



FIRM NEWS

Shook Attorneys Selected as JD Supra Readers Choice in Food and Beverage

Shook Partners [Mark Anstoetter](#), [Katie Gates Calderon](#), [Lindsey Heinz](#) and [Jim Muehlberger](#) have been selected as the top authors in [JD Supra's 2022 Readers Choice Awards](#) on the subject of food and beverage law. The four authors of the *Food and Beverage Litigation and Regulatory Update* tied for first place out of a pool of 1,100 authors. We thank the readers for this honor, and we look forward to bringing you more news on food and beverage law and regulation in the year to come!

[Learn more about the Readers Choice Award >>](#)

LEGISLATION, REGULATIONS & STANDARDS

FDA Issues Guidance on FSMA Enforcement

The U.S. Food and Drug Administration (FDA) has issued [guidance](#) indicating that it will not enforce particular provisions implementing the Food Safety Modernization Act (FSMA). “In certain situations the FDA has determined it is appropriate to take time to consider options, including rulemaking, to address concerns raised by stakeholders, while continuing to protect public health,” the [constituent update](#) states. “As we work on solutions, the agency does not intend to enforce these provisions as they currently apply to entities or activities addressed in the guidance.” Affected rules include:

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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.

For additional information about Shook's capabilities, please contact



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- Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food;
- Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Animal Food;
- Foreign Supplier Verification Program;
- Produce Safety; and
- Intentional Adulteration.

OEHHA, FDA Issue Updates on PFAS

Regulations governing the use of per- and polyfluoroalkyl substances (PFAS) continue to evolve. In California, the Office of Environmental Health Hazard Assessment (OEHHA) announced the addition of perfluorooctanoic acid (PFOA), one type of PFAS, to the list of chemicals established under the state’s Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65).

The U.S. Food and Drug Administration (FDA) issued a constituent update about the results of tests for PFAS in food. The study purportedly found that 89 of 92 food samples “had no detectable levels of PFAS”; the three that contained the substance were seafood—tilapia, cod and shrimp. “To date, there have been 10 samples with detectable PFAS out of 532 [Total Diet Study (TDS)] samples the FDA has tested since 2019,” the update notes. “Based on the best available current science, the FDA has no scientific evidence that the levels of PFAS found in the TDS samples tested to date indicate a need to avoid any particular food.”

EFSA Completes Added Sugars Assessment

The European Food Safety Authority (EFSA) has completed a “comprehensive safety assessment of sugars in the diet and their potential links to health problems.” The assessment aimed to set a tolerable upper intake level for dietary sugars, but the panel was unable to reach a conclusion. According to the assessment’s plain language summary, “the risk of adverse health effects (responses) increased across the whole range of observed intake levels (doses) in a constant (linear) manner, i.e. the higher the intake, the greater the risk of adverse effects.” The announcement indicated that the wide-ranging assessment may allow researchers to set a tolerable upper intake level following future studies.

One panelists reportedly stated, “We screened over 30,000 publications so we have identified several areas to target for researchers and technicians. The pooling and reuse of individual human data from research studies would be a valuable source of



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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

information. Research should focus both on the health effects of dietary sugars and on the impact of clinical and community interventions designed to reduce sugar intakes. Finally, we need validated methods for assessing intakes and the standardisation of reporting guidelines and definitions for dietary sugars and their sources.”

Genome-Edited Beef Low Risk, FDA Announces

The U.S. Food and Drug Administration has announced that it has “made a low-risk determination for the marketing of products, including food, from two genome-edited beef cattle and their offspring.” The agency determined that the product does not raise any safety concerns and that the product developer is not expected to pursue FDA approval before marketing the product, which is produced from cattle with an intentional genomic alteration (IGA) ensuring a short-hair coat. “To date, the FDA has made low-risk determinations for enforcement discretion for many other IGAs in animals for non-food uses and also has approved applications for five IGAs: in groups of goat, chicken, salmon, rabbit and, most recently, in a line of pigs,” the announcement notes.

“Today’s decision underscores our commitment to using a risk and science-based, data-driven process that focuses on safety to the animals containing intentional genomic alterations and safety to the people who eat the food produced by these animals,” the director of the FDA’s Center for Veterinary Medicine is quoted as saying. “It also demonstrates our ability to identify low-risk IGAs that don’t raise concerns about safety, when used for food production. We expect that our decision will encourage other developers to bring animal biotechnology products forward for the FDA’s risk determination in this rapidly developing field, paving the way for animals containing low-risk IGAs to more efficiently reach the marketplace.”

DeLauro Calls for Investigation into FDA Response to Infant Formula Concerns

U.S. Representative Rosa DeLauro (D-Conn.) has written a letter to the Office of the Inspector General seeking “assistance in investigating whether the Food and Drug Administration (FDA) took prompt, appropriate, and effective action leading up to the recent recall involving powdered infant formula produced by Abbott Nutrition’s Sturgis, Michigan plant.” DeLauro indicates she is “concerned the agency acted too slowly in pulling

inspections, subject to FDA, USDA and FTC regulation.



potentially dangerous infant formula off store shelves, which may have resulted in additional illnesses and death.”

