ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

4 Sections This Edition
Cases Per Section 1-10

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Regulatory	100%
Appeals	100%

FOOD & BEVERAGE DIGEST

New Lawsuits Filed

Toxic Baby Food Shocks the Market

Shepard v. Gerber Products Company, No. 2:21-cv-01977 (D.N.J. Feb. 5, 2021).

Thomas v. Beech-Nut Nutrition Company, No. 1:21-cv-00133 (N.D.N.Y. Feb. 5, 2021).

On February 4, the U.S. House of Representatives Subcommittee on Economic and Consumer Policy released the report "Baby Foods Are Tainted with Dangerous Levels of Arsenic, Lead, Cadmium, and Mercury." The widely publicized report found that those metals are present in the baby foods of four companies at levels that exceed those allowed under existing regulations for other products. Another three companies did not permit the subcommittee to test their products.

The heavy metal allegations in the subcommittee report mark the beginning of a new wave of baby food litigation, and it did not take long for potential plaintiffs to take notice. The following day, two of the companies, Gerber and Beech-Nut, were hit with proposed class actions for false advertising. The complaints rely heavily on the House subcommittee report. Beech-Nut was sued in New Jersey, where the plaintiffs alleged that the products were labeled "100% natural," but in reality, plaintiffs allege, they contain heavy metals. Gerber was sued in New York, where the plaintiffs alleged that—despite advertising itself as the "most trusted name in baby food"—the company omitted the heavy metals from the list of ingredients on its products.

We will closely monitor these suits as they progress through the court system.

Organic Protein Products Newest Vanilla Villains

Darnell v. Orgain Management Inc., No. 3:21-cv-00015 (N.D. Cal. Jan. 4, 2021).

Newton v. Orgain Management Inc., No. 1:21-cv-00062 (E.D.N.Y. Jan. 6, 2021).

The plaintiffs' bar's crusade against vanilla-flavored products continues to flood federal courts across the country, primarily in California and New York. This month, consumers took aim at Orgain Management Inc.—a manufacturer of organic, high-protein products—with a pair of suits in those states. The new filings allege that both Orgain's unsweetened vanilla almond protein milk and plant-based protein powder are falsely and misleadingly marketed as having their characterizing flavor from vanilla beans, despite chemical analyses revealing that there was at most de minimis real vanilla in the products. Instead, the suits claim that the products contain artificial flavors that simulate the characterizing flavor, and therefore the front labels are deceptive because they do not disclose that the products are artificially flavored.

The complaints argue that Orgain's deception is further enhanced by the statements "Clean Nutrition" and "Organic Natural Flavors" on the rear label of its products. Perhaps learning from previous failures at the motion to dismiss stage, the new complaints allege that the vanilla taste derived from these artificial ingredients is "dissimilar to what consumers expect from a product labeled as 'vanilla bean flavor.'" Still, it seems a bit of a stretch to assert

that the plaintiff wouldn't have purchased her organic almond high-protein milk had she realized that "much, if not all, of the vanilla flavor came from non-vanilla plant sources." Both suits seek to certify multistate classes and are pursing claims under state consumer protection laws as well as fraud and unjust enrichment.

Getting Philosophical: What Really *Are* "Real" Berries?

Lyons v. Mars Wrigley Confectionery US LLC, No. 7:21-cv-00620 (S.D.N.Y. Jan. 23, 2021).

As the plaintiffs' bar continues its crusade against vanilla flavoring, it also has charged ahead with challenges to "made with real" and other flavorings based on increasingly metaphysical claims. A putative class action in New York federal district court alleges that a global chocolate and confectionary maker deceives consumers by labeling its chocolate-covered fruit products as "Made with Real Fruit" and containing "Real Mixed Berries."

The problem with these representations, the plaintiff alleges, is that the products contain "more than just fruit." Pointing to the ingredients label, the plaintiff alleges that the "real fruit" also contains other ingredients like sugar, citric acid, natural flavor, and ascorbic acid. Moreover, consumers allegedly would not have bought the products or paid less for them had they "known the truth." The plaintiff seeks to certify a New York class for New York consumer protection, fraud, and unjust enrichment claims.

