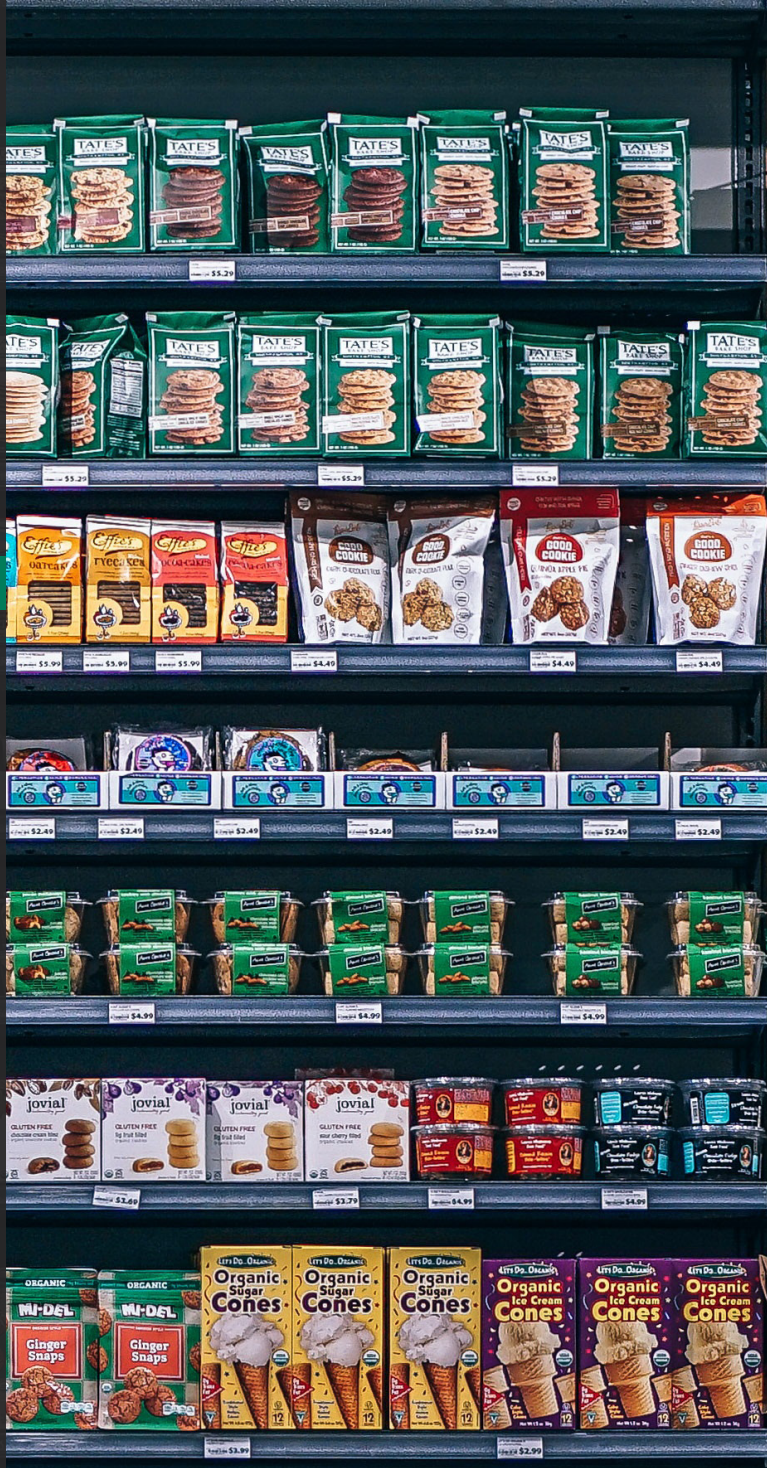
ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

