ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

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LITIGATION TRENDS	100%

ORDERS

Butter Luck Next Time

White v. Schwan's Consumer Brands Inc., No. 2:23-cv-00147 (E.D. Wis. Mar. 14, 2024).

The Eastern District of Wisconsin dismissed a class action complaint taking aim at a popular food company's labeling of its classic American dessert—Mrs. Smith's Apple Pie. The plaintiff in this case took issue with the "de minimis" amount of butter in the product's crust, despite the prominent disclosure that the flaky exterior is "made with real butter." The plaintiff alleged that this statement was misleading because, although the ingredients list discloses "Shortening Butter Blend (Palm Oil, Butter [Cream, Salt])" before palm oil, palm oil was allegedly the primary shortening agent used in the pie's crust, and in higher relative and absolute amounts than butter. By the time the motion to dismiss briefing was over, the plaintiff asserted claims for breach of Wisconsin's unfair competition statute, breach of warranty, and common-law fraud.

The court not only dismissed all three claims, but questioned the plaintiff's baking bona fides along the way ("Plaintiff's assumption that butter is necessarily the superior fat to use in making a pie crust is questionable."). After assessing the scope of an allowable private right of action under Wis. Stat. § 100.20, the court assumed without deciding that the plaintiff had properly alleged a violation of an "order" of the Wisconsin Department of Agriculture, Trade and Consumer Protection.

The plaintiff first challenged the label under a Wisconsin regulation that incorporates federal FDA labeling requirements, alleging that the defendant's labeling violated 21 C.F.R. § 101.4(a)(1), which requires that ingredients must "be listed by common or usual name in descending order of predominance by weight." The court noted that 21 C.F.R. § 101(b)(14) provides an exception to that rule for "blends of fat, like shortening, which may also be designated in their order of predominance 'as "_____ shortening" or "blend of ____ oils"' where the blank is filled in with the applicable term, so long as immediately following the term, 'the common or usual name of each individual vegetable, animal, or marine fat or oil is given in parentheses.'" The court also rejected the plaintiff's argument that a mix of vegetable and animal fats cannot be its own ingredient and held that in these circumstances, "[a]ll that matters is that butter is the second most predominant ingredient in the blend."

The court next rejected arguments that the pie's front-side labeling did not "clearly and conspicuously identif[y] the commodity contained in" the package. The court noted that the package was clearly labeled as what it is—an apple pie—and allegations that the ingredient list failed to identify ingredients by their common name failed to allege a violation of the regulation. The court also dismissed the plaintiff's argument that a reasonable consumer would expect a "non de-minimis amount of butter" in the product, holding that the label's "Made with Real Butter" disclosure did not imply a certain amount of butter in the product.

Finally, the court made short work of the breach of warranty and fraud claims, finding that the plaintiff failed to give the proper pre-suit notice for a breach of warranty claim and that her fraud claim was not pleaded with particularity and was barred by the economic loss doctrine. And just like that, another Sheehan suit came to an abrupt end—a tradition as American as apple pie.

A Significant Level of an Insignificant Amount? Huh?

Grausz v. The Hershey Co., No. 3:23-cv-00028 (S.D. Cal. Jan. 25, 2024).

Jumbo shrimp. Minor crisis. Working vacation. Significant levels of an insignificant amount of chemicals? Add it to the list of oxymorons. A plaintiff in a California class action alleged that she purchased chocolate that allegedly contained (undisclosed) trace amounts of heavy metals. She proceeded under fraudulent and unlawful omissions theories, arguing that the manufacturer had a duty to disclose because the omitted information concerned an unreasonable safety hazard and because FDA regulations required the manufacturer to list lead and cadmium in the ingredient list.

The court nixed the unreasonable safety hazard argument, finding the plaintiff's allegations that "[n]o amount of lead is known to be safe" and that cadmium poses a serious safety risk to consumers because it *can* cause cancer were insufficient. She needed to plead that the trace amounts at issue in the case were actually enough to cause the health effects she cited in her complaint to show an *unreasonable* safety hazard.

