ALSTON & BIRD

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Edition Facts

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Cases Per Section 2-5

Reading Calories 0

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

New Lawsuits Filed

Plaintiffs' Bar Has New Flavor of the Week

Santiful v. Wegmans Food Markets Inc., No. 7:20-cv-02933 (S.D.N.Y. Apr. 9, 2020); *Bardsley v. Nonni's Foods LLC*, No. 7:20-cv-02979 (S.D.N.Y. Apr. 13, 2020).

By now, readers of this publication should be well aware of Spencer Sheehan and his firm's affinity for products containing artificial flavorings. Sheehan's firm first ramped up his litigation efforts in the flavor-suit arena by mobilizing against makers of all things vanilla, including ice cream, coffee creamer, and more. They then diversified into "distinguishing characterizing flavors." Now they have reached back to their original well, filing yet another putative class action attacking a vanilla-flavored product. The focus of this latest complaint is Wegmans Food Markets, which is allegedly peddling cake mix under the "misleading" label of "Vanilla Cake Mix" because the product "has less vanilla than the label represents and contains non-vanilla flavors … not disclosed to consumers on the front label." According to the latest filing, Wegmans may not be solely responsible for the alleged lack of vanilla in its products—the complaint purports to explain how the "flavor industry" is "attempt[ing] to disrupt [the] supply of vanilla to create a 'permanent shortage.'"

Showing they can both walk and chew gum at the same time, Sheehan's firm has also targeted the lemon flavor of Nonni's Foods' Limone Biscotti cookies. The suit alleges that Nonni's labeling of its Limone Biscotti cookies "is designed to—and does—deceive, mislead, and defraud" consumers. The complaint alleges that because the product designates its characterizing flavor as "Lemon" without any qualifying terms such as "flavored, … consumers get the impression that its lemon taste is contributed only by the characterizing food ingredient of lemons." But, because the ingredient list identifies the presence of "natural flavors" rather than simply lemon oil or lemon zest, the complaint alleges the product "may" contain other flavor enhancers. Because the label allegedly gives consumers the false impression that the cookies' flavor is exclusively from lemons, and because the value of the product consumers purchased was "materially less than its value as represented," the complaint seeks to certify a class of New York purchasers and asserts violations of New York consumer protection statutes, negligent misrepresentation, breaches of warranties, fraud, and unjust enrichment.

Consumers Learn a New Trick—and Raise New Allegations—Against Dog Food Maker

Cohen v. Ainsworth Pet Nutrition LLC, No. 20STCV16789 (Cal. Super. Ct. Apr. 29, 2020).

The latest suit against Rachael Ray Nutrish dog food follows a series of putative class actions against Rachael Ray Nutrish that allege, among other things, false and deceptive product labeling. In February, a New York federal district court for the second time denied a proposed class action alleging that the "natural" label for Rachel Ray Nutrish was false and deceptive because of the presence of glyphosate, a common weed killer.

In this latest class action complaint, the consumers allege that the dog food manufacturer falsely advertises its premium dog food as "wholesome," "high-quality," and "safe," despite lacking a basic nutrient essential to the heart health of dogs—taurine—exposing dogs to unnecessary health risks. Specifically, the plaintiffs allege that the defendant's dog food does not contain taurine, and that the defendant sold dog food that it knew or should have known was hazardous to dogs' health since at least 2010, when the Pet Food Institute acknowledged the need to add taurine to dog food to maintain dogs' health. The plaintiffs allege that the defendant deceived the public into buying Rachael Ray Nutrish dog food by failing to disclose the taurine deficiency in its food. The plaintiffs seek recovery for economic losses resulting from their purchase of the premium-priced dog food along with seeking injunctive relief requiring the defendant to stop its allegedly deceptive labeling practices and to engage in corrective advertising.

Flavored Seltzer Water Lacks Juice, Purchasers Claim

Mangone v. Big Geyser Inc., No. 7:20-cv-03267 (S.D.N.Y. Apr. 26, 2020).

