

ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

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Cases Per Section 1-6

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motion to Dismiss	100%
Motion for Multidistrict Litigation	100%
Settlement	100%
Regulatory	100%



New Lawsuits Filed

Organic Flavors Not Enough to Bring Back Water's Sparkle

Kelly v. Whole Foods Market Group Inc., No. 1:21-cv-03124 (S.D.N.Y. Apr. 11, 2021).

A sour consumer has asserted a putative class action against an upscale grocery chain, alleging it overcharges consumers for its “Lemon Raspberry Italian Sparkling Mineral Water.” But the consumer’s tart attitude toward the refreshing drink is not because it consists of mineral water with just enough carbonation to give that satisfying, crisp finish. It’s not because the water is sourced from a boot-shaped country (famous for its cuisine, vistas, and, of course, water) that is over 4,000 miles from where the plaintiff filed the complaint. It’s not even because the product is certified “USDA Organic” and identifies “Organic Natural Flavors (Raspberry, Lemon)” among its ingredients.

The actual reason, the plaintiff alleges, is far more insidious. Wielding pictures of lemons and raspberries and the words “Lemon Raspberry,” the defendant purportedly tricks consumers into believing an appreciable amount of lemon and raspberry is used for the water. The complaint claims there isn’t, nor does the water’s flavor come predominantly from lemons and raspberries. The plaintiffs seek to certify an eight-state class of consumers for violations of consumer protection laws, breach of warranty, fraud, negligent misrepresentation, and unjust enrichment.

Cheese Louise! Boxed Mac and Cheese Accused of Containing Harmful Chemicals

Franklin v. General Mills Inc., No. 2:21-cv-01781 (E.D.N.Y. Apr. 1, 2021).

Stuve v. The Kraft Heinz Company, No. 1:21-cv-01845 (N.D. Ill. Apr. 6, 2021).

Lavalle v. General Mills Inc., No. 7:21-cv-03103 (S.D.N.Y. Apr. 9, 2021).

A trio of newly filed lawsuits takes aim at everyone’s favorite comfort food, the ubiquitous boxed macaroni and cheese. In lawsuits filed in the Eastern District of New York, Northern District of Illinois, and Southern District of New York, the plaintiffs allege that Annie’s and Kraft macaroni and cheese products fail to disclose that they contain, or are at risk of containing, allegedly dangerous phthalates. These phthalates purportedly enter the products from the product packaging and machinery used to make the products. The plaintiffs further contend that phthalates cause a wide range of health problems, from fertility issues to neurodevelopmental problems such as ADHD and anti-social behavior. The lawsuits are, in large part, based on a 2017 study conducted by the Coalition for Safer Food Processing and Packaging, a nonprofit consumer advocacy organization (although the plaintiffs do not explain why they waited nearly four years after this apparently bombshell study).

The plaintiffs’ claims are premised on both alleged omissions and misrepresentations about the presence of phthalates (or the risk the products could contain phthalates) and marketing the products as healthy and wholesome. The plaintiffs seek to certify nationwide and state

classes, asserting claims for violations of consumer protection statutes, fraud, breach of warranty, and unjust enrichment.

“Naturally Flavored” Water Goes a Little Flat

Gammino v. The Kroger Company, No. 5:21-cv-02933 (N.D. Cal. Apr. 22, 2021).

Harking back to the more traditional “natural” lawsuits, a California consumer is seeking to certify a nationwide class for claims that a line of sparkling waters is false and deceptive. The fizzy waters represent they are “Naturally Flavored,” a claim the plaintiff believes is nothing but hot (carbonated) air. Instead, the complaint alleges, the waters contain the artificial flavoring ingredient dl-malic acid. Unlike its naturally occurring cousin (l-malic acid), dl-malic acid allegedly is produced in petrochemical plants and derived from tasty products like benzene and butane.

But the plaintiff claims there’s more. The defendant grocer also purportedly conceals from consumers that its effervescent water line is artificial. Although the ingredients list discloses that the sparkling waters contain malic acid, it does not specify whether it is the naturally occurring l-malic or the artificially produced dl-malic acid. For this purported deception, the plaintiff seeks to certify a nationwide class for claims under various consumer protection laws, breach of warranty, fraud, and unjust enrichment, and injunctive relief.

Pancakes That Are Protein-Packed? More Like Protein-Lacked!

Hinkley v. Baker Mills Inc., No. 2:21-cv-00221 (D. Utah Apr. 13, 2021).

Seeking to increase their protein consumption, a group of “health conscious” consumers are challenging the protein content claims made by the manufacturers of Kodiak Cakes Buttermilk Flapjack and Waffle Mixes. The suit alleges that the flapjack and waffle mix falsely claims that the products contain more protein than it actually does. Based on amino acid content testing of the products, the plaintiffs allege that the pancake and waffle mix does not pack the advertised 14 grams of protein per serving but rather contains a measly 11.5 grams.

