ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

APRIL 2020

Edition Facts

7 Sections This Edition
Cases Per Section 1-7

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motions to Certify Class	100%
Motions for Summary Judgment	100%
Settlements	100%
Regulatory	100%
Appeals	100%

New Lawsuits Filed

No Soup for Plaintiffs!

Vanlaningham v. Campbell's Soup Co., No. 20-L-0189 (Ill. Cir. Ct. Mar. 6, 2020).

Soup is making a comeback, both in consumers' homes and in consumer class actions. Here, disgruntled consumers of Campbell's Soup's "Home Style" and "Slow Kettle" soups have filed a putative class action against the soup company in Illinois state court, alleging that Campbell's labels and website misleadingly describe the soups as having no preservatives or artificial flavors. In reality, the plaintiffs allege, the soups contain both. According to the plaintiffs, Campbell's website details the use of these preservatives and artificial flavors, such as citric acid, succinic acid, and other food additives. The plaintiffs contend that the labels, which state "No Preservatives Added" and "No artificial flavors and no added preservatives or colors," are therefore misleading.

On this basis, the plaintiffs seek to certify a class of Illinois citizens who have purchased certain Home Style or Slow Kettle soups in the past five years. They seek to recover damages for Campbell's alleged false, deceptive, unfair, and misleading marketing and advertising in violation of the Illinois Consumer Fraud and Deceptive Business Practice Act, breach of express warranty, and unjust enrichment.

New Lawsuits Claim Malic Acid Is a "Natural" Buzzkill

Winters v. 2 Towns Ciderhouse Inc., No. 3:20-cv-00468 (S.D. Cal. Mar. 12, 2020).
Willard v. Tropicana Manufacturing Co., No. 1:20-cv-01501 (N.D. Ill. Feb. 28, 2020).

Riding the wave of legal challenges to "natural" labeling on food and beverage products, two new putative class actions were lodged against 2 Towns Ciderhouse and Tropicana for allegedly mislabeling their drink products as containing no artificial flavors when they actually contain artificial malic acid. The first asserts statutory consumer protection claims alleging the defendant company's apple cider products' flavoring contains "D-Malic Acid," and therefore, the products are falsely advertised as containing "Nothing Artificial: NO concentrates or refined sugars; NO essences or artificial flavors; NO velcorin or sorbate." In addition, the complaint notes, the defendant employs professional chemists or brewers to create the chemical formula in these products, so it knew or should have known that malic acid is not naturally occurring. In other words, the defendant should have known better.

Similarly, two plaintiffs filed a lawsuit against a national juicer asserting that the company deceives customers by failing to disclose on product labels that several of its juice-based beverages contain artificial flavors, including its "Trop 50" and "100% Juice" products. According to the plaintiffs, malic acid is "manufactured in petrochemical plants from benzene or butane—components of gasoline and lighter fluid, respectively." Both complaints seek injunctive relief and compensatory damages on behalf of the putative classes.

No Easy Street: CBD Tale of Intrigue

CBD970 LLC v. Labyrinth Holdings Inc., No. 1:20-cv-00617 (D. Colo. Mar. 4, 2020).

CBD970 LLC harvested one of the largest hemp crops in the United States in 2019, allegedly about 400,000 plants with an average cannabidiol (CBD) value of 12% per plant. CBD970 claims it expected this crop would yield about $30 million in profits from processing that crop into lucrative CBD oil. CBD970 hired Labyrinth Holdings Inc. to do the processing.

It alleges, however, that things went awry when Labyrinth purportedly failed to process the hemp into CBD oil with THC levels below 0.3%, ultimately producing CBD oil with illegal amounts of THC. Making matters worse, Labyrinth then reportedly siphoned some CBD oil to Rifle Onion Company LLC, which sent the oil to an entity called Easy Street Services Company. On March 4, 2020, CBD970 sued Labyrinth and its principals for breach of contract, fraud, and other claims in federal district court. CBD970 claims that about 60,000 pounds of crop is gone—it's not clear from the complaint if it went up in smoke. Labyrinth has not yet answered. Are the book rights up for grabs?

