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LEGISLATION, REGULATIONS & STANDARDS

FDA to Hold CBD Public Hearings

U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb reportedly said in a February 27, 2019, hearing before the House Appropriations Committee that the agency will hold public hearings on cannabidiol (CBD) in April 2019. Gottlieb reportedly told the committee that FDA is assembling a working group of senior officials to create rules that would govern CBD in food and other uses. According to CNBC, "Gottlieb floated what a possible framework might look like. He suggested high concentrations might be regulated as a drug that has more stringent oversight while lower concentrations could be categorized as food products that come with an easier review process."

Meanwhile, a New York City crackdown on CBD in food products has reportedly been postponed. Beginning in October 2019, CBS reports, violators selling CBD food may be subject to fines of \$200 and risk lower public health letter grades.

FDA Releases Strategy Document on Food Imports

The U.S. Food and Drug Administration has released "Strategy for the Safety of Imported Food," which outlines methods the agency is using to ensure that it meets its four goals: (i) ensuring that

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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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imported food meets U.S. food safety requirements; (ii) preventing the entry of unsafe foods; (iii) rapidly responding to unsafe imported foods; and (iv) maintaining an “effective and efficient food import program.”

NMPF Submits Petition on “Milk” Labeling

The National Milk Producers Federation (NMPF) has submitted a [citizen petition](#) urging the U.S. Food and Drug Administration (FDA) to “[e]nforce existing ‘imitation’ labeling requirements against nutritionally inferior non-dairy substitutes for standardized dairy foods that are named and positioned as forms of ‘milk,’ ‘yogurt,’ ‘cheese,’ ‘ice cream,’ or ‘butter,’ yet fail to provide the ‘imitation’ disclosure statement that is required.”

The petition’s introductory letter argues that its recommended actions “are necessary to ensure that consumers are adequately informed concerning the material differences between standardized dairy foods (e.g., milk, yogurt, cheese, ice cream, butter) and the wide variety of non-dairy substitutes that are available in the marketplace which are identified through the misappropriation of terms that have been defined by standards of identity to identify standardized foods that meet specified compositional, nutritional, or functional requirements.”

The debate over dairy and non-dairy substitute labeling extends to Canada, where a creamery has [reportedly](#) been told to stop referring to its “plant-based, dairy-free” product as cheese. In an [Instagram post](#), Blue Heron Creamery announced that the Canadian Food Inspection Agency warned that it cannot refer to its product as cheese “even if we identify it as plantbased, vegan, dairy free, use a hyphen or otherwise distinguish it from dairy.” In place of “cheese,” the company used the cheese emoji.

Europol Arrests Wine Counterfeiters

Europol [announced](#) that it has “dismantled a sophisticated criminal network involved in counterfeiting trademarks and distinctive labels of a famous winery in Florence, Italy, as well as counterfeiting at least 11 000 bottles of red wine.” The agency

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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.

arrested three people, including two members of the same family, who allegedly “sold sports products online as a way to mislead consumers of their activities.” According to a press release, the “modus operandi was to prepare bottles of low-quality wine and once ready, would sell them to the Italian and international markets, primarily in Belgium and Germany.”

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.

Codex Public Meetings Announced

The U.S. Department of Agriculture has announced public meetings to discuss proposed positions for the United States to take at various Codex Alimentarius Commissions. A meeting on general principles and procedures is scheduled for February 25, 2019, for the March Codex meeting in Bordeaux, France. The U.S. Codex Office will also host a public meeting on April 1, 2019, to discuss positions on contaminants in foods and a public meeting on May 6, 2019, to discuss methods of analysis.



LITIGATION

Government Urges Court to Reject Lenny & Larry's Settlement

The federal government has filed a statement of interest in a lawsuit alleging that Lenny & Larry's Inc. misled consumers as to the amount of protein in its cookies. *Cowen v. Lenny & Larry's Inc.*, No. 17-1530 (N.D. Ill., E. Div., filed February 15, 2019). The statement argues that the settlement is a marketing opportunity for Lenny & Larry's rather than a benefit for the consumer class.

