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FIRM NEWS

Shook Attorneys Detail Class Certification Decision in Ocean Spray Case

Shook Partner [Frank Cruz-Alvarez](#) and Associate [Rachel Forman](#) have authored an [article](#) for *WLF Legal Pulse* examining a [California federal court's decision](#) to certify a class of consumers alleging they were misled by Ocean Spray Cranberries Inc.'s marketing claim that its products contain no artificial flavoring despite containing malic and fumaric acids. The decision has “thrown the doors open for class certification in food-labeling cases,” Cruz-Alvarez and Forman write.

“Although packaged-food businesses have responded to years of class-action lawsuits with labeling modifications that make their products less-inviting targets, decisions like *Hilsley* show that plaintiffs’ lawyers are equally creative and determined to keep the claims coming,” the authors conclude. “This is especially true for products labeled as ‘natural’ or free of artificial ingredients when those products arguably do contain synthetic ingredients, regardless of their purpose. That new angle might just be enough to survive something as rigorous as the class-certification analysis required under *Comcast*, as evidenced by this case.”

LEGISLATION, REGULATIONS & STANDARDS

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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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Some FDA Inspectors Called to Work During Shutdown

In a series of tweets, U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb announced that about 200 food investigators—of 550—for the agency’s Office of Human and Animal Food Operations have been working during the federal government’s partial shutdown, with additional staff possibly “on the way depending on needs.” Gottlieb further noted which food operations have continued during the shutdown: (i) “[h]igh-risk domestic food surveillance inspections”; (ii) “foodborne illness surveillance and outbreak investigations”; (iii) “[e]xecution of high-risk food recalls”; (iv) “[i]nspection of foreign food facilities”; and (v) “[s]ampling of imported food samples (including sampling for antibiotic residue contamination and decomposition analysis.” High-risk foods reportedly include seafood, dairy, fresh produce, spices, eggs, sandwiches and infant formula.

Nebraska Bill to Define “Meat” Withdrawn

A Nebraska state senator has withdrawn a proposed bill to define “meat” as an animal-derived product. Sen. Carol Blood submitted the bill to protect the state’s meat industry, according to the Washington Post. “All I’m asking for is truth in advertising. It’s clear that meat comes from livestock, and livestock is our livelihood in Nebraska,” Blood reportedly said. A motion to withdraw the bill was filed January 23, 2019, and Blood did not comment on the withdrawal.

CFS Files Petition to Ban Hydroponic Agriculture in Organic Food

The Center for Food Safety (CFS) has filed a petition recommending that the U.S. Department of Agriculture (USDA) prohibit the use of hydroponic agriculture in the cultivation of organic food. “Hydroponic production systems are fundamentally different from organic production systems as defined by federal law—they do not promote soil health or conserve biodiversity,” the

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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.

petition states. “Organic certification of hydroponics thus misleads consumers, because these products are indistinguishable from truly organically produced products with the same label.”

CFS argues that organic production by definition must include soil, citing the Organic Foods Production Act and noting that the statute and the National Organic Program’s final rule implementing it do not include the words “hydroponic” or “soilless.” The petition urges USDA to amend existing regulations to expressly prohibit hydroponic systems in organic production and revoke existing organic certifications issued to hydroponic operations.

Oregon Senators Urge FDA to Update CBD Regulations

Sens. Ron Wyden (D-Ore.) and Jeff Merkley (D-Ore.) have sent a [letter](#) to the U.S. Food and Drug Administration (FDA) requesting an update to federal regulations on cannabidiol (CBD) to “give U.S. producers more flexibility in the production, consumption, and sale of hemp products.”

Wyden and Merkley urge FDA to answer a series of clarifying questions, including “What lawful pathways are currently available for those who seek approval to introduce Cannabis sativa L. and its derivatives as a food, beverages or dietary supplement, including into interstate commerce?” and “Are there circumstances in which Cannabis sativa L. and its derivatives may be permitted as a food, beverages or dietary supplement by the agency?”

“Farmers in Oregon and nationwide are poised to make real economic gains for their communities once these regulations are updated,” a [press release](#) quotes Wyden and Merkley as saying. “We will be closely engaged in the ongoing implementation of our legislation, as it was Congress’ intent to ensure that both U.S producers and consumers have access to a full range of hemp-derived products, including hemp-derived cannabinoids.”

PIRG Releases Food Safety Report

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.



Public Interest Research Group (PIRG) has published a report on food safety in the United States. The report finds an increase in food recalls since 2013 but acknowledges that systemic advances in food-safety issue detection may partly account for that increase. The authors make a number of policy recommendations, including (i) requiring food-production plants to address the most common pathogens in their safety plans; (ii) establishing “clear enforcement consequences for recurring violations of food safety protections or plans”; (iii) declaring antibiotic-resistant strains of *Salmonella* as “an adulterant in meat and poultry”; (iv) improving food traceability; (v) granting the U.S. Department of Agriculture “mandatory recall authority for contaminated food”; and (vi) penalizing companies that “continue to sell products after a recall.”

Red Bull Ad Makes Unauthorized Focus Claims, ASA Rules

The U.K. Advertising Standards Authority (ASA) has ruled that Red Bull Co. made unauthorized health claims about purported benefits of its energy drink on mental focus and concentration. The company’s subway advertisement featured cartoon women in an office setting with the text “The Secret to Finishing Early.” The ad referenced a consumer initiative encouraging workers to leave the office early one September 2018 day.

“The ASA considered that while the ad’s tone was light-hearted, the scenario it presented of being overwhelmed or busy at work was one that would be familiar and relatable to consumers,” the agency’s assessment summary states. “While we understood that the ad was intended to be part of a marketing initiative aimed at encouraging consumers to improve their productivity and leave at 4 pm on a specific day, we considered that the penultimate line of the poem, ‘... to leap every hurdle a hectic day brings’ implied that Red Bull could help improve consumers’ mental focus, concentration and energy levels (and therefore increase productivity).” Because these health claims were not authorized by the EU Register, ASA concluded that the ad breached its code and directed Red Bull not to use the ad again in its current form.

LITIGATION

Graham Crackers with White Flour Mislead Consumers, Lawsuit Alleges

A consumer has filed a putative class action alleging Mondelez Global LLC misleads consumers by making its Honey Maid graham crackers primarily with white flour rather than graham flour. *Kennedy v. Mondelez Global LLC*, No. 19-0302 (E.D.N.Y., filed January 15, 2019). The complaint alleges that Honey Maid products are marketed as “graham crackers” while the ingredients panel lists “unbleached enriched flour” first and “graham flour” second. The plaintiff cites Dictionary.com to assert that consumers expect a “graham cracker” to be “a slightly sweet cracker made of whole wheat flour” and that any cracker made with more white than graham flour cannot be called a graham cracker. The plaintiff seeks class certification, injunctive relief, damages and attorney’s fees for an alleged violation of New York consumer-protection law, negligent misrepresentation, fraud, unjust enrichment and breach of warranties.

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