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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK HARDY & BACON

Note: The Food and Beverage Litigation and Regulatory Update website is under construction this week.

LEGISLATION, REGULATIONS & STANDARDS

Cultured Chicken Passes FDA Pre-Market Consultation

The U.S. Food and Drug Administration (FDA) has completed a pre-market consultation for chicken meat made from cultured animal cells, finding "no further questions at this time about the firm's safety conclusion." UPSIDE Foods created its cultivated chicken product by taking living cells from chickens and growing them in a controlled environment.

"The FDA is ready to work with additional firms developing cultured animal cell food and production processes to ensure their products are safe and lawful under the Federal Food, Drug, and Cosmetic Act," the agency stated. "We also plan to issue guidance to assist firms that intend to produce human foods from cultured animal cells to prepare for pre-market consultations."

Before the cultivated chicken can be sold for human consumption, UPSIDE facilities must pass inspection by FDA and the U.S. Department of Agriculture (USDA), and the food itself must earn a mark of inspection from USDA's Food Safety and Inspection Service (FSIS). "As this product comes closer to entering the U.S. market, we are closely coordinating with USDA-FSIS to ensure it is properly regulated and labeled," an FDA constituent update stated.

FDA Issues Final Rule For Food Traceability

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The U.S. Food and Drug Administration (FDA) has submitted for publication its final rule establishing new traceability recordkeeping requirements for persons who manufacture, process, pack or hold foods the agency has designated for inclusion in its Food Traceability List.

The rule, titled "Requirements for Additional Traceability Records for Certain Foods," is part of FDA's New Era of Smarter Food Safety Blueprint and would implement Section 204(d) of FDA's Food Safety Modernization Act.

The final rule will be published in the Federal Register on November 21, 2022.

The purpose of the rule is to help FDA more quickly and effectively identify recipients of certain foods, mitigate foodborne illness outbreaks and address credible threats of serious adverse health consequences or death.

Report Recommends Ways to Strengthen FDA Oversight of Food Contact Substances

A government watchdog office has recommended that the U.S. Food and Drug Administration (FDA) ask Congress for more authority to compel companies to hand over safety information about substances used in manufacturing, packaging and transportation of food.

On November 8, the Government Accountability Office (GAO) issued a report on FDA oversight over food contact substances, which can migrate into food and potentially pose health risks to consumers.

FDA is responsible for reviewing the safety of food contact substances before and after they are authorized for use, through pre-market and post-market reviews. The agency is also tasked with taking action when the agency identifies safety concerns.

After interviewing FDA officials and stakeholders and reviewing FDA documents and the agency's website for actions it took between 2000 and 2022 to stop the use of potentially unsafe substances, GAO identified two key limitations in FDA's efforts to ensure food safety.

GAO found that FDA does not have specific legal authority to compel companies to provide information and data on substances' safety and extent of use, which it needs to prioritize and conduct post-market reviews.

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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

Additionally, GAO found that while agency staff can search FDA's information system for each food contact substance and find the date of the last pre-market review, the system cannot readily identify all substances that, according to their last review dates, may warrant additional review because new safety information may have emerged.

Accordingly, GAO recommended that FDA:

- Request from Congress specific legal authority to compel companies to provide the information needed to reassess the safety of substances, and
- Track the dates of the last reviews for all food contact substances to allow FDA to readily identify substances that may warrant post-market review.

FDA neither agreed nor disagreed with the former recommendation, but agreed with the latter recommendation, the report said.

inspections, subject to FDA, USDA and FTC regulation.

LITIGATION

‘All Fruit’ Spread Not Entirely ‘All Fruit,’ Consumer Alleges

A New York woman has filed suit against fruit spread, jam and jelly maker B&G Foods, Inc., alleging the company misleads consumers as to the contents of its Polaner-brand fruit spreads. *Indiviglio v. B&G Foods, Inc.*, No. 22-9545 (S.D.N.Y., filed November 8, 2022).

