, contains 11 grams of sugar and lists "organic dried cane sugar syrup" as the second ingredient on the ingredient list. Further, adding milk or a milk substitute—as instructed by the packaging—would result in a total of 20 grams of sugar per serving, nearly a quarter of the daily recommended intake, according to the complaint. Citing to FDA regulations, the

plaintiff alleges that products with "trivial source of sugar" representations must contain less than 0.5 grams of sugar, and that the use of the "slightly sweet" claim is unauthorized by the FDA because "slightly" is synonymous with "low," and "low sugar" claims have never been authorized by the FDA. Seeking both injunctive and monetary relief, the plaintiff alleges that but for her mistaken belief that the product was "low in sugar," she would not have purchased the chai tea product.

Coffee Claims Not Stale Yet for Under-Caffeinated Consumers

Morris v. United Intertrade Inc., No. D-101-CV-202002485 (New Mexico 1st Judicial District Court, Santa Fe County).

Despite claims of chronic under-caffeination per purchase, consumers are having no problem perking up new false advertising lawsuits against coffee makers for allegedly inflating the amount of coffee that can be made from their products. In the freshest pot of allegations, a plaintiff who purchased a can of Café Don Pedro coffee, sold by defendant United Intertrade, alleges that the coffee's labeling misrepresents that the can "makes up to 4 gallons or 100 cups" of joe, when in fact, no consumer could actually brew that much coffee from a can of Don Pedro. Pursuing claims under New Mexico's consumer protection statutes, the plaintiff alleges that if he and other consumers had known that they could not make as much coffee from the product as advertised, they would not have purchased the coffee.

"Free" Offers Die Hard

Seaman v. Kellogg Company, No. 1:20-cv-05520 (E.D.N.Y. Nov. 13, 2020).

Consumers were not saying "Yippee-ki-yay" in response to Kellogg's offering of "on-pack" promotions that expire long before the shelf life of the products they are offered on. A new lawsuit filed in the Eastern District of New York alleges that Kellogg misleads consumers by offering on-pack promotions for other products such as crayons, snacks, and movie tickets without adequately disclosing that the promotions end before the on-pack products' shelf lives expire. The plaintiffs complain that many of the promotions displayed on Eggo waffles, Pop-Tarts, Apple Jacks, and Corn Pops, for example, will no longer be redeemable even when these products remain on the shelf. According to the suit, Kellogg prints more product boxes displaying promotions than it could possibly sell because these special offers increase the company's sales. The plaintiffs seek to represent a class of all purchasers of the products during the applicable periods who reside in New York and North Carolina, and they are pursuing injunctive and monetary relief for violations of state consumer protection statutes, breach of warranties, fraud, and unjust enrichment.

More Vanilla Products Added to Plaintiffs' Naughty List

Slide v. Wakefern Food Corp., No. 2:20-cv-16336 (D.N.J. Nov. 17, 2020).
Kushner v. Monster Energy Co., No. 1:20-cv-05606 (E.D.N.Y. No. 17, 2020).
Prescott v. Nestlé Holdings Co., No. 1:20-cv-05683 (E.D.N.Y. Nov. 22, 2020).
Brown v. Mars Wrigley Confectionery US LLC, No. 4:20-cv-08292 (N.D. Cal. Nov. 24, 2020).

In last month's edition, we discussed the frenetic pace at which the plaintiffs' bar filed vanilla-related litigation during October. While that pace did slow somewhat in November, there was no shortage of new products for plaintiffs to lament as being falsely and deceptively marketed as containing natural vanilla flavoring. Added to consumers' growing "naughty list" of offending products this past month were Dove Vanilla Ice Cream Bars, Wakefern Foods' Wholesome Pantry brand Almondmilk, Nestlé's Coffee Mate brand Almond Milk Creamer, and Monster Energy's coffee-based energy drinks, including its French Vanilla, Java 300 Triple Shot drink. As with previous litigation, these new suits followed the largely cookie-cutter approach of alleging that despite being advertised as "Vanilla" products that contain "Natural Flavors," these products mainly derive their vanilla flavoring from vanillin and other non-vanilla sources. In fact, two of the four cases listed above contain the *exact same refrain*, noting that "Unfortunately for consumers, the Product is not flavored mainly from vanilla beans and as a result, does not taste like vanilla." Some of the products—such as Mars Wrigley's Dove Vanilla Ice Cream Bars—are alleged to contain "at most, only a trace of real vanilla" and, according to the plaintiff, contain "vanilla enhancers" contrary to the expectations of reasonable consumers. One expectation we can all be sure of come 2021: New vanilla-related litigation will keep pouring in, and we'll continue to monitor and provide updates on the most recent vanilla-related news—whether it be naughty, or nice.

