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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

FDA Revokes GRAS Status from PHOs

The U.S. Food and Drug Administration (FDA) has amended regulations in light of its determination that partially hydrogenated oils (PHOs) are no longer generally recognized as safe (GRAS). The 2015 determination "recognized that there were some uses of PHOs in foods that are expressly authorized by GRAS affirmation regulations, acknowledged that there could be some uses recognized by 'prior sanction' (and thus could not be regulated as a food additive), and stated that we would address such uses separate from the final determination," according to the agency's *Federal Register* announcement.

"[B]ased on our current review of scientific data and information, as well as previous safety reviews performed to support various FDA actions regarding *trans* fat, we are prohibiting all prior-sanctioned uses of PHOs," the agency announced. "We have determined that the prior-sanctioned uses of PHOs may render food injurious to health." PHOs were previously listed as an optional ingredient in peanut butter and canned tuna, were allowed in menhaden and rapeseed oils, and were sanctioned in margarine, shortening, bread, rolls and buns.

The rule will take effect December 22, 2023, and comments will be accepted until October 23, 2023.

UK Food Safety Agency Issues Guidance on Glycerol in Slush-Ice Drinks

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The United Kingdom's Food Safety Agency (FSA) has issued voluntary industry guidance warning against selling slush-ice drinks containing glycerol to children aged four and under. FSA also advises that retailers should not offer free refill promotions of such drinks to children under the age of 10 so that they are not exposed to excessive amounts of glycerol.

The agency updated its guidance following an FSA risk assessment that found children under the age of four may suffer from headaches and sickness caused by exposure to glycerol. The agency said it is aware of two cases in Scotland in recent years in which children were hospitalized because of glycerol intoxication. FSA said at very high levels of exposure, glycerol intoxication could cause shock, hypoglycemia and loss of consciousness.

"While the symptoms of glycerol intoxication are usually mild, it is important that parents are aware of the risks – particularly at high levels of consumption," said Adam Hardgrave, head of additives at FSA. "It is likely that there is under-reporting of glycerol intoxication, as parents may attribute nausea and headaches to other factors."

FSA said slush-ice drinks can contain glycerol as a substitute for sugar to create the slush effect. The new guidance encourages companies to use the lowest amounts necessary to achieve that effect.

FDA Seeks Comments on Pasteurized Orange Juice Standard

The U.S. Food and Drug Administration (FDA) has issued a request for information in response to a citizen petition asking FDA to amend the standard of identity for pasteurized orange juice.

The Florida Citrus Processors Association and Florida Citrus Mutual filed the petition, which seeks to lower the minimum soluble solids content, also known as the Brix level. The petitioners seek to reduce the Brix level from 10.5 to 10 percent, citing a drop in the average Brix level of Florida's orange crops due to bacterial disease and severe weather.

According to an FDA constituent update, lowering the minimum level of soluble solids might reduce the sweetness of the juice and the levels of certain nutrients. FDA's request for information is seeking comment in a number of areas, including consumer acceptance and nutritional value of pasteurized orange juice with a lower minimum soluble solids content. The deadline for submitting comments is October 16, 2023.

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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 inspections, subject to FDA, USDA and FTC regulation.

LITIGATION

Consumer Alleges Taco Bell Misrepresents Beef, Ingredients in Menu Items

Taco Bell is facing a proposed class action from a New York man alleging that the company falsely advertised the amount of beef and other ingredients contained in its Crunchwrap Supreme, Vegan Crunchwrap, Mexican Pizza and Veggie Mexican Pizza products. *Siragusa v. Taco Bell Corp.*, No. 23-05748 (E.D.N.Y., filed July 31, 2023).

The plaintiff alleged Taco Bell uses the misleading images of its products in-store and on its drive-thru menu boards, on its website and on food delivery service websites. The complaint includes side-by-side images of the company's advertisements compared to the products the customer received from a Taco Bell store in New York.

“Taco Bell’s advertisements for the Overstated Menu Items are unfair and financially damaging to consumers as they are receiving a product that is materially lower in value than what is being promised,” the plaintiff said in the complaint. “Taco Bell’s actions are especially concerning now that inflation, food, and meat prices are very high and many consumers, especially lower income consumers, are struggling financially.”

