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LEGISLATION, REGULATIONS & STANDARDS

USDA Accepting Comments For Codex Meeting On Food Hygiene

The U.S. Department of Agriculture (USDA) has announced a public meeting to hear from stakeholders on positions for the December 2022 meeting of the Codex Committee on Food Hygiene. Topics to be covered include draft guidelines for controlling *E. coli* in raw beef, fresh leafy vegetables, raw milk, raw cheese and sprouts as well as draft guidelines for the safe use and reuse of water in food production. The meeting is scheduled for October 27, 2022.

LITIGATION

Court Sends GMO Disclosure Regulation Back to USDA for Review

A federal court in California has ruled that solely using QR codes on food packaging is not enough to disclose a product's bioengineered status to consumers. *Natural Grocers v. Vilsack*, No. 20-5151 (N.D. Cal., entered September 13, 2022).

The ruling was in a suit brought by retailers and non-profit organizations against the U.S. Department of Agriculture (USDA). The plaintiffs challenged a USDA regulation that took effect in January that required food manufacturers to disclose, on product packaging, bioengineered foods and foods made with bioengineered ingredients.

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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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The rule required all such products to include either a text, symbol or electronic or digital link to disclosure information. USDA also allowed food manufacturers to pair a text message hotline with a QR code on product packaging so that consumers could text the number or scan the code to receive the product's disclosure information. The court determined that USDA's decision to allow for electronic or digital-only disclosure was a "significant error." The regulation will next return to the agency for review.

Shook Of Counsel John Johnson III recently discussed the litigation with Nosh, a food and beverage publication. Johnson said the decision raises questions about the accessibility of QR codes, but noted those concerns were pre-existing. He also cautioned against seeing the ruling as having a wider application beyond the immediate case.

"My caution would be comparing [this to other disclosures] since this was a very narrow question," he said. "So much of the other food labeling requirements – statement of identity ingredients, nutrition labeling – those all come from the Food, Drug and Cosmetic Act, which has its own statutory elements and requirements ... instead of making any broad strokes I'd say this was a highly nuanced statutory discussion."

Beyond Meat Faces New Claim that It Misled Consumers on Protein Content

Three consumers have filed a putative class action against alternative-meat manufacturer Beyond Meat, Inc., alleging the company misled consumers as to the amount of protein in its products. *Garcia v. Beyond Meat, Inc.*, No. 22-297 (S.D. Iowa, filed on September 9, 2022).

The plaintiffs—who live in Colorado, Iowa and Florida—allege they relied on representations regarding the percent daily value of protein in the products, as well as labeling stating the amount of protein contained in the products. They assert that Beyond Meat products' stated protein amount and percent daily value claims are false and misleading, and that they chose to pay a premium price for the product based on the company's representations.

"Simply put, Defendant's protein amount and/or protein DV% for the Products are a farce," the plaintiffs assert in the complaint. "Defendant knowingly prepared the material on their website and product labels to misrepresent the true protein amount and/or protein DV% for the Products."

For alleged violations of state consumer fraud acts and the Magnuson-Moss Warranty Act, breach of express and implied



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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

warranty and unjust enrichment, the plaintiffs are seeking class certification, declaratory judgment, damages, prejudgment interest, restitution, injunctive relief, attorneys' fees and expenses.

The suit follows two other suits filed in May and June, which make similar claims.

Judge Tosses Claims that MorningStar Veggie Products Misled Consumers

A federal court has dismissed a proposed class action claiming Kellogg misled consumers into believing their “veggie” MorningStar Farms products were exclusively or mostly made with vegetables. *Kennard v. Kellogg Sales Co.*, No. 21-7211 (N.D. Cal., entered September 14, 2022).

The plaintiff in the suit alleged Kellogg misleadingly and illegally labels MorningStar Farms “veggie” products, in violation of California’s Consumer Legal Remedies Act, California’s false advertising law and California’s unfair competition law. She contended that reasonable consumers understand the term “veggie” to mean that products are made primarily of vegetables and alleged Kellogg’s use of the term “veggie” is false or misleading because the ingredients are not primarily vegetables.

The court disagreed, finding the allegations “are implausible and do not support a reasonable inference that some significant portion of consumers would be misled into thinking the VEGGIE products are made primarily of vegetables as opposed to being vegetarian meat substitutes made from grains, oils, legumes, or other ingredients.”

“Even if the use of the term VEGGIE is ambiguous and could possibly be construed as referring to vegetable content (as opposed to vegetarian content), looking to the packaging of the Veggie Products confirms that no significant amount of reasonable consumer would be misled,” the court held. “The packaging, which has been incorporated into the [first-amended complaint], provides no indication that any particular vegetable or class of vegetables is present in the Products. Instead, the majority of the photographs on the packaging show the Products clearly mimicking meat as vegetarian meat substitutes.”