Motions to Dismiss

Procedural Posture: Granted

Pesticide Case No Longer Brewing Against Coffee Giant

George v. Starbucks Corp., No. 1:19-cv-06185 (S.D.N.Y. Nov. 19, 2020).

Starbucks customers were handed a cold cup of coffee by a federal district court judge in New York when their false advertising claims against the popular coffee chain were dismissed. The plaintiff customers alleged that Starbucks violated New York consumer protection laws by deceptively and falsely advertising the quality of its products as the "best coffee for the best you" while at the same time using pesticides to eliminate flies and roaches in some of its stores. The complaint claimed that because certain New York Starbucks locations were infested with flies, cockroaches, fruit flies, and silverfish, and because those locations were using pesticides in the shops to abate the issue, the Starbucks advertisement of a "Perfect" coffee experience was false and misleading.

The court disagreed, however, finding that there were no statements by Starbucks that were likely to mislead a reasonable consumer. In dismissing the case with prejudice, the court explained that Starbucks's statements that its coffee was "the best" could not support a cause

of action for deceptive practices, "whether made in a single advertisement or a hundred," because the objectionable claims consisted of "obvious puffery" and could never be proven either true or false.

Court Ices Plaintiff's Ginger Ale Labeling Suit

Fitzgerald v. Polar Corp., No. 1:20-cv-10877 (D. Mass. Nov. 12, 2020).

Polar Corporation won dismissal over false advertising claims that alleged the company's ginger ale products are mislabeled as containing real ginger after the plaintiff admitted the product did, in fact, *contain real ginger*. While this admission was enough to flatten the plaintiff's claims, the court explained that no reasonable consumer would be fooled by the product's labeling because "any reasonable consumer would know ginger ale for what it is—a carbonated drink with ginger flavoring." The fact that here the ginger ale in question actually *did* use ginger as an ingredient ensured that the label's claim that the product was "made from real ginger" is not false. The judge also poured out the plaintiff's breach of warranty and unjust enrichment claims as those, too, were premised on the assertion that the ginger representation was false.

Motion for Class Certification

Procedural Posture: Granted

"0g Trans Fat" Breadcrumbs Challenge Not Toast Yet

Hawkins v. The Kroger Co., No. 3:15-cv-02320 (S.D. Cal. Nov. 9, 2020).

A California federal district court granted class certification to a plaintiff's challenge to the labeling of The Kroger Company's breadcrumbs as false and misleading. The suit complained that the labeling falsely advertised the breadcrumbs as containing "0g Trans Fat" on the front label despite the product containing partially hydrogenated oil (PHO)—an artificial trans fat.

In her motion for class certification, the plaintiff narrowed the scope of the class to a California class of purchasers, after originally pursuing a nationwide class, which the court acknowledged was permissible in its order granting class certification. The court found that the class met all requirements for certification, including finding that the requirement that the claims asserted be typical of all class members was met. On that point, the court was unpersuaded by Kroger's argument that the plaintiff should have known much earlier (in 2005, based on a conversation with her doctor about avoiding PHOs) that breadcrumbs contained trans fat because the ingredients on the label listed PHO. To the contrary, based on the plaintiff's testimony, the court found that the plaintiff did not know, and did not have sufficient reason to suspect, that the "0g Trans Fat" label was incorrect.

Checkout Lane

New Resource | Click or Scan for Details

Attendance Calories 0	
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Be sure to check out Alston & Bird's PFAS Primer, a new resource for companies facing potential liabilities from the plaintiffs and regulators turning their attention to these emerging contaminants. The PFAS Primer includes an interactive tracker to search regulations by state and updates on the latest science, including food packaging and food-contact materials. Subscribe now to stay on top of all the latest developments.

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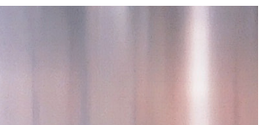

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