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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Senate Confirms FDA Commissioner

The U.S. Senate has voted to confirm Stephen Hahn as the commissioner of the U.S. Food and Drug Administration (FDA). Hahn, an expert in radiation oncology, reportedly promised to prioritize science, data and public health over political interests when directing the agency's policy.

NAD Declines RXBAR Label Challenge

The National Advertising Division (NAD) has found that Insurgent Brands LLC's RXBAR labels, which feature a brief list of ingredients on the front, communicate a substantiated claim about the main ingredients in the product and do not "convey misleading implied claims about weight and proportions of the protein bar inside." Kind Inc. challenged the labels, arguing that the labels—which primarily feature ingredients on a short, numbered list—do not imply that the list is in descending order by weight, as compared to the legally mandated ingredients list featured on the back of the packaging. NAD was unpersuaded by consumer perception surveys provided by Kind, finding "significant flaws" in the studies.

The board noted that the listed "3 Egg Whites" on the front label are present in the product in the form of dehydrated egg white powder, as "appropriate for a packaged, shelf-stable bar." The board also found that "the dried egg whites are not highly processed or altered in a significant manner such that they should not be called 'egg whites' to consumers and the [U.S. Food and Drug Administration] permits dried egg whites to be referred to as 'egg whites' on product ingredient lists."

Further, the board "also determined that the label does not reasonably convey that egg whites, nuts/legumes and dates are the only ingredients in an RXBAR. Each bar is also identified by a flavor which, for some bars, cannot logically come from the three core ingredients listed on the label."

New York to Ban Chlorpyrifos Through Regulations

New York Governor Andrew Cuomo has reportedly vetoed a bill that would have banned the use of chlorpyrifos by the end of 2021 but directed the state's Department of Environmental Conservation to issue a ban on the pesticide. His direction will result in an immediate ban on aerial uses of chlorpyrifos and phase out other uses by December 2020. An exception for spraying apple tree trunks will be permitted until July 2021.

"This bill bypasses the rigorous process available to challenge an approved product and substitute the legislature's judgment for the expertise of chemists, health experts and other subject matter experts in this field," Cuomo stated in his veto message. "While I do not agree that a pesticide should be banned by legislative decree, I agree that New York must lead the way by taking action to ensure the public that all regulatory options are taken to limit exposure to chlorpyrifos."

LITIGATION

Seventh Circuit Denies Appeal in Fannie May Slack Fill Case

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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.

The Seventh Circuit has declined to revive a putative class action alleging that Fannie May Confections Brands Inc. misleads consumers as to the amount of chocolates contained in its boxes. *Benson v. Fannie May Confections Brands Inc.*, No. 19-1032 (7th Cir., entered December 9, 2019). The court found that the plaintiffs suffered no "actual damage" as a result of Fannie May's allegedly misleading packaging. The plaintiffs "never said that the chocolates they received were worth less than the $9.99 they paid for them, or that they could have obtained a better price elsewhere," the court held. "That is fatal to their effort to show pecuniary loss. Moreover, their request for damages based on the percentage of nonfunctional slack-fill is quite vague. They do not explain how a percentage refund of the purchase price based on the percentage of nonfunctional slack-fill corresponds to their alleged harm. They thus failed to raise a plausible theory of actual damage, and so their allegations that Fannie May violated the [Illinois Consumer Fraud and Deceptive Business Practices Act] were properly dismissed on the pleadings."

Tofurky Granted Preliminary Injunction on Arkansas Meat-Labeling Law

An Arkansas federal court has granted Turtle Island Foods SPC, which does business as Tofurky Co., a preliminary injunction preventing the enforcement against it of an Arkansas law prohibiting the use of meat-related terms to describe plant-based products on food packaging. *Turtle Island Foods SPC v. Soman*, No. 19-0514 (E.D. Ark., C. Div., entered December 11, 2019). The court found that Tofurky "likely faces ruinous civil liability, enormous operational costs, or a cessation of in-state operations" if the statute is enforced against it. The court granted the preliminary injunction despite Arkansas' indication that it "does not intend to begin enforcement" until the constitutional challenge is resolved because "there is nothing in the record binding the State to that position" and "the State has made no assurances that it will not levy retroactive penalties for Tofurky's alleged violations of Act 501 between the law's passage and this litigation's conclusion."

Wendy's Avoids Drive-Through Discrimination Suit

An Illinois federal court has dismissed a lawsuit alleging Wendy's International discriminates against disabled customers who cannot independently access 24-hour Wendy's locations during night hours when the stores only accept drive-through orders. *Davis v. Wendy's Int'l LLC*, No. 19-4003 (N.D. Ill., E. Div., entered December 12, 2019). The court held that the Wendy's policy applied to all pedestrians regardless of their disabled status. "[A]s with any other non-drivers, [the plaintiff] could access the drive-through if she were a passenger in a car sharing service, a taxi, or a friend's car," the court noted. "Therefore, the fact that [the plaintiff] cannot drive because of her visual impairment does not establish that Wendy's drive-through policies are the but-for cause for her inability to obtain food. [] Instead, it is her status as a pedestrian that is the but-for cause of her injury." The court dismissed the plaintiff's claim with prejudice.

Attorney Lacks Standing to Challenge Trade Dress "Demeaning to Goats"

The U.S. Court of Appeals for the Federal Circuit has dismissed a challenge to trade dress protection granted to Al Johnson's Swedish Restaurant & Butik Inc., a Wisconsin restaurant that features grazing goats on its rooftop, brought by an attorney who found the trade dress "demeaning to goats." *Bank v. Al Johnson's Swedish Restaurant & Butik Inc.*, No. 19-1880 (Fed. Cir., entered December 9, 2019). The attorney argued that the trade dress of the restaurant, which includes a rooftop covered in grass and several goats grazing on it, is "offensive" and "denigrates the value he places on the respect, dignity, and worth of animals." The Trademark Trial and Appeal Board found this argument insufficient to establish standing; the Federal Circuit agreed and dismissed the appeal.

SCIENTIFIC / TECHNICAL ITEMS

Researchers Argue for Labeling Featuring Calorie-Equivalent Exercise

U.K. researchers have published a meta-analysis in *The BMJ* asserting that physical activity calorie equivalent (PACE) labeling on food packaging "may reduce the number calories selected from menus and decrease the number of calories/grams of food consumed by the public, compared with other types of food labelling/no labelling." Daley et al., "Effects of physical activity calorie equivalent food labelling to reduce food selection and consumption: systematic review and meta-analysis of randomised controlled studies," *The BMJ*, December 10, 2019. The researchers identified 15 studies on PACE labeling and reportedly found that the technique may have caused the study participants to choose meals that contained 65 fewer calories on average compared to participants not exposed to PACE labels.

"Most people eat three meals per day (plus two snacks); based on our findings for the number of calories consumed after exposure to PACE labelling (−65 calories), PACE labelling could potentially reduce calorie intake by up to 195 calories per day (−65×3 meals per day=~195 calories), although across repeated meals/snacks and over time this effect is likely to be reduced," the researchers argue. "PACE labelling is a simple strategy that could be easily included on food/beverage packaging by manufacturers, on shelving price labels in supermarkets and/or on menus in restaurants/fast-food outlets. When a consumer sees a visual symbol that denotes it will take 4 hours to walk off a pizza and only 15 min to burn off a salad, this in theory should create an awareness of the 'energy cost' of food/drink."