JULY 2020

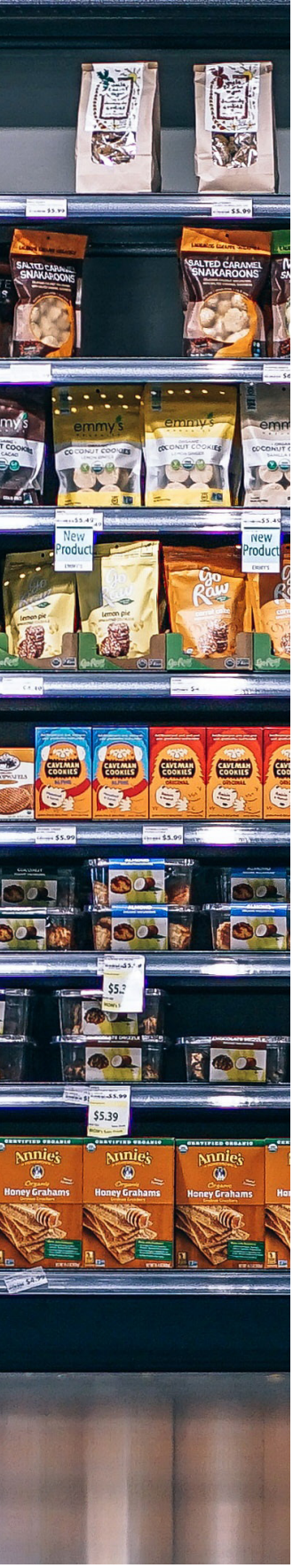


Edition Facts

4 Sections This Edition
Cases Per Section 1-5

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motion for Summary Judgment	100%
Settlement	100%



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New Lawsuits Filed

Consumer Realizes the *Worst* Part of Waking Up … Is Overpaying for Not Enough Coffee

Sorin v. The Folger Coffee Co., No. 9:20-cv-80897 (S.D. Fla. June 4, 2020).

After running out of coffee, an overtired consumer roasted a coffee maker with a new lawsuit, alleging it overstates the number of coffee servings that are in its coffee containers. The consumer alleges that she purchased a canister of Folgers Classic Roast, which stated on its front label that the canister "makes up to 380 6 fl oz cups." However, the consumer claims that following the serving instructions on the back label yields only 275 servings. She also alleges that a range of other coffee products similarly overstate the number of servings that they make.

Because of this allegedly false and misleading labeling, the consumer contends that she and similarly situated consumers overpaid for these products. She seeks to certify a Florida class of consumers, raising one claim for violations of Florida's consumer protection laws and seeking damages and injunctive relief.

Consumers Test Whether "100% Juice" Suits Are Worth the Squeeze

Siflinger v. Keurig Dr Pepper Inc., No. 56-2020-00542502 (Cal. Super. Ct., Ventura County June 11, 2020).

A consumer filed a putative class action in California, alleging that a juice manufacturer and its parent company falsely advertise juice products as "100% juice" when the products actually contain synthetic preservatives. The consumer takes aim at various Mott's apple juice products, including its 100% Original Apple Juice and 100% Apple White Grape Juice, as well as its "Real" citrus juices line, which includes products like ReaLemon 100% Lemon Juice and ReaLime 100% Lime Juice. Despite these products' claims that they contain "100% Juice," the consumer alleges they contain the artificial preservatives sodium benzoate, sodium metasulfite, and ascorbic acid.

The consumer contends that marketing the products as "100% Juice" when they contain these preservatives is "unfair, unethical, and illegal" and misleads reasonable consumers into thinking that products labeled "100% Juice" do not contain non-juice ingredients. The consumer seeks to certify a California class, raising claims for violation of California's consumer protection laws.

Consumer Is *Not* "Ready to Eat" Trendy To-Go Sandwiches in Natural Labeling Suit

Barton v. Pret a Manger (USA) Limited, No. 1:20-cv-04815 (S.D.N.Y. June 23, 2020).

