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LEGISLATION, REGULATIONS & STANDARDS

FTC Issues Warning Letters to CBD Companies

The U.S. Federal Trade Commission has announced that it sent warning letters to three companies selling “oils, tinctures, capsules, ‘gummies,’ and creams containing cannabidiol (CBD), a chemical compound derived from the cannabis plant.” The announcement notes that the letters warn the companies—which have not been identified—that “it is illegal to advertise that a product can prevent, treat, or cure human disease without competent and reliable scientific evidence to support such claims.” The agency states that each company marketed its CBD products as able to “treat or cure serious diseases and health conditions,” such as relieving “even the most agonizing pain” or treating autism, anorexia, schizophrenia, Alzheimer’s disease, traumatic brain injuries and other conditions.

“In the letters, the FTC urges the companies to review all claims made for their products, including consumer testimonials, to ensure they are supported by competent and reliable scientific evidence. The letters also warn that selling CBD products without such substantiation could violate the FTC Act and may result in legal action that could result in an injunction and an order to return money to consumers. The letters instruct the companies to

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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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notify the FTC within 15 days of the specific actions they have taken to address the agency’s concerns,” the announcement states.

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CSPI Submits Petition on Nitrate, Nitrite Labeling

The Center for Science in the Public Interest (CSPI) and *Consumer Reports* have petitioned the Food Safety and Inspection Service, requesting the agency “clarify the labeling of processed meats.” “Specifically, we ask that the agency cease requiring that such products be labeled ‘Uncured,’ and/or ‘No Nitrate or Nitrite Added’ when they have been processed using non-synthetic sources of nitrate and nitrite, such as celery powder, rather than traditional synthetic sources, such as sodium nitrite.” The petition asserts that both “synthetic and non-synthetic nitrites and nitrates may cause cancer,” and the petition coincided with the release of a *Consumer Reports* investigation purportedly finding that “consumers are confused by the ‘No Nitrate or Nitrite Added’ statements, which are currently accompanied by a fine-print disclaimer on product labels identifying the non-synthetic source of nitrates or nitrites.”

“We therefore urge the agency to stop requiring, and instead prohibit, the ‘No Nitrate or Nitrite Added’ claim on processed meat, except when no nitrate or nitrite is added from any source,” the petition asserts. “In its place, we ask that the agency require a front-of-package declaration and clear ingredient labeling whenever nitrates or nitrites are used in meats, regardless of the source. We also urge the agency to take additional steps to minimize levels of residual nitrates, nitrites, and nitrosamines in these products.”

Denmark to Ban PFAS from Food Packaging

Denmark has reportedly passed a law that will ban per- and polyfluoroalkyl substances (PFAS) from cardboard and paper used for food packaging. “These substances represent such a health problem that we can no longer wait for the EU,” Denmark’s food minister is quoted as saying. Recycled paper may continue to be used if the PFAS compounds are separated from food with a



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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.

barrier. PFAS compounds have come under scrutiny in both the United States and Europe as agencies research the effects of consuming the substances.

Mississippi Proposes Amendments to “Meat” Definition Bill

Mississippi’s bill restricting the use of animal-derived food products to describe plant-based foods, which has been in effect since July 2019, has reportedly received proposed amendments that would allow food companies to use such words if they are modified by vegetable-associated qualifiers, such as “veggie,” “meatless” or “plant-based.” The updated regulation would also allow food establishments to keep animal-derived and plant-derived products separate “provided that such non-meat products comply” with the naming regulations “and do not contain any false or misleading consumer disclosures.”

GAO Issues Report on “Use By” Labeling

The U.S. Government Accountability Office (GAO) has conducted a study on how “use by” and “best by” dates on food products could be improved to reduce food waste. The agency examined actions by the U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA) and concluded with the recommendation that “USDA and FDA develop a mechanism to facilitate coordination with relevant nonfederal stakeholders on actions related to date labels,” according to the agency. “USDA and FDA agreed with our recommendation and are planning actions to implement the recommendation.”

Coconut Group Seeks Removal of Coconuts from “Tree Nut” Allergen Labeling

The Coconut Coalition of the Americas has announced an effort to revise 2006 guidance interpreting the Food Allergen Labeling and Consumer Protection Act “to remove coconut from the list of ‘tree nuts’ identified as a major food allergen,” according to a press

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.



release. “The fact is coconut is not a major food allergen nor is it a nut,” the organization asserts. It cites the American College of Allergy, Asthma and Immunology to argue that coconut is a fruit rather than a tree nut, and although “allergic reactions to coconut have been documented, most people who are allergic to tree nuts can safely eat coconut.”

