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FIRM NEWS

Shook Attorneys to Present at GMA Legal Conference

Shook, Hardy & Bacon Partners [Jim Muehlberger](#) and [Lindsey Heinz](#), along with Associate [Naoki Kaneko](#), will present at the [Grocery Manufacturers Association \(GMA\) 2018 Legal Conference](#) February 27-28, 2018, in New Orleans, Louisiana.

Heinz will join a “Roundtable Discussion on Legal Issues for Organic Products,” which will center on the continual market growth of organics, encompassing food, beverage, personal care and household products. The session will provide a comprehensive review of legal issues surrounding organic products.

Muehlberger and Kaneko are presenting “Trends in Consumer Goods Class Action Litigation,” a breakout session that will broadly examine the types of claims the plaintiff’s bar has filed across the consumer goods industry to help companies better anticipate litigation risks.

LEGISLATION, REGULATIONS & STANDARDS

FDA’s Food Code 2017 Released

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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



[Mark Anstoetter](#)

The U.S. Food and Drug Administration (FDA) has released the 2017 edition of the FDA Food Code, a set of model regulations and advice for the reduction of foodborne illnesses, including suggested uniform standards for retail food safety, inspections and audits.

The Code includes (i) a requirement for a person in charge of the establishment to be a “Certified Food Protection Manager”; (ii) an added section regarding the use of bandages, finger cots and stalls; (iii) standardized cooking times and temperatures for “intact and non-intact” meat and poultry; and (iv) updated procedures for operation during extended water or electrical outages.

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LITIGATION

EEOC Alleges Meat Processor Racially Discriminated

The U.S. Equal Employment Opportunity Commission (EEOC) has filed a lawsuit alleging Chicago Meat Authority Inc. discriminated against African-Americans, resulting in multiple violations of U.S. civil rights statutes. *U.S. Equal Opportunity Emp't Comm'n v. Chicago Meat Authority, Inc.*, No. 18-1357 (N.D. Ill., filed February 22, 2018). EEOC alleges that the processor (i) failed to recruit or hire African-Americans because of their race; (ii) engaged in hiring practices that caused a disparate impact on the basis of race; (iii) fired an employee based on his race and in retaliation for engaging in a protected activity; (iv) subjected African-Americans to a hostile work environment that included frequent racial epithets and slurs as well as other offensive comments based on race; and (v) failed to take action to remedy the alleged harassment. EEOC seeks injunctive relief, an order that the defendant provide equal employment opportunities regardless of race and protected activity, back pay, front pay or reinstatement for the terminated employee, compensation and punitive damages.

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.



Complaint Alleges Counterfeit Use of

Kosher Certification Mark



Kosher Supervision Services Inc. (Kof-K) has filed a complaint alleging Original Gourmet Food Co. used the “Kof-K” kosher certification mark on its product without authorization, alleging the snack maker’s action was “intentional and willful use of a counterfeit of the Kof-K mark.” *Kosher Supervision Servs. v. Original Gourmet Food Co.*, No. 18-2487 (D.N.J., filed February 22, 2018). Kof-K asserts that it never contracted with Original Gourmet, approved or certified any of its products as kosher, or granted permission for its use of the certification mark. Alleging trademark infringement, false designation of origin, dilution of famous mark, unfair competition, Kof-K seeks injunctive relief, damages and a finding that the case is “exceptional” to permit an award of attorney’s fees.

Court Refuses to Dismiss Contaminated Dog Food Complaint

A federal court in Washington will allow plaintiffs to amend a false advertising complaint alleging that their dogs became sick after eating pet food contaminated with pentobarbital, a drug used to euthanize animals. *Mael v. Evanger’s Dog & Cat Food Co. Inc.*, No. 17-5469 (W.D. Wash., entered February 20, 2018). The complaint alleged that the plaintiffs’ dogs became ill after eating Evanger’s beef products and that a U.S. Food and Drug Administration (FDA) investigation found traces of pentobarbital in several of the company’s products. The plaintiffs allege that Evanger’s falsely advertised the products as “human grade, USDA inspected meats,” although FDA reportedly found that none of the company’s products were USDA-inspected or human grade. After the FDA investigation, Evanger’s recalled all of the products.

Evanger’s moved to dismiss the complaint, arguing that plaintiffs referred to both recalled and non-recalled products. The court found that the plaintiff had failed to allege “beyond mere speculation causation between the food and the symptoms” and that the complaint lumps together dogs that became sick from the recalled beef products with a dog that became sick after eating a non-beef, non-recalled product. Finding that the deficiencies

could be cured by additional facts, the court granted leave to amend.