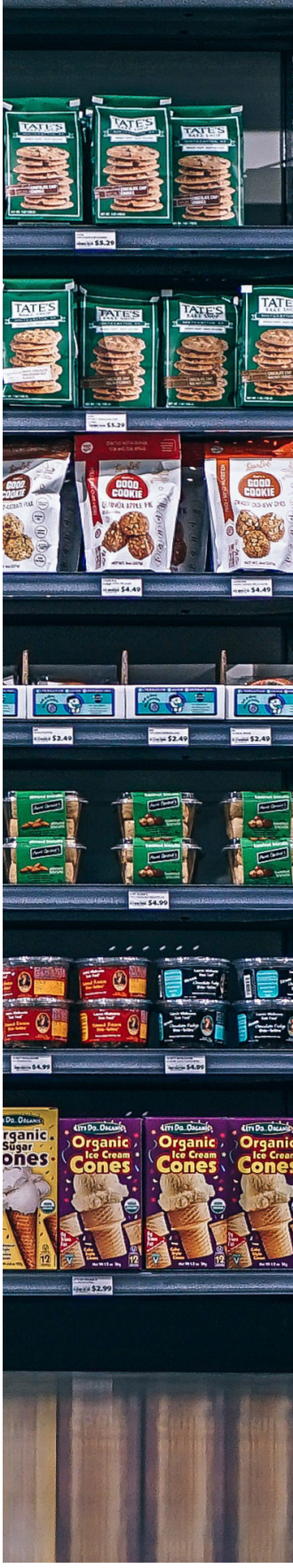
A consumer lodged a putative class action against a global grab-and-go sandwich chain, alleging its "natural" marketing and advertising is false, deceptive, and misleading. According to the plaintiff, the defendant claims that many of its products are made with "natural ingredients" and markets its products to health-conscious consumers with labeling like "organic coffee" and "natural food." The plaintiff alleges, however, that these "natural" representations are untrue and that at least 26 of the defendant's products actually contain GMO ingredients (like soya) or synthetic ingredients (like maltodextrin, citric acid, malic acid, and diglycerides, among others).

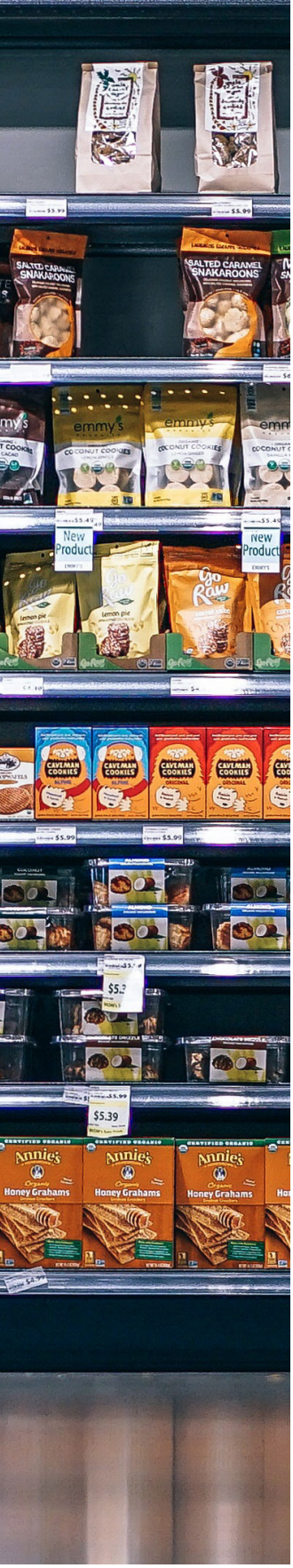
The consumer alleges that she and similarly situated consumers paid a premium in reliance on the defendant's "natural" and health-conscious labeling. She seeks to certify nationwide and New York classes and raises claims for unjust enrichment, breach of warranty, violations of New York's consumer protection laws, and injunctive relief.

Salty Consumer Files Suit over Size of Popcorn Packaging

Reisfelt v. Topco Associates LLC, No. 30-2020-01141971 (Cal. Super. Ct., Orange County June 8, 2020).

A particularly salty California consumer sued Topco Associates for allegedly slack-filling its boxes of Full Circle Market microwave popcorn. Notably, the plaintiff's suit "does **not** assert any claims based on misrepresentation," i.e., she doesn't claim that she ever suspected the boxes of popcorn contained any more microwavable bags than they actually did. Instead, the plaintiff alleges she and other consumers were overcharged for their popcorn because Topco's packaging is "substantially larger than necessary to contain the three microwavable popcorn bags included per box." According to the plaintiff, this illegal, nonfunctional slack-fill violates both state and federal regulations, and because Topco could have fit an additional bag of popcorn in each box, its products are illegally misbranded under state and federal regulations. The plaintiff asserts claims under two California consumer protection statutes and seeks to certify a California class of consumers who purchased these "larger than necessary" boxes, despite knowing full-well what they contained.





