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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

U.K. to Implement New Food Advertising Standards

U.K. Prime Minister Boris Johnson has announced a series of measures aimed at limiting advertising for foods high in salt, sugar and fat. The measures include a ban on ads for such foods before 9 p.m., the implementation of calorie counts on food menus and a ban on "buy one get one" deals on some types of foods. The government will also launch "a consultation to gather views and evidence on our current 'traffic light' labelling system to learn more about how this is being used by consumers and industry, compared to international examples."

The announcement is a reversal from Johnson's previous stance on food advertising limits that he attributed to his diagnosis and recovery from COVID-19. "I've wanted to lose weight for ages and like many people I struggle with my weight," he wrote in *The Daily Express*. "I go up and down, but during the whole coronavirus epidemic and when I got it too, I realised how important it is not to be overweight. The facts are simple: extra weight puts extra pressure on our organs and makes it harder to treat heart disease, cancer and – as we have found – coronavirus. This was true in my case, and it's true in many thousands of others. It was a wake-up call for me and I want it to be a wake-up call for the whole country."

FDA Issues Consumer Update on Milk Allergies and Dark Chocolate

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The U.S. Food and Drug Administration (FDA) has issued an update for consumers on its 2018 study examining milk allergies and dark chocolate. "U.S. law requires manufacturers to label food products that are major allergens, as well as food products that contain major allergenic ingredients or proteins," the update notes. "Allergens contained in a food product but not named on the label are a leading cause of FDA requests for food recalls, and undeclared milk is the most frequently cited allergen. Chocolates are one of the most common sources of undeclared milk associated with consumer reactions."

FDA advised consumers to interpret "may contain" disclosures as "likely to contain," even if the package is also labeled as dairy-free or vegan. "Unfortunately, you can't always tell if dark chocolate contains milk by reading the ingredients list. FDA researchers found that of 94 dark chocolate bars tested, only six listed milk as an ingredient. When testing the remaining 88 bars that did not list milk as an ingredient, FDA found that 51 of them actually did contain milk. In fact, the FDA study found milk in 61 percent of all bars tested."

Europe Announces Seizure of Counterfeit Dairy Products

Europol and Interpol have announced the seizure of 320 additional tonnes of "counterfeit and substandard food and beverages" following an operation that involved 83 countries, bringing the operation's seizure total to about 12,000 tonnes. "This year's operational activities have found a new disturbing trend to address: the infiltration of low-quality products into the supply chain, a development possibly linked to the COVID-19 pandemic," the press release notes. The operation, which focused on dairy foods, olive oil, alcohol and horse meat, also identified counterfeit cereals, grains and derived products as well as coffee, tea and condiments.

LITIGATION

Grocers File Lawsuit Over BE Standard

The Center for Food Safety and several food retailers have filed a lawsuit against the U.S. Department of Agriculture (USDA) alleging that the agency "fell far short of fulfilling the promise of meaningful labeling" of bioengineered (BE) foods with its 2019 labeling rules. *Natural Grocers v. Perdue*, No. 20-5151 (N.D. Cal.,

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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.

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

filed July 27, 2020). The complaint takes issue with four aspects of USDA's BE labeling rule. First, the plaintiffs allege that allowing companies to use QR codes to disclose BE ingredients will "discriminate against major portions of the population—the poor, elderly, rural, and minorities—with lower percentages of smartphone ownership, digital expertise, or ability to afford data, or who live in areas in which grocery stores do not have internet bandwidth."

The plaintiffs also object to the terminology USDA chose. The rule uses "bioengineered" rather than "genetically engineered" (GE) or "genetically modified" (GM) and prohibits the use of the latter terms, a decision the plaintiffs allege was arbitrary and capricious. Third, the plaintiffs argue that USDA "decided to exclude highly refined GE foods, creating a new extra-statutory limitation."

Finally, the plaintiffs assert that limiting the use of "GE" or "GM" on packaging is contrary to manufacturers' and retailers' First Amendment rights. "In this context, manufacturers and retailers have the right to label foods as produced through genetic engineering or as genetically engineered. Yet the final rule attempts to restrict that right in multiple ways, providing only limited and restricted voluntary labeling beyond its narrow scope. Those speech chilling restrictions violate the statute's text and purposes as well as the 1st Amendment's guarantees."

Court Dismisses Mondelez Alkalized Cocoa Lawsuit

A New York federal court has dismissed a putative class action alleging that Mondelez misled consumers by labeling Oreos as "always made with real cocoa" despite containing cocoa refined through an alkalizing process. *Harris v. Mondelez Global LLC*, No. 19-2249 (E.D.N.Y., entered July 28, 2020). The plaintiffs argued that the "representation 'real cocoa' is false, deceptive and misleading because consumers expect 'real cocoa' to indicate a higher quality cocoa than had the ingredient merely been accurately identified as 'cocoa' (minus the descriptor 'real')."

"Plaintiffs do not dispute that the challenged products are in fact made with cocoa, which is fatal to their case," the court held. " Plaintiffs' claims are trained on whether the product contains cocoa that is real, and the Oreos indisputably do contain cocoa, along with other ingredients." The court dismissed the claims with prejudice, finding the substantive issue could not be cured with better pleadings.

inspections, subject to FDA, USDA and FTC regulation.

Union Targets FSIS Poultry Processing Waivers in Lawsuit

Several labor unions and their affiliated international union, the United Food and Commercial Workers Union (UFCW), have filed a lawsuit urging the U.S. Department of Agriculture and its Food Safety Inspection Service (FSIS) to "set aside a waiver program" for exceeding maximum line speeds on the grounds that FSIS adopted the program without adhering to procedures set forth in the Administrative Procedures Act (APA). *U. Food & Comm. Workers Union, Local No. 227 v. USDA*, No. 20-2045 (D.D.C., filed July 28, 2020). Under a 2014 rule, FSIS allows poultry plants to process birds at a rate of 140 birds per minute, but a 2018 waiver program allowing some plants to process up to 175 birds per minute has granted waivers to "nearly 43 percent of all plants subject to that regulation," according to the complaint.

"In adopting the new waiver program, FSIS ignored concerns—raised by plaintiff UFCW and others—that increasing line speeds at poultry processing plants would increase the risk of injury to workers on the line," the plaintiffs argue. "Instead, the agency asserted that it lacked the legal authority to address worker safety concerns, even as it acknowledged that it had considered and addressed worker safety concerns in its 2014 rulemaking." For alleged violations of the APA, including the notice-and-comment and arbitrary-and-capricious sections, the plaintiffs seek a declaration that the waiver program was adopted without observance of procedure.

Plaintiff Alleges Kroger Underfills Coffee Cans

A plaintiff has filed a putative class action asserting that The Kroger Co.'s ground coffee packaging and labeling mislead consumers as to the amount of cups of coffee they can produce. *Lorentzen v. Kroger Co.*, No. 20-6754 (C.D. Cal., filed July 28, 2020). "The scheme is straightforward," the complaint alleges. "Defendant sells the Products with the representation they contain enough ground coffee to yield a specific number of servings (e.g., 225 cups). This representation is prominently displayed on the front panel of the coffee canister. However, if the back-panel brewing instructions are followed, the canister produces significantly less than what is advertised on the front panel." For example, the plaintiff asserts, one product's labeling indicated it could be used to make "about 225 cups," but the contents would make about 110 cups if the direction of one

tablespoon of coffee per six ounces of water is followed. The plaintiff seeks class certification, an injunction, restitution, attorney's fees and costs for alleged violations of California consumer-protection statutes.

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