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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

FDA Issues Draft Guidance on Plant-Based Milk Alternatives

The U.S. Food and Drug Administration (FDA) has announced the availability of draft guidance for industry on labeling plant-based milk alternatives. The guidance indicates that plant-based milk alternatives can be labeled as "milk" if they are "qualified by the plant source of the food," such as "soy milk" or "almond milk."

The guidance notes that a majority of consumers purportedly understand the difference between milk and plant-based milk alternatives, but they might not understand the nutritional differences. To clarify this difference, FDA recommends that labels for plant-based milk alternatives include a voluntary nutrient statement with a comparison to milk, such as "Contains lower amounts of [nutrient name(s)] than milk."

CSPI Urges FDA to Respond to Companies Intentionally Adding Sesame

A food-industry watchdog has filed a petition urging the U.S. Food and Drug Administration (FDA) to notify food manufacturers that they cannot skirt food safety laws by adding sesame and other major allergens to foods.

On January 30, the Center for Science in the Public Interest (CSPI) submitted a petition to FDA requesting that it issue a notice to manufacturers and update its industry guidance to prevent manufacturers from intentionally adding sesame and

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other major allergens to products when they identify allergen cross-contact risks.

CSPI said in the petition that action is urgently needed to prevent practices that have emerged as companies have moved to implement the Food Allergy Safety, Treatment, Education, and Research (FASTER) Act. The law declared sesame a major allergen and required food manufacturers to label their products that use sesame or items derived from it by January 1. The group is also asking FDA to clarify that the ingredients and "contains" statement cannot be used to declare cross-contact risks.

"The practice of adding major allergens as a response to food safety rules is shocking, unprecedented in scope, and has the potential to undermine long-established protections for Americans with food allergies," the group said in the petition. "It is also illegal, violating both the letter and intent of FDA's food safety rules, because it takes an existing hazard identified by the company (an allergen cross-contact risk) and further elevates the risk to consumers by increasing potential exposure to the food allergen."

FDA Releases List of 2023 Foods Program Priorities

The U.S. Food and Drug Administration (FDA) has indicated which guidance documents will be prioritized between February 2023 and January 2024. The list includes documents on allergens, food additives, food safety and the Food Safety Modernization Act. Forthcoming labeling guidance documents will focus on "Labeling of Plant-Based Alternatives to Animal-Derived Foods," "Questions and Answers About Dietary Guidance Statements in Food Labeling" and "Use of Nutrient Content Claims for Added Sugars in the Labeling of Human Food Products."

LITIGATION

Consumer Sues over Pretzels' "Whole Grain," "Real Honey" Claims

A New York woman has filed suit against Campbell Soup Co. and Snyder's-Lance Inc., alleging the companies' Snyder's pretzels' claims that they contain "Whole Grain" and "Real Honey" mislead consumers. *Payne v. Campbell Soup Co.*, No. 23-1210 (S.D.N.Y., filed February 13, 2023).

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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 inspections, subject to FDA, USDA and FTC regulation.

The plaintiff alleges in her complaint that the defendants, which make and sell Snyder's of Hanover Braided Twists Pretzels, "market their Products in a systematically misleading manner by misrepresenting that their Products are made with 'Whole Grain' and that their Honey Wheat Product is also made with 'Real Honey.'"

"Unbeknownst to consumers, however, Defendants' Products are not predominately made with 'whole grain' nor is the Honey Wheat Product primarily sweetened with 'real honey,'" the plaintiff alleged in the complaint. "Instead, the Products' ingredients on their back panel list 'enriched wheat flour' as the Product's primary ingredient—a well-known substitute to 'whole grain' wheat. Similarly, the back panel of Defendants' Honey Wheat Products lists 'brown sugar,' as the Products' primary ingredient, followed by 'tapioca syrup,' and 'malt extract'—two well-known processed sweeteners."

For alleged violations of state consumer protection statutes and sections 349 and 350 of the New York General Business Law, the plaintiff is seeking class certification; declaratory judgment; compensatory, statutory and punitive damages; prejudgment interest; restitution; and costs and expenses including attorney's fees.

Southern Comfort "Gas Station" Bottles Mislead, Consumer Alleges

A plaintiff has alleged that the small bottles of Sazerac Co.'s Southern Comfort sold at some stores mislead purchasers into believing that they are buying the same distilled spirits sold in larger bottles under the same brand name rather than the mini bottles' contents of malt beverages. *Del Rosario v. Sazerac Co.*, No. 23-1060 (S.D.N.Y., filed February 8, 2023). "[T]he packaging contains identical colors, themes, fonts, symbols and spacing, and even the same outer grooves," the complaint argues, further asserting that the statement of composition on the mini bottles is "difficult to see without a magnifying glass."

The consumer also argues that the bottle indicates that the product contains "natural whiskey flavors," but "the amount of whisky in the Product is de minimis, equivalent of a thimble per 2500 gallons." Sellers of the mini bottles reportedly call the bottles "'shots,' a term used to refer to small servings of distilled spirits," according to the complaint.

The plaintiff seeks class certification, damages, costs and expenses for allegations of unjust enrichment, fraud, breach of warranties and violations of state consumer fraud statutes. The lawsuit

echoes similar claims brought against Fireball Cinnamon Whisky in January 2023.

