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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Bill on Mandatory Sesame Labeling Passes U.S. Legislature

The U.S. House of Representatives has voted 415-11 to pass the Food Allergy Safety, Treatment, Education, and Research Act of 2021 (FASTER Act), a bill that will expand the definition of "major food allergen" to include sesame. The bipartisan bill, which passed the Senate in March 2021, will head to the White House for President Biden's signature. Upon enactment, sesame will become the ninth major food allergen, joining milk, egg, wheat, peanuts, shellfish, tree nuts, fish and soybeans.

LITIGATION

Plaintiff Argues Sparkling Mineral Water Lacks Lemons and Raspberries

A plaintiff has filed a putative class action alleging that Whole Foods Market Group Inc. misleads consumers by selling sparkling mineral water in a lemon raspberry flavor without an "appreciable amount" of lemons and raspberries. *Kelly v. Whole Foods Mkt. Grp. Inc.*, No. 21-3124 (S.D.N.Y., filed April 11, 2021). The label of the water contains images of lemons and raspberries, the complaint asserts, and consumers "will expect the presence of a non-de minimis amount of lemon and raspberry ingredients, based on the pictures of these fruits." The plaintiff argues that the ingredient list, which shows the contents as "carbonated mineral

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water, organic natural flavors (raspberry, lemon)," fails to inform consumers the flavoring "mainly consists of flavors from fruits other than lemons and raspberries." "Because lemon oil and raspberry oil or raspberry extract are not separately identified ingredients, it means that any real lemon or raspberry flavoring is at most a *de minimis* or a trace amount and is part of the 'Organic Natural Flavor.' ingredient," the complaint asserts. The plaintiffs allege violations of New York's consumer-protection statute, fraud, negligent misrepresentation and breach of warranty.

Bone Broth Products Contain Indigestible Protein, Consumers Allege

Two consumers allege that Ancient Brands' Ancient Nutrition Bone Broth Protein products are marketed as beneficial to health but contain protein that is "largely indigestible to the human body and provides little to no actual benefit to consumers." *Bush v. Ancient Brands LLC*, No. 21-0390 (N.D.N.Y., filed April 5, 2021). The complaint asserts that Ancient Brands fails to calculate the protein content as a percentage of daily value or as calculated by the Protein Digestibility Amino Acid Corrected Score, allegedly violating state and federal regulations. The plaintiffs detail how protein content is calculated, asserting that the percentage daily value listed on the packaging provides consumers information on the quality of protein and is required on product packaging that contains a nutrient content claim for protein. The plaintiffs allege violations of New York and California consumer-protection statutes as well as fraudulent concealment, unjust enrichment and breach of express warranty.

Court Rules Heinz Did Not Infringe "Metchup" Mark

The U.S. Court of Appeals for the Fifth Circuit has ruled that H.J. Heinz Co. Brands did not violate the Metchup trademark when it introduced a poll letting consumers choose the name of its mayonnaise-ketchup blend, which ultimately chose "Mayochup" as the winner but included "Metchup" as an option. *Perry v. H.J. Heinz Co. Brands LLC*, No. 20-30418 (5th Cir., entered April 12, 2021). The district court found no likelihood of confusion between Heinz' "convenient, yet perhaps gratuitous, mixture" and the plaintiff's product, which has sold about $170 worth of either mayonnaise-ketchup or mustard-ketchup blends "from the lobby of a nine-room motel adjacent to his used-car dealership in Lacombe, Louisiana."

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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 appeals court found that the Metchup name was one of more than 90 suggestions submitted by consumers in Heinz' poll on what the mayonnaise-ketchup combination should be called, which also included, as the court noted, "Saucy McSauceface, an apparent nod to Boaty McBoatface, the name the Internet proposed for a British research ship." Following the campaign, "Heinz posted mock-up bottles bearing the proposed names on its website. Heinz never sold bottles with Saucy McSauceface or Metchup on them. It was all for advertising purposes only."

"Before posting the mock-up bottles, Heinz had its in-house lawyers run a trademark search, which turned up a trademark registration for Metchup," the court found. "Turns out, Heinz was not the first to grapple with both the problem of having to contemplate ratios and the inconvenience of having to use two bottles when preparing a burger." Finding no evidence that Metchup was being sold anywhere, Heinz concluded that the trademark had been abandoned, and the district court agreed.

The Fifth Circuit affirmed the dismissal of trademark infringement, but it vacated the district court's cancellation of the plaintiff's trademark. "[B]ecause Mr. Perry sold some Metchup and testified that he hoped to sell more, a finder of fact should determine whether his incontestable trademark should be deemed abandoned and canceled," the court held.

inspections, subject to FDA, USDA and FTC regulation.