



LEGISLATION, REGULATIONS & STANDARDS

FDA Releases Foodborne Illness Report

The U.S. Food and Drug Administration (FDA) has [announced](#) the release of the [Interagency Food Safety Analytics Collaboration’s annual report](#), which provides data on source attribution estimates for 2020 for *Salmonella*, *E. coli* and *Listeria monocytogenes*. The findings include that (i) “*Salmonella* illnesses came from a wide variety of foods”; (ii) “*E. coli* O157 illnesses were most often linked to Vegetable Row Crops (such as leafy greens) and beef”; and (iii) “*Listeria monocytogenes* illnesses were most often linked to Dairy products, Fruits, and Vegetable Row Crops.”

LITIGATION

Additional Heavy Metals Baby Food Lawsuit Dismissed

A New Jersey federal court has dismissed claims filed against Plum PBC and Campbell Soup Co. alleging the companies sold baby food products containing high levels of heavy metals. *In re Plum Baby Food Litig.*, No. 21-2417 (D.N.J., entered October 31, 2022). In finding that the plaintiffs lacked standing, the court echoed the reasoning followed by a [Virginia federal court](#) in a decision dismissing a lawsuit against Gerber with similar claims.

“Plaintiffs purchased the baby food products from Defendants to feed their children, and these products were fully used for their

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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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intended purposes. [] Plaintiffs do not allege that their children have suffered physical harm: the children did not starve or become nutrient deficient. [] Imparting nutrition is ostensibly what Defendants advertised regarding its baby food products,” the court found. “Moreover, the [U.S. Food and Drug Administration’s (FDA’s)] opinion that parents should not throw out their supply of packaged baby foods or eliminate certain foods to avoid toxic elements because it could result in deficiencies in nutrients and poor health outcomes suggests that the products are fulfilling their intended purpose of providing nourishment to babies and infants. While the FDA’s statement is not determinative in this Court’s decision, it substantially weakens and makes less plausible Plaintiffs’ claims that they did not receive the benefit of their bargain with regard to Defendants’ baby food products.”

Ninth Circuit Declines En Banc Review of Acrylamide Decision

The Ninth Circuit has denied the Council for Education and Research on Toxics’ petition for an en banc reconsideration of a March 2022 decision upholding a preliminary injunction on enforcing mandated warnings on products containing acrylamide under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *Cal. Chamber of Com. v. Council for Education and Research on Toxics*, No. 21-15745 (9th Cir., entered October 26, 2022). The order denying the rehearing is brief, but one circuit judge issued a statement respecting the denial but asserting that the court should have granted the petition for rehearing.

“The right to access the courts is one of ‘the most precious of the liberties safeguarded by the Bill of Rights.’ [] But in this opinion, without basis in law or precedent, this Court narrows that fundamental right. The panel opinion closes the courtroom doors to all those seeking to enforce provisions of California’s Proposition 65 with respect to a chemical present in a wide range of food products—on pain of contempt. In doing so, the panel opinion expands the so-called ‘illegal objective’ exception far beyond any prior decision of the Supreme Court or the appellate courts: it allows a single judge to enjoin potential plaintiffs from filing any sort of lawsuit if the judge predicts that the lawsuits will fail upon a defense grounded in a federal right.”

Court Tosses Claims that Formula’s ‘Milk-based’ Labeling Misled Consumers



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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

A federal court in California has largely granted Mead Johnson & Company's bid to throw out a proposed class action alleging the company misled consumers about just how much milk was in its Enfamil baby formulas. *Martinez v. Mead Johnson & Co., LLC*, No. 22-0213 (C.D. Cal., entered October 22, 2022). The court granted the company's motion to dismiss on all but one of the plaintiff's claims, her claim for unjust enrichment and restitution, and allowed the plaintiff to file an amended complaint.

The plaintiff alleged in her February 2022 complaint that Mead Johnson engaged in misleading advertising by calling its Enfamil powdered infant products "Milk-based" when milk is one of the ingredients, not the primary ingredient by weight. The plaintiff alleged that at the time of purchase, she understood that phrasing to mean milk was the primary ingredient, but later learned the primary ingredient in the product was corn syrup solids.

