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LEGISLATION, REGULATIONS & STANDARDS

FDA Releases Guidance on Dietary Fiber Labeling

The U.S. Food and Drug Administration has released guidance identifying eight non-digestible carbohydrates that the agency intends to add to its list of dietary fibers—including mixed plant cell wall fibers, alginate, polydextrose and resistant maltodextrin/dextrin—because the agency has "tentatively determined that they have physiological effects that are beneficial to human health." These additions "provide industry with additional clarity to update their product labels and accurately

declare dietary fiber content on the Nutrition Facts and Supplement Facts labels for consumers," according to a constituent update.

Industry Groups File Petition to Ban Labeling Foreign Meat as "Product of USA"

The American Grassfed Association and the Organization for Competitive Markets (OCM) have filed a petition urging the U.S. Department of Agriculture (USDA) to change its policy allowing meat produced outside of the United States to be labeled as a product of the country if it passes through an agency-inspected plant. The groups call for a change to USDA's Food Safety and Inspection Service Policy Book, which allows a label to bear "Product of U.S.A." if the food is "processed" within the United States. They argue that the section should be clarified to instruct that a label can bear the phrase if "it can be determined that significant ingredients having a bearing on consumer preference such as meat, vegetables, fruits, dairy products, etc., are of domestic origin (minor ingredients such as spices and flavorings are not included). In this case, the labels should be approved with the understanding that such ingredients are of domestic origin."

"With the Congressional repeal of mandatory Country of Origin Labeling for beef and pork products, it is imperative that when a company chooses to label its meat products that origin statement be truthful," the executive director of OCM said in a press release.

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"Allowing foreign profiteers to mislabel meat products plunders the profits of U.S. farmers and ranchers at the expense of U.S. consumers. This is simply criminal."

Hawaii Bans Chlorpyrifos

Hawaii Governor David Ige has signed a bill that will ban the use of chlorpyrifos in the state beginning January 1, 2019. The law allows users of the pesticide to apply for a temporary permit allowing its use until December 31, 2022, and prohibits the use of pesticides near schools during normal school hours. The bill was passed in May 2018 by a unanimous Hawaii legislature.

LITIGATION

Appeals Court Affirms Dismissal of Organic Baby Formula Suit

A California appeals court has affirmed the dismissal of a lawsuit alleging that infant formula was mislabeled because it contained synthetic ingredients, ruling that the plaintiff's state law claim was preempted by the Organic Foods Production Act (OFPA). *Organic Consumers Assoc. v. Honest Co. Inc.,* No. B280836 (Cal. App. Ct., entered June 12, 2018). The advocacy group alleged that the formula contains synthetic ingredients not permitted in organic

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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

products under OFPA, thus violating the California Organic Products Act (COPA).

"Association's complaint does not allege that Honest is selling its premium infant formula without having gone through the organic certification process," the court found. "Nor are there any allegations of misconduct by Honest in obtaining or using its organic certification. Rather, the gravamen of Association's single cause of action under the COPA is that Honest is labeling as organic infant formula that is not in fact organic." The court found this claim preempted by federal law. "If, as Association contends, the COPA permits private plaintiffs to file lawsuits challenging an organic certification issued under federal standards when there are no allegations of intentional fraud, the COPA would undermine the national uniformity provided by Congress in the OFPA and the [National Organic Program] in several key respects." For example, the court noted, "Allowing lawsuits by private parties that second-guess a certification decision would, in effect, improperly expand this limitation on who can suspend or revoke an organic certification and could result in certifications that are valid in one state but not another."

Advocacy Groups Sue FDA To Compel Decision on Food Additive Petition

Seven advocacy groups, including the Center for Science in the Public Interest, Natural Resources Defense Council and Center for Food Safety, have filed a petition for a writ of mandamus seeking

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.

to compel the U.S. Food and Drug Administration (FDA) to issue a decision on a 2015 petition asking FDA to withdraw its approval of seven food additives purportedly shown to cause or linked to cancer. *In re Breast Cancer Prevention Partners v. FDA,* No. 18-71260 (9th Cir., filed May 2, 2018). According to the petition, the additives—including benzophenone, ethyl acrylate and pyridine—add flavoring to food, such as mango, butterscotch, "floral, cinnamon and mint notes." The petition alleges that "food labels do not indicate whether a product contains any of the seven flavors here at issue. And the degree of risk associated with consumption is impossible to predict. … [C]oncentrations of the flavors—and, therefore, the health consequences of ingestion—may vary significantly between brands."

