



SPOTLIGHT

FTC Holds Forum on Advertising to Children

On October 19, 2022, the U.S. Federal Trade Commission held a forum titled “Protecting Kids from Stealth Advertising in Digital Media” to discuss ever-growing concerns over advertising to youth, particularly in the digital landscape. This issue is one that affects many industries, including the food and beverage industry. Indeed, there is a program administered by BBB National Programs—the Children’s Food and Beverage Advertising Initiative—that is specifically designed for the marketing of food and beverage products to children.

Shook Partners [Lindsey K. Heinz](#) and [Madison M. Hatten](#) reported on the FTC forum in *FTC Discusses Growing Concerns Over Digital Advertising to Youth*, an article in JD Supra. In this article, they lay out the regulatory landscape that applies when marketing products to youth and report on the specific issues raised at the FTC forum. Heinz had this takeaway from the forum: “The clear message is that the FTC is concerned about the rapidly-evolving digital landscape, and the accompanying privacy issues, particularly with respect to interactive games. Children already lack the cognitive abilities to distinguish what is and is not marketing in certain settings—these realities are simply amplified in the digital space.”

Partner Madison Hatten agreed and pointed out that some unique solutions were discussed, including mandatory disclosures. “There is a big question whether mandatory disclosure of commercial content is consistent with the First Amendment. That will be a big hurdle for regulators to overcome if they proceed

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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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down that path,” said Hatten. The public will have until November 18, 2022, to submit comments on the topics discussed.

LEGISLATION, REGULATIONS & STANDARDS

Public Meeting Announced for National Advisory Committee on Microbiological Criteria for Foods

The U.S. Department of Agriculture has announced a November 15, 2022, public meeting to discuss and vote on adopting measures related to controlling *Salmonella* in poultry products. The meeting will also include an update on actions related to *Cyclospora cayetanensis* as well as an additional work charge on *Cronobacter* in powdered infant formula. Parties interested in expressing comments during the meeting must register by November 8, 2022.

LITIGATION

Court Dismisses Coffee Serving-Size Case

A New York federal court has dismissed a lawsuit alleging that customers of Big Lots Inc. were misled by the packaging of Fresh Finds Colombian coffee. *Devey v. Big Lots Inc.*, No. 21-6688 (W.D.N.Y., entered October 12, 2022). The plaintiff asserted that the canisters of coffee she purchased stated that the contents could produce “up to 210” 6-oz. servings, but preparation by following the serving instructions would only yield 152 servings.

“[B]y focusing solely on the instructions for brewing a *single* serving, plaintiff’s calculation completely overlooks the brewing instructions on the label for larger batches, which offer a significantly higher potential yield. While 1 Tbsp. of ground coffee is recommended for a single serving, larger batches require 20% less ground coffee: ¼ cup (4 Tbsp.) for 5 servings, and ½ cup (8 Tbsp.) for 10,” the court found. “Preparing coffee in batches of 5 or 10 per the label instructions, the 152 Tbsp. of ground coffee that plaintiff alleges the Product contained would yield at least 190 6-oz. servings, a 9.5% shortfall from the maximum of ‘up to 210 suggested strength’ servings indicated on the label – and roughly one third the size of the discrepancy calculated and alleged by plaintiff.”



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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

“While there is no fixed ‘bright line’ as to the precise point where a yield representation for a product intended to be prepared in varying strengths becomes a misrepresentation so material as to mislead a reasonable consumer, I am not convinced that plaintiff’s allegations are sufficient to nudge her claim over that theoretical boundary. Indeed, ‘up to’ statements are generally not construed as concrete promises about a product’s maximum yield, particularly in relation to products such as ground coffee, for which it is well-known (and as the Product label reflects) that the greater the batch being prepared, the smaller the proportion of product that is necessary to produce a given strength.”

