ISSUE 805 | July 28, 2023

LEGISLATION, REGULATIONS & STANDARDS

FDA Issues Update on Sesame Allergen Labeling

The U.S. Food and Drug Administration (FDA) has released an FDA Voices "Catching Up with Califf" update that addresses the practice of manufacturers adding sesame to foods to avoid taking proactive steps to ensure the lack of sesame in the production process.

"When sesame is present as an ingredient, we are seeing manufacturers meeting compliance by adding the appropriate declaration to their labels so that consumers can make more informed choices. These steps are having a real impact on public health by helping to make these products safe for consumers with sesame allergies," the update states. "At the same time, we have become aware of a practice with an outcome we do not support. Some manufacturers are intentionally adding sesame to products that previously did not contain sesame and are labeling the products to indicate its presence. This keeps manufacturers in compliance with our law for disclosing the presence of a major food allergen, but limits options for consumers who are allergic to sesame."

The update suggested the agency may take action on the practice in the future. "We also recognize there are some challenges with ensuring products are free of allergens, and we are meeting with both industry and consumer advocates to gain additional information and to hear the diversity of perspectives on this issue. The agency is interested in finding solutions, within our authorities, that meet the needs of consumers with food allergies, while also taking into account the practical limitations industry

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may be facing in implementing effective cross-contact controls and allergen labeling."

LITIGATION

Consumers Claim Fruit Juice Smoothies Contain PFAS

A California woman and an Illinois man have filed a proposed class action against beverage manufacturer Wm. Bolthouse Farms alleging that the company's fruit juice smoothies, marketed as nutritious and healthy, contain so-called "forever" chemicals. *Tate v. Wm. Bolthouse Farms, Inc.*, No. 23-01038 (E.D. Cal., filed July 12, 2023). The products at issue are Bolthouse Farms' Green Goodness, Amazing Mango, Blue Goddess, C-Boost Fruit Juice Smoothies and Berry Superfood Boost, which the plaintiffs allege are prominently labeled and marketed as nutritious, healthy "100% Fruit Juice Smoothie[s]."

"However, despite Defendant's consistent and pervasive marketing representations to consumers that their Products are a healthy '100% Fruit Juice Smoothie' that is free from any artificial ingredients, Plaintiffs' independent testing has determined that the Product actually contains [per- and polyfluoralkyl substances (PFAS)]—a category of man-made chemicals with a toxic, persistent, and bioaccumulative nature which are associated with numerous health concerns," the plaintiffs said in their complaint. "The presence of PFAS is entirely inconsistent with Defendant's uniform representations."

The plaintiffs' claims include violations of the Magnuson-Moss Warranty Act; California Consumer Legal Remedies Act, California Unfair Competition Law and California False Advertising Law; and the Illinois Consumer Fraud and Deceptive Business Practices Act. They're seeking class certification, restitution, damages, attorney's fees, civil penalties and prejudgment interest.

Grillo's Alleges Pickle Co-Packer Misappropriated Trade Secrets

Grillo's Pickles Inc. has filed a lawsuit alleging its co-packer Patriot Pickle Inc. misappropriated its proprietary processes and recipes to produce a new line of pickles under the Whole Foods 365 label. *Grillo's Pickles Inc. v. Patriot Pickle Inc.*, No. 23-22387 (S.D. Fla., filed June 27, 2023).

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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 inspections, subject to FDA, USDA and FTC regulation.

Grillo's alleges Patriot violated agreements with Grillo's that it would not disclose confidential information about Grillo's products. Grillo's asserts in its complaint that Patriot's new pickles are offered directly next to Grillo's pickles at Whole Foods, one of Grillo's biggest retailers. Grillo's alleges the two products list identical ingredients and nearly identical nutrition facts, but the Whole Foods brand is 30% cheaper.

