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2019: THE YEAR IN REVIEW | December 20, 2019



LEGISLATION, REGULATIONS & STANDARDS

CBD Explodes in Popularity But Hits Regulatory Wall

Following the passage of the [2018 Farm Bill](#), which legalized the cultivation of hemp, cannabidiol (CBD) became the star ingredient of 2019, featured on its own as an oil or in food and beverages. The U.S. Food and Drug Administration (FDA) struggled to keep up with the hype; while CBD stayed in legal limbo, U.S. [lawmakers](#) and other [public officials](#) [urged](#) the agency to take action and create a legal framework for a burgeoning industry capitalizing on the popularity of CBD and its purported

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calming and healing effects. Several companies went too far in their marketing, however, according to the U.S. Food and Drug Administration’s and Federal Trade Commission’s warning letters focused on the claimed benefits of the product.

The U.S. Department of Agriculture issued its interim final rule on hemp production in October, but the announcement drew hundreds of comments urging the agency to make pragmatic adjustments. Sens. Ron Wyden (D-Ore.) and Jeff Merkley (D-Ore.) sent a letter to the USDA passing along additional feedback they purportedly heard from Oregon farmers, who argued that the interim final rule set unrealistic hurdles for hemp producers.

In November, FDA issued a consumer update clarifying that the agency “is concerned that people may mistakenly believe that trying CBD ‘can’t hurt’” while studies have identified possible effects on the liver and male reproductive health. The update accompanied warning letters to several CBD manufacturers and distributors, which then triggered a number of consumer lawsuits alleging they were sold illegal merchandise under the guise of legality.

Shook’s Cannabis Law practice helped companies navigate the regulatory minefields of CBD and other cannabis-derived products. Shook also released a white paper, “Wild West or New Frontier? Global Cannabis Market Spurs Legal Spend Across All Sectors,” that drew on feedback from in-house counsel at, among other industries, food and beverage companies.

Governments Question Food Packaging

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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Safety

Consumers and regulators have long expressed concerns about the safety of plastic and other materials in packaging for food, and in 2019, concern turned towards perfluorinated compounds (PFAS). Rep. Debbie Dingell (D-Mich.) introduced legislation in May that would ban PFAS in food containers and cookware, and a U.S. Food and Drug Administration (FDA) presentation was revealed that reportedly disclosed that agency researchers found high levels of PFAS in meat, fish, leafy greens and chocolate cake. In its response to headlines about the presentation, FDA stated, “Overall, our findings did not detect PFAS in the vast majority of the foods tested. ... In addition, based on the best available current science, the FDA does not have any indication that these substances are a human health concern, in other words a food safety risk in human food, at the levels found in this limited sampling. These data give our scientists a benchmark to use as we continue our critical work studying this emerging area of science.”

Denmark passed a law banning PFAS from cardboard and paper used for food packaging, but efforts to limit the use of plastic food packaging outside of the United States largely focused on banning plastic utensils, straws and other single-use implements. England and the EU both announced such bans, and Canada made similar efforts. In addition, a Canadian study purportedly found that plastic teabags can release billions of microplastics and nanoplastics into the water they are steeped in.



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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

No Agreement on Definitions of “Meat” and “Dairy”

The dispute over the meaning of meat- and dairy-related terms continued in 2019, with more states passing bans on the use of terms implying animal-derived products, such as “burger” or “milk,” to describe plant-based products. Nebraska, Arizona and Washington considered bans, and Arkansas’ ban was targeted with a challenge from Tofurky that has resulted in a temporary injunction preventing the state from enforcing the statute against the company. Similarly, Mississippi proposed amendments to its meat-defining law after a “vegan bacon” and “vegan chorizo” company argued that the law “harms society.” A Missouri court, meanwhile, denied the Good Food Institute’s and American Civil Liberties Union’s motion for a preliminary injunction to enforce the state’s meat-labeling statute. In addition, a bipartisan bill introduced in November, the Real MEAT Act, would define meat-related terms if the U.S. Department of Agriculture and Food and Drug Administration (FDA) “fail[] to take appropriate action.”

The issue has extended across the Atlantic, where the EU agriculture committee approved a measure that would limit the use of “steak,” “sausage,” “burger” and “escalope,” among other terms, to only describe “edible parts of the animals.” A committee of the U.K. House of Lords submitted a letter arguing against the approval in August, arguing that the “Veggie tubes proposal [is] a mistake.”

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.



