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FIRM NEWS

Silverman Speaks to Congressional Staff About Food Litigation Trends

Shook Partner [Cary Silverman](#) was an invited panelist at The George Mason University Antonin Scalia Law School's Law and Economics Center's [Congressional Civil Justice Academy](#) program on the legal challenges surrounding food labeling, advertising and marketing. The event, which draws congressional staff, was held on April 26, 2019, in the U.S. House of Representatives Agriculture Committee's hearing room in Washington, D.C.

Silverman discussed the wave of consumer class actions and private attorney general lawsuits targeting food and beverage makers ranging from "natural" claims to slack fill litigation, as explored in his paper "[The Food Court: Trends in Food and Beverage Class Action Litigation](#)" and law review article "[In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far.](#)" His suggestions for addressing the subject included federal class action reform, clear labeling regulations backed by preemption and objective decisions by judges as to whether reasonable consumers are actually misled by the advertising and marketing practices targeted in lawsuits by private lawyers, serial plaintiffs and advocacy groups.

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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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Hemp Not Allowed in Alcohol Beverages, TTB States

The U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) has issued an industry circular stating that it “will return for correction any applications for formulas containing ‘hemp’ ingredients (other than ingredients derived from hemp seeds or hemp seed oil)” until the U.S. Food and Drug Administration (FDA) indicates that the ingredients’ use would not violate the Federal Food, Drug, and Cosmetic Act. The circular, addressed to wineries, breweries, distilleries and importers, states that TTB consults with FDA on ingredients’ safety and notes that, despite the change in the definition for “marijuana” in the 2018 Farm Bill, “FDA stressed that food companies that wish to use cannabis or cannabis-derived ingredients in their foods are subject to the relevant laws and regulations that govern all food products, including those that relate to the requirements for food additive approval and substantiation of evidence for Generally Recognized as Safe (GRAS) status.”

EPA, New York Take Actions on Pesticides

The U.S. Environmental Protection Agency (EPA) has affirmed its previous opinions finding that “there are no risks to public health when glyphosate is used in accordance with its current label and that glyphosate is not a carcinogen.”

“EPA has found no risks to public health from the current registered uses of glyphosate,” EPA Administrator Andrew Wheeler said in a press release. “Today’s proposed action includes new management measures that will help farmers use glyphosate in the most effective and efficient way possible, including pollinator protections. We look forward to input from farmers and other stakeholders to ensure that the draft management measures are workable, realistic, and effective.”

Meanwhile, the New York legislature has passed a ban on chlorpyrifos that would take effect January 1, 2020. After that

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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.

date, aerial application of the pesticide would be prohibited; after January 1, 2021, all use of the pesticide would be prohibited except for use on apple-tree trunks. On December 1, 2021, all uses would be banned. The legislature has passed the bill and it awaits the governor's signature.

States Target Food Packaging, Straw Bans with Legislation

Maine has reportedly become the first state to ban single-use food and drink containers made from polystyrene. The law, which will take effect in 2021, echoes a similar bill in Maryland that has been passed by the legislature but remains unsigned by the governor. According to the *Associated Press*, Oregon, Vermont and Connecticut are considering polystyrene bans as well.

The Florida legislature has reportedly passed a law that would prevent municipalities from regulating plastic straws until 2024. Some cities, including Miami Beach, previously passed ordinances preventing restaurants and bars from providing plastic straws or prohibiting the use of plastic straws at public parks and beaches. The bill is awaiting the governor's signature.

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

Cocoa Pebbles Lacks Real Cocoa, Lawsuit Alleges

Post Consumer Brands LLC allegedly misleads consumers by marketing its Cocoa Pebbles and related products as made with “real cocoa” despite listing only “cocoa (processed with alkali)” in the ingredients panel, according to a consumer’s putative class action. *Copeland v. Post Consumer Brands LLC*, No. 19-2488 (E.D.N.Y., filed April 26, 2019). The complaint asserts that alkali in cocoa affects “the taste and color of the cocoa powder to such an extent that they are a characterizing feature”; further, consumers believing the product to contain “real cocoa” expect “the cocoa powder component to be nutritionally and organoleptically superior than it actually is.” For alleged violations of California’s consumer-protection statutes as well as negligent

misrepresentation, breach of warranties, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, restitution, damages and attorney's fees.

FTC, Gerber Settle Anti-Allergy Lawsuit

The U.S. Federal Trade Commission (FTC) has settled its lawsuit alleging that Gerber Products Co. made false claims about the anti-allergy benefits of Good Start Gentle infant formula, according to an order terminating the action. *FTC v. Gerber Prods. Co.*, No. 14-6771 (D.N.J., entered April 30, 2019). FTC filed the action in response to Gerber's claims that its formula was "the first and only infant formula" that could claim to reduce the risk of developing allergies. Following FTC's lawsuit, consumers made similar claims in a putative class action. The court's order terminates the action but does not provide details about the settlement.

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