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Not Pumped Up About Anti-Gains, Consumer Throws Down Muscle Claims False Ad Suit

Seiger v. Woodbolt Distribution LLC, No. 6:20-cv-06374 (W.D.N.Y. June 7, 2020).

A dietary supplement company was hit with a putative class action alleging the company falsely advertises its muscle-building supplements when, instead of having the intended benefits, they actually decrease muscle growth and repair. According to the complaint, the supplement maker falsely markets its Xtend branched-chain amino acid (BCAA) products as "clinically shown to support muscle recovery and growth." Based on independent research results, however, the supplements lack a complete protein source to build muscles and actually decrease muscle protein synthesis. In support of its theory of liability, the lawsuit points to research results from a researcher on muscle metabolism, Dr. Robert Wolfe, who concluded that the products' claim that they stimulate muscle protein synthesis was "unwarranted."

Alleging violations of the New York General Business Law, the plaintiff seeks to represent a class of New York residents who purchased the muscle-building supplements. The plaintiff also seeks damages for the putative class, alleging that they would not have paid a price premium for the products had they known they do not work.

Motions to Dismiss

Procedural Posture: Granted

Complaint over "Prime" Pork Labeling Is Prime for Dismissal

Davis v. The Fresh Market Inc., No. 1:19-cv-24245 (S.D. Fla. June 26, 2020).

Pork consumers sued an upscale grocery store and meat producer, alleging that the defendants misrepresented that the U.S. Department of Agriculture (USDA) had graded their Chairman's Reserve Prime Pork product as "prime," when that was not the case. The plaintiffs claimed that the defendants made misleading representations about USDA meat grades in promoting their product by referring to it as "prime" in a number of promotional materials. The defendants moved to dismiss the lawsuit, arguing that the plaintiffs failed to allege that the defendants linked their "prime" pork product to the USDA, stated that the products were graded by the USDA, or even ever used the term "USDA" in any of their advertisements.

The district court dismissed the complaint in its entirety, agreeing with the defendants that the complaint failed to allege that the challenging labeling and advertising represented the pork was USDA certified and that the alleged misrepresentations were mere puffery touting the quality of the pork. The court also agreed that the plaintiffs failed to plausibly allege that the defendants made actionable misrepresentations because a reasonable consumer would not be deceived by the defendants' promotional materials into believing that the USDA had graded the pork as prime.

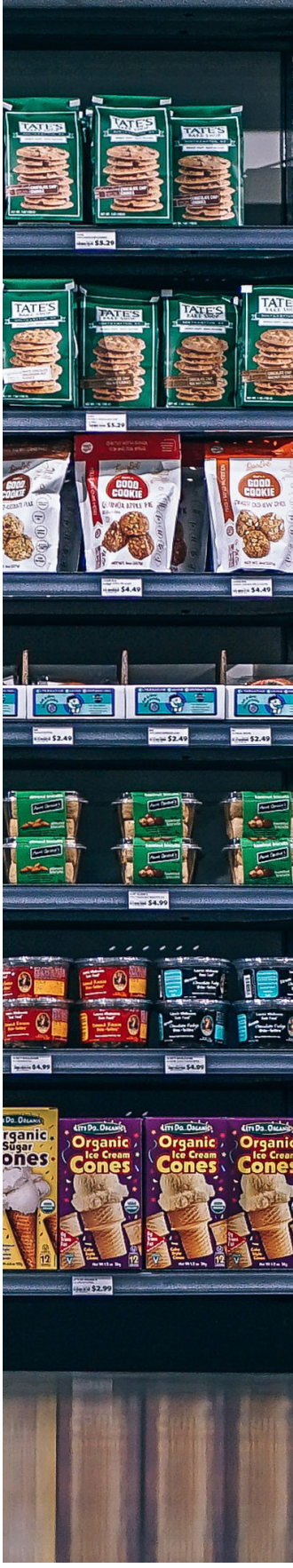
Procedural Posture: Granted with leave to amend

