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LEGISLATION, REGULATIONS & STANDARDS

House Panel Questions FDA Officials on Food-Recall Audit

One day after the U.S. Food and Drug Administration (FDA) issued draft guidance on proposals to expedite product warnings and recalls, FDA and other health officials testified before the House Subcommittee on Oversight and Investigations about the results of an audit faulting the agency for the failure of the recall process to ensure food safety. Conducted by the Office of Inspector General of the Department of Health and Human Services, the audit identified a two-month average delay between when FDA notified companies of issues and when companies took action.

During the hearing, Rep. Greg Walden (R-Ore.) reportedly displayed a snack container he had brought to a 2009 hearing on a nationwide *Salmonella* outbreak traced to products manufactured by the Peanut Corp. of America (PCA). PCA executives are serving federal prison terms for their roles in the outbreak, and a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit has upheld the convictions of Stewart Parnell, Michael Parnell and Mary Wilkerson. *U.S. v. Parnell*, No. 15-14400 (11th Cir., entered January 23, 2018).

Panera Petitions FDA to Define "Egg"

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Mark Anstoetter

Panera Bread has reportedly petitioned the U.S. Food and Drug Administration (FDA) to establish a clear definition of the term "egg" after learning that agency rules dictate that "no regulation shall be promulgated" to define eggs. The company asserts that under existing regulations, restaurants can sell processed substances containing artificial flavorings, gums, coloring and fillers as "eggs." Panera's director of wellness and food policy said in a press release, "Panera and our competitors use the FDA definitions to guide our product descriptions and names. But in the case of 'eggs,' we have no guidance. Brands can say they offer an egg sandwich, but sell an egg product that contains multiple additives."

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LITIGATION

Court Finds Standing for Injunction Based on Possible Intent to Purchase

A California federal court has ruled that plaintiffs alleging they might purchase Carrington Tea Co.'s coconut oil products in the future have established standing sufficient to withstand a motion to dismiss. *Zemola v. Carrington Tea Co., LLC,* No. 17-0760 (S.D. Cal., entered January 24, 2018). The court had previously determined that the plaintiffs lacked standing to pursue an injunction because they failed to allege they would purchase the products in the future, but the U.S. Court of Appeals for the Ninth Circuit later ruled in an unrelated case that plaintiffs can seek injunctions if they plausibly allege that they "will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product in the future," or that they "reasonably, but incorrectly" assume that the product had been improved.

Because one plaintiff alleged that he would like to purchase Carrington's products in the future, that he shops at stores that sell the products and that he might rely on the company's labeling in the future, the court found that he had pleaded sufficient facts to overcome the motion to dismiss. "And even if [the plaintiff] is unlikely to purchase Defendant's coconut oil products in the future given his apparent beliefs regarding the healthfulness of

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.

coconut oil generally," the court said, "it is not entirely implausible that he might do so and suffer harm as a result."

Slack-Fill Putative Class Action Filed Against Takis Snack Chips

Barcel USA, maker of Takis chips, faces a putative class action filed by a plaintiff alleging that four-ounce bags of Zombie and Guacamole tortilla chips contain as much as 64 percent nonfunctional slack-fill. *Morrison v. Barcel USA, LLC*, No. 18-531 (S.D.N.Y., filed January 22, 2018). The plaintiff compared the Takis bags to similarly sized bags of Doritos chips, which allegedly contain 33 percent slack fill. She alleges that her economic injury was equivalent to the proportion of the purchase price she paid for the slack-fill. Claiming deceptive and unfair trade practices, false advertising and common-law fraud, the plaintiff seeks class certification, injunctive relief, restitution, disgorgement, damages, corrective advertising and attorney's fees.

Scarpetta Sauces Mislabeled as "No Preservatives," Lawsuit Alleges

A consumer has filed a putative class action alleging PVK Inc. mislabels Scarpetta pasta sauces as containing "No Preservatives" despite including citric acid on the ingredient list. *Jocelyn v. PVK Inc.*, No. 18-427 (E.D.N.Y., filed January 22, 2018). The plaintiff alleges that she relied on the representation on the container and would not have purchased the sauce had she known it contained preservatives. Claiming deceptive and unfair trade practices, false advertising and common-law fraud, the plaintiff seeks class certification, injunctive relief, restitution, disgorgement, damages, corrective advertising and attorney's fees.

Court Dismisses KFC Halal Advertising Lawsuit

An Illinois federal court has dismissed a franchisee's lawsuit alleging KFC wrongfully prevented him from advertising halal chicken, finding the franchise contract gave KFC control over

advertising and promotional material. *Lokhandwala v. KFC Corp.*, No. 17-5394 (N.D. Ill., entered January 23, 2018). Although the plaintiff alleged that KFC's prohibition on advertising dietary claims contradicted the earlier representations KFC had made to him, the court found that the franchise agreement gave KFC express power to change its advertising policies. In particular, the contract stated that "[n]o failure, forbearance, neglect or delay of any kind or extent on the part of KFC in connection" with enforcing and exercising its rights "shall affect or diminish KFC's right to strictly enforce . . . this Agreement at any time." The court ruled that given the contract's "unambiguous language on advertising" as well as its integration clause, it would not consider extrinsic evidence of KFC's previous actions. The court also dismissed a promissory estoppel clause on the grounds that Kentucky state law does not allow such claims when the parties have a valid contract.

