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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

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FDA Revokes Rule Allowing Brominated Vegetable Oil in Foods

The U.S. Food and Drug Administration (FDA) has revoked its regulation authorizing the use of brominated vegetable oil as a food ingredient used to stabilize flavoring oils in fruit-flavored beverages after concluding it is no longer considered safe. In an [announcement](#), the agency said it came to that conclusion after studies conducted in collaboration with the National Institutes of Health showed the potential for adverse health effects in humans. The final rule takes effect August 2, 2024.

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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USDA Announces Codex Meetings

The U.S. Department of Agriculture (USDA) has announced two public meetings to discuss U.S. positions for Codex Alimentarius Commission sessions. On August 21, 2024, the U.S. Codex Office will host a [public meeting](#) to discuss positions for the Codex Committee on Food Import and Export Inspection and Certification Systems, which will be held in September in Australia. Items on the agenda include a discussion paper on an appeals mechanism for import rejections as well as a discussion



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paper on the standardization of sanitary requirements.

The Codex Office will also host a [public meeting](#) on September 3 to define U.S. positions for the Codex Committee on Nutrition and Foods for Special Dietary Uses, held in Germany in October. Agenda items include Nutrient Reference Values for children aged 6-36 months, technological justification for several food additives and a discussion paper on harmonized probiotic guidelines for use in foods and supplements.



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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.

LITIGATION

Welch's Fruit 'n Yogurt Snacks Prompt Labeling Suit

A New York woman has filed a proposed class action alleging Welch Foods Inc.'s Fruit 'n Yogurt Snacks are deceptively labeled as healthy yogurt products when they contain unhealthy ingredients. *Morris v. Welch Foods Inc.*, No. 24-6385 (W.D.N.Y., filed June 18, 2024). The plaintiff asserts that the product packaging prominently features pictures of fresh fruit covered in a creamy yogurt dip accompanied by the phrase "real fruit surrounded by creamy yogurt," which is allegedly likely to be interpreted by consumers as implying the products are healthy. She also pointed to the "yogurt coating" in the product's ingredients list, noting that the coating contains sugar, palm kernel oil, whey powder and other ingredients but lacks active bacterial cultures, which she asserts is a necessary component of yogurt. "Essentially, in a visual and semantic sleight of hand, Defendant substitutes an unhealthy ultra-processed candy-like coating for a healthy product (yogurt)," the plaintiff alleges.



Challenge to Baby Food Front-of-Package Labeling Revived

A Ninth Circuit panel has affirmed a lower court's dismissal of fraud claims in a baby-food labeling case but reversed a ruling

that had dismissed an unjust-enrichment claim brought under California’s Sherman Law. *Davidson v. Sprout Foods Inc.*, No. 22-16656 (9th Cir., entered June 28, 2024). The lower court had ruled that the Sherman Law, the state’s analogue to the federal Food, Drug, and Cosmetic Act, was preempted by the federal law and thus could not be grounds for a legal challenge against Sprout Foods.

The Ninth Circuit disagreed, holding that federal law did not preempt private enforcement of the Sherman Law’s requirements. The court found that the plaintiffs sought to enforce state standards identical to the federal standards—particularly those requiring that baby-food manufacturers not feature nutrient-content claims on the front of the package—and that the federal law did not preempt private enforcement of the state standards.

Trader Joe’s Sued for Gluten in Gluten-Free Bagels

A California woman has filed a proposed class action alleging Trader Joe’s Co.’s Gluten Free Almost Everything Bagels contain high levels of gluten. *Starks v. Trader Joe’s Co.*, No. 24-5543 (C.D. Cal., filed June 28, 2024). The plaintiff filed suit after Moms Across America conducted testing purportedly finding that the bagels contain 269.8 parts per million of gluten, which the plaintiff says is 13 times the governmental limits and nearly 27 times the Gluten-Free Certification Organization’s limits. The plaintiff argues that “consumers reasonably believe that a product labeled as ‘Gluten Free’ does not contain substantial amounts of gluten.”

Popsicle Co. Sues Rival for Health Claims

GoodPop has alleged that Jonny Pops misleads consumers into believing its popsicles are made from fruit while their main ingredients are water and added cane sugar. *Austin’s Natural*

Frozen Pops, Inc. v. Jonny Pops, LLC, No. 24-0716 (W.D. Tex., filed June 27, 2024). The plaintiff called the defendant “a wolf in sheep’s clothing,” as Jonny Pops’ products are sold in health-oriented grocery stores such as Whole Foods and Sprouts. GoodPop alleges that JonnyPops’ products contain 66% more added sugar per fluid ounce than a sugar-sweetened soda. “On the back of pumping more than a million pounds of added sugar into the bodies of children and adults through its trojan horse pops, JonnyPops has grown to tens of millions in annual sales with an estimated 70%+ from their fake fruit pops,” GoodPop argues. “Put simply, JonnyPops is a willful bad actor who is harming children, adults, and truthful competitors like GoodPop by flooding the market with pops that are genuinely bad, inside and out.”

SCIENTIFIC / TECHNICAL

WHO: Alcohol Use Linked to 2.6M Deaths Globally

A [report](#) from the World Health Organization (WHO) has reportedly found that 2.6 million deaths per year were linked to alcohol consumption, accounting for 4.7% of all deaths. The report, which uses 2019 data, provides an update on the global public health impact of alcohol and drug use. In addition to alcohol-related deaths, WHO estimates that 400 million people lived with alcohol use disorders in 2019 and 209 million lived with alcohol dependence. The organization called on governments to increase awareness through a coordinated global advocacy campaign and strengthen prevention and treatment capacity of health and social care systems, among other recommendations.

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