



Having trouble reading this email? [View in your browser.](#)

ISSUE 823 | AUGUST 2, 2024

FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK
HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

SUBSCRIBE

ARCHIVES

Lawmakers Introduce Bill Banning Commercial Octopus Farming

A bipartisan group of U.S. senators has [introduced](#) a law that would ban commercial octopus farming in the United States and prohibit imports of farmed octopus. The Opposing the Cultivation and Trade of Octopus Produced through Unethical Strategies (OCTOPUS) Act, sponsored by Sens. Sheldon Whitehouse (D-R.I.) and Lisa Murkowski (R-Alaska), would prohibit commercial octopus aquaculture operations; impose fines on the import of commercially farmed octopus or products containing it; require importers to certify that they are not importing farmed octopus; and require the National Oceanic Atmospheric Administration to collect data on octopus harvest methods in trade programs under its jurisdiction.

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



Lindsey Heinz

816.559.2681

lheinze@shb.com

USDA Announces New Policy to Curb *Salmonella* in Raw Poultry Products

The U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) has issued a [proposed rule and determination](#) to reduce *Salmonella* contamination and illnesses

associated with raw poultry products. The proposed rule would establish final product standards to prevent raw chicken carcasses, chicken parts, ground chicken and ground turkey products that contain any type of *Salmonella* at or above 10 colony forming units and any detectable level of at least one of the *Salmonella* serotypes of public health significance from entering commerce. USDA will accept comments on the proposed rule within 60 days of publication in the *Federal Register*.



Jim 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.

LITIGATION

Consumer Could Have Reasonably Expected Bones in Boneless Wings, Ohio Court Rules

In a 4-3 ruling, the Ohio Supreme Court has ruled a consumer could have reasonably expected boneless chicken wings to contain bones and guarded against it. *Berkheimer v. REKM, L.L.C.*, No. 24-2787 (Ohio, entered July 25, 2024). The plaintiff sued restaurant Wings On Brookwood and suppliers Gordon Food Service (GFS) and Wayne Farms, L.L.C. after he ordered boneless wings and inadvertently swallowed a chicken bone, causing a tear in his esophagus that resulted in a bacterial infection and ongoing medical issues. The trial court granted the defendants' motions for summary judgment, determining that common sense dictated that the presence of bone in meat dishes, even ones advertised as "boneless," is a natural enough occurrence that consumers should reasonably expect it and guard against it.

The ruling was affirmed by an intermediate appeals court and again by the high court, which held that Ohio courts should use a blend of the "reasonable expectation" and the "foreign-natural" tests. The dissenting opinion called the majority's position "jabberwocky," noting, "Still, you have to give the majority its



due; it realizes that boneless wings are not actually wings and that chicken fingers are not actually fingers."

Meati Foods Products Are Made From Mold, Consumer Alleges

A California woman has filed a lawsuit alleging Emergy Inc.'s Meati Foods deceptively labels its products as being made from mushroom root when they are made from mold. *Caldeira v. Emergy Inc.*, No. 24-01775 (E.D. Cal., filed June 24, 2024). The plaintiff alleges that the company's products are advertised as "Made From Mushroom Root" and "95% Mushroom Root Protein," while the main ingredient is *Neurospora Crassa*, a red mold that commonly grows on bread. "This deception is particularly dangerous because it is well known that consuming high concentrations of mold can cause severe allergic reactions in members of the consuming public, and can potentially lead to death," the plaintiff alleges.

Boar's Head Faces Listeria Recall Suit

A New York consumer has filed a proposed class action alleging Boar's Head Provisions Co. Inc. failed to disclose to consumers that several of its products contained *Listeria monocytogenes*. *Torres v. Boar's Head Provisions Co. Inc.*, No. 24-5405 (E.D.N.Y., filed Aug. 1, 2024). The company issued a recall of its products on July 25, 2024. The plaintiff alleges that the recall, which included the opportunity for purchasers to seek refunds, was not a sufficient remedy for consumers.

Eggland's Best's 'Cage Free' Labeling Misleads, Consumers Allege

Eggland's Best faces a proposed consumer class action about the living conditions of its animals that produce "cage free" eggs. *Janecyk v. Eggland's Best, Inc.*, No. 24-6222 (N.D. Ill., filed July

23, 2024). The plaintiffs allege that marketing representations showing Eggland's Best's hens as "free to roam in a pleasant, natural environment" are false. Instead, they allege the hens producing cage-free eggs live confined indoors with hundreds of thousands of closely packed hens. "These hens are not 'free to roam' anywhere, and their living conditions are neither 'natural' nor 'pleasant,'" they argue. "Quite the opposite. Living in cramped, artificial conditions is highly stressful for hens, and it increases their risk of disease, injury, and death."