"Although Whole Foods 365 has sold pickles for many years, before 2023, Whole Foods 365 pickles were co-packed by Hermann Pickles," the company alleges. "When Whole Foods 365 used Hermann Pickles as its co-packer, the formula and the packaging for the aforementioned pickles was entirely different. It was not until it began using Patriot as a co-packer that Whole Foods 365 pickles' formula and packaging became virtually identical to Grillo's pickles."

Grillo's is alleging misappropriation of trade secrets under federal and Florida state law and breach of contract. It seeks declaratory judgment, general and special damages, prejudgment interest, punitive damages, fees and costs including attorney's fees, and injunctive relief, as well as an order requiring Patriot to return all material containing its trade secrets and destroy all notes and copies of confidential information.

Earlier in 2023, Grillo's filed suit against Patriot and Wahlburgers, alleging they mislead consumers and retailers by labeling and marketing Wahlburgers pickles as "fresh," "all natural" and containing "no preservatives" when Wahlburgers pickles contain an artificial chemical preservative.

Tomato Cannery Misleads on 'No Preservative' Claims, Consumer Alleges

A California man has filed a proposed class action against Pacific Coast Producers, the largest tomato cannery in the United States, alleging the company misleads consumers about its products' "no preservatives" claims. *Onn v. Pacific Coast Producers*, No. 23-03524 (N.D. Cal., filed July 14, 2023). The plaintiff alleged that Pacific Coast clearly lists "No Preservatives" on its products' labels but includes citric acid, which can function as a food preservative, in the products.

"Citric acid functions as a preservative in the Products, and this is true regardless of Defendant's subjective purpose or intent for adding it to the Products, such as to impart flavor," the plaintiff said in his complaint. "Even if the Products' citric acids do not, in fact, function as a preservative in the Products, they nonetheless

qualify as preservatives given that they have the capacity or tendency to do so."

The plaintiff is alleging violations of California's Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act; breach of express warranty; and unjust enrichment. He seeks class certification, declaratory judgment, damages, prejudgment interest, restitution, fees and costs, and injunctive relief.

Kraft Beats Velveeta Cook Time Lawsuit

A federal court in Florida has tossed a proposed class action alleging The Kraft Heinz Foods Co. misleads consumers on the cook time of its single-serve Velveeta mac and cheese product. *Ramirez v. Kraft Heinz Foods Co.*, No. 22-23782 (S.D. Fla., entered July 27, 2023). The plaintiff alleged she bought Kraft's Velveeta microwavable single-serve cups of mac and cheese marketed as being ready in 3 1/2 minutes. She alleged that statement is false and misleading because it takes longer to prepare the product for consumption.

Kraft sought dismissal of the complaint, arguing in part that the plaintiff lacks standing because she did not suffer an injury. The company argued that the plaintiff has not plausibly alleged she did not receive the benefit of her bargain and that she continued to purchase the product after becoming aware of the cook time. The plaintiff responded that she sufficiently alleged that she paid a premium price due to the misrepresentation and that price premium allegations are sufficient to establish standing.

The court sided with Kraft Heinz, finding that the plaintiff does not allege that she was unable to consume the product or that it was otherwise so flawed as to be rendered useless.

"In fact, the Complaint does not even include an allegation that Plaintiff ever attempted to cook the product. Similarly, Plaintiff's Complaint contains no factual allegations of the price she might have paid if Defendant's product was not marketed as ready in three and a half minutes," the court said. "Therefore, Plaintiff has failed to demonstrate an injury and lacks standing for her [Florida Deceptive and Unfair Trade Practices Act] and tag-along claims." The court similarly found the plaintiff lacked standing for injunctive relief, dismissing the complaint without prejudice and leave to amend.

Taco Bell, Taco John's Agree to 'Taco Tuesday' Trademark Truce

A trademark dispute between Taco Bell and Taco John's over the trademark for "Taco Tuesday" has come to an end, according to news reports. In May, Taco Bell petitioned the U.S. Patent and Trademark Office to cancel two companies' trademark registrations for "Taco Tuesday," including Taco John's. In a pair of petitions to the Trademark Trial and Appeal Board (TTAB), Taco Bell IP Holder LLC said that it believes "Taco Tuesday" "should be freely available to all who make, sell, eat, and celebrate tacos." The company asserted that "Taco Tuesday" is a common phrase, used ubiquitously by restaurants across the country.

