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LEGISLATION, REGULATIONS & STANDARDS

20 State AGs Ask FDA to Act on Lead, Metals in Baby Food

Citing a wave of childhood lead poisoning connected to recalled applesauce pouches, a group of 20 state attorneys general have renewed earlier requests that the U.S. Food and Drug Administration (FDA) establish requirements that baby food manufacturers test for lead and other metals. The AGs—led by New York Attorney General Letitia James—asked FDA to take official notice of relevant information in support of their October 2021 citizen petition urging FDA to drive down the levels of toxic heavy metals in food intended for babies and young children, in part by issuing guidance on finished product testing. FDA denied the petition in May 2022, prompting AGs to send a request for administrative reconsideration in June 2022.

In a February 14 letter, James pointed to three documents containing relevant facts warranting official notice, including January 2023 draft guidance on action levels for lead in food intended for babies and young children, FDA's series of public notices on its investigation into elevated lead and chromium in cinnamon applesauce pouches, and an FDA inspection report from December 2023 finding that the manufacturer of the recalled cinnamon applesauce products did not test its finished products for heavy metals prior to their distribution throughout the United States.

"The enclosed documents make it evident that some manufacturers and distributors of baby foods in the U.S. currently lack a clear understanding of the proper way to apply preventive

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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controls to avoid adulteration of finished baby food products by lead or other toxic elements," James said. "Indeed, FDA has publicly supported, through its legislative proposals, a policy that would allow FDA to 'require industry to conduct toxic element testing of final products marketed for consumption by infants and young children and maintain such records of these testing results for FDA inspection.'"

Proposed California Bill Aims to Ban Unnecessary PFAS Use by 2030

A California lawmaker has introduced a bill seeking to ban the use of products containing so-called "forever chemicals," unless their use is necessary. State Sen. Nancy Skinner (D-Berkeley) introduced the Ending Forever Chemicals Act, or Senate Bill 903, which would ban the sale of all products containing PFAS in California by 2030. In a statement, Skinner said the state has led the nation in addressing PFAS in products such as food packaging and cosmetics. "But PFAS still remain in hundreds of products sold and used in our state, and these forever chemicals are increasingly found in our drinking water, our food and our bodies," she said. "With S.B. 903, California will end the unnecessary use of forever chemicals and significantly reduce the harm PFAS pose to our environment and our health." The bill is co-sponsored by the Environmental Working Group, Breast Cancer Prevention Partners, the California Association of Sanitation Agencies, Clean Water Action and the Natural Resources Defense Council.

USDA Announces Public Meetings for Codex, NOSB

The U.S. Department of Agriculture (USDA) has announced multiple meetings to hear opinions from stakeholders on issues related to the Codex Alimentarius Commission and the National Organic Standards Board (NOSB).

- The U.S. Codex Office will hold a public meeting on March 19, 2024, to provide information and receive public comment on U.S. positions for the Codex Committee on Food Additives, held in April 2024.
- The office will also hold a meeting on March 21, 2024, to discuss U.S. positions for the Codex Committee on Contaminants in Foods, which will be held April 15–19.
- NOSB will hear oral public comments via webinars held on April 23 and 24, 2024, and hold an in-person meeting April 29–May 1 to discuss and vote on proposed recommendations

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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.

to USDA, obtain updates on issues pertaining to organic agriculture and receive comments from the organic community.

LITIGATION

Graham Cracker Lawsuit to Continue

A federal court in New York has dismissed some allegations in a complaint alleging Wakefern Food Corp.'s graham crackers packaging misleads consumers into believing the product has more whole grain graham flour than non-whole grain flour. *Feldman v. Wakefern Food Corp.*, No. 22-6089 (S.D.N.Y., entered February 8, 2024). The plaintiff also alleged that the packaging misled her into believing the graham crackers contained more than a de minimis amount of honey.

The court dismissed statutory claims brought under Connecticut, New Jersey and Delaware consumer-fraud law as well as state warranty and Magnuson-Moss Warranty Act claims. The plaintiff's fraud and unjust enrichment claims were also dismissed, but the court allowed New York, Pennsylvania and New Hampshire claims to proceed.

The court focused on Wakefern's argument that the "common or usual name," as required by U.S. Food and Drug Administration regulations, of the product is "graham cracker." As evidence, the defendant appealed to the court's "experience and common sense" rather than submitting evidence of the usage of "graham cracker," the court noted. "Defendant's argument necessarily asks the Court to go beyond the four-corners of the Complaint to determine the 'common usage' of the term 'Graham Cracker,'" it found. "'This [the Court] cannot do.'"

