

BodyArmor targeted in putative class action alleging the drink's advertising misleads consumers as to its health benefits, continuing a trend

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The plaintiffs' class action bar continues to target "healthy" advertising claims made by food and beverage companies by bringing expensive class action lawsuits against the companies.

The latest company forced to defend its advertising is BA Sports Nutrition, LLC, the maker of BodyArmor SuperDrink, which was recently hit with a putative class action in the Northern District of California. The lawsuit, *Silver v. BA Sports Nutrition, LLC*, No. 20-cv-00633 (N.D. Cal.), alleges that, despite BodyArmor's labels and advertisements representing SuperDrink as providing "superior hydration," "better hydration," and a "more natural" way to hydrate, the drink is actually a "dressed-up soda masquerading as a health drink."

The named plaintiffs allege that BA Sports misleadingly advertises BodyArmor—through labels, TV and billboard advertisements, and paid social media influencers—as healthy despite each 16-ounce bottle containing the full daily recommended limit of sugar for adult men, and more than the recommended daily limit for children and adult women. Although BA Sports fortifies BodyArmor with vitamins, the complaint alleges that this fortification is unlawful because the FDA prohibits fortifying junk foods just to market them as healthy—the so-called "jelly bean rule."

But BodyArmor is not alone. Seemingly the entire food and beverage industry remains within class action plaintiffs' crosshairs. For example, advertisements for coconut-based products have been the target of several actions in recent years.

In 2017, Costco settled an action challenging the labels on its coconut oil product, which advertised the product's "health benefits" and encouraged consumers to use the oil as a substitute for butter when, in fact, the product allegedly contained a high amount of saturated fat.

Danone US Inc. has faced a pair of similar class actions in California challenging the advertising of its coconut milk products. Last year, in *Andrade-Heymsfield v. Danone US, Inc.*, No. 19-cv-589, 2019 WL 3817948 (S.D. Cal. Aug. 14, 2019), the Southern District of California dismissed claims alleging that Danone deceptively advertised its So Delicious Coconut Milk. There, the court concluded that the label's claims that the milk contains "good fats" and can help maintain "healthy" bones through calcium and vitamin D were "structure and function" claims about the milk's nutrients and their

effects, which are allowed by the FDA. The court also held that a reasonable consumer would be able to tell that the label's reference to "healthy" refers to promoting bone health rather than representing that the product as a whole is healthy.

The next month, however, in *Marshall v. Danone US, Inc.*, 402 F. Supp. 3d 831 (N.D. Cal. 2019), the Northern District of California denied Danone's motion to dismiss a putative class action alleging that the "cholesterol-free" representation on its Silk Coconutmilk label misleads consumers into believing the milk has health benefits, which allegedly are belied by its saturated fat content of three or more grams per serving.

BA Sports—which was filed by some of the same plaintiffs' counsel that pursued similar allegations against Coca-Cola's vitamin-water product in *Ackerman v. Coca-Cola Co.*, No. 11-02215 (E.D.N.Y.) and *Ford v. Coca-Cola Co.*, No. 09-00395 (E.D.N.Y.)—is another reminder that, as consumers continue to express a desire for healthy foods and products, the plaintiffs' bar will continue to bring these type of lawsuits.