Two carbonated water drinkers have sued Big Geyser, the manufacturer of Hal's New York brand drinks, on behalf of a putative class, alleging that the product labels mislead consumers into thinking that the products are flavored with fruit juice rather than artificial flavors. According to the complaint, the seltzer water drinks come in flavors such as "lemon" and "lime" and the product shows a slice of fruit on the label next to the statement "Naturally Refreshing," leading consumers to believe that the seltzer is actually flavored with fruit juice. The label states that the juice is flavored with "Natural Flavors," however, and not juice. According to the plaintiffs, natural flavors are less desirable than juice because they are "highly concentrated form[s] of the compounds which impart taste, created in a laboratory by chemists and scientists." The plaintiffs further allege that the products are required to disclose the added flavor (such as "Natural Lemon Flavored Seltzer Water") under applicable federal regulations, but fail to do so. The plaintiffs claim that the packaging is designed to mislead consumers, who pay more for the product believing that it is flavored with real juice.

Sparking Up Another CBD THC-Level Lawsuit

Key Compounds LLC v. Phasex Corporation, No. 6:20-cv-00680 (D. Or. Apr. 24, 2020).

Plaintiff Key Compounds claims it cut a deal with Phasex in 2019 for Phasex to accept a shipment of industrial hemp and process it to concentrate its levels of cannabidiol yet reduce its THC to nondetectable levels. But Phasex allegedly shipped industrial hemp product to Key Compounds via UPS containing THC levels of 2.5–5%, even though industrial hemp oil must by law have less than 0.3% THC.

The authorities, having a nose for these kinds of things, seized the shipment due to the packages' odor, arrested two Key Compounds employees, raided their business, and seized millions of dollars' worth of equipment. By the time the seized hemp oil was returned to Key

Compounds, it had allegedly declined in value from $250,000 to $35,000. Key Compounds sued Phasex for negligence and breach of contract. To no one's surprise, it remains a bad idea to ship products with greater than 0.3% THC levels that smell like marijuana via UPS.

False Ad Complaint Scolds Bad Dog Treat for Its "Natural" Labeling

Spalding v. Smokehouse Pet Products Inc., No. 2022-CC00742 (Mo. State Ct. Apr. 7, 2020).

A complaint was filed in Missouri state court by a putative class of consumers accusing Smokehouse Pet Products and Trader Joe's of falsely advertising their "Natural Gourmet" Beef Recipe Rolls dog treats. Because the dog treats are labeled "Natural Gourmet," according to the complaint, Missouri citizens are led to believe that the products do not contain synthetic ingredients or preservatives when they actually do.

Specifically, the lawsuit touts that the products include sodium erythorbate and sodium nitrate—both allegedly synthetic ingredients—to preserve the texture, flavor, and color of the product in "direct contravention to its express representation that the Dog Treats are 'NATURAL GOURMET.'" It is on this basis that the plaintiff alleges entitlement to damages for allegedly "false, deceptive, and misleading marketing and advertising" under the Missouri Merchandising Practices Act and Missouri common law.

Motions to Dismiss

Procedural Posture: Denied

Motion to Dismiss Sinks in "Dolphin-Safe" Labeling Suit

Gardner v. StarKist Company, No. 3:19-cv-02561 (N.D. Cal. Mar. 31, 2020).

StarKist tuna purchasers sued StarKist and its South Korean parent company Dongwon Industries, alleging that StarKist falsely promised consumers that its tuna products were dolphin-safe and sustainably sourced. StarKist moved to dismiss the plaintiffs' allegations in their second amended complaint as implausible. In opposition, the plaintiffs argued that the motion to dismiss violated Rule 12(g)'s prohibition on successive motions to dismiss and on the grounds that the plaintiffs had adequately pled their claims.

The district court agreed with the plaintiffs that StarKist's motion was barred by Rule 12(g) because the plaintiffs did not raise a new theory in the second amended complaint—they just clarified their dolphin-safe allegations. The district court further found that, even if StarKist's motion were not banned by Rule 12(g), it should still be denied because the plaintiffs' allegations were adequately pled. StarKist argued that the plaintiffs' allegations were not plausible because they failed to allege how reasonable consumers would interpret StarKist's dolphin-safe label and statements as guaranteeing no harm or injury whatsoever to dolphins, and that any fishing method, even the ones that the plaintiffs alleged were safer, would result in some injury to dolphins. The court rejected StarKist's argument as misconstruing the allegations. The district court reasoned that the plaintiffs alleged that StarKist promised dolphin safety while at the same time employing fishing methods that were widely known to harm dolphins, which was sufficient to demonstrate that their allegations that its fishing methods were "dolphin-safe" were false. The court nevertheless granted Dongwon's motion to dismiss for lack of personal jurisdiction.

