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LEGISLATION, REGULATIONS & STANDARDS

US, EU Near Agreement on Shellfish Trade

The U.S. Food and Drug Administration (FDA) has proposed to allow the import of raw bivalve molluscan shellfish—including clams, mussels, oysters and scallops—harvested in the Netherlands and Spain by officially acknowledging that the EU food-safety system provides "at least the same level of sanitary protection as the United States' system and is therefore equivalent." The United States and the European Commission have not yet reached equivalence findings on food labeling requirements, maximum levels for food additives, maximum pesticide residue limits, drug residue limits or limits on other contaminants.

"These critical determinations are a result of a multi-year, in-depth and cooperative review of shellfish safety systems in the U.S. and the EU, in which technical experts on both sides of the Atlantic have concluded that many of the safety controls in the EU and the U.S are equivalent," FDA Commissioner Scott Gottlieb said in a statement. "Both governments recommended these actions after reviewing existing food safety programs, safety measures for molluscan shellfish, and on-site audits to verify each other's systems."

Public comments on the proposed determination will be accepted through May 23, 2018.

U.K. Urges Food Industry to Reduce Calorie Content

A policy report announced by Public Health England (PHE) and the U.K. Department of Health and Social Care calls on the food industry to cut calorie content of certain foods—including pizza, ready-made meals, packaged sandwiches, meat products and savory snacks—by 20 percent before 2024. The report recommends reduction of calories through product reformulation, portion-size reduction and promotion of lower-calorie products.

According to PHE data released March 6, 2018, overweight children consume up to 500 excess calories per day, while overweight adults consume up to 300 excess daily calories. Along with a continuing program of salt and sugar reduction efforts, PHE also plans to launch a campaign to educate consumers on the calorie content of meals and snacks. According to the report, the U.K. National Health Service spends more than $8 million a year treating obesity-related conditions such as diabetes, heart disease and cancer, and the next step will be to engage with food retailers, manufacturers and restaurants to develop additional calorie-reduction guidelines.

LITIGATION

Court Expresses Doubt on FDA's "Good-Faith Efforts" to Define "Natural"

A New York federal court has issued a decision seemingly aiming to spur action from the U.S. Food and Drug Administration (FDA), which has purportedly exhibited "no discernible activity" to establish a definition of "natural." *In re Kind LLC "Healthy and All Natural" Litig.*, No. 15-2645 (S.D.N.Y., entered March 2, 2018). Kind LLC previously filed motions to dismiss or stay claims in multidistrict litigation alleging that its labeling was false and misleading. After allowing stays, the court has indicated that it

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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

might proceed with the case without waiting for input from FDA or the U.S. Department of Agriculture (USDA) on the definitions of "healthy" and "natural."

The court first found that the consumers' challenge to Kind's claim that its products are made without genetically modified organisms (GMOs) was not preempted by the National Bioengineered Food Disclosure Standard, holding that the relevant state consumer-protection statutes "do not impose a GMO standard or requirement. Those statutes only provide remedies for representations that are untrue or misleading . . . [the plaintiffs] simply want to ensure that Kind's labels are truthful."

Kind argued for a stay for the "non-GMO" claim because USDA's deadline to set GMO standards is July 2018. The court found "no doubt that a national GMO standard will be relevant to many of the underlying issues in this action. If the USDA successfully formulates that standard by July 2018, the parties may likely rely on it to strengthen their claims or defenses. Beyond that, however, a GMO standard will not conclusively shed light on whether a reasonable consumer would have been deceived by KIND's representation that its products were GMO free." The court stayed the "non-GMO" claims until August 15, 2018, to allow parties to review the scheduled July determinations.

The court then turned to the stay granted to the plaintiffs' "natural" labeling claims, noting that it originally stayed the claims in September 2016 because the "FDA rulemaking process should run its course." The court also noted that the public comment period on "natural" labeling ended in May 2016—but "[s]ince then, the FDA has gone quiet." The court then pointed to a July 2017 House Committee on Appropriations report on a bill that would, if passed, trigger a 60-day period in which FDA would be required to announce "the actions and timeframe" for defining "natural." Congress has not passed the bill, the court stated, and FDA might set a years-long timeframe, leaving "this case in judicial purgatory for an indefinite period of time."

After two years, the court found, "the pace of the FDA's process is still unclear. There is no indication whether the FDA is earnestly working toward a uniform 'natural' standard, or whether it has shelved that effort." The court indicated that it would continue the stay on the "natural" claims but "limit its duration through the

date on which the USDA is expected to define and promulgate the 'non-GMO' standard." Because the parties agree that the claims should not be litigated separately, the court found August 15, 2018, to be a "sensible benchmark from which it can reassess whether a stay over both claims is proper."

The court concluded its opinion by warning that the primary jurisdiction doctrine "relies on the timely and good-faith efforts of regulatory agencies in addressing issues within their domain . . . this Court cannot sit idly by on an illusory assurance that something is likely to happen."

