ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

3 Sections This Edition
Cases Per Section 1-10

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Settlement	100%

New Lawsuits Filed

Rum Rummers Cruise to State Court

Alonzo v. William Grant & Sons Inc., No. 155241/2021 (N.Y. Sup. Ct. May 28, 2021).

Back in January 2021, we reported that Richard Alonzo filed his original complaint in New York federal court challenging that the defendant's Flor de Cana rum was deceptively labeled as "Artisanal," "18," and "Slow Aged" because it misleads consumers about the age of the product. Those statements are misleading because consumers expect rum, like other spirits, to be labeled using the age of the youngest spirit included in the finished product. But Flor de Cana rum is instead composed of spirits with an *average* age of 18. While the complaint recognizes that this doesn't technically violate the statement of age regulations for spirits, it argues the labels are nevertheless misleading.

This past May, the defendant sought to dismiss the case because the district court lacked subject-matter jurisdiction. Rather than respond to that defense, the plaintiff sought leave to amend his complaint and switched out the plaintiffs in the federal action. Just three days later, Sheehan & Associates filed the new state court lawsuit on behalf of Alonzo in New York state court (presumably to bypass the jurisdictional arguments at issue in the federal court case).

Procedural maneuvering? Certainly. But the federal court allowed it. After the defendant alerted the federal court to these tactics, the court deemed Alonzo's federal claims to have been voluntarily dismissed pursuant to Rule 41(a).

A Bubbly Dispute over Flavored Water

Oldrey v. Nestlé Waters North America Inc., No. 7:21-cv-03885 (S.D.N.Y. May 2, 2021).

A disgruntled hydration enthusiast has sued Nestlé over its sparkling water labeled as containing "a twist of raspberry [and] lime." The plaintiff alleges that the beverage's labeling misleads customers about the nature of the raspberry and lime ingredients. According to the plaintiff, "a twist of raspberry and lime" suggests a small amount of fruit ingredients "that otherwise might be unexpected."

Instead, the plaintiff claims, the beverage contains flavor compounds that imitate the taste of raspberries and limes with almost no fruit ingredients. The plaintiff claims that she paid more for the sparkling water than she would have had the product been correctly labeled, comparing the product to the less-expensive competitor Spindrift Lime Seltzer. The plaintiff brings claims on behalf of a proposed class for violations of New York's consumer protection statute, breaches of express and implied warranties, negligent misrepresentation, fraud, and unjust enrichment.

In a Tizzy over Iffy Labels

Williams v. Molson Coors Beverage Company, No. 3:21-cv-50207 (N.D. Ill. May 22, 2021).

As consumers enter the heart of summer, a refreshing hard seltzer seems to be the perfect reward for a hard day's work at the beach, lake, or pool. Enter Vizzy Hard Seltzer. Not only does the beverage offer refreshing flavors like strawberry kiwi, blueberry pomegranate, pineapple mango, and black cherry lime, its label also discloses "with antioxidant Vitamin C from acerola superfruit." What could be wrong with a drink tailor-made for summer?

Quite a lot, according to a recent suit filed in Illinois federal court. The lawsuit comes on the heels of a March 15, 2021 letter sent by the Center for Science in the Public Interest to the Food and Drug Administration (FDA) and raises identical allegations as those in the letter. The suit first claims that the hard seltzer makes a prohibited nutrient content claim in violation of FDA regulations with the label "with antioxidant Vitamin C." Second, the label references the superfruit acerola to misleadingly suggest that the alcoholic beverage is healthy. Third, the hard seltzer violates FDA policy against fortifying alcoholic beverages with nutrients. Finally, and as is the manner of Sheehan & Associates complaints, the suit challenges the representations of mango flavoring because the seltzers do not contain an appreciable amount of the fruit. The plaintiff seeks to certify an Illinois class for breach of warranty, misrepresentation, unjust enrichment, and Illinois consumer protection claims.

Lawsuit Claims Protein Products Contain "Whey" Less Protein Than Advertised

Lozano v. Bowmar Nutrition LLC, No. 2:21-cv-04296 (C.D. Cal. May 24, 2021).

A lawsuit filed in California federal court alleges that whey-derived protein products contain "substantially less" protein than what is conveyed to consumers. According to laboratory testing of the products, each serving contains far less than the amount of protein represented on the nutritional facts label, and therefore, these variances are unlawful under federal law. The complaint also takes issue with statements claiming the products are "high protein," serve as "a healthy meal replacement with a range of amino acids to stimulate muscle growth," and will "fill[] you up."

Based on these allegations, the complaint asserts putative class claims for unjust enrichment and violations of various states' consumer protection laws. The complaint also seeks declaratory judgment, injunctive relief, compensatory and punitive damages, and attorneys' fees and costs.

Plaintiff Putting the Squeeze on Lime-Flavored Chips

Barnett v. Frito-Lay N.A. Inc., No. 3:21-cv-00470 (S.D. Ill. May 11, 2021).