Jury Awards Mondelez $8.6M in Contract Dispute Following Ritz Recall

An Illinois federal jury has awarded Mondelez Global LLC more than $8.6 million for its breach-of-warranty claims against a company that supplied it with whey powder that was recalled in 2018 for *Salmonella* contamination, prompting a recall of certain Ritz products. *Mondelez Global LLC v. Associated Milk Producers Inc.*, No. 20-6512 (N.D. Ill., issued February 10, 2023).

Mondelez brought the suit against Associated Milk Producers Inc. (AMPI) in November 2020 following the recall. The products at issue in the suit were Ritz items that used the whey powder in cheese fillings. In its complaint, Mondelez said the recall cost the company $25 million, including lost profits, marketing and the value of the products that needed be recalled.

Mondelez alleged AMPI breached warranties in purchase orders between AMPI and one of Mondelez's external manufacturers, Hearthside Food Solutions LLC (HFS), by supplying a product that did not conform to Mondelez's requested specifications and quality requirements.

The jury awarded Mondelez $8,650,516 in damages against AMPI after finding Mondelez proved it was a third-party beneficiary of the purchase orders between HFS and AMPI, and also that AMPI breached one or more warranties in the HFS purchase orders, according to a court order entered February 10.

Proposed Class Action Alleges Irish Butter Marketed as "Pure" Contains PFAS

A New York consumer has filed a proposed class action against the maker of Kerrygold butter, alleging that packaging claims that Kerrygold products contain "pure Irish butter" are misleading because they contain synthetic additives. *Winans v. Ornua Foods N. Am. Inc.*, No. 23-01198 (E.D.N.Y., filed February 14, 2023).

The products at issue are Kerrygold Salted and Unsalted Butter Sticks, according to the complaint. The plaintiff alleges they contain per- and polyfluoralkyl substances (PFAS), a category of synthetic chemicals.

"The presence of PFAS is entirely inconsistent with Defendant's uniform representations that the Products only contain 'pure Irish

butter,'" the plaintiff said in the complaint. The plaintiff noted that scientists are concerned about how PFAS affect human health. She also noted that New York has enacted a ban on the sale of any food packaging that intentionally contains PFAS.

The plaintiff is alleging violations of Sections 349 and 350 of the New York General Business Law, breach of express warranty, negligent misrepresentation and unjust enrichment. She is seeking class certification; an order requiring the defendant to establish a blood-testing program for medical monitoring; damages; a jury trial; and attorney's fees.

Consumers Sue Lindt for Heavy Metals in Dark Chocolate Products

Consumers from New York and California have filed a proposed class action against chocolate-maker Lindt, alleging the company failed to disclose to consumers that some of its dark chocolate products contain unsafe levels of lead and cadmium. *Gralia v. Lindt & Sprüngli (USA) Inc.*, No. 23-1186 (E.D.N.Y., filed February 13, 2023).

The Lindt products at issue include the Lindt "Excellence Dark Chocolate 70% Cocoa" bar and the Lindt "Excellence Dark Chocolate 85% Cocoa" bar. The suit stems from a December 2022 *Consumer Reports* article that purportedly found certain dark chocolate bars—including Lindt's two bars—had high enough levels of lead and cadmium that eating an ounce a day would put an adult over a level that public health authorities and experts say may be harmful.

"No reasonable consumer would know, or have reason to know, that the Products contain (or risk containing) Heavy Metals," the plaintiffs said in the complaint. "Worse, as companies across the industry have adopted methods to limit heavy metals in their dark chocolates, Defendant has stood idly by with a reckless disregard for its consumers' health and well-being."

The plaintiffs are alleging violations of sections 349 and 350 of New York's General Business Law and California's Unfair Competition Law, as well as unjust enrichment. They are seeking class certification, declaratory judgment, injunctive relief, damages and costs and expenses including attorney's fees.

MEDIA COVERAGE

CBA, Consumer Reports Author Op-Ed Criticizing FDA Redesign Plan

Representatives of the Consumer Brands Association (CBA) and Consumer Reports have co-authored an op-ed for *The Hill* arguing that U.S. Food and Drug Administration (FDA) Commissioner Robert Califf's plan to redesign the Human Foods Program "falls short of the profound changes FDA needs to better protect consumers and accelerate getting safe, new food products to the market."

The authors criticize the proposed change to the internal structure of the agency, asserting that it maintains the status quo. "Rather than unifying the entire foods program under a single leader with direct line authority, the major organizations responsible for running food-related operations would still report directly to Califf under his plan. We've already seen a splintered structure like this fail. A diluted plan to fix it won't deliver the full transformation FDA needs."

"At the end of the day, it's consumers who will face the consequences if FDA refuses to truly shift away from its existing culture of indecision and inaction," the op-ed concludes. "The next public update on FDA's foods program redesign plan should incorporate modifications that properly designate a deputy commissioner with the full authorities needed to drastically improve functionality. FDA must acknowledge the robust record of widespread support from consumer organizations, industry, and state and local regulators – even backed in FDA's requested third-party report – for this strong course of action. It's time for FDA to do its job and do it right."