New Artificial Flavoring Suit Claims Consumers Deceived by "Orange Colored Chips"

Ithier v. Frito-Lay North America Inc., No. 7:20-cv-01810 (S.D.N.Y. Mar. 1, 2020).

After filing dozens of putative class action complaints attacking makers of all things vanilla and other manufacturers of sweet treats, Spencer Sheehan's law firm has diversified, now challenging product labels based on representations of the products' "distinguishable characterizing flavors." The latest complaint alleges that Frito-Lay manufactures, markets, labels, and sells cheddar and sour cream potato chips purporting to be flavored without artificial flavoring in its Ruffles brand products.

Readers familiar with prior Sheehan-drafted complaints won't be disappointed with its detailed background on the "complex mixture of taste sensations" that is cheddar cheese flavor. But complex descriptions of the science and historical lessons on the "lexicon for description of cheddar cheese flavor" aside, the complaint claims that the chips and snacks maker fraudulently and deceptively sold Ruffles brand products because it failed to identify the products as "artificially flavored" on the front label, despite clearly including "artificial flavor" in the ingredients list. This was enough to "deceive, mislead, and defraud consumers," the complaint says. The complaint claims that "[t]he Product's label makes direct representations with respect to one of its 'distinguishable characterizing flavors,' cheddar cheese, through the orange colored chips, the block of cheddar cheese, the word 'Cheddar' and the orange label." According to the complaint, "If a product contains 'any artificial flavor which simulates, resembles or reinforces the characterizing flavor,' it has to be identified in the flavor designation on the front label." Because Frito-Lay has not identified its artificial butter flavor used to "round out" the cheddar flavor, it has been unjustly enriched by consumers that Frito-Lay "knows" will pay more for the chips because the front label does not say "artificially flavored."

Consumer Is Smoking Mad over Non-Smoked Almonds

Colpitts v. Blue Diamond Growers, No. 1:20-cv-02487 (S.D.N.Y. Mar. 22, 2020).

A purchaser of Blue Diamond's Smokehouse Almonds has filed a putative class action complaint alleging that the company's Smokehouse almonds are not flavored by an actual smoking process where wood chips are burned. The plaintiff contends that the term "Smokehouse," as well as the red-orange color scheme of the packaging, are evocative of fire used in smoking so that a reasonable consumer would understand that a smoking process was used to flavor the almonds. Instead, the plaintiff alleges, the smoked flavor is added to the almonds. The plaintiff argues that had he known that the Smokehouse almonds were not actually smoked, he would not have bought them or would have paid less for them.

The plaintiff seeks to certify a nationwide class of individuals who have purchased Blue Diamond's Smokehouse almonds. He alleges claims including a violation of New York's consumer protection law, negligent misrepresentation, breaches of express and implied warranties, fraud, and unjust enrichment.

Consumer Claims Surprise upon Learning Too-Sweet Juices Shockingly Are Not Heart-Healthy

Hanson v. Welch Foods Inc., No. 3:20-cv-02011 (N.D. Cal. Mar. 23, 2020).

A grape-juice drinker has sued Welch Foods Inc. over allegedly false statements on three of its 100% juice products that the juice "helps support a healthy heart." The plaintiff alleges that he purchased the product—and in fact paid more for it—in reliance on the challenged statements. The consumer alleges that scientific evidence demonstrates that consumption of 100% fruit juices actually increases the risk of cardiovascular diseases and other health conditions such as diabetes because the drinks are high in sugar, and therefore, the statements are false and misleading. The plaintiff asserts claims for breach of warranty and violations of various California consumer protection statutes and seeks to represent a class of California consumers.

Another Challenge to Purell's Germ-Killing Claims

Miller v. Gojo Industries Inc., No. 4:20-cv-00562 (N.D. Ohio Mar. 13, 2020).

