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LEGISLATION, REGULATIONS & STANDARDS

California Passes Cage-Free Eggs Mandate

California residents voted to pass a measure that will require by 2022 that all eggs sold in the state come from cage-free hens. The measure also sets minimums on cage sizes for animals raised for pork and veal production, with calves requiring 43 square feet and pigs 24 square feet. The Legislative Analyst’s Office reportedly found that the law will result in price increases for eggs, pork and veal and will cost California as much as \$10 million per year to enforce.

FDA Seizes Food Held in Insanitary Conditions

The U.S. Food and Drug Administration (FDA) has announced the seizure of human and animal food products held by J and L Grocery LLC in insanitary conditions. A complaint filed in Arkansas federal court alleges that September and October 2018 FDA inspections “revealed insanitary conditions including multiple live and dead rodents, rodent nesting, live racoons, live cats, a dead possum, animal feces, and urine-stained products in

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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and around the company's seven warehouses and sheds used to store food, medical products and cosmetics."

"The widespread insanitary conditions found at J and L Grocery is alarming and won't be tolerated," a press release quoted FDA Commissioner Scott Gottlieb as saying. "At this time, we're unaware of adverse events associated with the use of products purchased at J and L Grocery. The work of our field force and the goals of our vigorous oversight efforts are to find these kinds of potential hazards and intervene before consumers are harmed. We're committed to that mission."

LITIGATION

Taste Cannot be Copyrighted, EU High Court Holds

The European Court of Justice's Grand Chamber has determined that taste cannot be copyrighted in a lawsuit alleging copyright infringement of a cheese spread. *Levola Hengelo BV v. Smilde Foods BV*, No. C-310/17 (E.C.J., entered November 13, 2018). The court considered whether "taste" amounts to a work under copyright law. "[F]irst, the authorities responsible for ensuring that the exclusive rights inherent in copyright are protected must be able to identify, clearly and precisely, the subject matter so protected," the court stated. "The same is true for individuals, in particular economic operators, who must be able to identify, clearly and precisely, what is the subject matter of protection which third parties, especially competitors, enjoy. Secondly, the need to ensure that there is no element of subjectivity -- given that it is detrimental to legal certainty -- in the process of identifying the protected subject matter means that the latter must be capable of being expressed in a precise and objective manner."

"The taste of a food product cannot, however, be pinned down with precision and objectivity. Unlike, for example, a literary, pictorial, cinematographic or musical work, which is a precise and objective form of expression, the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product

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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.

concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed. Moreover, it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind.” Accordingly, the court declined to classify “taste” as protected by copyright.

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.

D.C. Court Dismisses Olive Oil Complaint

A D.C. court has dismissed a lawsuit challenging Deoleo USA Inc.’s “extra virgin” olive oil, finding that the plaintiff failed to state a claim. *Fahey v. Deoleo USA Inc.*, No. 18-2047 (D.D.C., entered November 8, 2018). Deoleo settled a similar lawsuit in March 2018, and the plaintiff “apparently caught wind of this news,” the court noted. “Six days after the settlement was publicized, he purchased a bottle of Bertolli EVOO ... [and] filed suit some six weeks later.” The court did not consider whether the plaintiff was bound by the terms of the settlement because it first found that the plaintiff failed to plead facts that could give rise to a right of relief.

The plaintiff “marshals but one ‘fact’ to substantiate his claim that *this defendant* deceptively mislabeled the bottle of extra virgin olive [oil that the plaintiff] purchased in 2018: the results of a 2010 study on olive oil quality by the University of California, Davis,” the court found. “As it sees things, the Court would have to indulge at least three major—and dubious—assumptions to draw the inference [the plaintiff] asks for here: one methodological, one temporal, and one geographic. Start with the methodological assumption: is there good reason to think the methods used in the UC Davis study can support general conclusions about the quality of Bertolli olive oil? Not really,” the court stated, noting that the study’s sample size was small and none of the bottles tested came from the same lot, contrary to U.S. testing regulation protocol. Further, the study was conducted eight years before the plaintiff bought his bottle of olive oil, the court found, noting that the plaintiff “offers no explanation for why the testing done on three bottles of Bertolli EVOO eight years ago should tell us anything about the quality of the Bertolli EVOO on store shelves today.” Finally, the study was conducted in California, and the plaintiff



purchase his olive oil from a D.C. supermarket. “As Deoleo notes, the fact that three bottles ‘sitting on random store shelves in California’ didn’t pass a taste test does not plausibly suggest that the bottle [the plaintiff] purchased was similarly deficient, much less that every bottle sold in D.C. was as well.”

Holding that the plaintiff “has pled facts that suggest a plausible right to relief would require the Court to entertain not one, not two, but all three of these assumptions,” the court stated. “Unconvinced that any single one of them is warranted, the Court will grant Deoleo’s motion to dismiss.”

Plaintiff Challenges Malic Acid in Vivaloe Beverages

A consumer has filed a putative class action alleging that Vivaloe beverages are misleadingly marketed as naturally flavored because they contain malic acid. *Anderson v. Outernational Brands Inc.*, No. 18-2550 (S.D. Cal., filed November 6, 2018). The complaint asserts that malic acid is “an inexpensive synthetic chemical used in processed food products to make the products taste like tangy fresh fruits” that “is not naturally-occurring but is in fact manufactured in petrochemical plants from benzene or butane—components of gasoline and lighter fluid, respectively—through a series of chemical reactions, some of which involve highly toxic chemical precursors and byproducts.” The plaintiff admits that malic acid is generally recognized as safe for use as flavorings but argues that the d-malic form of malic acid “has never been extensively studied for its health effects in human beings.” The plaintiff alleges violations of California consumer-protection statutes and seeks class certification, damages, attorney’s fees and injunctions.

A [similar 2016 lawsuit](#) challenged the citric acid content in Vivaloe.

MEDIA COVERAGE

Advocacy Group Calls for a Ban on “Freakshakes”

According to the BBC, advocacy group Action on Sugar has called for restaurants to stop serving “freakshakes,” milkshakes with added “chocolates, sweets, cake, cream and sauce.” The group reportedly surveyed restaurants for nutritional information on their freakshakes and found that some contained as many as 1,280 calories, or “more than half the daily recommended amount of calories for an adult and over six times the amount of sugar recommended for seven to 10-year-olds.” The group called on the U.K. government to “introduce legislation to force companies to be more transparent about what is in their products.”

Russia “Resurrects the Soviet Super Chicken,” Bloomberg Reports

Russia has created a poultry-breeding program to reduce its dependence on meat imports, *Bloomberg reports*. The country has used Soviet technology—which created “a bigger and tastier version of *Gallus gallus domesticus*” that apparently nearly went extinct following the collapse of the government—to establish a program that aims to reduce foreign imports of food products. *Bloomberg* also notes that a “replacement program for potatoes” has been approved, while a program for sugar beets is in progress. “To our knowledge, no country has a large-scale poultry breeding program that competes with the major corporations,” *Bloomberg* quotes a scientist with the United Nation’s Food and Agriculture Organization as saying.

“They thought we wouldn’t be able to compete with them in a million years,” one of the scientists who worked on the Soviet project reportedly told the news outlet. “Now it’s a completely different situation. Friends are friends, but you know how it goes.”

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