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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

State Lawmakers Introduce Food Additive Bans

State lawmakers in three states have introduced bills seeking to prohibit the use of food additives, building on a first-in-the-nation law passed in California in 2023. In California, a state lawmaker has proposed a bill, AB 2316, that would ban public schools from serving foods with titanium dioxide and the synthetic food dyes Red Dye No. 40, Yellow Dyes No. 5 and 6, Blue Dyes No. 1 and 2 and Green Dye No. 3.

In Pennsylvania, a bipartisan team of state lawmakers introduced two bills that would collectively ban nine chemicals from food made, distributed or sold in the state: HB 2116, which seeks to ban six food dyes—Red Dyes No. 3 and 40, Yellow Dyes No. 5 and 6, Blue Dyes No. 1 and 2—and HB 2117, which seeks to ban potassium bromate, brominated vegetable oil and butylated hydroxyanisole.

Two New York lawmakers introduced bills seeking to ban the use of seven food and beverage additives and require companies to disclose when they add chemicals self-determined to be Generally Recognized As Safe (GRAS). AB A6424A/SB S6055B would prohibit the use of azodicarbonamide, brominated vegetable oil, butylated hydroxyanisole, potassium bromate, propylparaben, Red Dye No. 3 and titanium dioxide. The second bill, SB S8615/AB A9295, requires companies to disclose to New York when they add chemicals to foods or beverages that the company self-determines are GRAS without notifying the U.S. Food and Drug Administration (FDA).

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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"While the FDA does approve a small fraction of new food chemicals, it does not require premarket approval, notice, or its own safety review for the vast majority of chemicals, which instead are self-determined as GRAS by the food companies who use them," one lawmaker said in a news release. "These GRAS determinations currently can be conducted in secret by experts or employees paid by the companies, without notifying FDA or the public."

USDA Seeks Comments on Additions to Bioengineered Foods List

The U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) will accept comments on potential additions to or subtractions from the National Bioengineered Food Disclosure Standard. Adding an ingredient to the list "establishes a presumption about what foods might require disclosure under the Standard," but the list is not exhaustive and other ingredients may require disclosure as well. AMS specifically seeks comments on whether dry edible beans, cowpea, wheat, rice, purple tomato and plums should be added to the List but will also accept suggestions of other additions or subtractions. Comments must be received by April 29, 2024.

LITIGATION

Court Grants Motion to Dismiss 'Olympia' False Source Lawsuit

A California federal court has granted a motion dismissing allegations that the name of Pabst Brewing Co.'s The Original Olympia Beer misled consumers into believing it was brewed in Olympia, Washington. *Peacock v. Pabst Brewing Co.*, No. 18-0568 (E.D. Cal., entered March 15, 2024). The plaintiff had alleged that Pabst started brewing the now-defunct beer brand in 2003 in Olympia but later contracted production out to breweries in other regions. The complaint focused on the brand slogan "It's the Water" and label depictions of waterfalls to argue that the Olympia brewery setting provided a unique selling proposition to consumers.

The court sided with Pabst, finding no evidence that reasonable consumers would be deceived by the marketing of Olympia beer. Pabst submitted surveys purportedly showing that (i) "no respondent mentioned the water used to brew Olympia Beer as their reason for first purchasing Olympia Beer"; (ii) 5% of

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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.

respondents “indicated the ’geographic origin of the beer’ as part of their reasoning for their first purchase”; and (iii) only 2% of respondents shown the packaging noted that the source of the water on the packaging was marketed as a selling point for the brand. Accordingly, the court held that Pabst had met its initial burden of proof that a reasonable consumer would not be misled.

SunnyD Seltzer Maker Sued for ‘0g Sugar’ Claims

Sunny Delight Beverages Co. faces a proposed class action alleging the zero-sugar labeling on its Vodka Seltzer is misleading because the product contains two grams of sugar. *Albrigo v. Sunny Delight Beverages Co.*, No. 24-0403 (S.D. Cal., filed February 29, 2024). The plaintiff alleges she bought the seltzer because she relied on the packaging indicating it had no sugar. Breaking down the alcohol and caloric content of the product, the plaintiff asserts that because a gram of sugar has 4 calories "and about 8 calories in the Seltzer from fruit juice, there are about 2g of sugar in the Seltzer, or slightly less depending on what fruit juice(s) Defendant uses.”

“Defendant’s representations that the Seltzer contains ‘0g Sugar’ are literally false,” she asserts. The plaintiff alleges violations of California’s consumer-protection statutes, breaches of warranties, negligent misrepresentation, intentional misrepresentation and unjust enrichment, and she seeks class certification, destruction of misleading and deceptive advertising materials, a recall, damages, attorney’s fees and costs.