Venturing into a nuanced chemistry class befitting gainz-seekers, the suit also claims that the protein used in flapjack and waffle mix packs less punch than higher-quality proteins. When the mix’s amino acid and protein content is adjusted by the “Protein Digestibility Corrected Amino Acid Score” (or the unhelpfully long acronym “PDCAAS”), the complaint claims that the products provide even less *absorbable* protein per serving. The plaintiffs seek to certify a 49-state class for unjust enrichment and fraud and state classes for New York, Florida, and Illinois under their consumer protection laws. As we [previously covered](#), the 50th state—California—is already at play in a separate putative class action brought by the same law firm and raising the same allegations.



Consumer Burned by Certified Natural Sunscreen

Dantona v. Raw Elements USA, No. 604832/2021 (N.Y. Sup. Ct., Nassau County, Apr. 20, 2021).

As the summer months approach and sun protection moves to the forefront of consumers' minds, one consumer is taking a hard look at the ingredients of her sunscreen. She filed suit in New York state court against a sunscreen brand for its allegedly deceptive marketing of its products. The plaintiff alleges that Raw Elements USA touts its various sunscreen products as "certified natural" despite the fact that they contain synthetic materials, such as zinc oxide and tocopherol. The plaintiff claims that consumers have no meaningful ability to test or independently confirm that the products contain these synthetic materials because the nature of the ingredients is not apparent by the products' ingredient list. The proposed class action includes claims for violations of New York consumer laws along with breach of express warranty and unjust enrichment.

All-Butter Pound Cake Lacks ... Butter?

Salouras v. Sara Lee Frozen Bakery LLC, No. 1:21-cv-02117 (N.D. Ill. April 19, 2021).

A disgruntled pound cake enthusiast has sued Sara Lee for its allegedly deceptive, unfair, and false merchandising practices regarding its All Butter Pound Cake. Despite containing the representation that the treat is an "All Butter Pound Cake," the plaintiff alleges that it contains another, lower quality shortening ingredient—soybean oil. The complaint claims that the bakery's branding and packaging of the product deceive consumers into thinking that the pound cake only contained butter as a shortening ingredient. According to the plaintiff, pound cake made with other shortening ingredients aside from butter are worth less and the deceptive advertising caused her to pay more for the product than she otherwise would have. Like the Prairie Farms vanilla case discussed above, this complaint also takes aim at Sara Lee's use of the food coloring annatto, claiming that it imparts a yellowish hue that bolsters the misrepresentation and makes the product appear to contain more butter than it actually does.

Recently, however, the plaintiff voluntarily dismissed her complaint without prejudice. We may yet see how this sordid tale of deceptive desserts ends.

Motion to Dismiss

Procedural Posture: Denied in part

Dog Owners Have Their Day as Some Claims Proceed Past Dismissal

In re Big Heart Pet Brands Litigation, No. 4:18-cv-0861 (N.D. Cal. April 27, 2021).

Pet owners who brought suit against a pet food company alleging misrepresentations scored a partial victory in their litigation when a federal district court found their misrepresentation claims survived a motion to dismiss. According to the plaintiffs, Big Heart Pet Brands' food contained a false and misleading label that it was "100% complete and balanced," when in reality it contained the sedative pentobarbital. The court found that the plaintiffs had alleged enough to support that they were actually deceived by the "100% complete and balanced" label. The plaintiffs' reliance on the misrepresentations was a key factor in the decision. Because the court found that the plaintiffs had *not* relied on the misrepresentations on the company's website, the claims based on those misrepresentations were dismissed. Accordingly, the case will continue on the misrepresentation claims based on the statements on the dog food bags.

Motion for Multidistrict Litigation

Procedural Posture: Granted

Consumers Create Caffeinated Consolidated Action in Crusade for Coffee

In re Folgers Coffee Marketing and Sales Practices Litigation, No. 2984 (J.P.M.L. Apr. 1, 2021).

A wave of putative class actions alleging that Folger Coffee Company, its parent J.M. Smucker Co., and others exaggerated how many cups of coffee can be made from their ground coffee canisters has been consolidated into a multidistrict litigation in Missouri federal court.

The consolidated lawsuits allege a systematic practice of false advertising by the coffee company and retailers in vastly overstating the amount of coffee that can be made from a canister in order to charge a higher price. The panel that consolidated the actions found that the plaintiffs in the various separate cases seek to represent overlapping classes of purchasers of the product and that there were efficiencies to be had from the consolidation of the actions.

Settlement

Procedural Posture: Granted

Breezing into a Vanilla Settlement

Biegel v. Blue Diamond Growers, No. 7:20-cv-03032 (S.D.N.Y. Apr. 19, 2021).