An Illinois consumer has alleged that the maker of the popular Tostitos brand tortilla chips misleads consumers about the amount and quantity of lime in their Tostitos Hint of Lime chips. According to the complaint, consumers read "hint" to mean that the tortilla chips contain a small—yet still appreciable—amount of actual lime. If this claim sounds vaguely familiar, it could be because this lime-loving litigant just happens to be represented by Spencer Sheehan, the infamous Vanilla Crusader who has filed hundreds of flavor-based suits over the past few years.

But that's not all. The complaint alleges that consumers are increasingly looking for foods with "positive health benefits," including ones with "actual fruit ingredients." Of course, tortilla chips on taco night are a prime source to get these health benefits. The plaintiff alleges that had she known the product didn't contain an actual "hint" of lime, she wouldn't have paid as much as she did. The plaintiff even goes so far as to allege the defendant dupes consumers into paying more for the products because of the well-known "growing American appreciation for aspects of Hispanic cultures, where the lime has long been afforded primacy among fruits." The plaintiff seeks to certify a class of similarly situated lime-loving Illinois citizens and is seeking relief for violations of Illinois consumer protection laws, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

Adding Some Color to the "All Natural" Litigation Landscape

Escobar v. Snapple Beverage Corporation, No. 2:21-cv-03987 (C.D. Cal. May 12, 2021).

Bland plaintiffs filed a putative class action alleging that the "all natural" claim on Snapple beverage products is misleading because the products include added coloring. Armed with excerpts from the FDA, the complaint alleges that the "all natural" labeling is false and deceptive because the beverages contain food coloring agents, "vegetable and fruit juice concentrates,""vegetable juice concentrates,""fruit juice concentrates," and/or "beta carotene" that actually serve as added coloring.

The plaintiffs seek to certify a nationwide class and California and Kentucky subclasses of purchasers and assert violations of California and Kentucky law, unjust enrichment, and breach of express warranty.

Not Berry Happy with Breakfast Bars

Johnston v. Kashi Sales LLC, No. 3:21-cv-00441 (S.D. Ill. May 2, 2021).

A disgruntled purchaser of Kashi's "Ripe Strawberry" bars has brought a putative class action alleging that the product does not contain enough strawberry. Despite images of strawberries and breakfast bars featuring red filling on the package, the plaintiff complains that the bars actually contain a "strawberry filling" whose ingredients include more pear juice and apple powder than strawberries.

The plaintiff claims that this misleads customers into thinking that the bars contain more strawberry filling than they do, which harms customers who think that they are buying a product that contains all the health and taste benefits associated with strawberries. The plaintiff seeks to certify an Illinois class of purchasers for claims under the Illinois Consumer Fraud and Deceptive Business Practices Act, as well as breaches of warranty, fraud, and unjust enrichment claims.

Protein Products Allegedly Pack Less Punch Than Advertised

Meraz v. Purely Elizabeth LLC, No. 3:21-cv-04091 (N.D. Cal. May 28, 2021).

In what appears to be a growing trend in the food and beverage world, another complaint was filed that alleges certain products contain less protein per serving than the labeling representations claim. According to a new complaint filed in California federal court, Purely Elizabeth deceptively labels and markets certain products, including oats, bread, muffin mixes, oatmeal, pancake and waffle mixes, and granola, as containing more grams of protein per serving than they do. The plaintiffs claim that amino acid testing shows some of those products "contain up to 25% less protein than claimed" (which really translates to just 6 grams of protein rather than 7).

Not only do the disgruntled consumers take issue with the *amount* of protein packed in the products, they claim they were defrauded by the defendant through its use of proteins with "low biological value to humans." In a rather circular allegation, the plaintiff claims the defendant's use of *collagen* protein in its Pecan Collagen Protein Oats is deceptive (try reasoning through that one) simply because collagen protein lacks one of the nine allegedly essential amino acids. The plaintiffs also claim that the products are misbranded because the labels include a protein claim but do not provide the required percent daily value of protein on the nutritional facts panel. The plaintiffs claim this conduct caused them and members of the putative class to pay a price premium for the products. The putative class seeks to recover for alleged violations of the California consumer protection statutes, fraud, and unjust enrichment.

"Vegetarian" Fish Food Label Fools Consumer Hook, Line, and Sinker

Kramer v. Rolf C. Hagen (USA) Corporation, No. 1:21-cv-10748 (D. Mass. May 6, 2021).

According to a new complaint in Massachusetts federal court, something's fishy with the defendant's "Vegetarian" fish food. It's not semantics about the definition of vegetarian. According to the complaint, that "vegetarian" should mean the product does not contain any meat or fish should not be a controversial statement.

Rather, the plaintiff claims that the defendant's fish food—labeled "Vegetarian" on the front of the product—contains glaringly un-vegetarian ingredients like herring meal, krill, shrimp meal, and fish oil. The complaint also alleges that the fine print—an ingredients list on the back of the packaging that discloses these animal-derived products—cannot cure the unambiguous, misleading statements on the front that the product is "Vegetarian Fish Flakes." The plaintiff seeks to certify a nationwide class and various state and multistate subclasses for violations of California and various other states' consumer protection laws, breach of warranty, and unjust enrichment.

