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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

FIRM NEWS

Court Dismisses Beef "Product of the USA" Lawsuit

A New Mexico federal court has dismissed allegations that several food companies falsely labeled beef as a "Product of the USA" because the cattle were raised in other countries but brought to the United States for slaughter and processing. Shook attorneys represented Tyson Foods Inc. in the litigation. *Lucero v. Tyson Foods Inc.*, No. 20-0106 (D.N.M., entered August 27, 2020).

"Plaintiffs do not seek to impose equivalent requirements as those imposed by the [U.S. Department of Agriculture (USDA)] or to enforce the USDA's labeling requirements," the court stated. "Rather, they seek to impose different labeling requirements by asking this Court to declare USDA approved labels misleading. Plaintiffs' interpretation of 21 USC § 678 would render the express presumption clause a nullity." The court, holding that all of the plaintiffs' claims were preempted and that the plaintiffs failed to state a claim as a matter of law, dismissed the case with prejudice.

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LEGISLATION, REGULATIONS & STANDARDS

EFSA Sets Tolerable Intake of PFAS

The European Food Safety Authority (EFSA) has released its assessment of perfluoroalkyl substances (PFAS)—a group of chemicals that can be found in food and food packaging—and their potential risks to human health. The agency has set the

threshold for a group tolerable weekly intake of 4.4 nanograms per kilogram of body weight.

EFSA noted that its 2018 assessment considered an increase in cholesterol as the main critical effect of PFAS, but the experts in the 2020 assessment "considered the decreased response of the immune system to vaccination to be the most critical human health effect."

FDA Issues First Injunction Under Produce Safety Rule

The U.S. Food and Drug Administration (FDA) has announced that it has issued "the first consent decree of permanent injunction against a firm or grower for violating public safety standards under the Produce Safety Rule enacted under the Food Safety Modernization Act of 2011." Fortune Food Product Inc. will be prohibited from "growing, harvesting, packing and holding sprouts and soy products at or from their facility, or any other facility, until certain requirements are met. The consent decree requires the defendants to, among other things, take corrective actions and notify the FDA before such operations may resume."

"Manufacturing foods in violation of the Produce Safety Rule and Current Good Manufacturing Practice regulations places consumers' health at risk," an agency official is quoted as saying in the September 15, 2020, press release. "This action demonstrates the agency's commitment to pursuing and taking swift action against those who repeatedly disregard these food safety standards and distribute adulterated foods."

USDA Extends Hemp Comment Period

The U.S. Department of Agriculture has announced that it will provide an additional 30 days for public comments on the interim final rule (IFR) that established the Domestic Hemp Production Program. According to the announcement, "Comments are solicited from all stakeholders, notably those who were subject to the regulatory requirements of the IFR during the 2020 production cycle." The deadline for comments on the rule is October 8, 2020.

FDA Announces Flexibility on Nutrition Facts Enforcement for Smaller Manufacturers

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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

The U.S. Food and Drug Administration (FDA) has announced that it will not initiate enforcement actions for the updated Nutrition and Supplement Facts label requirements in 2021 against food manufacturers with less than $10 million in annual food sales. The updated requirements are scheduled to take effect January 1, 2021. “Although the compliance date will remain in place, the FDA will not focus on enforcement actions during 2021 for these smaller food manufacturers,” the announcement states. “This additional flexibility includes manufacturers of packages and containers of single-ingredient sugars, regardless of the size of the manufacturer.”

inspections, subject to FDA, USDA and FTC regulation.

LITIGATION

Oklahoma Plant-Based Meat Law Challenged

Upton’s Naturals Co. and the Plant Based Foods Association have filed a First Amendment challenge to Oklahoma’s law requiring manufacturers of plant-based meat products to include a disclaimer on the labels of products that are named after animal-derived products, such as “burgers.” *Upton’s Naturals Co. v. Stitt*, No. 20-0938 (W.D. Okla., filed September 16, 2020). The law, scheduled to take effect November 1, 2020, prohibits advertising “a product as meat that is not derived from harvested production livestock” but allows plant-based items to comply with the regulation if they display, “in type that is uniform and size and prominence to the name of the product,” text informing consumers “that the product is derived from plant-based sources.” Regulated words include “pork,” “burgers,” “hot dogs,” “meatballs,” “jerky,” “sausages,” “chorizo,” “steak,” “bacon” and “corned beef.”

“The Act is unreasonable, unnecessary, does not advance any legitimate government interest, and is not tailored to any legitimate government interest,” the plaintiffs argue. “The Act does not address any real problem in a meaningful way. The Act is not in the public interest. The Act has no positive impact on society. Instead, the Act harms society.” The plaintiffs seek a declaratory judgment stating that the law violates the First and Fourteenth Amendments to the U.S. Constitution as well as preliminary and permanent injunctions preventing enforcement of the act.

Nut Blend Contains Too Many Peanuts, Plaintiff Argues

A consumer has filed a lawsuit alleging that Star Snacks Co.'s Imperial Nuts Energy Blend "is deceptively marketed as containing mostly almonds, pecans and walnuts when in actuality is composed of more peanuts than all the other contents combined." *Andrews v. Star Snacks Co.*, No. 20-1357 (N.D. Ala., filed September 11, 2020). The plaintiff alleges she relied on the front-of-packaging displays, which list the contents as "Almonds, Pecans, Walnuts, Honey Roasted Peanuts, Honey Roasted Sesame Sticks" and show "the more desirable nuts (almonds, pecans and walnuts) arranged more prominently on the package to create a misleading impression of the package contents." The plaintiff alleges breach of contract, breach of warranty and violations of Alabama's Food and Drug Law.

Plaintiff Challenges Oil Content in "All Butter Pound Cake"

A plaintiff has alleged that he was misled by the packaging on Sara Lee Frozen Bakery's All Butter Pound Cake because he believed butter to be the only shortening ingredient when the cake actually contained soybean oil as well. *Briley v. Sara Lee Frozen Bakery LLC*, No. 20-7276 (S.D.N.Y., filed September 4, 2020). The complaint asserts, "Where a food is labeled as 'Butter _____' or uses the word 'butter' in conjunction with the food name, reasonable consumers will expect all of the shortening ingredient to be butter," which the plaintiff argues that consumers prefer to other shortening ingredients because they avoid "highly processed artificial substitutes for butter." The plaintiff alleges fraud, negligent misrepresentation and unjust enrichment along with alleged violations of New York's consumer-protection statutes and the Magnuson-Moss Warranty Act.

Strawberry Pop-Tarts Contain Pears and Apples, Consumer Alleges

A consumer has filed a putative class action alleging that Kellogg Sales Co. misleads consumers by marketing its Frosted Strawberry Pop-Tarts as containing only strawberries in its filling to the exclusion of any other fruit content. *Brown v. Kellogg Sales Co.*, No. 20-7283 (S.D.N.Y., filed September 5, 2020). "Consumers do not expect a food labeled with the unqualified term 'Strawberry' to contain fruit filling ingredients other than

strawberry, and certainly do not expect pears and apples, as indicated on the back of the box ingredient list," the complaint asserts. "Contrary to the legal requirements to prevent consumer deception, the Product's name—'Frosted Strawberry'—fails to disclose the percentage of the characterizing ingredient of strawberries in the Product." For allegations of negligent misrepresentation, fraud, unjust enrichment and violations of New York's consumer-protection statutes, the plaintiff seeks class certification, preliminary and permanent injunctions, damages, costs and attorney's fees.