The plaintiff alleges violations of New York's General Business Law and seeks class certification, an award of statutory or compensatory damages, an order that the company stop selling the overstated menu items or correct their deceptive behavior, attorneys’ fees, expenses and costs.

9th Circuit Upholds Dismissal of Kashi, Kellogg Protein Claims

The Ninth Circuit has upheld dismissal of two putative class actions alleging that Kashi and Kellogg used false and misleading labeling advertising the amount of protein in their products, finding that the lawsuits were preempted by federal law. *Brown v. Kellogg Co.*, No. 22-15658 (9th Cir., entered August 14, 2023); *Nicaro v. Kashi Co.*, No. 22-15377 (9th Cir., entered August 14, 2023).

The plaintiffs alleged Kashi and Kellogg products' front labels were false and misleading because they overstate the amount of protein in their products and implicitly exaggerate protein quality, according to the Ninth Circuit's opinion. The district court granted the defendants' motion to dismiss, finding that the plaintiffs' claims were preempted by federal law because the defendants measured protein using a method approved by the U.S. Food and Drug Administration.

The Ninth Circuit affirmed the lower court ruling, noting that while it agrees with the district court's preemption analysis and conclusion, it reads the federal food labeling regulations differently. "Even if protein quantity is calculated using a federally approved method, promoting a product's protein quantity outside of the label's Nutrition Facts Panel could be misleading if the panel does not disclose the percent daily value of protein adjusted for the protein's quality," the court said in its opinion. "Here, we nevertheless affirm the district court's dismissal of Plaintiffs' complaints because neither of them alleges that the Nutrition Facts Panels on Defendants' product labels omitted the required protein quality-adjusted percent daily value information."

Court Dismisses Claims PepsiCo Infringed on Beverage Company's Trademarks

A federal court has granted PepsiCo's motion to dismiss a lawsuit alleging its Mtn Dew Rise Energy drink infringed on RiseandShine Corporation's registered marks. *RiseandShine Corp. v. PepsiCo Inc.*, No. 21-6324 (S.D.N.Y., August 2, 2023).

The plaintiff, which does business as Rise Brewing, owns registered marks that it uses on its canned coffee- and tea-based drinks. According to the decision, Rise Brewing holds a federal trademark for "Rise Brewing Co." and the associated design, which it started using in 2015. The company displays these marks and other marks using the word "rise" in relation to its canned coffee- and tea-based beverages. In the complaint, Rise Brewing asserted five claims against PepsiCo, including trademark infringement, unfair competition and false designation of origin.

PepsiCo filed a motion for summary judgment on all claims. The district court sided with PepsiCo, citing a binding Second Circuit decision holding that the plaintiff's mark was "inherently weak." In making its ruling on summary judgment, the district court said in that the strength of the mark weighs against Rise Brewing.

"In addition to the weakness of the mark, a lack of similarity between the parties' products can be grounds for summary

judgment in and of itself," the district court said. "Given this framework, the Circuit's finding as a matter of law that Plaintiff's mark is weak, its conclusion that it is 'clear error' to find that the parties' products are similar and its statement that '[t]o the extent that Defendant's use of its marks caused any likelihood of confusion, this was because Plaintiff chose a weak mark in a crowded field,' summary judgment is granted to Defendant, as a matter of law."

Court Preliminarily Approves $7.7 Million Kona Coffee Settlement

A federal court has given preliminary approval to a $7.7 million class action settlement for Hawaiian coffee farmers in their lawsuit claiming Mulvadi Corp. and other companies wrongly sold coffee using the name "Kona." *Corker v. Mulvadi Corp.*, No. 19-0290 (W.D. Wash., filed July 31, 2023). The settlement follows 11 prior settlement deals between farmers and those selling coffee under the name "Kona."

According to court filings, although Mulvadi Corp. is bankrupt, its insurer has agreed to pay the $7,775,000 settlement, bringing the plaintiffs' and class members' total overall recovery to over $40 million. Additionally, Mulvadi and its owner in his personal capacity have agreed to provide injunctive relief, including to stop doing business with certain coffee suppliers, to obtain proof that any coffee they purchase is genuine Kona, and to print a lot number on every bag of coffee they sell.