But the plaintiff gained traction with her argument about FDA regulations. She claimed that under the Federal Food, Drug, and Cosmetic Act (FDCA), the manufacturer was required to disclose lead and cadmium as ingredients in the products. As framed by the court, the issue was whether the FDA's exemption for incidental additives, 21 C.F.R. § 101.100(a)(3), applied to the trace chemicals. Under that exemption, manufacturers do not have to disclose on a food label incidental additives "that are present in a food at insignificant levels and do not have any technical or functional effect in that food." Incidental additives include "[s]ubstances migrating to food from equipment or packaging or otherwise affecting food" so long as they are "not food additives."

Manufacturers have relied on this exemption to varying degrees of success in trace chemical cases. In *Richburg v. Conagra Brands Inc.*, No. 1:22-cv-02420 (N.D. Ill. Feb. 8, 2023), the court found that alleged trace PFAS chemicals could not reasonably be considered "ingredients" (and thus the representation "only real ingredients" was not false or misleading) because the FDA exempts migratory substances like PFAS from ingredient disclosure requirements. But in *Stuve v. Kraft Heinz Co.*, No. 1:21-cv-01845 (N.D. Ill. Jan. 12, 2023), the court declined to find the exemption preempted the plaintiff's claims for failing to disclose trace levels of phthalates. The court clung to the "insignificant levels" language and determined that was a question of fact yet to be resolved.

Here, the court adopted the *Stuve* approach, explaining "whether an additive is present at an 'insignificant level' in the food depends on whether 'consumers care about the amount of [the offending chemical] in [the product],' such that it is possible a substance is not present 'at insignificant levels' even when it is present 'in very small amounts.'" Further, what constitutes insignificant levels is a question of fact, not suitable for dismissal at a preliminary stage of the proceeding.

The import of the court's ruling is that a plaintiff could easily assert a viable mislabeling claim at the motion to dismiss stage, arguing that any manner of trace chemicals should have been disclosed on a product's ingredient list, and whether the level of the trace chemicals is "insignificant" or not depends on what consumers care about—an amorphous standard raising a question of fact. Whether this holding sticks remains to be seen: after the plaintiff

amended her complaint, the manufacturer filed a new motion to dismiss asking the court to review this issue anew. In that motion to dismiss, the manufacturer argued that the incidental additive exemption to the ingredient disclosure requirement did not apply in the first instance because the trace chemicals were unintended contaminants—not ingredients—and therefore were never required by law to be listed.

LITIGATION TRENDS

"Real Cheese" Claims—

(Don't) Say Cheese!

Sisca v. Kraft Heinz Foods Co., No. 2:24-cv-00813 (E.D.N.Y. Feb. 03, 2024).
Fischetti v. Mondelēz Global LLC, No. 2:24-cv-01135 (E.D.N.Y. Feb. 14, 2024).

The Eastern District of New York is home to a recent uptick of lawsuits challenging representations about "real cheese" used in food formulations. Two separate food manufacturers face challenges there from putative classes of purchasers who allege they were misled by front-label representations that products were "Made with Real Cheese." The plaintiffs are demanding some cheddar for their trouble.

In both complaints, the plaintiffs seek to certify a statewide class of New York consumers who purchased either Velveeta Shells & Cheese or Ritz Bits Cracker Sandwiches. The plaintiffs are grated that the front packages of these products say "Made with Real Cheese" despite real cheese taking a back seat to other ingredients like whey and canola oil. The plaintiffs concede that both products are made with real cheese, but they each allege that each labeling amounts to a "half-truth" because it creates an expectation that cheese is a predominant ingredient. Furthermore, the plaintiffs allege the cheesy representation preys on consumers' desire to seek out premium, unprocessed food items and allows the defendants to overcharge for their products.

In both actions, the plaintiffs allege that the defendants violated New York General Business Law §§ 349-350 by engaging in unfair and deceptive practices, and the Velveeta litigation tacks on a count for violating New York Agriculture and Markets Law § 201 for "misbranding" in a false or misleading way.

The nearly identical complaints were both filed by Spencer Sheehan, who readers of this digest will recognize as a frequent flyer on the plaintiff's side of labeling litigation. Perhaps the Vanilla Vigilante is donning a new mantle as the Cheesy Crusader. Time will tell if this trend has a long shelf life.