Purchasers of Purell-branded Advanced Hand Sanitizer products filed a putative class action against the products' manufacturer, claiming these products were deceptively labeled and marketed. The plaintiffs contend that Purell has no scientific evidence to support claims such as "kills 99.99% of illness causing germs" and that Purell's products are "2X" as powerful as competitors' products. This lawsuit follows several recent consumer class actions accusing the company of deceptively labeling its products.

To support their position that Purell's claims were false and misleading, the plaintiffs reference the Food and Drug Administration's (FDA) January 17, 2020 warning letter to Purell, which described the products as topical antiseptics that were not proven to be safe and effective in preventing infection or various diseases implied by Purell's advertising. The plaintiffs seek to represent Michigan, Oregon, California, and nationwide classes of consumers who purchased Purell-branded Advanced Hand Sanitizer products in the U.S. Seeking unspecified damages, the plaintiffs have brought claims based on Michigan's, Oregon's, and California's unfair trade practices and consumer protection laws, as well as a claim for unjust enrichment.

Motions to Dismiss

Procedural Posture: Denied in Part

Paw-sitive Tests for Grains, Corn, and Soy in Pet Foods Sink Dismissal Bid

Rice-Sherman v. Big Heart Pet Brands Inc., No. 3:19-cv-03613 (N.D. Cal. Mar. 16, 2020).

A California district court rejected a pet-food manufacturer's motion to dismiss a putative class action against it. The plaintiffs allege that the defendant's claims that its pet food contains no grains, corn, or soy protein are false because independent testing revealed the presence of these ingredients in the pet food. The defendant raised several unsuccessful arguments to dismiss the lawsuit, including that the false ad claims are not appropriate for a class action and that the lawsuit should be moved to Ohio, the location of the defendant's headquarters. The defendant also argued that the plaintiffs had not been specific enough in their allegations, particularly because the complaint did not sufficiently specify when and how testing was conducted on the pet food.

The district court was unconvinced. It reasoned that to establish harm, the plaintiffs need only allege that they bought the food based on its claims and that the claims were false. The district court similarly rejected the argument that the plaintiffs failed to assert the amount at which corn or soy became dangerous, observing that such an allegation is not needed for false or misleading labeling claims. However, the district court did trim claims from the lawsuit (injunctive relief, equitable relief, and punitive damages), but gave the plaintiffs the opportunity to amend.

Procedural Posture: Granted

Not "One" Actionable Piece to False Ad Suit

Melendez v. One Brands LLC, No. 1:18-cv-06650 (E.D.N.Y Mar. 16, 2020).

A New York district court recently dismissed a putative class action claiming that One Brands LLC lied to consumers about the sugar content in its energy bars. Ruling that the

lawsuit was preempted by federal law, the court determined that the plaintiff's consumer protection claims under the New York General Business Law failed because the testing they relied on to prove the bars supposedly contained more sugar than advertised did not follow methodology prescribed by the FDA. The court also rejected as preempted the plaintiff's false advertising theory that the use of the term "One" in the product name refers to the number of grams of sugar in each bar, reasoning that the FDA has only enacted regulations about the use of implied claims in a product name (not those that make express claims about nutrient content).

The court found that no reasonable consumer would be misled by the representations on the front of the package because any ambiguity about nutritional content was clarified by the products' nutrition facts panels. In addition to dismissing the claims of unnamed class members, the court disposed of the plaintiff's warranty, misrepresentation, and unjust enrichment claims for failing to plead threshold elements of those causes of action.

Motions to Certify Class

Procedural Posture: Denied

Consumers Lose Steam in Challenge to Promises of Nutritious Steady Energy

McMorrow v. Mondelēz International Inc., No. 3:17-cv-02327 (S.D. Cal. Mar. 9, 2020).

A California district court has denied two proposed classes of California and New York consumers who allegedly purchased belVita breakfast products in reliance on statements on the products' packaging bearing the phrases "NUTRITIOUS STEADY ENERGY," "NUTRITIOUS SUSTAINED ENERGY," or "NUTRITIOUS MORNING ENERGY." The plaintiffs alleged that, despite their labeling, the products were not nutritious and in fact increased the risk of serious diseases. The plaintiffs moved to certify a class of California and New York consumers alleging violations of California, New York, and federal law.