LITIGATION

Cannabis Edibles Co. Cannot Claim Trademark Ownership, Court Holds

A California federal court has rejected a trademark infringement claim on the grounds that the company alleging preceding use of the trademark manufactures cannabis-infused edibles, which are illegal under federal law. *Kiva Health Brands LLC v. Kiva Brands Inc.*, No. 19-3459 (N.D. Cal., entered September 6, 2019). The parties to the litigation—Kiva Brands Inc. (KBI) and Kiva Health Brands (KHB)—dispute the rights of the “Kiva” trademark, and KBI argues that its ownership stems from its predecessor company selling cannabis-infused edibles in California since 2010.

“While KBI is only asserting California common law rights to the KIVA mark [], it is doing so as a defense to a federal trademark claim,” the court found. “That defense relies on KBI’s prior use of the mark. [] KBI’s prior use was illegal under federal law []. KBI therefore did not make lawful prior use of the mark. [] To hold that KBI’s prior use of the KIVA mark on a product that is illegal under federal law is a legitimate defense to KHB’s federal trademark would ‘put the government in the anomalous position of extending the benefits of trademark protection to a seller based upon actions the seller took in violation of that government’s own laws.’ . . . Although the parties have not identified, and the Court has not seen, any directly relevant authority about the interplay of state marijuana laws and federal trademark law, the Court is persuaded that the illegality of KBI’s products under federal law renders KBI unable to challenge KHB’s federal trademark. Accordingly, at this stage in the case, KHB has demonstrated ownership of the mark nationally, including in California.”

StarKist to Pay \$100 Million in Price-Fixing Case

A California federal court has reportedly refused to lower the fine of \$100 million that StarKist must pay following a guilty plea on charges of price fixing. The company apparently argued that the penalty could bankrupt it because it continues to face potential civil damages, but the court found that StarKist had legal recourse to ask for an extended payment schedule should financial troubles arise. Under the court's schedule, StarKist will pay \$5 million within 30 days of the ruling, \$11 million in 2020 and \$21 million each year from 2021 to 2024.

Ninth Circuit Sends Hemp Truck Case to State Court

The U.S. Court of Appeals for the Ninth Circuit has reversed a district court's decision not to apply an abstention that would defer a case on the legality of transporting hemp to state court proceedings. *Big Sky Scientific v. Bennetts*, No. 19-0040 (9th Cir., entered September 4, 2019). Hemp producers were reportedly hoping to receive guidance from the federal courts on the interpretation of the 2018 Farm Bill and its change in legal status for hemp, which producers began sending across state lines before states established regulatory frameworks for the crop.

Chipotle Settles GMO Lawsuit for \$6.5 Million

Chipotle Mexican Grill Inc. has agreed to pay \$6.5 million to settle allegations that it misleadingly marketed its food as free of genetically modified organisms (GMOs). *Schneider v. Chipotle Mexican Grill Inc.*, No. 16-2200 (N.D. Cal., motion for preliminary approval filed September 11, 2019). Under the agreement, class members can receive 10 meals with proof of purchase, with a limit of 15 meals per household, or \$2 per meal up to five meals without proof of purchase.

Researchers Purportedly Find Link Between Soda Consumption and Early Mortality

A study examining the health effects of soft drink consumption in 10 European countries reportedly found that both sugar-sweetened and artificially sweetened beverages are associated with greater all-cause mortality. Mullee et al., “Association Between Soft Drink Consumption and Mortality in 10 European Countries,” *JAMA Internal Medicine*, September 3, 2019. The researchers assessed dietary intake of 451,743 participants and apparently found a correlation between consuming two or more soft drinks per day and higher rates of mortality from circulatory, digestive and neurodegenerative diseases.

Tax on Foods with Sugar May Fight Obesity More than SSB Taxes, BMJ Study Asserts

A U.K. modeling study has apparently found that a 20% tax on foods with high levels of sugar could reduce rates of obesity more than taxes on sugar-sweetened beverages (SSBs). Scheelbeek et al., “Potential impact on prevalence of obesity in the UK of a 20% price increase in high sugar snacks: modelling study,” *BMJ*, September 4, 2019. The study model predicted the effects of a 20% price increase on “three categories of high sugar snacks: confectionery (including chocolate), [cookies], and cakes.” The model reportedly showed that the price increase would cause average Body Mass Index numbers for U.K. residents to decrease by 0.53. “This change could reduce the UK prevalence of obesity by 2.7 percentage points,” the researchers assert.

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