Taco John's recently announced it would abandon its registration for the term. *CBS News* reported that in a statement, Taco John's CEO Jim Creel said that paying to defend the trademark didn't "feel like the right thing to do."

"As we've said before, we're lovers, not fighters, at Taco John's," Creel said.

Taco Bell's challenge of the other registration—to the Gregory Hotel in New Jersey—remains in effect.

Subway Tuna Case Dismissed

A lawsuit alleging Subway Restaurants Inc. sells tuna products that contain other fish species, pork or chicken has reportedly been dismissed. *Amin v. Subway Restaurants Inc.*, No. 21-0498 (N.D. Cal., entered July 27, 2023). The company reportedly came to an agreement with the plaintiff to dismiss the case with prejudice. Subway is pursuing sanctions against the plaintiff's attorneys for allegedly bringing a frivolous action.

"Subway serves 100% real, wild-caught tuna," the company said in a statement. "The lawsuit and the plaintiff's meritless claims, which have always lacked any supporting evidence, resulted in the spread of harmful misinformation and caused damage to Subway franchisees and the brand. We are pleased with the Court's decision to dismiss the case."

Whole Foods Antibiotics Lawsuit Trimmed

A California court has dismissed the claims of two of three plaintiffs in a lawsuit alleging Whole Foods Market Services Inc. sold beef products with traces of antibiotics despite marketing the products as containing "No Antibiotics, Ever." *Safari v. Whole Foods Mkt. Svcs. Inc.*, No. 22-1562 (C.D. Cal., entered July 24, 2023).

The court dismissed claims brought by one plaintiff, an individual who alleged she purchased beef from a store in Tustin, California. The product that the plaintiff purchased was not tested by a laboratory for antibiotic residue, and the products that the group of plaintiffs did have tested were purchased from different Whole Foods stores across the country rather than the store in Tustin. Testing for only some of the samples showed antibiotic and pharmaceutical residues, the court noted, and the plaintiff could not allege that she purchased beef from a store that sold products with antibiotic residues. "For [the plaintiff] to claim an injury based solely on Whole Foods' sale of antibiotic-tainted beef to other customers at other stores would be akin to seeking the general enforcement of California's consumer remedies and 'compliance with regulatory law (and, of course, to obtain some money via the statutory damages),'" the court held. "Such a claim is too close to what courts deem a 'generalized grievance,' where a plaintiff asserts a claim without any specific harm to herself."

The court also dismissed claims brought by plaintiff Farm Forward, which alleged injury on the basis of reputational harm and diversion of resources. The court was unpersuaded that the organization had standing on either basis. "Multiple problems arise from Farm Forward's conclusory allegation of reputational harm," it noted. "First, Farm Forward does not identify what injuries would result from the alleged reputational harm. Would Farm Forward receive fewer donations? Would farmers and ranchers no longer coordinate with Farm Forward to end factory farming? The Amended Complaint is silent on the actual injuries. Second, while it is possible that Farm Forward's reputation would have been harmed if it was exposed as unwittingly promoting antibiotics-laden beef, here Farm Forward claims to have ***exposed*** Whole Foods through Farm Forward's own investigations and public awareness campaign. If anything, those actions would logically enhance Farm Forward's reputation with its supporters and the public." The court also found that because Farm Forward's testing program "was a continuation of its existing mission to end factory farming, it fails to meet the Ninth Circuit's requirement for organizational standing."

The court held that a third plaintiff, an individual, was able to assert standing because he purchased beef from some of the stores from which the samples tested showed antibiotic residues. The claims brought by the first plaintiff and Farm Forward were dismissed with leave to amend.

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