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LEGISLATION, REGULATIONS & STANDARDS

FDA Releases Guidance on Intentional Adulteration

The U.S. Food and Drug Administration (FDA) has released the third and final installment of its draft guidance on intentional adulteration of food under the Food Safety Modernization Act. The guidance focuses on food defense corrective actions, food defense verification, reanalysis and recordkeeping. The rule applies to domestic and foreign companies required to register with FDA as food facilities.

LITIGATION

Mashed Potatoes Lawsuit Dismissed

A New York federal court has dismissed a lawsuit alleging that BEF Foods Inc. misleadingly marketed its Bob Evans mashed potatoes as containing butter. *Sarr v. BEF Foods*, No. 18-6409 (E.D.N.Y., entered February 13, 2020). The lawsuit alleged that the packaging promised “real butter” and “fresh potatoes” despite containing vegetable oil and preservatives.

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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.

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The court found that the product’s ingredient list disclosed that the mashed potatoes contained both vegetable oil and butter, with butter as the more predominant ingredient. The court was also unpersuaded on the “fresh potatoes” point. “No reasonable consumer would conclude that the phrases ‘Made with Fresh Potatoes’ and ‘Made with 100% Fresh Potatoes’ [] imply that the finished Mashed Potatoes product itself was ‘just prepared’ or lacking preservatives,” the court held. “BEF’s representations unambiguously mean that the potatoes used as an ingredient in the Mashed Potatoes were fresh when so incorporated.”

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Honey Purchasers Granted Certification

A California federal court has granted certification to a class of consumers who purchased honey from one of the brands produced by the Sioux Honey Association who believed the honey to be “pure” or “100% pure. *Tran v. Sioux Honey Ass’n*, No. 17-0110 (C.D. Cal., entered February 24, 2020). The plaintiff asserts that the honey is not “pure” because it contains traces of glyphosate. The court assessed the plaintiff’s claims and found that they met the certification requirements of numerosity, commonality and typicality; further, she was found to be an adequate representative of the proposed class. Accordingly, the court certified a class of California residents who have purchased a Sue Bee honey product since January 2014.



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LaCroix Linalool Lawsuit Dropped

A lawsuit challenging the ingredients in LaCroix sparkling water has been dismissed with prejudice by the plaintiffs. *Rice v. Nat’l Beverage Corp.*, No. 18-7151 (N.D. Ill., E. Div., entered February 18, 2020). National Beverage Corp. reportedly shared a letter with the media about the voluntary dismissal, stating that a laboratory cited in the complaint confirmed that it had not, as alleged, determined that the ingredients in LaCroix were not natural. “That laboratory has since confirmed in writing and separately under oath that its testing could not, and did not, determine whether the ingredients were ‘synthetic’ and made no finding as to the source of the ingredients it identified.” The letter reportedly also asserts that the plaintiff was provided results from a different

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.

laboratory, “which confirmed that LaCroix’s flavor ingredients are 100% natural and free of any ‘synthetic’ sources.”

Kellogg “Healthy” Settlement Rejected

A California federal court has rejected a settlement in a lawsuit that alleged Kellogg Sales Co. misled consumers by marketing its products as “healthy.” *Hadley v. Kellogg Sales Co.*, No. 16-4955 (N.D. Cal., San Jose Div., entered February 20, 2020). The court found the settlement agreement to be invalid for several reasons: (i) “the release of the claims is overbroad”; (ii) the parties did not show that certification was appropriate; (iii) the parties failed “to provide sufficient information to justify a proposed reversion to Kellogg”; (iv) several forms associated with class participation contained errors; and (v) the “settlement structure is currently inconsistent with the fact that the voucher portion of the settlement constitutes a coupon settlement under the Class Action Fairness Act.”

Shook Partner Lindsey Heinz and Associate Elizabeth Fessler wrote an article for *Law360* on the settlement when it was announced in late 2019, focusing on the lessons companies can take about “healthy” litigation.

Jägermeister Logo Permissible Despite Religious Symbol, Swiss Court Rules

The Swiss Federal Administrative Court has reportedly ruled that Jägermeister can use its logo, “a stag with a shining white cross between its antlers,” on a variety of products in Switzerland because it is not offensive to religion. The Swiss Federal Institute of Intellectual Property had argued for a restriction on the use of the logo, asserting that the “image was offensive to the religious leanings of some consumers,” according to *Swiss Info*. The court reportedly disagreed, finding that consumers associate the logo with Jägermeister rather than the story of St. Hubert that inspired the logo.

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.



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