“As such, the Court finds, as a matter of law, that viewed as a whole, the Product’s label would not have misled a reasonable consumer, who followed the instructions on the label, in a manner that the consumer would find to be material,” the court held. “Because all of plaintiff’s claims hinge on establishing the existence of such a misrepresentation, they must all be dismissed.”

Consumer Suit Targets Artificial Flavoring in Jalapeño Poppers

An Illinois consumer has brought a proposed class action against Herr Foods Inc., alleging the packaging of its jalapeño-poppers-flavored cheese curls misleads consumers as to the source of the product’s flavoring. *Forlenza v. Herr Foods Inc.*, No. 22-5278 (N.D. Ill., filed September 27, 2022)

The plaintiff asserted in the complaint that consumers have a hierarchy when it comes to the source of a food’s taste: the most preferred option is when the taste comes from a characterizing food ingredient, followed by natural flavors and artificial flavors. She also cited surveys finding that a majority of the public seeks to avoid artificial flavoring.

The plaintiff said she read and relied on labeling including “Oven Baked With Real Cheese,” “Flavored Cheese Curls,” and a picture of a ripe jalapeño and cheese dripping out of one of the snacks, among other representations, and believed the product got its jalapeño and cheese taste from these ingredients or natural flavorings from these ingredients. The product does not contain intact peppers, however, because the pepper ingredients are only listed as part of the product’s seasoning, described as “Green Bell Pepper Powder [and] Chipotle Pepper.”

inspections, subject to FDA, USDA and FTC regulation.



“Plaintiff did not expect the jalapeño and/or cheese taste was from artificial jalapeño and/or cheese flavoring because, in her experience, this is the type of information typically disclosed to consumers on the front label,” the complaint said. The plaintiff’s claims include alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and other state consumer-fraud acts, as well as unjust enrichment and fraud. She is seeking class certification, injunctive relief, damages and attorney’s fees.

Kombucha Maker Accused of Misleading Consumers on Products’ Alcohol Content

A group of consumers have filed a proposed class action against a North Carolina kombucha company, alleging the company misleads consumers as to the alcohol content of its beverages. *Burke v. Tribucha, Inc.*, No. 22-0406 (E.D.N.C., filed October 6, 2022).

Kombucha is a fermented tea drink that, when made without pasteurization, can develop a high amount of alcohol, their complaint argues. The plaintiffs, who live in Florida, Illinois, Virginia and Tennessee, assert that Tribucha failed to disclose that its raw kombucha is an alcohol beverage, instead labeling the products as containing only trace amounts of alcohol. They allege that the beverages contain more than twice the alcohol allowed for non-alcohol beverages.

“Defendant’s disclaimer that the Products ‘contain a trace amount of alcohol,’ is woefully inadequate as it does not contain the mandated Surgeon General warning, is not prominently featured on the product, and is still sold to consumers under 21 years old,” the complaint asserts. “The disclaimer is also false, as the Products contain more than just ‘trace amounts’ of alcohol. As a result, reasonable customers are still being misled by Defendant’s false and misleading advertising concerning the alcohol content of its kombucha beverages.”

The plaintiffs allege Tribucha violated state consumer-protection laws in their respective states. They are also bringing claims of fraud, breach of express and implied warranties and unjust enrichment. They are seeking class certification, declarative judgment, damages, prejudgment interest, restitution, injunctive relief and reasonable attorney’s fees.

Court Sides with Tofurky, Blocks Arkansas from Enforcing Meat Labeling Law

A federal court has blocked the state of Arkansas from enforcing a 2019 law that made it illegal for companies to use words like “burger” or “sausage” to describe products not made from animals. *Turtle Island Foods SPC v. Soman*, No. 19-0514 (E.D. Ark., entered September 30, 2022).

The ruling was in a lawsuit brought by the Good Food Institute, Animal Legal Defense Fund and the American Civil Liberties Union on behalf of Tofurky, a maker of plant-based meat products. The suit challenged an Arkansas law that would have made it illegal for companies to use words typically associated with animal products to describe products not made from animals. The plaintiffs alleged that the law violates Tofurky’s First Amendment and Fourteenth Amendment rights.