University Sues Professor's Company for Fruit Cultivar Patent Infringement

Washington State University (WSU) has filed a lawsuit alleging Phytelligence Inc., a WSU horticulture professor's company, sold an apple cultivar to a third party, breaching a propagation contract and infringing the university's patent. *Wash. State Univ. v. Phytelligence Inc.,* No. 18-0361 (W.D. Wash., filed March 8, 2018). WSU allegedly agreed to allow Phytelligence, which aims to commercialize technology for soilless tissue cultures and ripening chemistries, to propagate the cultivar that produces the Cosmic Crisp apple, WA 38. The complaint alleges that although the contract forbade Phytelligence from transferring or selling the cultivar, the company has sold WA 38 trees to at least one grower. The complaint also asserts that after the cultivar was patented, WSU allowed a nonprofit association to grant licenses for propagation and sale of the trees; Phytelligence allegedly inquired about obtaining a licence but did not apply for one. In addition, Phytelligence previously filed a lawsuit against WSU claiming breach of the propagation contract on the grounds that it was unable to obtain a commercial license, and the university counterclaimed for breach of contract and trademark infringement.

Flavoring Manufacturer's Trade Secret Claim to Continue

An Illinois court has refused to dismiss Gold Medal Products Inc.'s lawsuit alleging that Bell Flavors and Fragrances Inc., with

the help of a former Gold Medal employee, misappropriated trade secrets. *Gold Medal Prods. Inc. v. Bell Flavors & Fragrances Inc.,* No. 17-4084 (N.D. Ill., entered March 2, 2018). Gold Medal alleged that its recipe and flavor profile for caramel Glaze Pop, a popcorn coating, are trade secrets, which the defendants allegedly misappropriated when the former employee helped Bell Flavors create a similar product for one of Gold Medal's competitors.

Denying Bell's motion to dismiss, the court declined to establish whether Gold Medal could prove it owned trade secrets because the record was insufficient to support an analysis. The court rejected Bell's argument that the recipe and flavor profile are not trade secrets because the ingredients are publicly listed and not patented by Gold Medal. Further, differences in the manufacturing processes of Gold Medal's and Bell's glazes do not preclude a misappropriation claim, the court noted.

Popcorner Bags Contain 54 Percent Slack Fill, Consumer Alleges

BFY Brands, Inc., maker of Our Little Rebellion snacks, faces a potential class action alleging that its one-ounce bags of popcorn contain up to 54 percent slack fill. *Reaves v. BFY Brands, Inc.*, No. 18-2065 (S.D.N.Y., filed March 7, 2018). The plaintiff alleges that he bought bags of Popcorners products—including Smokin' Jalapeño White Cheddar, Sweet Heat Chili and Sweetly Salted Caramel—but did not receive the amount he expected based on the size of the packages. Claiming violations of New York consumer-protection laws, deceptive and unfair trade practices, false advertising and fraud, the plaintiff seeks class certification, injunctive relief, damages, corrective advertising and attorney's fees.

Lawsuit Alleges Kombucha Drinks Falsely Advertise Probiotic Content

A consumer has filed a putative class action alleging that Brew Dr. Kombucha misleadingly advertises its products as containing "billions" of probiotic bacteria. *Bazer v. Brew Dr. Kombucha*, No. 2018-2943 (Ill. Chancery Ct., Cook Cty., filed March 5, 2018). The plaintiff asserts that he bought several bottles of kombucha in

different flavors because he heard about the benefits of the beverage and the probiotic bacteria it purportedly contains. According to the complaint, tests showed that the product contained about 50,000 bacterial colonies rather than the "billions" advertised on the bottle's label. Claiming violations of consumer-protection laws, breach of warranties and unjust enrichment, the plaintiff seeks class certification, disgorgement and attorney's fees.

Salt-and-Vinegar Lawsuit Survives Motion to Dismiss

A California court has denied a motion to dismiss a putative class action alleging the label of Frito-Lay North America Inc.'s Lay's salt-and-vinegar-flavored potato chips fails to specify whether the vinegar flavoring is natural or artificial. *Allred v. Frito-Lay N. Am., Inc.,* No. 17-1345 (S.D. Cal., entered March 7, 2018). The plaintiff couple filed similar lawsuits against Kellogg and Frito-Lay concurrently in July 2017, and Kellogg's motion to dismiss was denied in February 2018. The court held that the suit is not preempted by U.S. Food and Drug Administration regulations and found plausible the allegation that a reasonable consumer might be deceived by the Lay's labeling.

MEDIA COVERAGE

Critics Question Yelp's Health Inspection Alerts

An alert appearing on Yelp that discloses San Francisco health inspection scores may "improve the functioning of markets" and help consumers make "better decisions," but critics reportedly say the posted scores illustrate the failures of the city's food-safety inspection system. Two researchers, who authored "Digitizing Disclosures: The Case of Restaurant Hygiene Scores," previously helped Yelp design the alert boxes, which appear on pages for about five percent of San Francisco restaurants. According to the *San Francisco Chronicle*, the alert boxes reduced Yelp users' "intention to visit" by 21 percent, despite the intention of the

alerts to be a system of accountability rather than a warning of deterrence.

The Golden Gate Restaurant Association (GGRA) told the *Chronicle* that the scores are based on routine inspections conducted every six to 18 months. If restaurants earn a low inspection score, they have a week to correct the violations or face closure. “If you see [a low score], that was fixed in a week,” a spokesperson for the GGRA reportedly said. “You fix the violations, but live with the score until the next inspection.” A spokesperson for San Francisco Health Department confirmed to the *Chronicle* that “[i]f the restaurant is open, that means they’ve been inspected and should be safe to eat.”