Blue Diamond asked a New York federal court to give its initial blessing on its settlement with a proposed class of Almond Breeze vanilla-flavored product buyers, using the Califia Farms vanilla milk settlement as its model. In the putative class action, the plaintiffs alleged that they purchased almond milk products relying on the front label representations of “vanilla [with other natural flavors]” and that they “expected a nonnegligible amount of extracts from vanilla beans, because they expected that if the Products contained synthetic flavor ingredients, the Products would truthfully disclose this on the front label with statements they were ‘Artificially Flavored.’”

Subject to caps, customers with proof of purchase can receive cash payments of up to \$1 per item, and those without proof, \$0.50 per item. The settlement is valued at approximately \$2.6 million. This settlement, which amounts to more than a hill of beans, goes against the trend of cases where defendants have secured full or partial dismissals of vanilla-flavor claims.

Regulatory

FDA Continues to Hold the Line Against CBD Health Claims

[Warning Letter from Food & Drug Administration to BioLyte Laboratories LLC \(Mar. 18, 2021\).](#)

[Warning Letter from Food & Drug Administration to Honest Globe Inc. \(Mar. 15, 2021\).](#)

The Food & Drug Administration (FDA) maintains that its *official* position is that cannabidiol (CBD), by virtue of having been the subject of clinical studies and the eventual approval as a pharmaceutical (Epidiolex®), may not be used in food or dietary supplements. The FDA does not, however, prohibit the use of cannabis or cannabis-derived ingredients in cosmetic products. And in practice at least, the FDA has adopted a mellow approach, enforcing only those CBD products with “over-the-line” health claims.

Recent FDA warning letters issued on March 15 and 18, 2021 to makers of topical CBD products indicate that the FDA is still taking this more targeted approach. In those letters, the FDA indicates that the marketers make claims that the product is intended to diagnose, cure, mitigate, treat, or prevent disease (i.e., drug claims), such as claims involving pain relief. The FDA’s continued trickle of warning letters targeting CBD-containing products continues to serve notice to the CBD industry that the agency is not letting up on its enforcement efforts when marketers cross the line into health claims.

Prop 65 Warning Requirements Now in Place for Online Sales of Alcoholic Beverages

Proposition 65 was approved by Californians in 1986 and requires warnings when a business knowingly or intentionally exposes individuals to chemicals that the state has identified as causing cancer or reproductive toxicity, unless an exception to the warning requirement applies. Effective April 1, 2021, for alcoholic beverages sold over the internet or through a catalog, in addition to the warnings provided on the internet or in the catalog, a warning must also be provided to the purchaser or delivery recipient either before or contemporaneously with the delivery of the product. The warning, which must be readable and conspicuous to the recipient before consumption, can be provided either: (1) on or in the shipping container or delivery package; or (2) by email or text message as part of an electronically delivered receipt or purchase confirmation.

New York Attorney General Cracking Down on Arsenic in Baby Food

[Press Release, New York Attorney General, “Attorney General James Probes Toxic Substances Found in Baby Food Sold in New York” \(Apr. 29, 2021\).](#)

The New York attorney general has launched an investigation into certain baby food makers about the amount of arsenic found in their infant rice cereal products. The New York attorney general requested information from the companies to determine whether the amount of arsenic in their products exceeds the legal maximum permitted by state law. She is also assessing the companies’ compliance with New York’s consumer protection laws in connection with this issue.

This investigation comes on the heels of a congressional report released in February that revealed dangerous levels of heavy metals in baby food. In addition to the New York attorney general’s investigation, the report prompted parents to sue major manufacturers of baby food over claims of deceptive advertising, claiming that the products are advertised as healthy but fail to mention that they include heavy metals.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories 0

% engaging value

Knowledgeable Speakers 100%

Current Topics 100%

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June 2, 2021



[Bringing Food Products to Market – Part 2: Special Topics](#)

In this 45-minute webinar presented by members of our Food & Beverage and FDA teams who served as FDA and USDA regulatory attorneys, Sam Jockel and Ben Wolf break down what it takes to establish a suitable regulatory status for a number of products.

Contributing Authors



[Angela Spivey](#)
404.881.7857
angela.spivey@alston.com



[Rachel Lowe](#)
213.576.2519
rachel.lowe@alston.com



[Sean Crain](#)
214.922.3435
sean.crain@alston.com



[Rachel Naor](#)
415.243.1013
rachel.naor@alston.com



[Katherine Wheeler Gamsey](#)
404.881.7462
katie.gamsey@alston.com



[Andrew Phillips](#)
404.881.7183
andrew.phillips@alston.com



[Jamie George](#)
404.881.4951
jamie.george@alston.com



[Alan Pryor](#)
404.881.7852
alan.pryor@alston.com



[Samuel Jockel](#)
202.239.3037
sam.jockel@alston.com



[Troy Stram](#)
404.881.7256
troy.stram@alston.com



[Kathryn Clifford Klorfein](#)
404.881.7415
kathryn.klorfein@alston.com

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