Court Dismisses Foodborne Illness Suit Against Chipotle

A federal court in Louisiana has dismissed with prejudice a lawsuit alleging that Chipotle Mexican Grill's food caused the plaintiff to contract *Helicobacter pylori*, holding that the plaintiff had not pleaded "any semblance of a fact that causally connects [his] illness" with Chipotle. *Gilyard v. Chipotle Mexican Grill Inc.,* No. 17-0441 (W.D. La., entered June 14, 2018). The court found that the plaintiff failed to plead "factual allegations sufficient to show that Chipotle failed to act as a prudent person skilled in food preparation." The only factual allegation in the complaint, the court noted, was that the plaintiff regularly ate at Chipotle in the two months before he was diagnosed with an *H.*

pylori infection. Further, the court found, the complaint did not allege how the food was defective, how the duty of reasonable care in making or storing the food was breached, or that Chipotle provided contaminated food or utensils.

Court Upholds NYC Ban on Foodservice EPS

A state court has denied a petition to overturn a New York City ban on the use of expanded polystyrene foam (EPS) containers, finding the city's determination "was a painstakingly studied decision and was in no way rendered arbitrarily or capriciously." *In re Application of Rest. Action All. v. City of New York*, No. 100731/2015 (N.Y. Super. Ct., New York Cty., entered June 5, 2018). In 2015, the same court vacated and annulled findings by the city commissioner of sanitation in support of the ban because of "shortfalls" in the findings, remanding the matter for reconsideration. "This time," the court said, "the Commissioner's findings are based on reviews of petitioners' evidence and on [the sanitation department's] further studies and research."

Among the city's findings, the court said, were (i) a 30-year history of "failure of subsidized markets of foam recyclers"; (ii) the lack of market for post-consumer recycled foam, particularly soiled foodservice foam; (iii) that because of breakage, only about seven percent of EPS ended up in correct bales during recycling; (iv) that EPS is the leading plastic pollutant in New York City

waterways; and (v) that the majority of foam recyclers process only “clean” EPS.

Defendant Distillery Wins Trademark “Bourbon War”

The U.S. Court of Appeals for the Sixth Circuit has affirmed summary judgment in favor of Peristyle LLC, finding that its use of the term “Old Taylor” falls under the Lanham Act’s fair use defense. *Sazerac Brands, LLC, v. Peristyle, LLC*, No. 17-5933/5997 (6th Cir., entered June 14, 2018). The “Old Taylor” mark references Colonel Edmund H. Taylor, Jr., who built the Old Taylor distillery in 1887, and although production at the facility ceased in 1972, Sazerac Brands owns the trademark rights to “Old Taylor” and “Colonel E.H. Taylor.” Peristyle was formed to renovate the medieval castle-style building, listed on the National Register of Historic Places as the “Old Taylor Distillery.” Although Peristyle has not resumed bourbon production at the facility, it has used the name “Old Taylor Distillery” in its marketing materials.

Noting that a defendant seeking shelter under the fair use defense must show use of the mark in a “descriptive or geographic sense” and do so “fairly and in good faith,” the court found that the “record confirms that Peristyle never used Old Taylor in a non-descriptive fashion.” As for good faith, the court found, “[a]ll along, the company recognized that the Old Taylor trademark belonged to Sazerac and that Peristyle would have to develop its

own name to brand its products. Once it decided on a name, Peristyle's fliers featured that name: Castle & Key." The court also ruled that Sazerac's false advertising claim failed, finding that Peristyle never made a "false or misleading" description or representation of fact.

Werther's Settles Slack-Fill Class Action

A federal court in New York has dismissed a putative class action alleging that Storck USA L.P. packaged Werther's Original Sugar Free Chewy Caramels with nonfunctional slack fill and misrepresented the candy's effect on blood glucose levels. *Kpakpoe-Awel v. Storck USA L.P.,* No. 18-1086 (S.D.N.Y., entered June 8, 2018). According to court filings, the parties have entered into a confidential settlement agreement.

MEDIA COVERAGE

Distributor's "Local" Fish Misleads Customers, AP Reports

The *Associated Press* has published an investigation into Sea To Table, a seafood distributor that reportedly misled its clients—including universities, meal-kit companies and high-profile chefs—about the source of its fish. The company promised to inform customers about the location of the fishing boats that caught its

products, but *AP* reporters purportedly found evidence that the company lied, including video footage showing a consistently empty Montauk harbor during a week when the company sold the reporters tuna from a boat that supposedly docked there. Moreover, the owner of the boat listed on the order apparently told the reporters his boat was in a different state at the time. The reporters also sent the purchased fish to a lab for testing, which purportedly found that the fish "likely came from the Indian Ocean or the Western Central Pacific," although the article acknowledges the limitations of such testing.