Microplastics Litigation—

Bottled Water Microplastics Litigation Is Making a Splash

Moore v. Bluetriton Brands Inc., No. 1:24-cv-01640 (E.D.N.Y Mar. 5, 2024).
Dotson v. Danone Waters of America LLC, No. 2:24-cv-02445 (C.D. Cal. Feb. 27, 2024).
Dotson v. CG Roxane LLC, No. 2:24-cv-02567 (C.D. Cal. Feb. 22, 2024).
Daly v. The Wonderful Company, No. 1:24-cv-01267 (N.D. Ill. Jan 18, 2024).
Daly v. Danone Waters of America LLC, No. 1:24-cv-02424 (N.D. Ill. Feb. 28, 2024).

Class actions involving bottled water is on the rise as attention focuses on chemicals and plastics in food packaging (in particular, PFAS and microplastics). Following studies in 2018 and 2019 and a fresh February 2024 Consumer Reports study, microplastic litigation should be on every consumer packaged goods manufacturer's radar. While there is no consensus within the scientific community on harm caused by microplastics, the plaintiffs' bar has chugged its drink and ran straight to the courthouse.

Plaintiffs across the country, with nearly identical allegations (and for some, the same plaintiff), are not bottling it in anymore. They argue companies that make and sell bottled water have engaged in a host of consumer protection statutory violations by labeling their bottled water as "natural" when the products allegedly contain microplastics. So far this year, we have seen five class actions brought against bottled water manufacturers seeking to certify nationwide and state-specific subclasses.

Without scientific consensus on the impact of microplastics, or guidance from the Environmental Protection Agency or FDA on the presence of microplastics (nor the definition of "natural"), defendants are left to draw analogies to other trending litigation, such as PFAS and glyphosate claims, to challenge these claims. In similar litigation, defendants have found some success in arguing that the FDCA preempts migratory substances like PFAS from disclosure as an ingredient. Likewise, courts have recently found that a "natural" claim could not lead a reasonable customer to believe there are no "accidental or innocuous amounts" of glyphosate in a product. These types of challenges could support dismissal as defendants attempt to put a lid on claims in the bottled-water battle.

Of these five cases, plaintiff Dotson voluntarily dismissed both complaints in April. The other cases are in various stages of motion to dismiss briefing. We'll watch out for future splashes and keep you updated.

Gummy Supplements—

Manufacturers of Gummy Supplements Stuck with Citric Acid Suits

McLaurin v. CVS Pharmacy Inc, No. 24STCV05082 (Cal. Sup. Ct. Feb. 29, 2024). *Salguero v. Natrol LLC*, No. 24STCV05309 (Cal. Sup. Ct. Mar. 1, 2024).

As our loyal readers know, sticky situations are on the rise for defendants that include "no preservatives" label claims on products containing citric acid. Over the past year, manufacturers of cough syrup, sour fruit snacks, canned tomatoes, fruit juice, mac n' cheese, baby food, gelatin snacks, Bloody Mary mix, goldfish crackers, and energy drinks have all faced challenges to "no preservative" or "no artificial preservative" claims based on plaintiffs' allegations that citric acid is an artificial preservative. Most of these cases ended in voluntary dismissal, presumably after the parties settled.

These complaints draw from a predictable playbook—citric acid is almost always described as being synthetically produced by "black mold," and plaintiffs frequently cite a four-subject observational "study" (co-authored by a plastic surgeon and a lawyer) to support their assertion that "manufactured citric acid" is associated with negative health outcomes. While this fearmongering may be scary enough to make even the strongest of gummies wiggle, plaintiffs don't stop there. The complaints include references to FDA regulations, webpages, and warning letters to support the allegation that citric acid functions as a preservative regardless of whether it was added to the product for that purpose.

The latest targets of plaintiffs' citric acid crusade include gummy dietary supplements. In two recently filed suits against manufacturers of gummy supplements, plaintiffs allege violations of California consumer protection laws and breach of express warranty on behalf of putative classes of California consumers. The complaints follow the citric acid playbook to a T. While the *Salguero* case recently settled, only time will tell whether the remainder of these gummy claims will stick a settlement or melt under the heat of a motion to dismiss.

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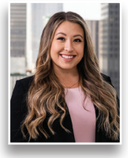

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