The court granted the plaintiffs a permanent injunction against the state, finding that the state appears to believe that the simple use of words like “burger,” “ham” or “sausage” would leave the typical consumer confused, but that position requires the assumption that consumers disregard all other food labeling.

“The labels in the record evidence before the Court include ample terminology to indicate the vegan or vegetarian nature of the products,” the court stated. “Additionally, the State has not come forward with evidence of any broad marketplace confusion around plant-based meat alternatives to bolster its claim. Thus, the Court concludes that ‘considering the label as a whole, an ordinary consumer would not be deceived about’ whether Tofurky’s products contain animal-based meat.”

‘Texas Pete’ Hot Sauce Labeling Misrepresents Product’s Origin, Suit Alleges

A California man has sued the maker of Texas Pete-brand hot sauce products, alleging the company deceptively advertises itself as having Texas ties, while it is in fact made in North Carolina. *White v. T.W. Garner Food Co.*, No 22-6503 (C.D. Cal., filed September 12, 2022).

The plaintiff has brought a proposed class action against T.W. Garner Food Co., a North Carolina company, alleging the company’s labeling and advertising campaign “is overloaded with references to Texas.”

“Although Defendant brands the Products ‘Texas Pete,’ there is surprisingly nothing Texas about them: unknown to consumers,

the Products are standard Louisiana-style hot sauces, made with ingredients sourced outside the state of Texas, at a factory in North Carolina,” the complaint said. The plaintiffs noted that the packaging and labeling has “distinctly Texan imagery: the famed white ‘lone’ star from the Texan flag together with a ‘lassoing’ cowboy.”

“Defendant concocted this false marketing and labeling scheme specifically because it knows the state of Texas enjoys a certain mysticism and appeal in the consumer marketplace and is known for its quality cuisine, spicy food, and hot sauce in particular,” the complaint asserts. “By way of its false marketing and labeling, Defendant knowingly and intentionally capitalizes on consumers’ desire to partake in the culture and authentic cuisine of one of the most prideful states in America.”

The complaint includes claims of violations of California’s Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act, as well as breach of warranty and unjust enrichment. The plaintiff is seeking class certification, declaratory relief, injunctive relief, damages, attorneys’ fees and pre- and post-judgment interest.

Consumer Groups Sue for Alcohol Labeling Requirements

Three consumer groups have filed suit against the U.S. government urging action on a nearly two-decade-old petition seeking greater transparency in alcohol labeling. *Center for Science in the Public Interest v. U.S. Dep’t of Treasury*, No. 22-2975 (D.D.C., filed October 3, 2022).

The plaintiffs—the Center for Science in the Public Interest, Consumer Federation of America and National Consumers League—are suing the U.S. Department of Treasury and Alcohol and Tobacco Tax and Trade Bureau (TTB), calling on them to require alcohol labeling “with the same basic transparency consumers expect in foods,” such as alcohol content, calorie and ingredient information. The groups initially filed a 2003 petition along with 66 other organizations and eight individuals, including four deans of schools of public health.

“Enhanced transparency in alcohol labeling is a commonsense step that can help address the health and safety concerns related to the consumption of alcohol and would allow consumers to make informed choices about the alcoholic products they purchase,” the plaintiffs said in the [complaint](#).

While the Treasury Department has acknowledged that labeling could be an effective means of conveying important information to consumers, the plaintiffs said the defendants “have failed to take significant action in nearly two decades to address this urgent public health and consumer protection matter.”

“As a result, Plaintiffs’ members and supporters have for years been forced to consume alcoholic products without knowing important diet, health, and safety information or possibly forgo them,” the plaintiffs said.

The plaintiffs are seeking a judgment that the government’s failure to act on their earlier petition constitutes an “unreasonable delay” under the Administrative Procedure Act, a court order requiring the defendants to issue a final decision on the relief sought, and attorneys’ fees.

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