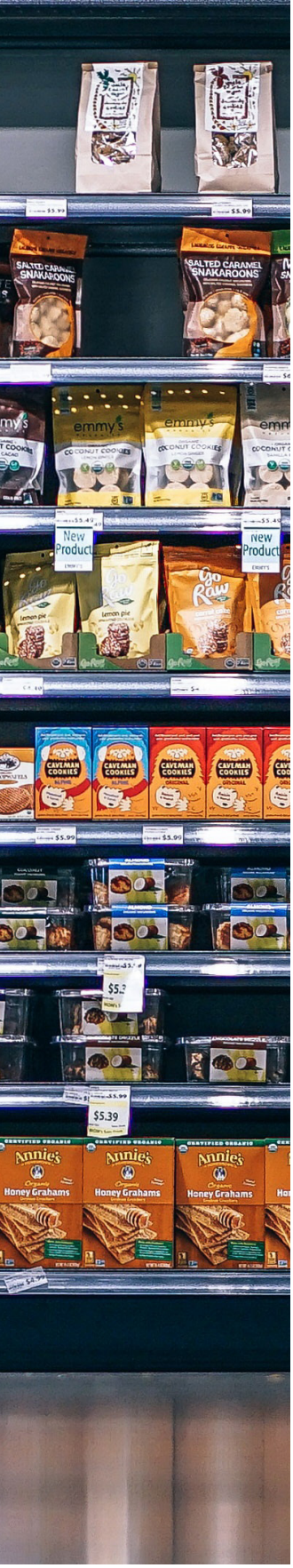
Court Finds That Vanilla Complaint Is Not Worth a Hill of Beans

Zaback v. Kellogg Sales Company, No. 3:20-cv-00268 (S.D. Cal. June 22, 2020).

As we have covered several times before, the flavor of the past 18 months has been vanilla. Specifically, the vanilla flavoring suit. These suits allege that food products falsely or misleadingly claim that their vanilla flavor is derived exclusively from vanilla beans or vanilla bean extract. The offending conduct? Simply having the word "vanilla" in their name or by including pictures of vanilla plants on their packaging.

As the number of these lawsuits approaches 100, courts have finally started to rule on the merits of their allegations. One federal district court in California found that these allegations—leveled against Bear Naked Granola V'nilla Almond—failed to state a claim. The district court did not buy the plaintiff's allegations that, by identifying "natural flavors" (as opposed to vanilla extract or even vanilla flavor) on the ingredient list, the defendant conceded the product's flavoring was not derived exclusively from vanilla beans. The district court found that the plaintiff provided no factual basis for this allegation but





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rather impermissibly speculated on what was—and was not—used to impart a vanilla flavor in the granola. The district court nevertheless granted the plaintiff leave to amend the complaint to cure these speculative allegations.

Procedural Posture: Granted in Part

One Potato, Two Potato: TGI Friday's and Utz Dismissed from Potato Skins Snack Case

Troncoso v. TGI Friday's Inc., No. 1:19-cv-02735 (S.D.N.Y. June 8, 2020).

Updating the April 2019 edition of the *Food & Beverage Digest*, a New York federal district court dismissed TGI Friday's (TGIF) and Utz from a proposed class action challenging "TGI Fridays Potato Skins Snacks." In filing suit against the manufacturer of the chips, its parent company (Utz), and TGIF, the plaintiff alleged that because TGIF carries a "Potato Skins" appetizer, she was led to believe the snack contained real potato skins and was a healthier option than most chips. The only potato-based ingredients in the snack are "potato flakes" and "potato starch."

In its order dismissing Utz and TGIF (which merely licenses its trademark and brand name to the chip manufacturer for display on the snack chips) from the case, the district court found that the plaintiff failed to allege a connection between the TGIF restaurant appetizer and the labeling on the snack product. It concluded that "no reasonable consumer would believe that the snack chips, shelf-stable and sold at room temperature in gas stations, would be identical in taste or substance to an appetizer, prepared with perishable dairy products and served hot in a restaurant." However, the district court did not dismiss the plaintiff's claim against the chip manufacturer alleging that customers were misled into believing the chips contain potato peels as an ingredient.