Court Allows Claims That Kombucha Is Too Alcoholic to Continue to Ferment

Freedline v. O Organics LLC, No. 3:19-cv-01945 (N.D. Cal. Mar. 31, 2020).

A California federal court has permitted some claims against kombucha manufacturer O Organics to proceed following the company's motion to dismiss. A consumer of O Organics' kombucha brought a putative class action suit against the company alleging that the company misled consumers about the alcohol and sugar content in its kombucha beverage products. According to the plaintiff, lab tests have shown that the alcohol content in O Organics kombucha is between 1.63% and 2.63%—which exceeds the 0.5% limit permitted for drinks that are nonalcoholic beverages. The plaintiff also claims to have been misled by the sugar content in the kombucha.

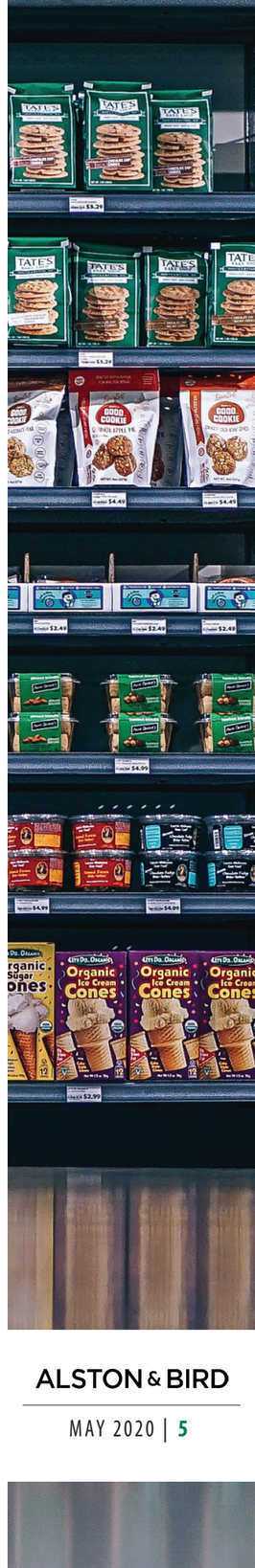
The district court rejected O Organics' argument that the complaint's alcohol allegations were "long on rhetoric, but short on facts." It found that the plaintiff's allegations were sufficient to state a claim that the kombucha was mislabeled as nonalcoholic. However, the court dismissed the allegations that the plaintiff was misled about the sugar content, finding that the allegations relating to an "undeclared sugar content" were "threadbare" and failed to assert a plausible claim.

Procedural Posture: Granted

Victory Still Sweet in Chocolate-less Chip Case

Cheslow v. Ghirardelli Chocolate Company, No. 4:19-cv-07467 (N.D. Cal. Apr. 8, 2020).

The Ghirardelli Chocolate Company recently won its bid to dismiss a putative class action complaint alleging that the chocolate manufacturer duped consumers into thinking its cocoa-free white baking chips actually contained chocolate. Critical to the district court's decision to toss the case was the fact that the words "chocolate" and "cocoa" appeared nowhere on the Ghirardelli label. Rather, the packaging advertised the product as "Premium Baking Chips Classic White Chips."



The district court rejected the plaintiffs' argument that because the description contained the word "white," it implied that the baking chips contained white chocolate. The district court also did not buy the plaintiffs' argument that Ghirardelli's use of the word "premium" conveyed to consumers that the product possessed characteristics of real white chocolate, instead finding that the term "premium" was mere puffery. And the court was also not persuaded by the plaintiffs' argument that the product's label was deceptive simply because it contained images of cookies with white chips and baking recipes, noting that it was not reasonable to conclude anything about the quality of the chips from a simple image. While the judge dismissed the plaintiffs' California consumer protection claims without prejudice, she noted that she was "skeptical" the complaint could be amended to state a plausible claim for relief.