The plaintiff said in her complaint that the fruit spreads are described as “All Fruit.” Additionally, she said the product’s front label contains pictures and statements of the subject fruit in the color of that fruit, and also has the statement “Sweetened Only With Fruit Juice.”

“Though ‘All Fruit’ tells consumers the Product will consist only of fruit ingredients, the ingredient list reveals it does not consist only of fruit because it contains ‘Citric Acid, [and] Natural Flavor,’” the plaintiff said in the complaint. “While juice concentrates, cherries, and fruit pectin can reasonably be described as fruit, citric acid and natural flavor cannot be.”

While citric acid may be found in citrus fruit, the plaintiff alleged that when it is found in other foods, it’s industrially produced by fermentation. Additionally, the plaintiff said the statement

“Sweetened Only With Fruit Juice” furthers consumers’ expectations that the product is “all fruit.”

She said that had it not been for the alleged misrepresentations and omissions, she would not have bought the product.

She alleges B&G Foods violated the consumer fraud statutes of New York and other states. She also has brought claims of breach of express and implied warranties and unjust enrichment against the company. For her claims, she is seeking class certification, damages and costs and expenses, including reasonable plaintiff’s fees.

Quaker Oats ‘SIMPLY’ Granola Target of Labeling Suit

Three consumers have filed a proposed class action against The Quaker Oats Co., alleging Quaker Oats' "SIMPLY" granola products led consumers to wrongly believe the products contained only represented ingredients. *Campobasso v. The Quaker Oats Co.*, No. 22-6043 (N.D. Ill., filed November 2, 2022).

The plaintiffs, who are from New York, Illinois and California, take issue with the use of the word "SIMPLY" in the name of the product, as well as the inclusion of a list of select named ingredients and pictures of only those ingredients on the product labeling. They said such labeling leads reasonable consumers to believe the products only contain those certain ingredients, when they also contain several other ingredients, such as wheat, sugar, inulin and vegetable oils.

"Plaintiffs and Class members purchased the Products and paid a premium price based on Defendants’ advertising of the Products as ‘SIMPLY’ granola, which is seen as a premium due to being a food with clean, simple ingredients," they said in the complaint. "Had Plaintiffs and Class members been aware of the truth about the Products, they would not have purchased them, or would have paid significantly less for them."

Plaintiffs allege violations of Illinois, New York and California consumer fraud acts, as well as other state consumer fraud acts, and breach of express and implied warranties and unjust enrichment. They are seeking class certification, declaratory judgment, disgorgement, damages, injunctive relief, attorneys' fees and pre- and post-judgment interest.

‘Popcorn Indiana’ Packaging Misleads Consumers, Indiana Woman Alleges

An Indiana woman has filed a proposed class action against Eagle Family Foods Group LLC, alleging the manufacturer of Popcorn Indiana-branded popcorn misled consumers as to the origin of its product. *Gibson v. Eagle Family Foods Group LLC*, No. 22-2147 (S.D. Ind., filed November 4, 2022).

The plaintiff noted in her suit that Indiana is the second largest popcorn producer in the country, second only to Nebraska, and that Popcorn, Indiana, is a real town known for its history of popcorn production. She alleged that consumers expect Popcorn Indiana to be made in Indiana, from start to finish, but the product has no real connection to the state aside from its raw materials.

The plaintiff pointed to the popcorn's labeling, which includes the statement "Popcorn Indiana," along with other elements, "giving consumers the impression it is made in Indiana, from the harvesting of the corn to the popping of the kernels."

The product was popped, however, in Waukegan, Illinois, a fact only disclosed to consumers on the product's website, not its packaging.

The plaintiff is alleging violation of consumer fraud acts of Indiana and other states, breach of express and implied warranties, negligent misrepresentation, fraud and unjust enrichment. She is seeking class certification, injunctive relief, damages, costs and expenses including reasonable attorney's fees.