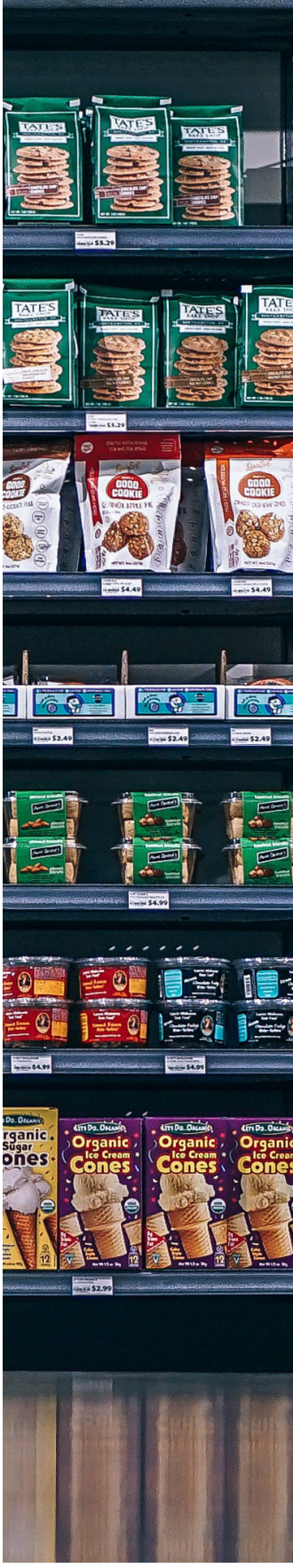
Procedural Posture: Denied

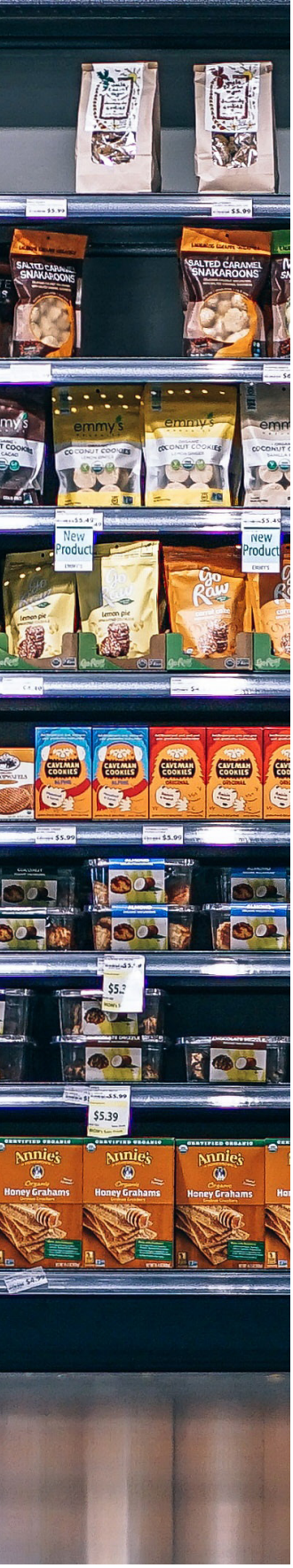
Consumers' Second Shot at Gingko Pill Class Action Survives Dismissal Bid

Sonner v. Schwabe North America Inc., No. 5:15-cv-01358 (C.D. Cal June 11, 2020).

A California federal court denied Nature's Way's motion for another early exit from a lawsuit alleging its ginkgo biloba pills do not improve cognitive health as advertised, finding the complaint satisfied the jurisdictional amount in controversy when it was filed (even if that amount subsequently decreased throughout the litigation). In its bid for dismissal, Nature's Way argued that because the plaintiff was only able to certify a California class, the amount in controversy no longer met the Class Action Fairness Act's minimum threshold. The court sharply rejected this argument, however, finding that jurisdiction is decided when the lawsuit is filed—even if it decreases after filing.