Baking Mix Slack-Fill Case Gets Whacked

Buso v. ACH Food Companies Inc., No. 3:17-cv-01872 (S.D. Cal. Apr. 20, 2020).

A California federal district court granted ACH Food Companies' motion to dismiss a slack-fill challenge to its Fleischmann Simply Homemade Baking Mix Cornbread. The plaintiff claimed the products were sold in a nontransparent container containing 50% empty space, or nonfunctional slack-fill. The California Fair Packaging and Labeling Act (CFPLA) prohibits food product containers that mislead consumers and deems a food product's container misleading if it does not allow a consumer to fully see its contents and if it contains nonfunctional slack-fill. The plaintiff claimed the slack-fill in the cornbread mix was nonfunctional and misled consumers in violation of the CFPLA and California consumer protection laws.

In its order granting ACH Food's motion to dismiss, the district court agreed with the defendant that it is unreasonable for a consumer to be deceived about the amount of product contained in the cornbread mix box because the package discloses the net weight and the number of servings. The district court dismissed with prejudice the plaintiff's consumer protection claims to the extent they are based on the reasonable consumer deception theory. The court also dismissed without prejudice claims based on the nonfunctional slack-fill theory, allowing the plaintiff to file an amended complaint.

"Natural" Peanut Butter Claims Don't Stick

Forsher v. J.M. Smucker Company, No. 5:19-cv-00194 (N.D. Ohio Mar. 31, 2020).

A federal district court dismissed a putative class action filed against J.M. Smucker Co. alleging the company mislabeled its peanut butter as "natural" because the product supposedly may contain sugar from genetically modified beets. Finding the claims were too speculative to be plausible as a matter of law, the court reasoned that the plaintiff failed to allege that the peanut butter was genetically modified (and merely surmised that one part of a single ingredient may have been). In other words, the complaint did not provide any facts demonstrating that the peanut butter contains sugar derived from genetically modified beets or, concomitantly, that "the sugar contains any bioengineered genetic material." The claims were therefore insufficient to show that a reasonable consumer would be misled.

Regulatory

Food Safety and Inspection Service Promotes Consistency, Aligns with FDA Enforcement Policy on "Healthy" Definition

Expansion of the Use of the Term "Healthy," 85 Fed. Reg. 15,759 (Mar. 19, 2020).

While nutrition science has changed since the early 90s, the Food & Drug Administration's (FDA) and Food Safety and Inspection Service's (FSIS) regulatory requirements for using a "healthy" claim on food has not. Current regulations provide boundaries for the use of the implied nutrient claim "healthy," including criteria for nutrients to limit in the diet, such as total fat, saturated fat, cholesterol, and sodium, as well as requirements for nutrients to encourage in the diet, including vitamin A, vitamin C, calcium, iron, protein, and fiber.

In a notice and request for comments, the FSIS has announced it will "allow establishments to use the implied nutrient content claim 'healthy'" on labels that: (1) are not low in total fat, but have a fat profile makeup of predominantly mono- and polyunsaturated fats; or (2) contain at least 10% of the Daily Value per reference amount customarily consumed (RACC) of potassium or vitamin D. This enforcement discretion policy aligns with the FDA's existing policy on "healthy" claims that it put forward in 2016, "Guidance for Industry: Use of the Term 'Healthy' in the Labeling of Human Food Products." For companies wishing to use a "healthy" claim on FSIS-regulated products, they will first need to submit at least one label sketch to the FSIS for approval.

Federal and State Regulators to CBD Companies: Don't. Make. Medical. Claims.

Cease and Desist Letter from N.Y. Attorney General to Finest Herbalist (Apr. 1, 2020); Warning Letter from Food & Drug Administration to Neuro XPF (Mar. 31, 2020).

The online sales of hemp-derived CBD products have ramped up in response to the COVID-19 pandemic. Regrettably, during these times, a handful of CBD companies have been taking advantage of people's fear and anxiety over the spread of the coronavirus, making certain claims that CBD can treat and even cure COVID-19. On March 31, the FDA issued a warning letter to a CBD company, Neuro XPF, which claimed that CBD helps strengthen the immune system, stating, among other things, that "[y]our best defense against the COVID-19 blitz starts with a strong immune system." The Federal Trade Commission (FTC) also issued a similar warning to Neuro XPF. Both the FDA and FTC have warned other companies making similar COVID-19 claims.