Cookie-Making Elves Allegedly Fudged Ingredients

Pizarro v. Ferrara Candy Company, No. 7:21-cv-00151 (S.D.N.Y. Jan. 8, 2021).

Those Keebler elves are up to some new tricks, or so the plaintiff claims in a Spencer Sheehan putative class action filed in New York federal district court. The complaint alleges that the venerable chocolate-covered cookies are deceptive and misleading because of the claim the cookies are "made with real Keebler fudge." However, the plaintiff claims, consumers understand "fudge" to be the product that they can make at home with ingredients that they can find in their kitchen cupboard or fridge: sugar, milk, and butter.

Again relying the ingredients label, the plaintiff challenges that these cookie products instead are made with vegetable oil, invert syrup, and whey, which the plaintiff contends are not "real ingredients." The plaintiff references online cooking forums to bolster her allegations that reasonable consumers prefer using butter over vegetable oils to make fudge. She also contrasts the qualities of whey and invert sugar with "real milk" and sugar to emphasize that consumers do not consider them to be typical ingredients of "real fudge." The plaintiff seeks to certify a New York class for New York consumer protection, misrepresentation, and unjust enrichment claims.

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Consumer Red-Hot over Charcoal All-Natural Claims

Lyons v. Royal Oak Enterprises LLC, No. 7:21-cv-00524 (S.D.N.Y Jan. 22, 2021).

A New York consumer sued Royal Oak Enterprises, a manufacturer of barbeque charcoal products, claiming that the company mislabels its charcoal as "100% All Natural Hardwood" despite actually containing harmful chemicals. The suit also takes issue with other ancillary representations such as "eco-friendly," "health-based," and providing a "cleaner burn." The complaint claims that these representations are false and misleading because rather than being composed of 100% hardwood, the charcoal consists of coal, limestone, borax, nitrates, and wood scraps. According to the complaint, scientific studies also prove that barbeque charcoal, like that manufactured by Royal Oak, is actually less eco-friendly compared to other barbeque fuel sources such as propane gas. Based on these allegations, the complaint asserts violations of New York consumer protection laws, as well as claims for breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Plaintiff Seeks to Heisenberg Undeniably "Awesome" Yumions

Socol v. 7-Eleven Inc., No 7:21-cv-00194 (S.D.N.Y. Jan. 11, 2021).

Whether it's three entire bags, or just one, the consumer in this case just does not like Yumions. The reason? It is not because one Walter White has little faith in onion snacks' ability to substitute for a full-balanced meal. Instead, the plaintiff believes the convenience store's onion snacks deceive consumers into thinking the "Crunchy Onion Snacks" are made with real onions.

The complaint alleges that the defendant instead relies on onion powder and other "natural flavor" to impart that classic "oniony" taste in the onion snacks. But these ingredients, the plaintiff claims, do not impart the same vitamins, nutrients, or even snacking experience as would onion snacks made with real onions. The plaintiff thus reasons that the defendant could—and did—charge a price premium based on the allegedly deceptive labeling. He seeks to certify a class of New York, Pennsylvania, Ohio, North Carolina, Virginia, and Connecticut consumers for claims under those states' consumer protection laws, misrepresentation, and unjust enrichment.

Regardless, TV fans can all agree that three entire bags of onion snacks—including the defendant's and those featured on a show about a certain enterprising chemistry teacher—without a doubt, "are awesome!"

Consumer's Temperature Rising over Fitness Drinks

Ruiz v. Celsius Holdings Inc., No. 3:21-cv-00128 (S.D. Cal. Jan. 22, 2021).

A new putative class action filed in California federal district court alleges that Celsius Holdings' fitness beverages are falsely advertised as "healthy" and containing no preservatives or artificial colors or flavors. The suit also takes issue with Celsius's claim that its products are "as natural as possible" because it claims the drink's characterizing flavors are derived from lab-synthesized ingredients rather than natural sources. The complaint alleges claims for breach of warranty and violations of California's consumer protection laws and seeks compensatory damages, punitive damages, injunctive relief, and restitution on behalf of similarly situated consumers.

Fishy "Sustainably Sourced" Salmon Labeling

Starr v. Mowi ASA, No. 2:20-cv-00488 (D. Me. Dec. 31, 2020).