The court denied the plaintiffs' motion for class certification because they failed to demonstrate predominance. The plaintiffs had introduced an expert survey purporting to measure the effect of the challenged statements on consumers' purchasing decisions. The defendant argued that the survey was flawed because the plaintiffs' claims in the complaint actually focused on the allegedly excessive sugar in the products, not how consumers valued the word "nutritious" on its own, without any claims related to energy. The district court agreed, concluding that the proposed survey was inadequate because it did not address whether the respondents would pay a price premium because the product was advertised as being "nutritious," because it was advertised as providing "steady energy," or a combination of the two. The plaintiffs' theory of liability was therefore inconsistent with their damages model and failed to show that common issues actually predominated over individual issues.

Motions for Summary Judgment

Procedural Posture: Denied

Sugarcoated Free Speech Is Not Exempt

Krommenhock v. Post Foods LLC, No. 3:16-cv-04958 (N.D. Cal. Mar. 9, 2020).

The plaintiffs filed a class action in California district court alleging that Post Foods' cereal contains a large amount of sugar, even though the products are advertised as healthy options due to claims of "whole grain," "fiber," "nutritious," and "healthy." Post Foods unsuccessfully moved for summary judgment on all the plaintiffs' claims, citing First Amendment protections. Specifically, the cereal maker argued that the challenged packaging's claims contain truthful information about specific ingredients and do not make a claim about the healthiness of the cereal as a whole. Post Foods also argued that its packaging's claims cannot be challenged on the basis that the added sugar makes those misleading, as "mainstream science supports" its view that the cereals are healthy despite the added sugar.

Nevertheless, the district court found that the plaintiffs have "ample, albeit disputed, evidence that the Products are not 'healthy' given the amounts of added sugar in them." Moreover, the district court concluded, the plaintiffs did not have to establish that the cereals are unhealthy due to their sugar content in order to survive summary judgment. To the contrary, imposing such a requirement would have elevated the plaintiffs' burden beyond what is usually required to defeat summary judgment.

Settlements

Parties Beef Up Settlement Motion After Court Rejects First Wimpy Attempt

Clay v. Cytosport Inc., No. 3:15-cv-00165 (S.D. Cal. Mar. 6, 2020).

The plaintiffs and the maker of the Muscle Milk protein shakes and powders have renewed their request for approval of their $12 million settlement of a class action lawsuit pending in federal district court. The proposed settlement resolves claims that the protein shakes and powders—a favorite of gym goers and other gainz seekers—overstated the amount of protein they contained and misrepresented that they contained a special "lean" blend even though they were no leaner than comparable products. The settlement includes a $12 million fund that will not revert to the defendant, removal of the "lean" wording from the products, and an award of attorneys' fees of up to $3.8 million to be paid out of the fund.

This is not the first time the parties have sought approval of their settlement to resolve the case. They previously attempted—and missed—this lift in May 2019. The district court denied preliminary approval without prejudice, providing the parties a roadmap of how to correct the issues with their first attempt. Now, the revised motion more narrowly defines the settlement classes to include only consumers of the products; provides class members

improved access to information, claims forms, and the objection and exclusion processes; and limits the release to only the allegations raised against the defendant in the action. Only time will tell if this motion also skipped leg day.

Regulatory

FDA on CBDs: Same Same, But Different?

U.S. Food and Drug Administration, Report to the U.S. House Committee on Appropriations and the U.S. Senate Committee on Appropriations: Cannabidiol (CBD)

U.S. Food and Drug Administration, FDA Advances Work Related to Cannabidiol Products with Focus on Protecting Public Health, Providing Market Clarity (Mar. 5, 2020)

Although the FDA claims its outlook on CBD remains unchanged, recent FDA papers suggest the agency is subtly shifting its perspective to carve out a regulatory pathway for consumer CBD products. The shift comes in a formal response to a congressional directive requiring the FDA to report on its progress toward establishing a coherent policy for CBD.