In addition to federal regulators, state regulators, such as the attorneys general for New York and Oregon, have taken action to stop CBD manufacturers from marketing their CBD products with similar medical claims. On April 2, New York Attorney General Letitia James ordered a CBD company, Finest Herbalist, to stop targeting consumers with claims that CBD can treat COVID-19 and required the company to provide a disclaimer on all displays of the product that the product "is not intended to diagnose, treat, cure, or prevent any disease, including [COVID-19]."

For companies engaged in the sale of CBD products, there is an easy-to-remember moral to making health and medical claims about their products:

Don't.

Appeals

Plaintiff Can't Get Any Slack in Underfilled Candy Box Appeal

Gordon v. Tootsie Roll Industries Inc., No. 18-56315 (9th Cir. Apr. 13, 2020).

Some appeals are—procedurally speaking—pristine. These cases come up on appeal carrying meticulously framed issues, clean records, and weighty implications. And they are the sort of appeals that advocates and law clerks alike relish having come across their desks.

This is not one of those cases. In this slack-fill case, the plaintiff alleged that Tootsie Roll's Junior Mints and Sugar Babies candy boxes contained 40% and 33% empty, nonfunctional space—or slack-fill. The district court below dismissed the case after the parties failed to appear for a pretrial conference that should not have taken place (the conference had been rescheduled for another time). However, the plaintiff did *not* appeal the dismissal of the case, but rather the district court's denial of attorneys' fees under California law in light of changes on the candy boxes' packaging. On appeal, the plaintiff argued that it was a "successful party" entitled to attorneys' fees because her lawsuit motivated the candy manufacturer to provide the primary relief that she had sought. The district court disagreed and denied an award of attorneys' fees.

The Ninth Circuit affirmed, observing that the candy manufacturer made neither of the changes that the plaintiff sought—either filling the boxes with more candy or shrinking the boxes to match the amount of candy. What's more, the plaintiff consistently disclaimed that the packaging changes would address her concerns, going so far as to describe the changes as "red herrings." Thus, the Ninth Circuit reasoned, the plaintiff cannot be a successful party—and is not entitled to attorneys' fees—because she did not obtain her primary relief in the case.

Brewer Vanquished in Crusade Against Beer "Corn Syrup" Ads

Molson Coors Beverage Company USA LLC v. Anheuser-Busch Companies LLC, Nos. 19-2200, 19-2713, 19-2782, 19-3097, 19-3116 (7th Cir. May 1, 2020).

Despite over a year of hard-fought litigation that has generated at least five appeals to the Seventh Circuit, "this case is and always has been simple." This dispute between the giant beer rivals, MillerCoors (now known as Molson Coors) and Anheuser-Busch, first erupted when Anheuser-Busch launched an advertising campaign during the 2019 Super Bowl that contrasted Bud Light's use of rice with Miller Lite's and Coors Light's use of corn syrup to brew beer. Offended, Molson Coors filed suit against Anheuser-Busch alleging that the ad campaign was false and deceptive under the Lanham Act because it implied that corn syrup remained in Miller Lite and Coors Light brews.