Ritz Bits 'Real Cheese' Labeling is Deceptive, Consumer Claims

A New York man has brought a putative class action alleging Mondelez Global LLC deceptively describes its Ritz Bits Cracker Sandwiches as having "filling made with real cheese" when they instead contain "cheese flavored filling with other natural flavor," the primary component of which is not cheese. *Fischetti v. Mondelez Global LLC*, No. 24-1135 (E.D.N.Y., filed February 14, 2024). The plaintiff alleged that the company, responding to an increased consumer demand for wholesome ingredients in shelf-stable packaged foods, markets its Ritz Bits Cracker Sandwiches

as having a "filling made with real cheese," which is displayed above an image of two wedges of cheddar cheese. The packaging also shows crackers filled with cheese, with "cheese" set off from the text "flavored filling with other natural flavor."

"Despite emphasizing that the 'filling [is] made with real cheese,' and how the crackers contain a 'Cheese Flavored Filling With Other Natural Flavor,' the primary component of this filling is not cheese," the plaintiff alleged. "This is revealed through the fine print of the ingredient list on the side of the package, listing 'WHEY,' and even 'SUGAR,' before 'CHEDDAR CHEESE POWDER.'" For alleged violations of New York General Business Law Sections 349 and 350, the plaintiff seeks class certification, damages, costs and expenses including attorney's fees.

Mondelez Obtains Injunction Following Tony's Chocolonely Promotion

Mondelez has alleged trademark infringement for use of a shade of purple following a Tony's Chocolonely marketing campaign in which the company showed versions of its product label stylized to appear similar to its competitors in the chocolate market. The Tony's campaign aimed to criticize its competitors for supply chains that allegedly involve slave labor, but Mondelez claimed it held a trademark on the use of lilac in chocolate, which Tony's used to imitate a Milka chocolate bar. A court reportedly has agreed, granting an injunction preventing Tony's from using the "distinctive Milka lilac colour," and Tony's rereleased the product with the same design but with a gray wrapper instead of purple.

'Yogurt Covered' Raisins Labeling Misleads Consumers, Plaintiff Alleges

A California woman has reportedly filed a proposed class action against Sun-Maid Growers of California, alleging the company deceptively advertises and labels its dipped raisins. *McGarity v. Sun-Maid Growers of Cal.* (San Diego Cnty. Super. Ct., case number unavailable). The plaintiff argues that the products prominently and unequivocally represent that they are yogurt-covered raisins, with packaging stating they are "Yogurt Covered." Reasonable consumers believe that they are healthy snacks because they are raisins covered in yogurt, and both are known to be healthy foods, the plaintiff asserts. "However, unbeknownst to consumers, the Class Products are not covered with yogurt, as yogurt is defined under federal regulations, and as consumers commonly understand the term," the complaint states. "They are, in fact, raisins coated with a flavored candy shell. Therefore, they

are more akin to candies such as Raisinets and Tootsie Rolls than they are to the healthy snack that Sun-Maid markets them as.”

The plaintiff asserts that she relied on the yogurt claim in making the purchase and that she would not have purchased the product had she known the product is “a candy-coated raisin that is merely vanilla yogurt-flavored.” She alleges violations of California's consumer-protection laws as well as breach of express warranty, breach of implied warranty and intentional misrepresentation. She seeks injunctive relief, damages, expenses and attorney’s fees.

‘Grind’ Maker Challenges ‘Daily Grind’ Vodka

Sazerac Brands LLC has filed a lawsuit alleging Central Standard LLC has infringed its “Grind” trademark by selling Daily Grind coffee-flavored vodka. *Sazerac Brands LLC v. Central Standard LLC*, No. 24-0185 (E.D. Wis., filed February 9, 2024). Sazerac, which sells an espresso-flavored rum spirit named Grind, alleges that Central Standard’s use of “grind” in its product name is “likely to cause substantial amounts of confusion amongst the relevant consuming public for numerous reasons,” including an allegedly similar sound and close proximity in the market.

In addition to damages, Sazerac seeks an injunction on Central Standard using “Grind,” unfairly competing with Sazerac, or “doing any other act likely to cause confusion or mistake or to deceive consumers into believing, mistakenly, that Defendant’s goods are sponsored, licensed, endorsed, or approved by Sazerac, or are otherwise affiliated with Sazerac.”

Campbell Soup Co. Misleads Consumers on its V8 Splash, Suit Alleges

Two California consumers have filed a proposed class action alleging Campbell Soup Co. deceptively markets its V8 Splash beverages as being healthy. *Serrano v. Campbell Soup Co.*, No. 24-01176 (C.D. Cal., filed February 12, 2024). “Rather than wholesome, natural fruit-juice beverages as advertised, the ‘V8 Splash’ products described in this action [] consist almost entirely of water and high-fructose corn syrup, artificially flavored to taste like fruit juice,” the plaintiffs allege. “These Products are labeled as if they contain only natural juices and flavors but in fact are highly-sweetened beverages containing undisclosed artificial flavoring made from petrochemicals.” The plaintiffs allege violations of California and New Jersey consumer-protection statutes as well as breach of warranties, misrepresentation and

fraud, and they seek class certification, damages, attorney's fees and injunctive relief.

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