



FIRM NEWS

Shook Senior Counsel Talks FDA on NOSH Podcast

NOSH has interviewed Shook Senior Counsel John Johnson for [an episode of its podcast](#). The episode discusses the implications of the December 2022 Reagan-Udall Foundation report that explored the inner workings of the U.S. Food and Drug Administration.

“What the report highlighted to me were those perpetual problems of ‘how do you align a national organization to ensure that the right resources are being put in the right place and there are clear leadership structures?’” Johnson says. “I think it’s an important report and criticism, but if someone said, ‘Wow, I’ve never seen this before,’ I think they’re taking too narrow of a look at the Food and Drug Administration.”

[Listen now >>](#)

The interview begins at about 13:00.

LEGISLATION, REGULATIONS & STANDARDS

USDA Issues Updated Organic Rules

The U.S. Department of Agriculture (USDA) has released a [final rule](#) amending organic regulations “to strengthen oversight and enforcement of the production, handling, and sale of organic agricultural products.” According to the announcement, the updates are intended to “close gaps in the current regulations to

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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



[M. Katie Gates Calderon](#)

816.559.2419

kgcalderon@shb.com

build consistent certification practices to deter and detect organic fraud, and improve transparency and product traceability” as well as “assure consumers that organic products meet a robust, consistent standard and reinforce the value of the organic label.” The updated regulations, which take effect March 23, 2023, will expand the use of National Organic Program import certificates and “reduce the types of uncertified entities in the organic supply chain that operate without USDA oversight.”

FDA Allows for More Vitamin D in Cereals, Grain-Based Bars

The U.S. Food and Drug Administration (FDA) is amending its food additive regulations to allow food manufacturers to increase the amount of vitamin D in breakfast cereals and grain-based bars.

FDA is allowing the addition of up to 560 international units (IU) of vitamin D per 100 grams of cereal and up to 400 IU per 100 grams in grain-based bars, a category that includes breakfast bars, granola bars and rice-cereal bars. The move comes in response to a 2019 petition from the Kellogg Company.

The final rule took effect January 5, 2023.

LITIGATION

Japanese Store Failed to List Allergens in English, Consumer Alleges

A woman whose allergic reaction to a cookie she had purchased from a Japanese convenience store in California triggered a worldwide recall of the product has filed a proposed class action against the store for failing to warn in English that its imported products contain allergens. *Fukaya v. Daiso California LLC*, No. 23-00099 (N.D. Cal., filed January 9, 2023).

The plaintiff alleged that Daiso California LLC and Daiso Holding USA Inc. sold packaged food products in its stores and online that listed allergens in Japanese but not in English.

She alleged in the complaint that the company issued a worldwide recall of its Tiramisu Twist Cookie in October 2022, the day after she alerted the defendants to her experiencing a “violent allergic reaction” to consuming the product, which failed to identify any tree nuts on its English-language packaging.



Lindsey Heinz

816.559.2681

lheinze@shb.com



James P. Muehlberger

816.559.2372

jmuehlberger@shb.com

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.



“The concern here is that whatever process is being used to translate the original Japanese ingredient label to the English language sticker label placed on the original packaging is woefully inadequate and is endangering the lives of consumers based on these mislabeled ingredient lists,” she said in her complaint. “Defendants have been placed on notice that their English translated food labels on packaged goods are inadequate, with the risk of endangering lives, yet have failed to systemically review the process of how these labels are translated.”



The plaintiff is alleging violations of California’s Consumers Legal Remedies Act, False Advertising Law, Unfair Competition Law and breach of express warranty. She is seeking class certification, damages, declaratory and injunctive relief, disgorgement, expenses and costs including attorneys’ fees, pre- and post-judgment interest and recall of the products at issue.

Lawsuits Follow *Consumer Reports* Article on Heavy Metals in Chocolate

Several companies—including Godiva Chocolatier Inc., Lindt & Sprüngli and Trader Joe’s Co.—have been targeted with consumer class action complaints following the December 2022 publication of a study conducted by *Consumer Reports* purporting to find that the dark chocolate products of several brands contained detectable levels of cadmium and lead. *Herd v. Trader Joe’s Co.*, No. 23-0065 (S.D.N.Y., filed January 4, 2023); *Ferrante v. Trader Joe’s Co.*, No. 23-0046 (E.D.N.Y., filed January 4, 2023); *Harkavy v. Godiva Chocolatier Inc.*, No. 23-0120 (N.D. Cal., filed January 10); *Harkavy v. Lindt & Sprüngli (N. Am.), Inc.*, No. 23-0121 (N.D. Cal., filed January 10).

The complaints assert that the dark chocolate products contain levels of lead and cadmium that exceed allowable limits set by California and New York. The plaintiffs cite *Consumer Reports*’ article as evidence, and several complaints noted a quotation from the article asserting that “eating just an ounce a day would put an adult over a level that public health authorities and [Consumer Reports]’ experts say may be harmful.”

Mini Fireball Bottles Mislead on Whisky Content, Consumer Alleges

An Illinois woman has filed a proposed class action against the maker of Fireball Cinnamon Whisky, alleging the company misleads consumers into believing its miniature-sized bottles labeled "Fireball Cinnamon" contain whisky when they instead

contain a malt beverage with whisky flavoring. *Marquez v. Sazerac Co.*, No. 23-00097 (N.D. Ill., filed January 7, 2023).

The plaintiff alleged in her suit that while the small bottles look nearly identical to larger bottles, the smaller bottles do not have the word “whisky” on the label, and the smaller bottles contain a malt beverage, not whisky, which is a distilled spirit. She also took issue with how the labeling identifies the product’s flavoring using the words “With Natural Whisky & Other Flavors.”

“What the label means to say is that the Product contains ‘Natural Whisky Flavors & Other Flavors,’ but by not including the word ‘Flavors’ after ‘Natural Whisky,’ purchasers who look closely will expect the distilled spirit of whisky was added as a separate ingredient,” she said. “However, even where a distilled spirit is used to manufacture flavors, it loses its class and type when blended with other ingredients. When viewed together with the Fireball distilled spirit brand name, the label misleads consumers into believing it is or contains distilled spirits.”

Among the plaintiff’s allegations are that Sazerac Co. violated the Illinois Consumer Fraud and Deceptive Practices Act and other state consumer fraud acts, breached implied and express warranties and engaged in fraud and negligent misrepresentation. She seeks class certification, injunctive relief, damages, and costs and expenses including reasonable attorney’s fees.

Rapper’s Contract Dispute Results In \$83M Verdict Against Energy Drink Company

A Florida jury has awarded rapper and singer Flo Rida nearly \$83 million in damages in his lawsuit against energy drink maker Celsius Holdings Inc. alleging a breach of contract. *Strong Arm Productions USA Inc. v. Celsius Holdings Inc.*, No. CACE21008997 (Fla. 17th Jud. Cir., entered January 18, 2023)

Flo Rida, whose legal name is Tramar Dillard, and his production company Strong Arm Productions sued the company in Florida state court in 2021, alleging Celsius breached a contract and failed to provide promised royalties and company stock after his endorsements helped the company reach its sales goals.

Dillard served as a brand ambassador for Celsius from 2014 to 2018. He asserted in the suit that he was instrumental in the company’s growth, including the company’s addition of new products to its lineup.

Law360 reported that the 750,000 bonus shares Dillard alleged he was owed from a 2014 contract were valued at approximately \$83 million (more than \$110 per share), and additional damages from a 2016 contract amounted to nearly \$5,500.

The company disputed that Dillard's endorsements were instrumental in its success, arguing instead that it had signed critical distribution deals that helped the company's stock increase in value.

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