Vegetarian's Suit Against Buffalo Wild Wings Dismissed

A New York federal court has held that a vegetarian who alleged Buffalo Wild Wings charged a premium price for non-meat food items fried in beef tallow failed to plead any injury in her complaint because loss of the purchase price does not constitute "actual injury" under state consumer-protection law. *Borenkoff v. Buffalo Wild Wings*, No. 16-8532 (S.D.N.Y., entered January 19, 2018). Although it was a "close call," the court held that the plaintiff had standing to sue, finding "some 'concrete and particularized' injury in paying for one item and receiving another, even if you ultimately receive the 'benefit of your bargain' from a purely objective economic standpoint." However, the alleged economic injury was insufficient to state a claim, the court held, because the plaintiff failed to explain "exactly how" the cost of the food was affected by the use of beef tallow or why she believed she paid a premium. As a result, the plaintiff's use of the word "premium" was a "legal conclusion couched as an allegation," the court found. The court also dismissed the plaintiff's claim for unjust enrichment as duplicative of the consumer-protection law claim.

Federal Court Denies Class Certification

to Orange Juice Plaintiffs

A New Jersey federal court has denied class certification to a group of consumers alleging that Tropicana Pure Premium orange juice was mislabeled and misbranded because the maker adds natural flavoring to the product in violation of the U.S. Food and Drug Administration's standard of identity for pasteurized orange juice. *In re Tropicana Orange Juice Mktg. & Sales Practices Litig.,* No. 11-7382 (D.N.J., entered January 22, 2018).

The court ruled that the plaintiffs' unjust enrichment, express warranty and New Jersey Consumer Fraud Act claims required individualized proof; thus, individual issues predominated over those of the class. In addition, the plaintiffs were unable to demonstrate that the proposed class was ascertainable—in particular, the court found, it was unclear whether any of the "dozens, if not hundreds of retailers" could confirm with certainty whether they possessed consumer data for the class period. If a consumer purchased the juice from a retailer that did not maintain relevant data, the consumer "would be excluded from the Class because there will be no way to verify his or her claim; and yet, that class member will still be bound by any judgment on the merits emanating from this Court. That defies one of the principal rationales of ascertainability—'identifying persons bound by the final judgment'—and simply cannot be permitted."

Grumpy Cat Wins $710,001 in Copyright and Trademark Suit

A California federal jury has awarded $710,001 to Grumpy Cat Ltd., which had alleged that a beverage company infringed its copyright and trademarks. *Grumpy Cat Ltd. v. Grenade Beverage LLC*, No. 15-2063 (C.D. Cal., verdict entered January 23, 2018). The dispute arose after Grumpy Cat licensed its trademark to Grenade Beverage LLC for a line of iced-coffee products; Grumpy Cat filed suit when it learned that Grenade was also using Grumpy Cat's likeness on coffee products and apparel—which fell outside the scope of the companies' agreement—and had registered the domain name grumpycat.com. The jury awarded Grumpy Cat $1 for breach of contract and $710,000 for copyright and trademark violations. The parties agreed before trial that the court would

rule on the cybersquatting and accounting claims as well as Grenade's counterclaims for declaratory relief for ownership and non-infringement of trademark, copyright and domain name.

Iceland Opposes Vodka Co.'s "I ' CELAND" Trademark Application

Iceland has filed a notice of opposition to a trademark application filed by an Ecuadorean company for use of the mark "I ' CELAND" for vodka, arguing that consumers will be confused as to the origin of the product, which features a label with images of snow-capped mountains and the term "Iceland Vodka." *Republic of Iceland, Ministry for Foreign Affairs v. Cosmica Cia. Ltda.*, No. 91239021 (T.T.A.B., notice filed January 17, 2018). Iceland's Ministry for Foreign Affairs coordinates the exports of Icelandic businesses and alleges it is responsible for protecting the "Iceland" mark, which has been used for various Icelandic alcohol products, including vodka. Iceland registered its mark with the U.S. Patent and Trade Office in 2009.

MEDIA COVERAGE

AI Grocery Amazon Go Opens

Amazon has opened Amazon Go, a grocery store using artificial intelligence (AI), prompting speculation about its potential effects on the labor market, worries about consumer privacy and skepticism about how well it will work. Shoppers scan a smartphone app at a turnstile as they enter, then items are added to a virtual shopping cart as shoppers pull them off the shelf. If the shopper puts the item back on a shelf, the item is deleted from the cart. When shoppers leave the store, their credit cards are charged for the total. The store reportedly uses machine learning algorithms and computer-vision image processing along with weight sensors, camera-friendly bar codes and infrared sensors to track products as they leave shelves and the store.

The store's technology hit speed bumps before its unveiling. Amazon Go's opening was delayed by a year as the company fine-tuned and tested the technology; among early bugs was the

cameras' inability to distinguish shoppers with similar body types. A test visit that included children found systemic errors when the children picked up items and put them back down in random places throughout the store. In addition, the technology disallows people from helping fellow shoppers by grabbing products off shelves because the person who moves an item is the shopper charged for it.

Privacy experts are reportedly concerned about the data Amazon may be collecting about shoppers. Alvaro Bedoya, executive director of the Center on Privacy & Technology at Georgetown University Law Center, reportedly told *The Washington Post*, "Are they really only tracking you when you lift the item off a shelf? Or are they tracking where you move throughout the store, what you're looking at, what sections you're dwelling in?" Additional questions persist about the effect on the labor market because the wide use of similar technologies could affect the 3.5 million people who work as cashiers. Amazon Go employs about 10 people to make food, stock shelves and check identification for alcohol purchases along with floor employees who troubleshoot problems. The company reportedly told *The New York Times* that the new technology changes the roles of retail employees rather than eliminating them, but a *Bloomberg* editorial speculates, "There's a decent chance this marks the earliest days of a dramatic shift in retail, one that calls for a fundamental rethinking of labor allocation, technology investments and how to approach customer service in stores."