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LEGISLATION, REGULATIONS & STANDARDS

FDA Seeks Comment on Foodborne Illness Study in Restaurants

The U.S. Food and Drug Administration (FDA) is soliciting public comment on whether the agency should continue to collect information about foodborne illnesses in restaurants. The proposal would extend studies of risk factors, preparation practices, employee behavior and the effects of regulation and food safety management systems on occurrences and outbreaks. FDA began a study of full-service and fast food restaurants in 2013; its current data collection will end in 2018, and the proposed collection would extend to 2022. Public comment will be accepted through April 9, 2018.

House Passes Menu Labeling Rule

The U.S. House of Representatives has passed a bill to amend the Federal Food, Drug and Cosmetic Act that would reduce nutrition- and calorie-labeling requirements on menus and bar civil liability for any restaurant or retail food establishment accused of violating the law's requirements. The Common Sense Nutrition Disclosure Act would allow restaurants to use average calorie counts or ranges on menus instead of exact counts and would permit online-only calorie disclosures. The bill would

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permit “reasonable-basis” disclosures that allow for variations in serving sizes, human error in preparation or variations in ingredients. It would also allow restaurants to decide whether to disclose content for a whole item or on a per-serving basis.

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LITIGATION

Wisconsin Federal Court Dismisses Butter-Grading Lawsuit

A federal court has granted summary judgment to Wisconsin in an Ohio dairy’s lawsuit alleging a Wisconsin law requiring butter to be graded by the U. S. Department of Agriculture or a state-licensed grader violated the commerce, due process and equal protection clauses of the U.S. Constitution. *Minerva Dairy, Inc. v. Brancel*, No. 17-0299 (W.D. Wis., entered February 5, 2018). In its complaint, the dairy alleged that small companies are unable to afford USDA grading or the creation of separate packaging solely for Wisconsin sales, effectively blocking them from the state’s market.

Finding that Wisconsin has a legitimate government interest in requiring grading labels on butter packages to assure consumers of product quality, the court held that the law does not violate the U.S. Constitution’s equal protection or due process clauses. The court reasoned that the law does not give Wisconsin butter makers “a categorical ‘competitive advantage over their counterparts outside the state,’” thus creating no disparate impact on or treatment of out-of-state manufacturers.

Italian Court Cancels Fine for Mislabeled Olive Oil

An Italian appeals court has reportedly voided a fine of €550,000 previously levied on Lidl Stiftung & Co. KG for selling bottles of mislabeled olive oil. The court ruled that Italy’s Antitrust Authority (AGCM) failed to explain why the company’s actions were negligent when the agency imposed the fine, which resulted from tests determining that bottles of Primadonna olive oil

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.





labeled as extra virgin contained only virgin olive oil. Although the Administrative Court of Lazio confirmed the product only met standards for virgin olive oil, it also determined that Lidl had demonstrated a normal degree of diligence in its control measures and verification systems.

Hy-Vee Denied Trademark for “Peaceful Piranha” Snacks

The Trademark Trial and Appeal Board has denied Hy-Vee Inc.’s application to register the “Peaceful Piranha” mark for a line of snack foods, deeming the mark to be too similar to the mark for an existing line of “Piraña” snack foods. *In re Hy-Vee, Inc.*, No., 87120774 (T.T.A.B., entered February 6, 2018). Finding “piranha” to be the dominant portion of the mark, the board found the term likely to confuse consumers unfamiliar with Spanish because they may read the pronunciation of the terms as identical. Further, consumers who understand Spanish may be confused because they would understand the cognate terms as a reference to the fish. Although Hy-Vee argued that “peaceful” and “piranha” are counterintuitive, creating an entirely different connotation with no association to “vicious” piranha fish, the board found the term “peaceful” was not likely to distinguish the marks because “it would merely indicate an atypical piranha, possibly for use with a subset of snack foods offered under the PIRAÑA mark.”

Werther’s Faces Class Action for Slack Fill, False Labeling

A consumer has filed a putative class action alleging Storck USA, L.P., maker of Werther’s, packages Original Sugar Free Chewy Caramels with nonfunctional slack fill and misrepresents the effect of maltitol syrup on blood glucose levels. *Kpakpoe-Awei v. Storck USA L.P.*, No. 18-1086 (S.D.N.Y., filed February 7, 2018). The complaint alleges that nontransparent 2.75-ounce bags of the candy contain as much as 69 percent slack fill while comparably sized 5-ounce bags of regular Chewy Caramels contain only 33 percent slack fill. Claiming violations of New York state consumer-protection laws, false advertising and fraud, the

plaintiff seeks class certification, an injunction, damages, corrective advertising and attorney's fees.

Boston Beer Co.'s "Day Party" Trademark Application Challenged by "Darty" Maker

American Beverage Corp., which sells alcohol cocktails under the "Darty" mark, has filed a notice of opposition to Boston Beer Co.'s application for a "Day Party" mark for beer. *Am. Bev. Corp. v. Boston Beer Corp.*, No. 91239170 (T.T.A.B., notice filed January 29, 2018). The notice asserts that the "colloquial meaning of DARTY is 'Day Party.'" American Beverage claims priority in filing and first use date, and the notice alleges that the goods are so similar as to cause consumer confusion about their source.

Bumble Bee Agrees To Settle Salmon Labeling Dispute

Bumble Bee Foods LLC has agreed to settle a proposed class action alleging the company's labels indicate its Medium Red Smoked Salmon Fillet in Oil product contains wild-caught smoked salmon despite actually containing farm-raised salmon with artificial smoke flavoring. *Rodriguez v. Bumble Bee Foods LLC*, No. 17-2447 (S.D. Cal., motion for settlement filed February 1, 2018). Under the terms of the agreement, Bumble Bee will begin repackaging the product in the second quarter of 2018, specify the salmon is "smoke-flavored," omit claims that it is "premium" or "medium red" and omit images that suggest the fish was wild-caught. The motion for settlement seeks a hearing date for a motion that will specify the incentive award, the amount of attorney's fees, and costs.

SCIENTIFIC / TECHNICAL ITEMS

Dairy Test May Support Grass-Fed Milk Mislabeling Claims

Iowa State University researchers have reportedly developed an inexpensive method to test whether milk was produced by grass-fed cows. Fluorescence spectroscopy, which measures light to identify the amount of chlorophyll metabolized by cows, may help regulators enforce organic milk standards requiring cows to eat a minimum of 30 percent foraged grass. The researchers reportedly found that cows fed grass only had about three times as many chlorophyll metabolites as grain- and silage-fed cows, while the organic milk samples they tested had about twice as many chlorophyll metabolites as the grain- and silage-fed cows.

Industry Groups Criticize JAMA Study Questioning Benefits of Omega-3

After *JAMA Cardiology* published a meta-analysis purporting to find “no significant association” between consumption of omega-3 fatty acids and “fatal or nonfatal coronary heart disease or any major vascular events,” industry groups reportedly criticized the conclusion, arguing that other meta-analyses find statistically significant reductions in cardiac death risks. The *JAMA* meta-analysis examined 10 randomized trials that involved at least 500 participants and a treatment duration of at least one year.

“The U.S. Food and Drug Administration would seem to disagree with the conclusion of this study, as it has already approved at least one prescription medication for fish oil that provides benefits for people with cardiovascular issues,” the president of the Natural Products Association was quoted as saying.

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