Discussing the plaintiff's California state law claims, the court said the plaintiff's interpretation of the label "may very well be sincere, but it is only one person's rather narrow interpretation."

"Martinez otherwise alleges no factual support for why a reasonable consumer would narrowly interpret a something based label to mean that that something must contribute the most to the product's weight, relative to any other ingredient," the court said.

The court said consumers could easily turn the bottle around and read the ingredient label, where they could see milk is an ingredient, but not the first one listed.

"And while reasonable consumers are not 'expected to look beyond misleading representations on the front of the box,' Martinez has not done enough to allege that calling a product 'Milk-based' is, in fact, deceptive when milk is patently one of the named ingredients," the court added.

In order for the plaintiff to prevail on her claims, the court said she would need to plausibly allege why the ingredient label fails to provide reasonable consumers with enough information to clarify any ambiguity around the phrase "Milk-based."

The court concluded the plaintiff failed to state a claim, granting the defendant's motion to dismiss with leave to amend. The court similarly dismissed the plaintiff's claims of breach of express and implied warranties, intentional and negligent misrepresentation.

Suit Alleges Mondelēz Misled Consumers on Source of Gum Flavoring



An Illinois woman has filed a proposed class action against Mondelez, alleging the company's Trident gum misleads consumers into believing its flavoring comes from peppermint or mint ingredients rather than artificial flavoring. *Lesorgen v. Mondelez Global LLC*, No. 22-50375 (N.D. Ill., filed October 28, 2022).

The product at issue in the suit is Trident Original Flavor gum. The plaintiff noted in the complaint that the front label states "ORIGINAL FLAVOR" with a picture of a blue-colored peppermint leaf.

"By representing the Product as 'mint' or 'peppermint' without any qualifying terms, consumers and Plaintiff expected its taste was from mint or peppermint ingredient," the plaintiff said in the complaint. "However, the ingredient list in small print on the back does not identify any mint or peppermint ingredients, and gets its mint or peppermint taste from 'Natural and Artificial Flavor.'"

The plaintiff asserts that the products' added natural and artificial flavor must be disclosed prominently on the front label to consumers.

The plaintiff's claims against Mondelez include alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and other state consumer fraud acts, breach of express and implied warranty, negligent misrepresentation, fraud and unjust enrichment. She seeks class certification, injunctive relief, damages and costs and expenses including attorney's fees.

Yogurt Maker Faces Suit for 'Naturally French' Labeling

A California consumer has filed a proposed class action against La Fermiere, alleging the yogurt maker misrepresented the origin of its products on its packaging. *Manier v. La Fermiere Inc.*, No. 22-1894 (C.D. Cal., filed October 27, 2022).

The plaintiff alleged she was misled by the product's packaging into believing the yogurt she bought was made in France, and she would not have purchased the company's yogurt had she been aware of the misrepresentations. According to the complaint, the defendant runs U.S. operations for a French-based company that manufactures, labels, distributes and sells yogurt in France and throughout Europe. It also manufactures, labels, distributes and sells yogurt products in the United States.

"Defendant's marketing, labeling and sale of the Products misleads a reasonable consumer to believe that the yogurts are

made in France, by using the words ‘Naturally French’ on the front label,” she asserted in the complaint. “Consumers interpret that statement to mean that the products are made in France, when in actuality they are made in the United States, in New York.”

The complaint also cited an article in *Taste France*, a publication of the French Ministry of Agriculture, in which the company’s CEO was quoted several times. The article stated his products “benefit from the ‘Made in France’ reputation, which is very popular with American consumers,” the plaintiff said.

“Therefore, it is abundantly clear that Defendants’ misrepresentations are false and misleading and are intended to be,” she added.

The plaintiff is alleging violations of California’s Consumers Legal Remedies Act, Unfair Competition Law and False Advertising Law, in addition to claims of breach of warranty and unjust enrichment. She is seeking class certification, injunctive relief, costs and expenses including attorney’s fees and prejudgment and post-judgment interest.

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