U.S. Olympic Committee Alleges Infringement by Prime Hydration

The U.S. Olympic & Paralympic Committee has alleged that Prime Hydration LLC infringed its marks in violation of the Ted Stevens Olympic and Amateur Sports Act. *U.S. Olympic & Paralympic Comm. v. Prime Hydration LLC*, No. 24-2001 (D. Colo., filed July 19, 2023). Prime released a drink with packaging featuring a description of Kevin Durant as "a true Olympian" and a "3x Olympic gold medalist," as well as social media marketing that featured phrases such as "Kevin Durant Olympic Prime Drink," "Olympic Achievements" and "Kevin Durant Olympic Legacy." The Olympic Committee alleges it contacted Prime to request cessation of infringement but Prime continued to ship the product after being notified of the alleged infringement.

Consumer Suit Alleges Cocoa Puffs Contains Dangerous Amount of Lead

A California man has filed a proposed class action alleging General Mills fails to disclose that its Cocoa Puffs cereal contains "a substantial and dangerous amount of lead." *Tobin v. Gen. Mills Sales Inc.*, No. 24-4397 (N.D. Cal., filed July 19, 2024). The plaintiff alleges that independent testing shows that an average-sized bowl of the cereal exceeds the California Prop. 65 Maximum Allowable Daily Level for lead and argues that General Mills knew or should have known the products contain lead.

Second Circuit Revives Wheat Cracker Labeling Suit

The Second Circuit Court of Appeals has revived a lawsuit alleging Back to Nature Foods Co.'s Stoneground Wheat Cracker product labeling is deceptive and misleading, finding the plaintiff pleaded sufficient factual allegations. *Venticinque v. Back to Nature Foods Co., LLC*, No. 23-1236 (2d Cir., entered July 12, 2024). The plaintiff alleged that the products' labeling misleads consumers into thinking the crackers are predominantly made with organic whole wheat flour when the primary ingredient is organic unbleached enriched wheat flour.

The case was dismissed by a lower court after the court concluded the plaintiff failed to adequately plead that a reasonable consumer would be misled by the labeling. The Second Circuit disagreed, comparing the case at issue to a prior case involving similar claims where the court held that “a reasonable consumer should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in large bold type on the front of the box.”

Consumers Allege Enfagrow Toddler Beverages Make Unlawful Health Claims

Mead Johnson & Co. and Reckitt Benckiser LLC face claims that they misbrand Enfagrow products by making prohibited nutrient content claims on product packaging. *Garland v. Mead Johnson & Co.*, No. 24-1168 (S.D. Cal., filed July 5, 2024). The plaintiffs allege that Enfagrow Premium and Enfagrow NeuroPro Toddler Nutritional Drink products are intended for children under the age of two, but federal regulations prohibit nutrient content claims for children in that age category. The representations at issue include “Immune Health Dual Prebiotics & Vitamins,” “Supports Brain Development Omega-3 DHA & Iron” and “22 nutrients to help support growth.” The plaintiffs argue that “by

echoing the nutritional concerns of parents and including claims and graphics about brain development and immune health, Defendants induce and mislead consumers into purchasing their Products for fear that a diet without the Products is nutritionally inadequate for their toddlers.”

Flamin’ Hot Cheetos Origin Story Disputed in Lawsuit

Richard Montañez has filed a lawsuit alleging PepsiCo Inc. and Frito-Lay Inc. have engaged in a “smear campaign” by stating that he was not the inventor of Flamin’ Hot Cheetos. *Montañez v. PepsiCo Inc.*, No. CIVRS2400356 (Cal. Super. Ct., San Bernardino Cty., Rancho Cucamonga Dist., filed July 18, 2024). Montañez alleges that the companies were “more than happy to leverage Mr. Montañez’s story to drive the product’s sales and popularity” by sending him on a speaking tour across the United States, during which he gave “speeches that PepsiCo/Frito-Lay reviewed and approved.” In 2021, the companies “made an inexplicable about-face,” Montañez alleges, by reportedly telling the writer of a *Los Angeles Times* article titled “The Man Who Didn’t Invent Flamin’ Hot Cheetos” that the companies’ records do not indicate Montañez was “involved in any capacity in the Flamin’ Hot test market” and calling Montañez’s version of events an “urban legend.”

Following the article, Montañez argues, he was no longer hired as frequently for speaking engagements—from approximately 35 per year to four in 2024. “For decades, Mr. Montañez lived the American Dream. Now, he’s living the American Nightmare. After years of lauding Mr. Montañez to drive sales, Defendants’ recent about-face—which can be only explained by some combination of a regime change, spite, and deep-seated racism—exemplifies the worst part of American history, exhibiting an attitude that says: Latinos with no higher education cannot be responsible for the success of a billion-dollar brand.”

Montañez alleges violation of the Fair Employment and Housing

Act, fraud, defamation, intentional interference with prospective economic advantage, unjust enrichment and violation of California's Unfair Competition Law.

SHB.COM

[ABOUT](#) | [CONTACT](#) | [SERVICES](#) | [LOCATIONS](#) | [CAREERS](#) | [PRIVACY](#)

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

© Shook, Hardy & Bacon L.L.P. All rights reserved.

[Update Your Preferences](#) | [Privacy Notice](#)