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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

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Agencies Take Action on PFAS

New FDA Data Shows PFAS Not Prevalent in Tested Foods

The U.S. Food and Drug Administration (FDA) [reportedly](#) found per- and poly-fluoroalkyl substances (PFAS) in eight of 95 foods tested for the so-called “forever chemicals.” While testing as part of its Total Diet Study, or TDS, FDA indicated it found PFAS in two beef and two cod samples, and one sample each of shrimp, salmon, catfish and tilapia. “The FDA concluded that exposure to PFAS at the levels measured in these eight samples is not likely to be a health concern for young children or the general population, based on evaluation of each PFAS for which there is a toxicological reference value,” according to a constituent update. “The data shared today are consistent with our previous TDS testing results that detected PFAS primarily in some meat and seafood samples, while the majority of previous TDS results were found not to detect PFAS.”

EPA Publishes Final Rule Designating Two PFAS as ‘Hazardous Substances’

The U.S. Environmental Protection Agency (EPA) issued a [final rule](#) designating two per- and polyfluoroalkyl substances (PFAS) as “hazardous substances” under the federal Comprehensive

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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Environmental Response, Compensation, and Liability Act (CERCLA). Shook Environmental & Toxic Tort Litigation Practice Co-Chairs [Dave Erickson](#) and [Adam Miller](#), along with Associate [Joe Zaleski](#), discuss the final rule and four takeaways in an [Environmental Client Alert](#).

Illinois Food Additive Bill Clears Senate

The Illinois Senate has passed a [bill](#) that would ban the manufacture of food products for human consumption containing brominated vegetable oil, potassium bromate, propylparaben and red dye 3 and require studies of the potential health risks of BHA and BHT. If passed, SB2637 would take effect January 1, 2028, and would establish a civil penalty not to exceed \$5,000 for a first violation and \$10,000 for subsequent violations.

In a [statement](#), bill sponsor Willie Preston (D-Chicago) said the U.S. Food and Drug Administration has failed to take action on the issue of harmful food additives. “Safer alternatives are already being used in the EU and other places,” he said. “We need to make sure that safer choices are available to families in Illinois and hopefully, other states will follow so all consumers have access to the healthiest options.”

Florida Bans Lab-Grown Meat

Florida Gov. Ron DeSantis has signed first-in-the-nation legislation prohibiting the sale of lab-grown meat in the state. [SB1084](#) prohibits the manufacture, sale and distribution of cultivated meat, defined as any meat or food product produced from cultured animal cells. In a [statement](#), DeSantis said the state is “fighting back against the global elite’s plan to force the world to eat meat grown in a petri dish or bugs to achieve their authoritarian goals.”

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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.



“Our administration will continue to focus on investing in our local farmers and ranchers, and we will save our beef,” he said.

California Bill Introduced To Require Fortifying Corn Masa with Folic Acid

California Assemblymember Joaquin Arambula (D-Fresno) has introduced a [bill](#), AB1830, that would require manufacturers of corn masa flour and corn masa products to fortify their products with folic acid. The law, which would take effect January 1, 2026, would exempt cottage food operations and microenterprise home kitchen operations.

The bill states that Latino communities face a disproportionately higher risk of neural tube defects (NTDs), a type of birth defect that the U.S. Food and Drug Administration (FDA) has previously attempted to reduce by mandating folic acid fortification of all enriched cereal grain products. FDA has also approved voluntary fortification of other ingredients, but only 10% of corn masa flour products are fortified in the United States. “While the American diet often relies heavily on wheat, many Central and South American cuisines depend on corn masa flour as a staple,” the legislation states. “Mandatory folic acid fortification of corn masa flour can lower the rate of NTDs, saving lives and dollars.”

USDA Declares Salmonella an Adulterant in Raw Breaded Stuffed Chicken Products

The U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) has finalized a policy declaring *Salmonella* an adulterant in raw breaded stuffed chicken products when they exceed a specific threshold. Under the policy, FSIS will consider any raw breaded stuffed chicken products that include a chicken component that tested positive for Salmonella at 1 colony forming unit (CFU) per gram or higher to be adulterated. “This final determination marks the first time

that *Salmonella* is being declared an adulterant in a class of raw poultry products,” Agriculture Secretary Tom Vilsack said in a [statement](#). “This policy change is important because it will allow us to stop the sale of these products when we find levels of *Salmonella* contamination that could make people sick.”

Arizona Meat Labeling Bill Fails in Tied Vote

An [Arizona House bill](#) that would have prohibited intentionally misrepresenting food items not derived from traditional livestock or poultry as meat or animal products failed to pass a Senate vote. The bill would have applied to lab-grown meat and plant-based meats or alternatives derived from insects or other sources. The bill’s sponsor [told](#) Cronkite News he is “not banning anything. I’m just saying, ‘Hey, I want to be able to walk in the grocery store as a consumer and be able to see this is lab-grown, this is bugs, this is plant-based.’ That’s all.”

The state Senate also declined to approve [HB2121](#), which sought to ban the sale or production of cell-cultured animal products in the state.

