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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

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FDA Announces Final Rule Updating Definition of "Healthy" Nutrient Content Claim

The U.S. Food and Drug Administration (FDA) has announced a final rule updating the definition of the nutrient content claim "healthy." To qualify as "healthy" under the updated definition, food products must contain a certain amount of a food from at least one of the food groups or subgroups outlined by the Dietary Guidelines for Americans. To qualify for the "healthy" claim, food products must also meet certain limits on saturated fat, sodium and added sugars. FDA said the rule will help ensure consumers have access to more complete, accurate and up-to-date nutrition information on food labels.

NAD Recommends General Mills End or Modify Fruit Snack Claims

BBB National Programs' National Advertising Division (NAD) has recommended that General Mills, Inc. discontinue or modify fruit-content and nutritional claims regarding Mott's Fruit Flavored Snacks. NAD found that General Mills failed to support

M. Katie Gates Calderon
816.559.2419
kgcalderon@shb.com

Lindsey Heinz
816.559.2681
lheinz@shb.com

the implied claims that the product contains whole fruits and vegetables made in social media posts and reviews the company reposted, and it recommended the company discontinue the challenged reposted reviews in its advertising and modify its advertising to avoid conveying the implied messages. General Mills said it would comply with the recommendation.

USDA, FDA Seek Information About Food Date Labeling

The U.S. Food and Drug Administration (FDA) and U.S. Department of Agriculture (USDA) have announced a joint Request for Information about food date labeling, including the use of "Sell By," "Use By" and "Best By." In a news release, the agencies said they seek information on industry practices and preferences for date labeling, research results on consumer perceptions of date labeling and any impact such labeling has on food waste and grocery costs. In a statement, FDA Deputy Commissioner Jim Jones said that confusion over different labeling terms is estimated to account for about 20% of food waste in the home. "We are looking forward to gathering valuable information to determine how date labeling can make it easier for consumers to know whether a food is still good to eat and avoid food waste," he said.

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

Honeycomb Van Leeuwen Ice Cream Does Not Contain Honeycomb, Suit Alleges

Van Leeuwen Ice Cream faces consumer claims that it deceptively advertises its "Honeycomb" ice cream because the product does not contain honeycomb or honey. *Ozuzu v. Van Leeuwen Ice Cream, LLC*, No. 24-8714 (S.D.N.Y., filed November 15, 2024). Consumers alleged that they purchased the product because they believed it to contain honeycomb and would not have purchased had they known it did not. The

plaintiffs point to the company's website, which itself acknowledges that the product is "surprisingly" made without honey. "Instead of meeting these expectations, Defendant concedes that its product labeling is 'confusing' and even declares to consumers 'Your whole life has been a lie,' demonstrating Defendant's clear understanding that consumers would expect honey in a product labeled 'Honeycomb.' Defendant then attempts to justify the absence of honey by comparing honeycomb-without-honey to 'ice cream without ice,' an illogical false equivalence."

Consumer Sues Grimmway Farms for E. Coli in Recalled Carrots

Grimmway Farms' voluntary recall of organic whole and baby carrots in November for *E. coli* contamination has prompted a proposed class action in California. *Allegretti v. Grimmway Enter., Inc.*, No. 24-01454 (E.D. Cal., filed November 27, 2024). A South Carolina woman alleges that the company failed to notify consumers of the products' risk, leading to her and her daughter becoming ill after consuming the recalled products.

UK Court Overturns 2023 'Milk' Trademark Ruling for Oatly

The United Kingdom's Court of Appeal has overturned a December 2023 ruling allowing Oatly to use the word "milk" on its packaging. In 2019, Oatly applied to register the mark "Post Milk Generation" for use on a variety of goods, and Dairy UK contested the application, arguing the phrase violated pre-Brexit regulations restricting the use of "milk" in non-dairy marketing. In December 2023, UK's High Court rejected Dairy UK's claim and found the trademark did not imply dairy-based products.

On appeal, Oatly argued the trademark was permitted by a provision of law allowing for a trademark "when the designations are clearly used to describe a characteristic quality of the product." The Court of Appeal disagreed, with one judge saying

that if Oatly was entitled to argue the trademark was allowed on those grounds, the argument "would nevertheless fail on the facts" because the trademark "Post Milk Generation" "does not describe, clearly or at all, a characteristic quality of any of the products … in relation to which Oatly wishes to use it. Rather, as obviously implied by the use of the words "post" and "generation", the Trade Mark describes the age-related characteristic of a particular cohort of people which Oatly intends should buy or consume its products."

Dunkin' Fruit Refreshers Lack Fruit, Consumer Claims

A New York consumer has filed a proposed class action alleging Dunkin' Donuts misleads consumers into thinking their Refresher drinks contain fruit. *Daly v. Dunkin' Brands, Inc.*, No. 24-1475 (N.D.N.Y., filed December 4, 2024). The plaintiff alleges that despite the Refreshers' names—including Mango Pineapple, Strawberry Dragonfruit and Peach Passionfruit—and marketing showing them as fruit-based beverages, they contain none of the referenced fruits and are instead "predominantly made with green tea, water and sugar."

Court Pares Down POM PFAS Case

A federal court dismissed claims against The Wonderful Co. LLC and an unjust enrichment claim against its subsidiary POM Wonderful LLC but allowed consumer protection and negligence per se claims to proceed in a proposed class action alleging the company misled consumers into thinking its pomegranate juice was "All Natural" when it contained per- and polyfluoroalkyl substances (PFAS). *Hernandez v. Wonderful Co. LLC*, No. 23-1242 (S.D.N.Y., filed November 25, 2024).

The court agreed with the defendants that The Wonderful Co. should be released from the suit because the plaintiffs allegations failed to indicate it had any role in the decision to label the

products as “All Natural.” The court also agreed the unjust enrichment claim should be dismissed because it was duplicative of the plaintiff’s claims of violations of Sections 349 and 350 of the New York General Business Law (GBL). The court allowed the GBL claims to proceed, however, after finding the plaintiffs sufficiently pleaded that a reasonable consumer could be misled and that they sufficiently alleged the expectations of a reasonable consumer at this stage of litigation.

In arguing for dismissal of the GBL claims, POM asserted it has no obligation to affirmatively disclose the presence of ubiquitous microcontaminants. The court said the argument fails because the plaintiffs’ complaint repeatedly alleges that POM knew that PFAS were in the product and had harmful effects.
“At this juncture, given the allegedly known serious health issues associated with PFAS exposure, as well as the tension between those health issues and the various representations on the packaging of the Product, the [complaint] sufficiently pleads allegations that support an objective expectation that the Product did not contain a detectable level of PFAS,” the court said.

Cocktail Mixes Labeled ‘No Preservatives’ Contain Preservatives, Consumer Alleges

A New York consumer alleges in a proposed class action that Sazerac Company's Stirrings cocktail mixes contain preservatives despite representations that they contain no preservatives. *Rodriguez v. Sazerac Co., Inc.*, No. 24-8206 (E.D.N.Y., filed November 26, 2024). The plaintiff alleges the company’s representations that the products—including Margarita Cocktail Mix, Old Fashioned Mix and Cosmopolitan Mix—contain “No Preservatives” are misleading because the products contain citric acid, a synthetic preservative.

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