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FIRM NEWS

Silverman Publishes “In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far”

Shook Partner [Cary Silverman](#) has authored an [article](#) for the *University of Cincinnati Law Review* arguing for a consistent application of the “reasonable consumer” standard in food and beverage litigation. Describing frequent litigation targets such as foods labeled as “natural” and packages containing “excessive slack fill,” Silverman explains that in some cases, “a plaintiff’s alleged understanding of a product’s marketing is simply contrary to nature or reality.” For example, he notes, a complaint alleging that Kind’s Vanilla Blueberry Clusters were mislabeled as containing “no refined sugars” was dismissed because no reasonable consumer would interpret the label as meaning raw sugar cane, which is “a grass that contains joined stalks resembling bamboo ... surrounded by bark.”

However, Silverman explains, some courts apply the reasonable consumer standard differently, allowing putative class action complaints to pass through the motion-to-dismiss stage, prompting settlement discussions between the parties. “In slack fill litigation, some courts have found packages that include not

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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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[Mark Anstoetter](#)

only the number of ounces of candy inside but even the precise number of candies may still mislead a reasonable consumer, allowing litigation to resolve the number of Sour Patch Kids that can fit in a box,” he writes.

Silverman suggests “three options for preserving the public’s respect for the civil justice system” as more food and beverage lawsuits are filed:

- Courts can “dismiss lawsuits with claims that strain believability as a matter of law before the expense or risks of the litigation pressure a company to settle it.”
- Legislatures can “tighten the requirements for private rights of action under state consumer protection statutes,” such as Arkansas’ 2017 change allowing only its attorney general to enforce the state’s Deceptive Trade Practices Act.
- Attorneys can self-regulate. “Lawyers specializing in bringing food and beverage marketing class actions can and should show greater ‘prosecutorial discretion,’ reserving litigation for false or truly deceptive practices,” Silverman argues.

“Reasonable consumers may not always have grounds for a lawsuit, but they are not without a remedy. They have the power to act with their wallets,” Silverman concludes. “Rather than bring a \$20 million lawsuit after finding an eightpiece bucket of KFC’s fried chicken does not overflow with chicken as on TV, a customer can ask for her money back or go elsewhere next time.”

LEGISLATION, REGULATIONS & STANDARDS

FDA Issues Draft Guidances on Produce

The U.S. Food and Drug Administration (FDA) has announced the availability of two draft guidance documents involving standards for produce. One draft guidance “provides a broad range of recommendations on how to meet the requirements” for growing produce and “outlines how to determine whether produce or farms may be eligible for exemptions.” The second guidance focuses on fresh-cut produce and methods for minimizing food-safety hazards. Comments on both guidance documents will be accepted until April 22, 2019.

NAD Refers Milk Claims to FTC

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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.

The National Advertising Division (NAD) has referred The a2 Milk Company's claims that its products are "easier on digestion" to the U.S. Federal Trade Commission (FTC). The National Milk Producers Federation challenged the milk marketing, asserting "errors in study design, methodology, and population selection" as well as arguing that the results of the company's study are "clinically insignificant." The a2 Milk Company responded that the organization "selectively presents incomplete and outdated research and observations made without the benefit of recent research" but declined to participate further in the system of self-regulation.

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

StarKist Pleads Guilty in Price-Fixing Case

The U.S. Department of Justice has announced that StarKist Co. has agreed to plead guilty to charges alleging the company conspired to fix prices of packaged tuna. The company will face a fine of up to \$100 million. "Our citizens' confidence in the ability to buy goods within an unbiased market is key to sustaining an efficient and fair economy," a press release quotes a special agent as saying. "This investigation stands as a symbol of our commitment to holding corporations and senior leadership accountable and ensuring that activities such as price fixing will not be tolerated."



MEDIA COVERAGE

Edible Cotton May Be Cultivated Soon, Bloomberg Reports

Edible cottonseeds have been approved for commercial cultivation by the U.S. Department of Agriculture and await Food and Drug Administration approval, according to Bloomberg. Texas A&M University has reportedly been developing the product—which

apparently tastes “like hummus”—for more than two decades. Bloomberg compares the nutritional value of cottonseeds to other tree nuts such as almonds or walnuts; in addition, cottonseeds could be “fed to carnivorous fish like salmon and trout that eat ground-up fish,” according to the article. The university’s work “opens up the opportunity that eventually every cotton plant will have this technology in it,” a vice president at Cotton Inc. reportedly told *Bloomberg*. “There’s no reason to leave a toxin in a domesticated plant.”

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