LITIGATION

Plaintiffs Allege Nondairy Surcharge Violates ADA

A group of consumers has filed a putative class action alleging International Coffee & Tea LLC, doing business as the Coffee Bean & Tea Leaf, violated the Americans with Disabilities Act (ADA) by adding a surcharge for customers ordering a nondairy substitute for milk. *Chaffin v. Int’l Coffee & Tea*, No. 24-3132 (C.D. Cal., filed April 17, 2024). The plaintiffs, who each have either a milk allergy or lactose intolerance, allege they were

charged \$0.80 for requesting lactose-free substitutes such as almond milk and oat milk, purportedly amounting to at least \$100,000,000 during the proposed class period. For allegations of the ADA and California's Unruh Civil Rights Act as well as unjust enrichment, the plaintiffs seek class certification, damages, declaratory judgment, disgorgement and attorney's fees.

Pistachio Ice Cream Flavoring Claims Allowed to Proceed

A federal court has denied a motion by Kahala Franchising to dismiss claims that it misleads consumers into believing Cold Stone Creamery's pistachio-flavored ice cream contains pistachios. *Duncan v. Kahala Franchising, L.L.C.*, No. 22-7841 (E.D.N.Y., issued May 2, 2024). According to the opinion, the plaintiff visited a Cold Stone Creamery and selected pistachio ice cream because she believed the product contained pistachio. She later learned after visiting the company's website that the products "use a mixture of highly processed ingredients to mimic the flavor of the fruits, nuts, and other ingredients specified in the Products' names." The plaintiff's amended complaint similarly targets other flavors of ice cream, including mango, coconut, mint, orange, butter pecan and orange sorbet, claiming they are merely flavored after their named ingredients, which is allegedly not what consumers expect.

The court analyzed several elements to assess sufficiency of the plaintiff's allegations, including express representations of ingredients used, such as "made with"; the availability of an ingredients list; whether the flavor designation can be used as both a noun and adjective; and availability and significance of consumer survey evidence. On the second element, the court was not swayed by the defendant's argument that the absence of "real" ingredients in its online ingredients list was fatal to the plaintiff's claims. Courts have rejected defense arguments based on ingredient lists that are difficult for consumers to access, the court noted, and the defendant's notion of requiring consumers

to check an online ingredients list “also seems antithetical to the experience offered by defendant to the public, as described on its website” touting what the company calls the “10-Minute Vacation,” positioning the store as a getaway from the outside world.

“So the thought is that in the midst of a trademarked ‘10-Minute Vacation,’ customers have a duty to locate, read and analyze its electronic ‘Ingredient Statement’—replete with references to Guar Gum, Diglycerides, Polysorbate 80, and Propylene Glycol—to fully protect their legal interests,” the court said. “Before advancing this argument, counsel may be well advised to research the term ‘buzzkill.’”

The court denied the company’s motion to dismiss the plaintiff’s General Business Law claims and express warranty claim regarding the pistachio ice cream but granted dismissal to claims regarding other flavors as well as implied warranty and unjust enrichment claims.

Consumer Challenges Aldi Peach Cups’ ‘100% Fruit Juice’ Claims

A New York consumer has filed a lawsuit alleging Aldi misleads consumers into believing its Yellow Cling Diced Peaches contains only fruit and fruit juice despite also including water, juice concentrates, synthetic preservatives and other ingredients. *Bono v. Aldi Inc.*, 24-3026 (E.D.N.Y., filed April 23, 2024). The plaintiff argues that the product is visibly filled with peaches and fruit juice and the packaging features a freshly picked peach with its stem intact, “as if it were recently plucked from a tree,” but that Aldi “fails to prominently and conspicuously reveal facts relative to the proportions or absence of peaches and 100% fruit juice.”

“This is because it fails to disclose that it contains mostly, or at least, a significant percentage, of other ingredients, including water, juice concentrates, flavorings, such as captured and/or

restored volatile compounds and essential oils, seasoning, and synthetic preservatives, besides peaches and 100% fruit juice,” the consumer asserts. The plaintiff alleges violations of New York’s General Business Law and seeks class certification, damages and attorney’s fees.

Consumers Sue Prime Hydration for Caffeine Labeling, PFAS

Two New York residents have filed a lawsuit alleging Prime Hydration LLC misleads consumers about the caffeine content of its products. *Vera v. Prime Hydration LLC*, No. 24-2657 (S.D.N.Y., April 8, 2024). The plaintiffs allege that although the company sells its energy drinks as containing 200 milligrams of caffeine per 12-ounce can, testing purportedly shows that the products actually contain between 215-225 milligrams of caffeine. The plaintiffs allege violations of state consumer fraud acts and the New York General Business Law as well as breach of express warranty, unjust enrichment and fraud and seek class certification, damages, expenses and attorney’s fees.

Prime also faces a 2023 lawsuit alleging its Grape Sports Drink contains per- and polyfluoralkyl substances (PFAS). *Castillo v. Prime Hydration LLC*, No. 23-3885 (N.D. Cal., filed Aug. 2, 2023). The plaintiff alleges the company’s marketing is “intentionally designed to drive sales and increase profits, including by targeting health-conscious consumers who reasonably believe that the Product is a healthy hydration drink that contains nutritious ingredients such as vitamins and antioxidants, and is free from ingredients which are known to be harmful to human health.” Content creator Logan Paul, who cofounded Prime, addressed the claims in a [TikTok video](#). “First off, anyone can sue anyone at any time—that does not make the lawsuit true. And in this case, it is not,” he said. “One person conducted a random study and has provided zero evidence to substantiate any of their claims.”

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