Plaintiff Alleges “Ancient Grains” Snack Mostly Made of Rice and Peas

MJS America LLC, maker of “Majans Bhuja Snacks,” faces a putative class action alleging that the primary ingredients of its “Ancient Grains Twists” are rice, peas, tapioca and sunflower or canola oil rather than ancient grains. *Louis v. MJS America LLC*, No. 18-1046 (E.D.N.Y., filed February 18, 2018). The plaintiff asserts that she paid a premium price for the product because she understood “Ancient Grains Twists” to mean that the snack was made exclusively from ancient grains, but the product allegedly contains only “non-substantive” amounts of chia and quinoa seeds, which the complaint describes as “pseudocereals among ancient grains.” Claiming false advertising, breach of express and implied warranties of merchantability, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney’s fees.

Plaintiffs Allege Contaminated Chicken Salad Caused Illness

Two consumers have filed a lawsuit alleging that they contracted *Salmonella* from deli chicken salad they purchased at Fareway Stores Inc. *Porter v. Fareway Stores Inc.*, No. 18-0050 (S.D. Iowa, filed February 20, 2018). The plaintiffs, a married couple, allege that the contaminated chicken salad sent them to an emergency room—with the wife requiring further hospitalization—and that they both tested positive for *Salmonella*. The complaint also states that Fareway chicken salad has been linked to “at least 28 confirmed and 66 probable cases of *Salmonella*” in Iowa by the state’s Department of Health, with reports of possible related illnesses in Nebraska and Minnesota. The U.S. Department of Agriculture’s Food Safety and Inspection Service issued a public health alert about the Iowa outbreak in February 2018. Alleging strict product liability, negligence and breach of warranty, the plaintiffs seek damages and attorney’s fees.

EU Ruling May Hinder Scotch Group's Infringement Claim

An EU magistrate has returned a preliminary ruling in a dispute between the Scotch Whisky Association and a German manufacturer of a spirit called "Glen Buchenbach" that may hinder the trade group's claim of infringement of the registered geographical term "Scotch Whisky." *Scotch Whisky Ass'n, The Registered Office v. Klotz*, No. C-44/17 (opinion of advocate general issued February 22, 2018). The trade group argues that the use of the Gaelic term "Glen" is both an indirect commercial use and an evocation of the registered geographical indication, amounting to a false and misleading indication of origin of the product.

Noting that at least three whiskies produced outside of Scotland include "glen" as part of their names, the magistrate found that "'Glen' does not have a sufficiently clear and direct link with the protected geographical indication in question." The indirect use of a registered geographical indication, the court found, "requires the disputed designation to be identical or phonetically and/or visually similar to the indication in question." Second, the evocation of such indication "does not necessarily require there to be phonetic and visual similarity." And finally, the court held that "it is not necessary to take into account of additional information found alongside the sign at issue in the description, presentation or labeling of the product concerned, in particular with regard to its true origin," to establish the existence of an evocation. "Even if the referring court were to find that consumers systematically associate the word 'Glen' with whisky, the required close connection to Scotch whisky, and thus the necessary proximity to the indication 'Scotch whisky,' may be lacking," the court noted.

Chicken Advertising Claims Not Preempted, Court Finds

Sanderson Farms Inc. lost a motion to dismiss false advertising claims brought by three advocacy organizations when a California federal court ruled that the claims are not preempted by either the Poultry Products Inspection Act (PPIA) or the Federal Meat Inspection Act (FMIA). *Organic Consumers Ass'n v. Sanderson*

Farms Inc., No. 17-3592 (N.D. Cal., entered February 9, 2018). The groups alleged that Sanderson’s marketing materials—which asserted that the poultry was “100% Natural” with “no hidden ingredients” and that “100% natural means there’s only chicken in our chicken”—were misleading because of U.S. Department of Agriculture testing reportedly showing the presence of antibiotics, ketamine, pesticides and “other unnatural substance residues.”

The court found that consumer-protection laws “are within the historic police powers resting with the states and are therefore subject to the presumption against preemption ... Consequently, they cannot be superseded by federal law or action unless it is the ‘clear and manifest purpose of Congress.’ Such purpose is not evident here. Neither the PPIA nor FMIA demonstrates express or implicit congressional intent to limit [such] legislation ... in fact, the state and federal laws here are complementary.” In addition, the court found that the plaintiffs had plausibly alleged that a reasonable consumer could be deceived by the marketing materials.