Mowi ASA and its subsidiaries face a putative class action alleging that the "sustainably sourced" labeling of the company's smoked Atlantic products is false and deceptive because the products are sourced using unsustainable industrial farming practices. Specifically, the complaint alleges that the defendants engage in a number of "environmentally destructive and inhumane" practices, including continued disease outbreaks in its industrial fish farms and the use of antibiotics. The plaintiff seeks to certify a nationwide class of purchasers and asserts violations of New York and other state consumer protection statutes, breach of express warranty, and unjust enrichment.

Tuna Fish Sandwich Schools Consumers

Dhanowa v. Subway Restaurants Inc., No. 4:21-cv-00498 (N.D. Cal. Jan. 21, 2021).

Can you eat fresh if a tuna sandwich does not actually contain tuna? A putative class action in California federal district court says no. The plaintiffs allege that the worldwide sandwich chain falsely labels its tuna sandwiches and wraps. It is not the sandwich part that makes the products deceptive. Nor is it the wrap part. Instead, the plaintiffs contend the products are falsely labeled because they do not contain tuna as an ingredient. In fact, the plaintiffs allege, the sandwiches and wraps "entirely lack any trace of tuna as a component, let alone the main or predominant ingredient."

The plaintiffs seek to certify a California class for claims for violations of California's consumer protection laws, various forms of misrepresentation, and unjust enrichment.

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Too Sweet to Be True

Brietzke v. Chobani LLC, No. 1:20-cv-11097 (S.D.N.Y. Dec. 31, 2020).

Two consumers sued yogurt producer Chobani LLC for misrepresenting the sugar content of certain flavors of its Greek yogurt by claiming on the yogurts' labels that those flavors contain "45% Less Sugar Than Other Yogurts*." Products with that claim are sweetened with non-nutritive sweeteners, which reduces their overall sugar content. The plaintiffs allege that this statement is misleading because consumers would expect that the "other yogurts" referenced on the label to be other yogurts also flavored with non-nutritive sweeteners, when in fact the other yogurts Chobani refers to exclude other yogurts that are also flavored with non-nutritive sweeteners.

According to the complaint, if Chobani compared the sugar content of its yogurts flavored with non-nutritive sweeteners to other yogurts that were flavored with both nutritive and non-nutritive sweeteners, Chobani's yogurts would only have 25% less sugar than other yogurts. The suit claims Chobani sells its yogurts at a price premium, and if consumers had known the truth about the sugar content, they would not have purchased the products or would have paid less for them. The complaint asserts violations of New York's consumer protection statutes as well as common-law causes of action for negligent misrepresentation, fraud, and unjust enrichment.

Motions To Dismiss

Procedural Posture: Granted

Pet Owners Barking Up Wrong Tree in "Natural" Pet Food Suit

Grossman v. Simply Nourish Pet Food Company LLC, No. 2:20-cv-01603 (E.D.N.Y. Jan. 27, 2021).

Previously, a New York dog owner sued two pet food manufacturers for falsely representing that their products were made from "Natural Ingredients" or "Natural Wholesome Ingredients," when in fact those products contained synthetic vitamins and minerals. The plaintiff asserted claims for violation of New York's consumer protection statutes, breach of express warranty, violation of the Magnuson–Moss Warranty Act, and unjust enrichment. After considering the defendants' motion to dismiss, the court agreed that the plaintiff lacked standing to seek injunctive relief because she alleged that she would only purchase the products again if the defendants changed their labeling and therefore could not show that she was likely to be deceived by the labels in the future. The court also dismissed the plaintiff's warranty claims, finding that she failed to provide the requisite pre-suit notice and that she failed to allege a violation of a written warranty as defined by the Magnuson–Moss Warranty Act because the "natural" representation did not affirm or promise that any material or workmanship would be free of defects. Finally, the court dismissed the plaintiff's unjust enrichment claim, finding it duplicative of the plaintiff's other claims.

