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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

FIRM NEWS

Shook Attorneys Detail Honey Litigation for Law360

Shook Partner Jim Muehlberger and Of Counsel John Johnson III have authored an article for *Law360* detailing litigation targeting honey producers. "Honey producers have sometimes been accused of diluting their product with syrup," they explain. "They have also faced many other accusations, including that their honey contains contaminants, that it lacks some key quality characteristic, or that its country of origin has been wrongly declared."

The article discusses the relevant U.S. Food and Drug Administration regulations, noting that the agency "has not generally developed legally enforced quality parameters for honey," as well as litigation targeting the product. "In the 2010s, a wave of litigation focused on filtered honey, which has the pollen removed from it to meet consumer preferences for characteristics like increased clarity and slower crystallization. In these suits, the plaintiffs alleged that the filtered honey was not honey because, according to some definitions, '[no] pollen … may be removed except where this is unavoidable in the removal of foreign inorganic or organic matter.' The plaintiffs alleged that the product had avoidable pollen removed and thus was not real honey. This allegation ultimately gained little traction, and these suits largely disappeared." More recent litigation, Muehlberger and Johnson note, focuses on processing techniques, the country of origin, the type of plant bees used to make the honey and the presence of certain contaminants that allegedly affect the purity of the honey.

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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LEGISLATION, REGULATIONS & STANDARDS

Congress Investigates Heavy Metals in Baby Food

A staff report from a subcommittee of the U.S. House of Representatives' Committee on Oversight and Reform has found that several baby foods contain high levels of heavy metals, including inorganic arsenic, lead, cadmium and mercury. The report argues that the U.S. Food and Drug Administration (FDA) "has failed to confront the risks of toxic heavy metals in baby food" and has "designed these limits to be protective of industry."

"In one category of baby food for which FDA has finalized a standard—infant rice cereal—it set the maximum inorganic arsenic content at the dangerous level of 100 ppb. Why did FDA set its level so high? Because in developing the limit, FDA was focused on the level of inorganic arsenic that would cause cancer. FDA disregarded the risk of neurological damage, which happens at a much lower level," the report asserts.

The report notes the trust that consumers place in baby food and argues that "baby food manufacturers and federal regulators have broken the faith."

"Step one to restoring that trust is for manufacturers to voluntarily and immediately reduce the levels of toxic heavy metals in their baby foods to as close to zero as possible. If that is impossible for foods containing certain ingredients, then those ingredients *should not be included in baby foods*," the report argues. "If certain ingredients, like rice, are highly tainted, the answer is not to simply lower toxic heavy metal levels as much as possible for those ingredients, the answer is to stop including them in baby foods. The Subcommittee urges manufacturers to make this change voluntarily."

Advocacy Groups Challenge Smithfield Foods Sustainability Marketing

A coalition of advocacy groups has filed a complaint with the Federal Trade Commission (FTC) asserting that Smithfield Foods misleadingly markets its pork products as "produced in an environmentally responsible and sustainable way" despite the company's production methods allegedly falling "far below the level of environmental sustainability that a reasonable consumer

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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

would expect based on the company's representations." The complaint further argues that "Smithfield touts its use of anaerobic digesters to produce methane from its pollution-laden waste as a sustainable innovation and solution to Smithfield's climate damaging production practices—a falsehood that capitalizes on an issue of growing importance to consumers." The petitioners include Food & Water Watch, Socially Responsible Agriculture Project and organizations from Iowa, Missouri and Pennsylvania.

LITIGATION

Lawsuit Alleges Market Basket Coffee Serving Sizes Mislead

A plaintiff has filed a putative class action alleging Demoulas Super Markets Inc. includes representations on its Market Basket coffee indicating that the tins hold 76 to 79 cups of coffee but only contain 37 to 39 cups when prepared according to the label's instructions. *Cohen v. Demoulas Super Mkts. Inc.*, No. 21-10177 (D. Mass., filed February 2, 2021). "This means that consumers of the Products, including Plaintiff, were cheated out of 51% of the servings they paid for, in both cases, based on the advertising, marketing, and labeling of the Products," the complaint asserts. The plaintiff alleges claims of unjust enrichment as well as breach of express warranty and untrue and misleading advertising under Massachusetts General Laws.

Claims Trimmed in Whole Foods Graham Cracker Lawsuit

A New York federal court has dismissed some claims while allowing others to continue in a lawsuit alleging Whole Foods Market Group Inc. misleads consumers by not using graham flour to produce or honey to sweeten its "honey graham crackers." *Campbell v. Whole Foods Mkt. Grp. Inc.*, No. 20-1291 (S.D.N.Y., entered February 2, 2021). The court found that the plaintiff adequately pleaded allegations that "the references to 'honey' and 'graham' on the product's packaging are likely to lead a reasonable consumer to wrongly believe that these graham crackers contain more whole-grain flour than non-whole grain flour, and that honey is their predominant sweetener," so claims under the New York General Business Obligation Law can continue.

inspections, subject to FDA, USDA and FTC regulation.

The court dismissed a claim of negligent misrepresentation, finding the plaintiff "failed to allege the existence of a special relationship giving rise to a duty to speak on the part of the Defendant." The plaintiff's fraud and breach-of-warranty tort claims were similarly dismissed when the court found that the plaintiff failed to plead essential factors to those claims, and a Magnuson-Moss Warranty Act claim was dismissed because the plaintiff "does not plead the existence of a written warranty." An unjust enrichment allegation was also dismissed as duplicative, and the court found that the plaintiff did not have standing to pursue injunctive relief.

Lawsuit Challenging USDA Pork Inspection Policy to Continue

A California federal court has denied a motion to dismiss an advocacy group lawsuit brought against the U.S. Department of Agriculture (USDA) challenging the implementation of the Food Safety and Inspection Service's New Swine Inspection System (NSIS). *Ctr. for Food Safety v. Perdue*, No. 20-0256 (N.D. Cal., entered February 4, 2021). The plaintiffs, several advocacy groups including the Center for Food Safety and Food & Water Watch, argued that the rule change violated the Administrative Procedure Act. The court found that the plaintiffs could reasonably argue a "credible threat," a standard in threatened environmental harm cases that "also applies to food safety cases such as this one."

"Here, Plaintiffs allege that the new NSIS procedures outlined in the Final Rule erode several important features of the traditional inspection process increasing the likelihood that adulterated pork products will enter the food supply and thus putting their members at risk of illness from consuming adulterated pork. Plaintiffs allege that under the Final Rule, responsibilities for ante-mortem and post-mortem inspections will fall to plant employees who are not required to receive specific training or certification related to inspections. Additionally, the Final Rule allows for line speeds at plants to increase, which will decrease the amount of time each inspector can devote to examining a carcass for potential disease. According to Plaintiffs, the data provided by Defendants shows that the NSIS plants tagged twenty-five to thirty-percent fewer animals than plants using the traditional inspection process. Plaintiffs also point to provisions of the Final Rule that rescind current testing requirements for *E. coli* and *salmonella*. Moreover, because approximately forty plants producing roughly ninety-three percent of the domestic pork supply will adopt the new NSIS rules, Plaintiffs allege that their members, who desire to continue to consume pork, will be unable

to avoid pork from NSIS plants given the number of plants likely to adopt the procedures and absence of consumer-facing labeling and disclosures regarding the location of the swine slaughter. [] Defendants argue that this theory is too speculative because the number of plants adopting NSIS is not certain; however, by Defendants' own estimate, NSIS plants will account for seventy-eight percent of the total pork slaughter nationwide, which is still a significant amount."

Accordingly, the court held that NSIS could pose a credible threat and denied the agency's motion to dismiss.