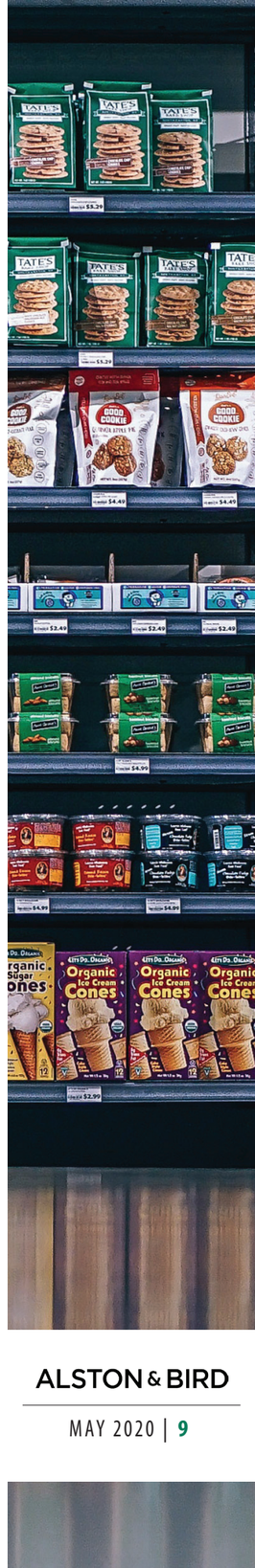
Winding through a procedurally intricate backstory (which we have highlighted here, here, and here), the case finally came up on cross-appeals (the fourth and fifth appeals in the case by our count) after the district court had partially enjoined certain representations in Anheuser-Busch's advertising and the use of "no corn syrup" on Bud Light's packaging.

Sidestepping the parties' morass of Lanham Act and procedural arguments, the Seventh Circuit found that Molson Coors "brought this problem on itself." Corn syrup appears on Miller Lite's and Coors Light's lists of ingredients, and the brewer leaned into this reality with its own ad campaign that beer brewed with corn syrup just tastes better. This question, the Seventh Circuit observed, is for a consumer rather than the judiciary to decide. "If Molson Coors does not like the sneering tone in Anheuser-Busch's ads, it can mock Bud Light in return. Litigation should not be a substitute for competition in the market." The Seventh Circuit thus affirmed the district court's judgment to the extent it denied a preliminary injunction but otherwise reversed or vacated the judgment. Although Molson Coors may view this development as "just a flesh wound," this opinion may be the death knell of this dispute.

California Supreme Court Decision Saddens Citizens Excited for Class Action Jury Duty

Nationwide Biweekly Administration Inc. v. Superior Court, No. S250047 (Cal. S. Ct. Apr. 30, 2020).

The California Supreme Court issued an important, yet not surprising opinion confirming that no right to a jury trial exists under the California constitution for causes of action for violations of California's unfair competition and false advertising laws. While prior appellate opinions have previously held that the gist of these actions is equitable and no jury trial rights exist for equitable claims, the 1st District Court of Appeal had held that a government action seeking penalties under the unfair competition law gave rise to a jury trial right. The California Supreme Court disagreed and, in doing so, discussed aspects of the unfair competition law and false advertising law, California's equity first doctrine, and the three potential tests for a violation under the unfair competition law. California citizens eager to decide food mislabeling class actions would have taken to the streets in protest but for the pandemic.



Second Circuit Puts Consumer Out to Pasture in Angus Steak Appeal

Chen v. Dunkin' Brands Inc., No. 18-3087 (2nd Cir. Mar. 31, 2020).

The Second Circuit affirmed a lower court's dismissal of a lawsuit brought by a disgruntled customer of Dunkin' Donuts who claimed that Dunkin' falsely advertised its breakfast sandwiches as containing Angus steak. The customer filed a proposed class action alleging that Dunkin's advertisements had deceived consumers into believing that two of the company's breakfast sandwiches labeled with the "Angus Steak" moniker contained an "intact" piece of meat when, in reality, the products contained a ground beef patty with additives. The lower court had dismissed some of the out-of-state plaintiffs for lack of personal jurisdiction, who had purchased their products at franchises outside the state of New York. It also found that the label "Angus Steak" was not deceptive or misleading to a reasonable consumer.

The Second Circuit agreed with the lower court's ruling on both jurisdiction and advertising. On personal jurisdiction, the Second Circuit observed that Dunkin', despite its franchises in the state, did not have such an exceptional presence in the state to render it essentially at home in New York. The Second Circuit similarly found that although Dunkin' was registered to transact business in the state, registering to do business in the state under New York's business registration statute no longer confers "consent" to personal jurisdiction in the forum state. The court specifically held that the television ads clearly show that these are grab-and-go products that don't require a fork and knife—which would not mislead a reasonable consumer into thinking she was getting an unadulterated piece of meat. Additionally, the TV advertisements show close-ups of the beef as ground beef patties. Since no reasonable consumer would be misled, the court upheld the dismissal of that claim.

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