Consumer Alleges 7-11 Misrepresented Peanuts as Naturally Flavored

inspections, subject to FDA, USDA and FTC regulation.



An Illinois man has sued 7-Eleven, alleging the convenience store chain's private-label spicy jalapeno-flavored jumbo peanuts misled consumers as to whether they were naturally flavored. *Wilim v. 7-Eleven, Inc.*, No. 22-4886 (N.D. Ill., filed September 9, 2022).

The plaintiff said in the suit that he read "Flavored Jumbo Peanuts — Spicy Jalapeño" on the packaging of the 7-Select brand jumbo peanuts and saw pictures of the two jalapeños and jalapeño slices on the packaging and believed the product got its flavor from jalapeños. He accuses 7-Eleven of misrepresenting the flavoring as natural when it is derived instead from artificial flavoring.

"Plaintiff is part of the majority of consumers who avoid artificial flavors, based on their beliefs that foods with artificial flavor are less healthy than those without them," the plaintiff said in the complaint. "Plaintiff did not expect the jalapeño taste was from artificial jalapeño flavoring because, in his experience, this is the type of information which is typically disclosed to consumers on the front label."

The complaint asserts violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and other state consumer fraud acts, as well as breaches of express and implied warranty, violation of the Magnuson-Moss Warranty Act, fraud, negligent misrepresentation and unjust enrichment. The plaintiff is seeking class certification, injunctive relief, damages, attorneys' fees, costs and expenses.

Putative Class Action Alleges Gerber Made Improper Nutrient Claims

A California woman has filed a proposed class action claiming that Gerber Products Co. made improper nutrient claims on its labeling of baby and toddler food products. *Howard v. Gerber Products Company*, No. 22-4779 (N.D. Cal., filed August 19, 2022).

The plaintiff alleges that Gerber makes nutrient content claims on product packaging that are prohibited by the U.S. Food and Drug Administration.

"Moreover, the nutrient content claims on Defendant's products mislead purchasers into believing that the products provide physical health benefits for children under two years of age in order to induce parents into purchasing Defendant's products," the plaintiff asserts in the complaint. "In fact, the Products are

harmful both nutritionally and developmentally for children under two.”

The plaintiff highlighted the use of labeling indicating protein content of products, as well as the use of the words “nutritious” and “wonderfoods,” and asserts that some of Gerber’s products contain high amounts of added sugar.

The plaintiff claims the baby food manufacturer has violated California’s Consumers Legal Remedies Act, as well as California laws against false advertising and unlawful, unfair and fraudulent trade practices. She is seeking class certification, injunctive relief, damages, restitution, disgorgement of profits, pre- and post-judgment interest and attorneys’ fees and costs.

“Kosher” Label on Hummus Challenged

A kosher certification organization has filed a lawsuit alleging International Food Products Inc., which does business as Sabra Foods, misleads consumers as to whether its hummus products are kosher. *Rabbinical Council of Mass. v. Int’l Food Products, Inc.*, No. 22-11460 (D. Mass., Boston Div., filed September 9, 2022). The Rabbinical Council of Massachusetts, or KVH Kosher, previously certified Sabra as kosher but revoked its license in 2016 for “non-payment of fees, for adding new ingredients to their products without informing KVH, and for failing to take corrective actions in a timely manner as required by KVH.” In addition to trademark allegations, KVH asserts that Sabra’s continued use of the mark harms consumers who eat kosher.

“KVH’s Mark on Sabra’s products caused a reasonable consumer to believe the products sold by Sabra with KVH’s mark are kosher, kosher for Passover or pareve, or prepared in accordance with orthodox Jewish religious standards,” the complaint alleges. “Sabra’s infringing and deceitful acts have caused and continue to cause substantial and irreparable injury to kosher and non-kosher food consumers, who unknowingly purchased their products that had not been certified as kosher by KVH, believing those products to be so certified, resulting in potential violations of those consumers’ religious and/or dietary beliefs, as well as their personal dietary choices. Additionally, the consumption of food products from Sabra could have large health ramifications for consumers who eat kosher foods due to health reasons.”

Study Purportedly Links SSB Consumption to Higher Risk of Death from Cancer

A study led by researchers at the [American Cancer Society](#) has purportedly found that people who drank two or more servings of sugar-sweetened beverages (SSBs) per day had a 5% higher risk of death from particular types of cancer than people who never drank SSBs. Marjorie L. McCullough et al., "[Sugar- and Artificially-Sweetened Beverages and Cancer Mortality in a Large U.S. Prospective Cohort](#)," *Cancer Epidemiology, Biomarkers & Prevention*, September 15, 2022. The research began in 1982 with 934,777 cancer-free participants, and by 2016, 135,093 participants had died from cancer. The researchers purport to have found an increased risk of death from colorectal and kidney cancers in participants who reported drinking two or more SSBs each day. The study also asserts that it found an association between artificially sweetened beverage consumption and increased risk of pancreatic cancer.

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