The report was late, submitted two weeks after it was due. It recites the FDA's standard refrains regarding CBD: that the agency still holds concerns about consumer safety, lack of clear scientific data on the long-term use and effects of CBD, and the need to protect vulnerable populations. The FDA's assertions that it is unlawful to include CBD in food products or to market CBD as a dietary supplement also echo the FDA's previous positions. Nevertheless, the FDA signaled its intent to develop regulatory pathways for CBD, particularly for use in dietary supplements. In doing so, the agency indicated its willingness to distinguish full-spectrum and broad-spectrum CBD products from isolate products. To further its investigation and evaluation of CBD products, the FDA is also indefinitely reopening the docket it opened before the May 2019 public meeting "to have a central, publicly accessible place to receive new information."

The cannabis industry is firmly entrenched in the U.S., with a variety of stakeholders invested in its continued growth and success. The FDA's recent statements may represent (belated) concessions of that reality.

Appeals

Suit Challenging CBD Website's "Heavy Metals" Article Gets Axed

Medical Marijuana Inc. v. ProjectCBD.com, No. D074755 (Cal. Ct. App. Mar. 20, 2020).

Medical Marijuana Inc. and HempMeds PX LLC sued Project CBD in 2014 for publishing an article claiming that some lab test results revealed heavy metals in the plaintiffs' CBD product, Real Scientific Hemp Oil. The plaintiffs claimed that the article contained false information and sought to hold Project CBD liable for libel, false light, and unfair competition. Seeking to dismiss these claims, Project CBD filed an anti-SLAPP motion for injunctive relief under California's anti-SLAPP statute (a strategic lawsuit against public participation (SLAPP) suit is a meritless lawsuit filed primarily to chill the defendant's exercise of First Amendment rights). The trial court denied Project CBD's motion, finding that the complaint "sufficiently pleads the substance of the allegedly false statements."

On appeal, the California Court of Appeal concluded that the trial court erred in determining that the plaintiffs have demonstrated a probability of prevailing on the merits. The appeals court found several issues with the plaintiffs' claims. Specifically, it concluded that the challenged article acknowledges conflicting evidence regarding the product testing but does not make a determination on the test results' accuracy, leaving it "to readers to determine for themselves what might have caused these discrepancies." On remand, the appeals court directed the trail court to enter an order granting Project CBD's anti-SLAPP motion in its entirety.

Illinois Sure Can Pick 'Em

Joiner v. SVM Management LLC, No. 2020 IL 124671 (Feb. 21, 2020).

The Illinois Supreme Court "has long held that, when a defendant tenders the full amount requested by a plaintiff purporting to represent a class before the named plaintiff files a class-certification motion, the plaintiff's claim becomes moot." After the U.S. Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, where the Supreme Court held a Rule 68 offer of settlement did not moot a Telephone Consumer Protection Act plaintiff's claims, it was not clear if the Illinois practice (also known as picking off) was still permissible. But *Campbell-Ewald* did not decide whether the result "would be different if a defendant deposits the full amount of plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." After discussing the difference between a tender and an offer, the Illinois court concluded that "[a] sufficient tender therefore provides the plaintiff with the relief she seeks, not just a promise to provide that relief, as well as an admission of liability.… Plaintiffs' argument that *Campbell-Ewald*'s holding is not limited to Rule 68 but is based on contract law is therefore unavailing."

Perhaps most interesting is the opinion's discussion of how to handle costs and attorneys' fees. Defendants seeking to tender the amount due plus reasonable costs and fees can be deterred from doing so if that tender will not be effective. The Illinois Supreme Court concluded that "we find it sufficient and appropriate for a defendant to tender the amount claimed in the demand along with a request for the demanding party's costs and fees" when the underlying statute provides for reasonable attorneys' fees because the court decides the reasonableness of attorneys' fees. Parties in other jurisdictions should tread carefully, however, as courts have reached varying conclusions on this issue.

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