Ocean Spray Cranberry Labeling Prompts Complaint

Two California consumers have filed a proposed class action alleging Ocean Spray Cranberries Inc.’s cranberry product labeling misleads consumers into thinking they are healthy when they contain high amounts of added sugars. *Elders v. Ocean Spray Cranberries, Inc.*, No. 24-0565 (S.D. Cal., filed March 25, 2024). The plaintiffs assert that the company labels the products as meeting the U.S. Department of Agriculture’s (USDA’s) “My Plate” dietary recommendations and as being “a wholesome snack you can feel good about” to “satisfy your sweet tooth.”

“This labeling is false and misleading because the Products contain high amounts of added sugar, the consumption of which increases the risk of, *inter alia*, cardiovascular disease, type 2 diabetes, metabolic disease, and liver disease, and is contrary to

authoritative recommendations, including by the USDA," they allege, noting that Cranberry Bites contain 16-18 grams of added sugar and Craisins contain more than 20 grams of added sugar. The plaintiffs assert violations of California's consumer-protection statutes as well as alleged breach of warranties, negligent misrepresentation, intentional misrepresentation and unjust enrichment. They seek class certification, a corrective advertising campaign, destruction of misleading and deceptive advertising materials, a recall, damages, attorney's fees and costs.

Consumers Allege Eggland's Best '25% Less Saturated Fat' Claims Are False

Illinois and California consumers have brought two proposed class actions alleging Eggland's Best falsely claims on its eggs' packaging that they contain "25% Less Saturated Fat Than Regular Eggs." *Vilchis v. Eggland's Best, Inc.*, No. 24-2073 (N.D. Ill., filed March 12, 2024); *Roye v. Eggland's Best, Inc.*, No. 24-2083 (C.D. Cal., filed March 14, 2024). The plaintiffs allege that independent testing shows the products contain more saturated fat than both regular eggs—which contain 1.5 grams of saturated fat per 50 gram serving—and Eggland's Best's marketing claim of 1 gram of saturated fat per 50 gram serving. The plaintiffs assert that Eggland's Best eggs actually contain 2.84 grams per 50 gram serving.

"No reasonable consumer would interpret Eggland's Best's on-label representation about saturated fat content to mean that the Products actually contain more saturated fat than 'Regular Eggs,'" the plaintiff in the Illinois suit said. "Eggland's Best's representation that the Products contain '25% Less Saturated Fat than Regular Eggs' is misleading because independent laboratory testing has shown that the nutritional content in the Products differs from the representation." The plaintiffs allege violations of Illinois and California consumer-protection laws and seek class certification, injunctive relief, damages, and an award of costs and expenses.

Food Lion Cereal Bars Primarily Artificially Flavored, Consumer Alleges

A Maryland man has filed a proposed class action alleging Food Lion LLC falsely advertises its Blueberry Fruit & Grain Cereal Bars as "naturally flavored" when they contain artificial flavoring. *Jura v. Food Lion LLC*, No. 24-00808 (D. Md., filed March 19, 2024). The plaintiff alleges that the company, seeking to capitalize on the trend of consumers preferring naturally flavored products, sells its

cereal bars packaged in several shades of blue, including a picture of two cereal bars with dark blue filling on a picnic table surrounded by fresh blueberries. He argues that the labeling describes the product as "Blueberry [–] Naturally Flavored" and "Made with Real Fruit Flavored Filling," which allegedly mislead because the product uses malic acid to create, resemble and reinforce its filling's blueberry taste.

"The Product is 'misbranded' and misleading because 'Made with Real Fruit Flavored Filling' is a 'half-truth,' because even though the filling includes the depicted fruit of blueberries and natural flavor, it includes artificial flavoring in the form of DL-Malic Acid for its blueberry taste, present in a greater amount than natural flavor," the plaintiff alleges. For alleged violations of the Maryland Consumer Protection Act, the plaintiff seeks class certification, damages, costs and expenses.

Plaintiffs Allege Vizzy 'Mimosa' Seltzer Lacks Sparkling Wine

Two consumers have asserted that Molson Coors Beverage Co. misleads consumers on the ingredients of its Vizzy Mimosa Hard Seltzer because true mimosas are made with sparkling wine rather than beer. *Krechting v. Molson Coors Beverage Co. USA LLC*, No. 24-0520 (M.D. Fla., Orlando Div., filed March 15, 2024). The plaintiffs argue that the labeling representations "Mimosa Hard Seltzer" and "Made With Real Orange Juice" persuaded them into believing the products contained wine. "'Mimosa Hard Seltzer' is misleading because unlike other competitor products, it is not based on wine, sparkling wine or champagne, but on fermented sugar, which qualifies it as a 'beer,'" they assert. "Consumers know that wine has health qualities lacking from other types of alcohol and is better for you than sugar. Consumers know wine is a natural product, made from grapes. Consumers prefer the light, crisp taste of wine more than neutral flavored alcohol obtained from sugar." For alleged violations of Florida's consumer-protection statute and false advertising, the plaintiffs seek class certification, damages, costs and expenses.