The letter notes that FDA alerted the public to a potential link between formula produced at the Sturgis location and *Cronobacter sakazakii* four months after the agency learned of the possible link. “The delay between the September inspection and the recall raises serious questions about the FDA’s ability to adequately regulate the infant formula industry,” the letter asserts. “It seems evident that the FDA could have acted sooner to prevent additional illnesses and deaths after the initial inspection.”

LITIGATION

Court Dismisses Lawsuit Challenging Fruit Content of Strawberry Pop-Tarts

An Illinois federal court has dismissed a complaint alleging that Kellogg Sales Co. misleads consumers by including more ingredients than just strawberries in the filling of its Strawberry Pop-Tarts. *Chiappetta v. Kellogg Sales Co.*, No. 21-3545 (N.D. Ill., E. Div., entered March 1, 2022). The plaintiff alleged that “the Product packaging misled her and other consumers into believing that the Product’s fruit filling contained ‘only strawberries and/or more strawberries than it does’ because it bears the word ‘Strawberry,’ and it depicts half of a fresh strawberry and red fruit filling. [] In reality, though, the Product’s fruit filling contains more than just strawberries; it also contains dried pears, dried apples, and a food dye known as ‘red 40,’ among other ingredients.”

The court was unpersuaded by the plaintiff’s arguments. “The essence of [the plaintiff’s Illinois Consumer Fraud and Deceptive Business Practices Act] claim is that the word ‘Strawberry,’ combined with a picture of half of a strawberry and a Pop-Tart oozing red filling, misleads consumers into believing that the Product’s filling consists of ‘only strawberries and/or more strawberries than it does’ have. [] However, no reasonable consumer could conclude that the filling contains a certain amount of strawberries based on the package’s images and its use of the term ‘Strawberry,’” the court found. “The front of the Product packaging does not state or suggest anything about the amount of strawberries in the Product’s filling or guarantee that the filling contains only strawberries, and [the plaintiff] concedes that the filling contains some strawberries. [] Accordingly, [the

plaintiff's] interpretation of the label is unreasonable and unactionable.”

The court found that the plaintiff's claims for breach of warranties failed for the same reason; “Kellogg never made the representation that [the plaintiff] claims it made.” Further, because of the failure of the state law warranties claims, the plaintiff's Magnuson-Moss Warranty Act claim failed as well. Accordingly, the court granted Kellogg's motion to dismiss the complaint but granted the plaintiff three weeks to amend the complaint “if she can do so in accordance with this Opinion and Federal Rule of Civil Procedure 11.”

Plaintiff Alleges Color of Brown Bread Implies Healthfulness

A plaintiff has filed a putative class action alleging Bimbo Bakehouse LLC misleads consumers by selling The Cheesecake Factory “Our Famous ‘Brown Bread’ Wheat Sandwich Loaf” as a bread made with primarily whole grains despite containing higher amounts of enriched wheat flour. *Hamidani v. Bimbo Bakehouse LLC*, No. 22-1026 (N.D. Ill., E. Div., filed February 26, 2022).

“Consumers increasingly prefer whole grains to non-whole grains,” the complaint asserts. In addition to “important nutrients like fiber, vitamins, minerals, and antioxidants,” the “bran also gives whole grains their distinctive brown coloring.”

“Despite the labeling of the Product as ‘Brown Bread,’ with a dark brown color, and visible pieces of grain, the Product is not made with mainly whole grains,” the plaintiff argues. “The ingredient list reveals that the most predominant ingredient is not whole grain flour but ‘ENRICHED WHEAT FLOUR.’ [] While ‘WHOLE WHEAT FLOUR’ is the third most predominant ingredient, this is less than the second most predominant ingredient of ‘WATER.’” The complaint further asserts that the addition of dried molasses and caramel color “cause the bread to be significantly darker than it would be if the color was based solely on the ratio of refined grains to whole grains.”

“The Product's name of ‘Brown Bread’ takes advantage of consumer assumptions and beliefs about the darker color of whole grain products. [] That the name is presented in quotes does not tell consumers the Product is not really brown bread.” The plaintiff alleges fraud, misrepresentation, unjust enrichment, breach of contract and breach of express and implied warranties.

Kroger Targeted in Prop. 65 Lawsuit

The Ecological Alliance has reportedly filed a lawsuit in California state court alleging The Kroger Co. failed to warn consumers about the presence of lead in several of its foods. *Ecological Alliance LLC v. Kroger Co.* (Cal. Super. Ct., Los Angeles Cty., no. and filing date unavailable). The complaint alleges that Kroger sells fifteen products that contain lead, including graham crackers, salad kits, bagels and spaghetti. The plaintiff advocacy organization purports to have tested the products and found levels of lead up to 140 times the limit set by California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). Ecological Alliance, which seeks injunctions preventing Kroger from selling lead-contaminated products without a Prop. 65 warning, alleges that it sent violation letters to Kroger and the California attorney general in the summer and fall of 2021, but the government agencies failed to take action against the company.

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