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# FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON



LEGISLATION, REGULATIONS & STANDARDS

## FDA Finds Milk Allergens in Dark Chocolate Samples

The U.S. Food and Drug Administration (FDA) has announced the results of a study examining 52 dark chocolate products, determining that four of the products had potentially hazardous levels of milk allergens. "The agency found the 12 samples from the four products to have milk allergen levels ranging from 600 ppm to 3,100 ppm," the announcement states. "The agency determined that, at these levels, the four products held the potential to cause severe reactions in consumers with milk allergy. The FDA took action as warranted to address each of these positives."

## USDA Denies Veal Group's Petition on Regulatory Definitions

The Food Safety and Inspection Service (FSIS), a part of the U.S. Department of Agriculture (USDA), has responded to a petition submitted by the American Veal Association aiming to establish "a regulatory definition for veal and other immature cattle that reflects established industry practices." The petition included a proposed definition and suggested subcategories for "milk-fed veal," "formula-fed veal" and "grain/grass-fed veal."

"After careful consideration of the issues raised in the petition, FSIS has decided to deny your petition without prejudice," the response states. "FSIS has determined that the petition does not include the necessary consumer research or other supporting data



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to demonstrate that a regulatory definition for 'veal,' based primarily on the dressed carcass weight and compliance with [U.S. Food and Drug Administration] regulations, is needed to meet consumer expectations for products labeled as 'veal.' FSIS has also determined that, for labeling purposes, it is not necessary to define optional veal subcategories based on the live animal's diet and dressed carcass weight because our current procedures for approving labels bearing animal raising claims provide producers with flexibility and are effective in ensuring that labels bearing these claims are truthful and not misleading."

## FDA to Hold Meetings on Proposed Traceability Records Requirements

The U.S. Food and Drug Administration will host three virtual public meetings to discuss the proposal of additional traceability records required for high-risk foods. All three meetings "will cover the same agenda items and are intended to facilitate and support the public's evaluation and commenting process." The meetings will be held November 6, November 18 and December 2, 2020.

## APHIS to Amend National Poultry Improvement Plan

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) has announced that it will amend regulations governing the National Poultry Improvement Plan (NPIP). The amendments "establish a U.S. Newcastle Disease Clean program within the NPIP, create an NPIP subpart specific to game birds, revise testing requirements, and clarify existing provisions of the regulations," according to the announcement. The agency also amends "the regulations concerning the payment of indemnity and compensation for low pathogenic avian influenza to reflect current policy and operational practices, and allowing NPIP voting delegates to represent multiple States during the Biennial Conferences." The changes take effect November 4, 2020.

## FDA Accepting Comments on Cultured Seafood Labeling

The U.S. Food and Drug Administration (FDA) has requested information "pertaining to the labeling of foods comprised of or


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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

containing cultured seafood cells," which the agency notes are "being developed and may soon enter the marketplace."

"Animal cell culture technology involves the controlled growth of animal cells, their subsequent differentiation into various cell types, and their harvesting and processing into food," the notice states. "Once produced, the harvested cells could potentially be processed into or combined with other foods and marketed in the same, or similar, manner as conventionally produced meat, poultry, and seafood." Comments will be accepted until March 8, 2021.

inspections, subject to FDA, USDA and FTC regulation.



LITIGATION

## Court Dismisses Mott's "Natural" Juice Lawsuit

A California federal court has dismissed a putative class action alleging that Mott's apple juices and applesauce are not "natural" as marketed because they contain trace amounts of pesticides. *Yu v. Dr Pepper Snapple Grp. Inc.*, No. 18-6664 (N.D. Cal, entered October 6, 2020). The complaint was previously dismissed without prejudice, and the amended version contained the "same five causes of action" but "added two generic surveys to the allegations."

The court examined the additional surveys but was unconvinced that they provided enough support to allow the case to move forward. "The 2015 Consumer Reports Survey arguably undermines, rather than supports, Plaintiff's argument about the reasonable consumer's interpretation of the word 'natural,'" the court held. "It states, 'Consumers were asked about their perception of the natural and organic labels. The organic food label is meaningful, is backed by federal regulations, and verified by third-party inspections; the natural label, however, is essentially meaningless (little regulation/verification).' [] Assuming all fact assertions are true, as the Court must, the Court finds this survey does not help plaintiff allege a plausible claim." The second piece of submitted evidence, a 2019 study conducted for the Corn Refiners Association, was "tangentially related to Plaintiff's claims, at best," the court held. Accordingly, the court dismissed the claims without leave to amend.

## Sugar Content of "Lightly Sweetened" Tea Challenged

A group of consumers has filed a putative class action alleging the Healthy Beverage Co. LLC misleadingly labels its products as "lightly sweetened" because the product contains 20 grams of added sugar, or 40% of the recommended daily intake. *Pierre v. Healthy Beverage Co. LLC*, NO. 20-4934 (E.D. Penn., filed October 6, 2020). The complaint cites a letter from the Center for Science in the Public Interest to the U.S. Food and Drug Administration alleging the company's representations of its products as "lightly sweetened" are misleading as well as the definition of "lightly" as it appears in a Merriam-Webster dictionary. The plaintiffs allege one cause of action, unjust enrichment, on behalf of a proposed nationwide class.

## Irish Court Classifies Subway Bread as Confectionery Item

The Supreme Court of Ireland has held that Subway's breads are subject to value-added tax (VAT) because they contain too much sugar to be considered a staple product. Under the country's VAT law, bread can contain up to 2% sugar in the flour to be classified as a staple product exempt from the tax; Subway's breads contain about 10% sugar in the flour for both the white and wholegrain varieties. Following the ruling, the breads will be taxed at 13.5% under the law. The Irish court reached the ruling following a challenge by a Subway franchisee alleging it should not have to pay the VAT.

## Malic Acid Suit Filed Against True Lemon

Grand Brands Inc. allegedly markets its True Lemon powdered drink mixes as "naturally flavored" despite containing malic acid, a plaintiff alleges. *Tedesco v. Grand Brands Inc.*, No. 20-1928 (S.D. Cal., filed September 28, 2020). The complaint asserts that Grand Brands fails to identify the type of malic acid included in its products and alleges that "[e]ven if reasonable consumers were to investigate the Defendant's claims on the Products' front labels by scrutinizing the ingredient statements on the back, consumers would still be unable to verify whether the Products contained artificial flavoring." The plaintiff further asserts that "analytical testing" of the products "confirmed that Defendant adds the artificial flavoring dl-malic acid to each of the Products." The eight claimed causes of action include alleged violations of California consumer-protection statutes as well as intentional and negligent misrepresentation.

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