Cancel Culture Lawsuit Takes on Yogurt Labeling

Gilker v. Chobani, LLC, No. 3:21-cv-00488 (S.D. Ill. May 16, 2021).

What's wrong with the labeling of Chobani Complete brand low-fat Greek yogurt? According to one Illinois consumer, just about everything. The name of the product allegedly implies that the product provides "complete nutrition," when the yogurt in fact doesn't supply all of a consumer's nutritional needs. A "plus sign" on the label supposedly suggests the yogurt contains more probiotics and prebiotics than comparable foods, but the label offers no comparison to other foods. And the label's "Only Natural Ingredients" claim is purportedly a half-truth because the yogurt contains the processed sweetener monk fruit extract.

The plaintiff seeks to represent an Illinois-only class, asserting claims for breach of the Illinois Consumer Fraud and Deceptive Business Practices Act, breach of express and implied warranty, negligent misrepresentation, fraud, and unjust enrichment. Whether some or all of the plaintiff's claims can survive a challenge under the "reasonable consumer" standard remains to be seen, but that issue will almost certainly be teed up in an early motion to dismiss.

Motions to Dismiss

Procedural Posture: Denied in part

A Plant-Based Lawsuit Continues to Grow

Maisel v. S.C. Johnson & Son Inc., No. 3:21-cv-00413 (N.D. Cal. May 5, 2021).

A California federal district judge allowed a proposed class action over mislabeling of cleaning products to move forward to discovery. The plaintiff alleged that the defendant mislabels its Ecover brand cleaning products by claiming that the products are "plant-based" when they actually contain synthetic and processed ingredients that do not come from plants.

The judge covered a lot of ground in his order, first finding that the plaintiff had standing to pursue her claims because she suffered an actual injury by purchasing Ecover dishwasher tablets when she otherwise would not have had she known they were mislabeled, and that even though she did not purchase any other Ecover products, they were substantially similar such that the plaintiff had standing to assert claims based on them. The plaintiff also established standing to pursue her injunctive relief claim because the plaintiff alleged that she was at risk for reasonably but incorrectly assuming that the products' labeling had been fixed and might purchase the products again. Turning to the substance of the claims, the district court rejected the defendant's argument that the plaintiff failed to adequately allege that the products were misleading because her interpretation of "plant based" doesn't reflect a reasonable consumer's understanding of the terms. To round out his order, the judge found that the court had pendent jurisdiction as to non-California class members' claims.

Procedural Posture: Denied

Headbanger's Ball: Fourth Time's a Charm to State Claims Alleging Heavy Metals in Dog Food

Classick v. Schell & Kampeter, Inc., No. 2:18-cv-02344 (E.D. Cal. May 18, 2021).

Originally filed in 2018, plaintiff Richard Classick's suit challenged advertising and claims surrounding Schell & Kampeter's Taste of the Wild dog food, but various claims were slashed over the years. In the Fourth Amended Complaint, the plaintiff challenged the dog food packaging, claiming it was false because of the presence of allegedly undisclosed heavy metals, BPA, pesticides, acrylamides, and regrinds. In its most recent ruling, the Eastern District of California said the show must go on and denied the defendant's motion to dismiss. The court rejected the defense's puffery arguments, concluding that the claims "The balanced diet that nature intended" and "The best nutrition available today" were capable of being objectively tested. The court also did not care that the plaintiff had fetched the food through Amazon, rejecting an argument that the California Consumers Legal Remedies Act requires a direct transaction and concluding "Plaintiff purchased Defendant's dog food. He is a consumer with a right to sue under the CLRA." The defendants' citation to other dog food cases that had been similarly disposed of did not strike a chord with the judge, who said the issues were better suited for summary judgment.

Settlement

Extra Stout Origin Claims Settle Five Years After First Pour

O'Hara v. Diageo Beer Company USA, No. 1:15-cv-14139 (D. Mass. June 1, 2021).

After slowly fermenting in federal district court for over five years, a lawsuit challenging Guinness Extra Stout beer seems to be close to the last drop. The plaintiff originally filed suit in 2015, claiming that the defendants deceptively label the famed Irish draught as made in St. James's Gate Brewery, Dublin, Ireland, when it was actually brewed and imported from Canada. In 2018, the district court poured out most of the plaintiff's claims, dismissing his challenges to the labeling on the bottles and packaging because the Alcohol and Tobacco Tax and Trade Bureau reviewed and issued a certificate of label approval for the labeling. The plaintiff's claims challenging explicit origin statements on the defendants' websites, however, remained.

After the case went flat for another three years, the district court apparently applied the lesson of the perfect pour for an extra stout and gave the claims more time to settle. On March 15 of this year, it denied a slew of class certification motions without prejudice, directed the parties to report to the district court about the possibility of settlement, and stayed the case. Although slightly longer than the recommended 119.53 seconds for an extra stout pour to settle, the extra time seemed to work. The plaintiff's motion to preliminarily approve a class action settlement notes that the settlement will refund putative class members 50 cents per sixer, class counsel will seek no more than $1.5 million in attorneys' fees and expenses (as a part of a clear sailing provision), and the defendants will dole out an additional $175,000 for a third party to administer the refunds.

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