The court also rejected Sanderson Farms’ argument that the groups lacked standing, finding all three had sufficiently alleged “frustration of its organizational mission” or “diversion of its resources” to establish injury in fact.

Court Denies Class Certification in Gerber Baby Food Labeling Suit

A federal court in California has again denied class certification in a lawsuit alleging that Gerber Products Inc. misbranded baby food, finding that the plaintiff is not entitled to injunctive relief and that the proposed damages models will not provide the correct measure of restitution. *Bruton v. Gerber Prods. Co.*, No. 12-2412 (N.D. Cal., entered February 13, 2018). The complaint alleged that certain “Nature Select” and “Organic” lines of Gerber baby foods made unlawful and deceptive nutrient claims and that the labels did not contain federally required warnings of the high calorie content of the products. After initial rulings on summary judgment were appealed to the Ninth Circuit, the remaining allegations included a claim that the labels violated California’s Unfair Competition Law (UCL) and a claim for unjust enrichment.

The court found that although the plaintiff had standing under the UCL, a class seeking injunctive relief can be certified only if a named plaintiff is subject to a likelihood of future injury. Gerber stopped using the challenged labeling in 2012, so without a likelihood of future injury, the plaintiff had no standing to pursue her unjust enrichment claim and could not represent a potential class, the court held.

In addition, the court found that none of the three proposed damages models could correctly measure Gerber's alleged misconduct so the plaintiff could not satisfy the predominance requirement for a class action.

SCIENTIFIC / TECHNICAL ITEMS

Study Reportedly Links Ultra-Processed Foods to Increased Cancer Risk

Researchers in France and Brazil have concluded that a 10 percent increase in the consumption of ultra-processed foods is associated with a “significant increase of greater than 10% in risks of overall and breast cancer.” Thibault Fiolet, et al., “[Consumption of ultra-processed food and cancer risks: results from NutriNet-Santé prospective cohort](#),” *BMJ*, February 14, 2018. The study, which involved surveying records of more than 100,000 participants, asserts that ultra-processed fats and sauces along with sugary products and drinks were associated with an increased risk of overall cancer, while ultra-processed sugary products were also associated with a higher risk of breast cancer.

The researchers hypothesized that the findings were caused by the “generally poorer nutritional quality of diets rich in ultra-processed foods,” the wide range of additives used, and heat-related processing and preparation that produce neoformed contaminants such as acrylamide.

Study Purports to Link SSBs with Lower Fertility

A study from the Department of Epidemiology at Boston University's School of Public Health has concluded that consumption of sugar-sweetened beverages (SSBs) may reduce fertility in both males and females. Elizabeth E. Hatch, et al., "Intake of Sugar-sweetened Beverages and Fecundability in a North American Preconception Cohort," *Epidemiology*. Researchers studied 3,828 women and 1,045 of their male partners for up to 12 menstrual cycles in the four-year study. Women who drank at least one SSB per day reportedly had a 25 percent lower monthly probability of conception, while men who drank at least one SSB per day reportedly showed a 33 percent lower probability of successful conception. The study did not purport to find an association between lowered fertility and the consumption of diet sodas or fruit juices.

JAMA Op-Ed Calls for Activism Transparency in Food Research

In a JAMA Viewpoint article, researchers from Stanford University have argued that nutrition studies should be transparent about their authors' financial and non-financial conflicts of interest, including their dietary preferences and activism work.

Noting that "the puritanical view that accepting funding from the food industry ipso facto automatically biases the results is outdated," the authors briefly call for a financial disclosure registry before shifting to focus on non-financial conflicts of interest. "Advocacy and activism have become larger aspects of the work done by many nutrition researchers, and also should be viewed as conflicts of interest that need to be disclosed," they assert.

"Therefore, it is important for nutrition researchers to disclose their advocacy or activist work as well as their dietary preferences if any are relevant to what is presented and discussed in their articles," the researchers argue. "This is even more important for dietary preferences that are specific, circumscribed, and adhered to strongly. For example, readers should know if an author is strongly adherent to a vegan diet, the Atkins diet, a gluten-free diet, a high animal protein diet, specific brands of supplements, and so forth if these dietary choices are discussed in an article."

“As a general rule, if an author’s living example could be reasonably expected to influence how some readers perceive an article, disclosure should be encouraged,” the article concludes. “Authors who have strong beliefs and make highly committed choices for diet or other behaviors should not hesitate to disclose them. Doing so may help everyone understand who is promoting what and why.”

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