The lawsuit, filed in 2015, alleged that the products' claimed ability to increase "mental sharpness" was not substantiated by scientifically credible evidence. After initially dismissing the lawsuit for failure to demonstrate breach of any promises through the challenged advertising, the Ninth Circuit revived the case on appeal, and the California class was later certified. In ruling on the defendants' motion to dismiss for lack of subject-matter jurisdiction, the court determined it was proper to include the amount in controversy of a national class in determining jurisdiction—which was well above $5 million—even if the class does not end up being certified.





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Motion for Summary Judgment

Procedural Posture: Denied

Nestlé Loses Summary Judgment Bid over Trans Fat Claims

Beasley v. Lucky Stores Inc., No. 3:18-cv-07144 (N.D. Cal. June 12, 2020).

As an update to the October 2019 and February 2020 editions of the *Food & Beverage Digest*, Nestlé and a group of retailers lost their summary judgment motion to nix a false ad suit alleging they misled consumers about the trans fat content of Coffee-mate brand creamers. The labels at issue claim that Nestlé's products contain "0g Trans Fat" despite containing partially hydrogenated oil (PHO) in the products and on the ingredient list.

Nestlé's summary judgment motion only focused on the fact that the plaintiff's claims were time barred by the applicable statutes of limitation. Relying on the plaintiff's deposition testimony that he has been aware that PHO was a source of trans fat since the late '90s, Nestlé argued that the plaintiff would have been aware of the factual basis for his claims during the class period. But after Nestlé filed its motion for summary judgment, the plaintiff contended he "misspoke at his deposition." Nestlé took issue with the timing and propriety of these contradictory statements, but the district court cast aside the controversy, noting that even if these challenged changes were disregarded, a triable issue of fact remained. According to the district court, the plaintiff viewed multiple statements on Nestlé's labels disclaiming the inclusion of trans fat in the Coffee-mate products, leaving a question of fact as to whether he should have investigated the ingredient list.

Settlement

Challenge to Black Pepper Product Grinds to a Halt

In re McCormick & Co. Inc. Pepper Products Marketing and Sales Practices Litigation, No. 1:15-mc-01825 (D.D.C. June 5, 2020).

Updating the August 2019 edition of the *Food & Beverage Digest*, a District of Columbia federal district court approved a settlement to resolve a consumer class action alleging McCormick & Co.'s black pepper tins and grinders contained nonfunctional slack-fill. The suit alleged that rather than decrease the size of its black pepper tin and grinders or the price of the product, the pepper purveyor reduced the weight of the ground pepper, deceiving consumers into thinking that the amount of product remained unchanged. The district court granted final approval of the parties' $2.5 million settlement, which includes awarding $1.1 million to plaintiffs' counsel in attorneys' fees and expenses.

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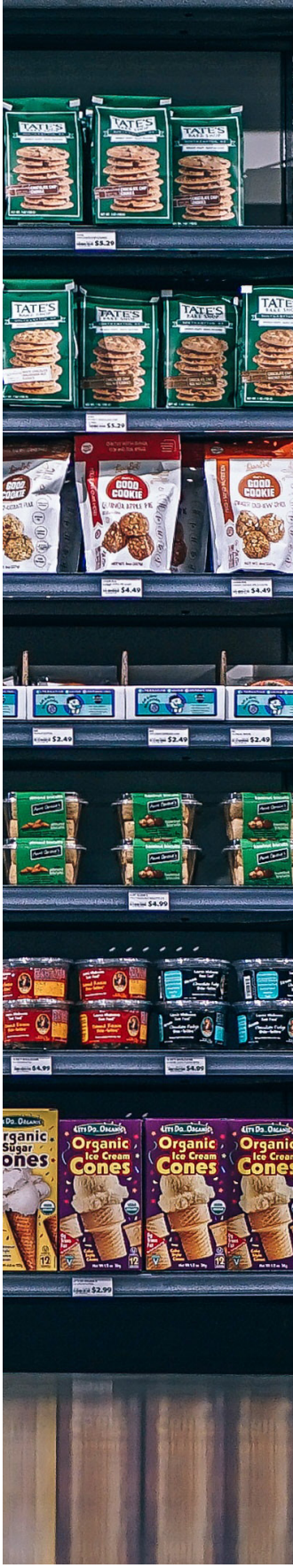

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