“The settlement before the Court has a purported \$3.5 million value, but that amount disguises the limited benefits it actually offers to class members. In reality, the settlement’s cash component will go almost entirely to class counsel, while the bulk of its non-monetary award will consist of free cookies the defendant plans to send to vendors across the country for distribution to whomever those vendors select,” the statement asserts. “Indeed, it is difficult to imagine a less balanced settlement than one where most of the money goes to class counsel and administrative costs, while class members get far less

than their counsel and the general public gets over \$3 million in free cookies. The United States thus urges the Court to reject the proposed settlement as it is currently structured.”

Lawsuit Challenges Certification of “San Marzano” Tomatoes

A consumer has filed a putative class action alleging that Cento Fine Foods Inc. misleadingly markets its tomatoes as “Certified San Marzano” without having the proper certification. *Sibrian v. Cento Fine Foods Inc.*, No. 19-0974 (E.D.N.Y., filed February 19, 2019). San Marzano tomatoes are grown vertically with supports in San Marzano sul Sarno in Italy, the complaint asserts. Cento’s San Marzano cans feature a logo for an Italian agency that “does not ‘certify’ that the Products are compliant with the San Marzano guidelines, and it is actually an entity which may have performed the [U.S. Department of Agriculture] Organic certification,” the complaint argues. Cento’s website also identifies a company that “verifies that the Products conform to the San Marzano official criteria,” but the plaintiff alleges that the company “is believed to be the company which supplies defendant with San Marzano seeds and possibly certifies whether the Products are organic, as opposed to certifying the growing and quality of the final product. ... It has even been claimed that [the company] only ‘certifies’ the production chain traceability of the seeds, confirming that the subject tomatoes were grown in Italy.”

The complaint also asserts that Cento’s “Find My Field” website feature—which allows consumers to enter a lot code found on the tomato can to view the field in which the tomatoes were grown—only retrieves four fields. “It is implausible that defendant can sell more San Marzano tomatoes than all other companies in the US, combined, and do so by cultivating only four fields,” the plaintiff alleges.

“It would not necessarily be misleading to grow tomatoes from San Marzano seeds and label them as ‘San Marzano’ tomatoes,” the complaint argues. “It is misleading to grow tomatoes that may or may not be from San Marzano seeds and represent them as being ‘certified.’” For allegations of negligent misrepresentation, unjust enrichment, fraud and violations of New York consumer-

protection statutes, the plaintiff seeks class certification, an injunction, damages and attorney's fees.

Wendy's Settles Data Breach Lawsuits

Wendy's International Inc. has settled two class actions alleging injuries stemming from a 2016 payment-system breach. *Jackson v. Wendy's Int'l Inc.*, No. 16-0210 (M.D. Fla., entered February 26, 2019); *First Choice Fed. Credit Union v. Wendy's Co.*, No. 16-0506 (W.D. Penn., entered February 26, 2019). A Florida federal court approved a \$3.4 million settlement between a consumer class and the company, including \$1.1 million in attorney's fees. In Pennsylvania, a federal court granted preliminary approval to a settlement in a lawsuit brought by a class of financial institutions that reimbursed customers for fraudulent transactions. Wendy's will pay \$50 million under the settlement agreement.

White Chocolate Content Challenged in Putative Class Action

A consumer has alleged that Snack Innovations Inc.'s Drizzilicious rice cakes are advertised as containing white chocolate but only contain "imitation flavoring." *Morrison v. Snack Innovations Inc.*, No. 19-1238 (S.D.N.Y., filed February 8, 2019). The complaint asserts that "white chocolate," by U.S. regulations, contains cocoa butter, dairy ingredients and sweetener, including 20 percent cocoa butter and 3.5 percent milk fat by weight. "The imitation white chocolate in the Products do not have cocoa butter or milk fat as required, and instead have other cheap confectionary ingredients to imitate the taste of white chocolate." The plaintiff alleges fraud and violations of New York consumer-protection statutes and seeks class certification, damages, corrective advertising and attorney's fees.