The court found that the proposed settlement class—all persons and entities who commercially farmed Kona coffee in the Kona District and sold their coffee between February 27, 2015, and the date of the order—likely meets the requirements for class certification. The court also found that the proposed settlement agreement is "likely fair, reasonable, and adequate, entered into in good faith, and free from collusion." A final approval hearing is set for November 30, 2023.

YouTube Star, Ghost Kitchen Cos. Disagree on Food Quality in Pair of Lawsuits

Jimmy Donaldson, who goes by MrBeast on YouTube, has filed a lawsuit alleging Virtual Dining Concepts and Celebrity Virtual Dining tarnished his reputation by serving low-quality food under the name of their joint-venture virtual-restaurant brand MrBeast Burger; the companies countersued, arguing Donaldson's

comments on the food quality tarnished the brand. *Beast Investments LLC v. Celebrity Virtual Dining LLC*, No. 23-6658 (S.D.N.Y., filed July 31, 2023); *Beast Investments LLC v. Celebrity Virtual Dining LLC* (N.Y. Sup. Ct., case number unavailable); *Virtual Dining Concepts LLC v. Beast Investments LLC* (N.Y. Sup. Ct., case number unavailable). Donaldson's company, Beast Investments, originally filed in federal court but voluntarily dismissed that complaint and refiled in state court, where the virtual-restaurant companies filed their complaints.

The complaint filed by Beast Investments asserts that "because Virtual Dining Concepts was more focused on rapidly expanding the business as a way to pitch the virtual restaurant model to other celebrities for its own benefit, it was not focused on controlling the quality of the MrBeast Burger customer experience and products." The complaint cites reviews calling the food "disgusting," "revolting," "inedible," "nasty" and "upsetting."

"More than half of the MrBeast Burger virtual restaurants have less than two (out of five) stars, which is well-below the median score of four stars across the platform," Beast Investments alleges. Donaldson seeks a declaration that his company can terminate the MrBeast Burger joint venture and requests an accounting of the joint venture's profits because Donaldson "has not yet received any profit share from the business since its inception almost three years ago and does not have access to the relevant books and records of the business."

The virtual-restaurant companies' complaint alleges Donaldson breached contracts and tortiously interfered with the companies' contractual relationships and prospective business. The companies argue that Donaldson misrepresented the quality of the food. "There were some complaints about the burgers, as is customary for any burger restaurant, but those were relatively few in number compared to the overall number of burgers sold," the complaint asserts. "Every restaurant gets periodic bad reviews and every company that sells product to the public has unsatisfied customers. The reality is that the overwhelming majority of customers were highly satisfied, and the product was excellent."

The companies also allege Donaldson disparaged the MrBeast Burger brand in "a slew of highly damaging social media posts, which were quickly amplified in numerous media outlets, just as he intended." They ask the court to enjoin Donaldson "from disparaging MrBeast Burger or Plaintiffs" and seek damages for Donaldson's alleged breach of contract.

"Kimade" Maker Challenges Competitor's Similar Images in Energy Drink

Campaign

Alani Nutrition has filed a lawsuit alleging Ryse Up Sports Nutrition infringed its copyright by creating a marketing image to advertise its energy drink that is nearly identical to an image featured in Alani Nu's campaign marketing its Kimade energy drink. *Alani Nutrition LLC v. Ryse Up Sports Nutrition LLC*, No. 23-5196 (N.D. Ill., E. Div., filed August 7, 2023).

Alani Nu and Kim Kardashian posted an image to their Instagram accounts featuring Kardashian in front of a weight set and a pink wall on July 10, 2023, to market Alani Nu's Kimade energy drink. On July 27, 2023, Ryse Up and model Paige Hathaway posted a nearly identical image with Hathaway standing in front of a pink wall and weight bench and styled similarly to Kardashian in Alani Nu's image. In comments on her social media post, Hathaway appears to confirm that Ryse Up intentionally recreated Alani Nu's image; in one comment cited in the complaint, she says, "This was definitely a super fun shoot to mimic!"

Alani Nu alleges Ryse Up's image violates its copyright—the company asserts that it "possesses exclusive rights to reproduce the Kimade Workout Image, prepare derivative works based on the copyrighted work, and distribute copies of the copyrighted work in the United States"—and asserts that the use of the recreated image is grounds for claims of unjust enrichment, federal false advertising and unfair competition, in addition to alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act.