The pet food manufacturers aren't completely out of the doghouse, however, because the court rejected arguments that the labels' "Natural" claims weren't deceptive because the labels were consistent with guidelines issued by the Association of American Feed Control Officials and did not represent that the added vitamins and minerals in the product were natural. Determining that a reasonable consumer could be deceived and might construe the products' labeling to suggest that the added vitamins and minerals were also natural, the court refused to dismiss the plaintiff's New York consumer protection claims.

Label Was Plain as Vanilla

Wynn v. Topco Associates LLC, No. 1:19-cv-11104 (S.D.N.Y. Jan 19, 2021).

Grocery shoppers in New York may be saddened to learn that a federal judge has dismissed a proposed class action that alleged that Topco Associates did not correctly label its "Vanilla Almondmilk." The lawsuit was brought by consumers who believed that "Vanilla" was misleading because the drink actually contained artificial flavoring—even though the front of the package just said it was flavored "Vanilla."

The court was not convinced, finding that the class had failed to allege that the label displayed any incorrect information or that a reasonable consumer would be misled by the label. The label, the court held, did not contain any words modifying "vanilla" that would have been misleading. This is now the second vanilla almond milk case dismissed recently, after Blue Diamond Growers escaped a similar class suit over its vanilla almond milk in December.

Regulatory

USDA Issues Final Hemp Rule

Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596 (Jan. 15, 2021).

On January 15, 2021, the U.S. Department of Agriculture (USDA) published its hemp production final rule, which will go into effect on March 22, 2021. The final rule regulates the production of hemp in the U.S. and builds off the USDA's interim final rule published on October 31, 2019. The final rule includes a number of key provisions, including requirements that pre-harvest samples be taken from the plant's flowers, that hemp be harvested within 30 calendar days of sampling, and that all hemp testing laboratories be registered with the Drug Enforcement Administration. The final rule also maintains the total THC limit of 0.3%, which is the sum of the delta-9-THC and THC-A content, and raises the "negligence" threshold (the allowable threshold that a plant can exceed the acceptable THC level and not trigger a negligent violation) from 0.5% to 1%.

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Appeals

Not 100% Reversed: Making America Grate [Cheese] Again?

Bell v. Publix Super Markets Inc., Nos. 19-2581, -2741 (7th Cir. Dec. 7, 2020).

The Seventh Circuit joined its "colleagues in at least three other circuits in holding that an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers." At issue was Parmesan cheese labeled "100% Grated Parmesan Cheese." The plaintiffs claimed that these products are deceptively labeled as 100% cheese because they contain anti-caking ingredients (disclosed on the ingredients statement) like cellulose powder and potassium sorbate. The district court dismissed the suit, concluding that a reasonable consumer would not be misled by the label "100% Grated Parmesan Cheese" because, among other reasons, (1) the challenged phrase was ambiguous and could mean the products are 100% grated, 100% Parmesan, or 100% cheese, or some combination thereof, so a reasonable consumer would turn to the ingredient list that would readily confirm the products were not in fact 100% cheese; and (2) the products were shelf-stable and so obviously had ingredients other than cheese.

The Seventh Circuit disagreed, holding that the plaintiffs' position—that the "100%" applied to all three words—was plausible. It rejected the so-called "ambiguity rule," namely that "ambiguity on a product's front label can be cured by clarity on its back," and endorsed the general principles that context matters, claims based on deceptive advertising claims based on unreasonable interpretations can still be rejected at the pleadings, and allowing a claim to survive a pleadings challenge did not "foreclose defendants from offering evidence to show that consumers are not actually misled." While much of the case returns to the drawing board, the court determined it lacked appellate jurisdiction over part of the case. Because there was no separate Rule 58(a) judgment and the 150-day fail-safe limit to appeal applied, the plaintiffs had filed their appeal of the rulings more than three months late.

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Attendance Calories 0	
	% engaging value
Knowledgeable Speakers	100%
Current Topics	100%
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February 15, 2021

"Food Ingredient GRAS Conclusions: What You Should Know"

Manufacturers have several options to bring new food ingredients to market, including food additive petitions, generally recognized as safe (GRAS) notifications to the U.S. Food and Drug Administration, and independent conclusions of GRAS status. **Sam Jockel** and **Ben Wolf** were interviewed by *Food Manufacturing*, addressing common questions about marketing food ingredients based on a GRAS conclusion.

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