Cows Must Be Stunned Before Slaughter To Be "Organic," EU Court Rules

The European Court of Justice's Grand Chamber has ruled that halal beef cannot carry an EU organic logo if the cows were not

stunned before they were slaughtered. *Œuvre d'assistance aux bêtes d'abattoirs v. Ministre de l'Agriculture et de l'Alimentation*, No. C-497/17 (E.C.J., entered February 26, 2019). The court compared an organic-labeling regulation requiring efforts to preserve animal welfare during the slaughtering process with a regulation allowing religious rituals during slaughter.

“While it is true that [the regulation] permits the practice of ritual slaughter as part of which an animal may be killed without first being stunned, that form of slaughter, which is authorised only by way of derogation in the European Union and solely in order to ensure observance of the freedom of religion [], is insufficient to remove all of the animal’s pain, distress and suffering as effectively as slaughter with pre-stunning, which, in accordance with [the regulation], is necessary to cause the animal to lose consciousness and sensibility in order significantly to reduce its suffering,” the court stated. “[I]t is important to ensure that consumers are reassured that products bearing the Organic logo of the EU have actually been obtained in observance of the highest standards, in particular in the area of animal welfare.”

Honey Heated to 120 Degrees Is No Longer Raw, Plaintiff Alleges

A consumer has filed a putative class action alleging that North Dallas Honey Co. sells its Nature Nate’s honey as “100% raw” but heats it to 120 degrees during bottling. *Pierce v. N. Dallas Honey Co.*, No. 19-0410-B (N.D. Tex., Dallas Div., filed February 19, 2019). The plaintiff argues that heating honey to more than 105 degrees can cause “[m]ost or all of the enzymes” to be “lost” or “denatured.” The plaintiff cites the “international standard promulgated by Codex Alimentarius for honey” to argue that Nature Nate’s honey contains elevated values of 5-hydroxymethylfurfural (HMF), which can indicate that “the honey has been heated enough to break down the enzymes contained in the honey.” The complaint further asserts that the honey product “is also not necessarily 100% honey” because some tested samples allegedly “showed that syrups had been added to the honey.” For allegations of negligence, fraudulent misrepresentation, fraudulent concealment, unjust enrichment and violations of state and federal consumer-protection statutes, the plaintiff seeks damages, class certification, attorney’s fees and costs.

FIRM NEWS

“Fine Print” Could Be A Plaintiff Lawyer’s Dream, Says Silverman

The Nutrition Business Journal spoke to Shook Partner Cary Silverman on the rise of lawsuits stemming from “clean labels” listed on food products. While consumers may want easier-to-read labels, this shortened language may open the door to potential lawsuits.

Silverman, who co-authored the 2017 report “The Food Court: Trends in Food and Beverage Class Action Litigation,” for the U.S. Chamber Institute for Legal Reform, says that transparency creates skepticism.

“I can only imagine the internal battles within food companies between marketing and legal,” Silverman told *NBJ*. “I understand why a company would want information printed transparently on the front of the package, but on the other hand, there is a reason lawyers like fine print. When you remove the fine print from a label and go with the basics, it could be a plaintiffs’ lawyer’s dream.”

Silverman’s report, which was co-authored with Shook Partner Jim Muehlberger, found that 20 food-marketing class actions were filed in 2008, while 2015 and 2016 saw 425 active cases. Defense attorneys argue that many of the suits are baseless.

“It’s all about the money,” said Silverman. “Their goal is a quick settlement. Rarely do these cases even get to class certified, let alone go to trial. These firms figure if they file 10 lawsuits, maybe six will be settled, two will be dismissed on merits, and the rest they’ll withdraw once they realize they are in a bad position.”

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