Milk has inspired a similar dispute, with U.S. representatives urging FDA in February to enforce “regulations defining what may be labeled a dairy product, to combat the proliferation of imitation and substitute dairy products in the marketplace that undermine FDA regulations by using standardized dairy terms on non-dairy products.” The National Milk Producers Federation submitted a citizen petition arguing the same point.

The efforts to define “meat” and “dairy” terms coincided with—and perhaps responded to—the rising popularity of plant-based Impossible Burgers, as several fast-food restaurants released their versions of the product. One consumer tried Burger King’s Impossible Whopper and was surprised to learn that the product is not vegan because it is cooked on the same surfaces as traditional Whoppers, according to his complaint. A New Zealand pizzeria triggered an investigation after it sold pizzas with “medium rare burger patty” that used plant-based products rather than animal-derived meat without warning customers of the change; although no issues were reported, many consumers argued for transparency in ingredients because the unassuming customers could have had allergies to the plant-based products. The Center for Food Safety also took action against the Impossible Burger, arguing to FDA that the product should not be available in grocery stores because the agency did not respond to the organization’s objections to the approval of a color additive used in Impossible Burgers.

While lab-grown meat is not yet ready for the consumer market, USDA and FDA announced in early 2019 that they will “jointly

oversee the production of human food products derived from the cells of livestock and poultry.”

Sesame Allergen Labeling Expands in UK, US

Allergen labeling grabbed headlines in the United Kingdom in 2019 as the country faced pressure from consumers concerned that prepackaged foods lacked mandated ingredient disclosures. Following the 2016 death of a teenager who consumed a premade sandwich packaged without notification of potential exposure to sesame, the U.K. Food Standards Agency launched a public consultation that resulted in the announcement of “Natasha’s Law.” Under the law, which will take effect in October 2021, restaurants and other food-service entities will be required to provide a full listing of ingredients on prepackaged food.

In the United States, sesame is not an allergen that requires labeling, although the U.S. Food and Drug Administration (FDA) requested comments on the allergy’s prevalence and severity in 2018. *The New York Times* called current U.S. regulations incomplete in January, and an August NPR article compared the two systems and found awareness of allergies in the United States lacking. Following the efforts of a state representative who has a daughter with a sesame allergy, Illinois passed a law requiring sesame to be labeled on food packages in August. “If they see us do it, the hope is that everyone does it,” the state representative

reportedly said. “I hope that the FDA and other states will follow suit.”

LITIGATION

“Healthy” Foods Continue To Confuse Consumers

Several 2019 putative class actions targeted food products that purportedly misled consumers because they were marketed as “healthy” despite containing ingredients with debated health benefits. Coconut and coconut-derived products were a popular target for plaintiffs, who asserted that they were misled about the benefits associated with cooking with coconut oil or drinking coconut milk because coconut products frequently carry high levels of saturated fat. The same plaintiff sued Hain Celestial Group Inc. and Danone U.S. Inc., though the court found that Danone’s marketing touting So Delicious Coconut Milk’s “Maximum Calcium Absorption” benefit was “a permissible structure/function claim.”

“Healthy” confusion also extended to TGI Friday’s Inc. potato skins—the “labeling deceives consumers into believing that they are receiving a healthier snack” because the potato skin is high in several nutrients, the plaintiffs allege—and sprouted grains, which Food for Life Baking Co. Inc. apparently marketed as nutritionally superior to comparable cereal products.

Kellogg Sales Co. faced a “healthy” lawsuit targeting the sugar content of its cereals while it settled a 2016 lawsuit with similar claims for \$20 million. Shook Partner Lindsey Heinz and Associate Elizabeth Fessler authored a Law360 article on the settlement.

Plaintiff’s Attorneys Shift Focus To Malic Acid, Vanilla, White Chocolate

Labeling class action filings focused on purportedly misleading ingredient labels tend to come in waves, and 2019 saw a surfeit of lawsuits targeting vanilla, white chocolate and malic acid.

Several plaintiffs alleged that they were misled by products listed as vanilla-flavored because, they argued, they believed they were buying products flavored with vanilla beans rather than artificial vanilla. The allegations reached yogurt, cream soda, ice cream, coconut milk and almondmilk, among other products.

D-1 malic acid, a synthetic flavoring, was frequently alleged to be masquerading on ingredient lists as malic acid, a naturally occurring compound. Many plaintiffs argued that they purchased products—including Brookside chocolates, Laffy Taffy, orange juice and SweeTarts—believing them to be “natural” and free of synthetic ingredients.

Plaintiffs continue to file putative class actions alleging that they were misled by labels marketing products as containing “real cocoa” rather than “cocoa processed with alkali,” and Oreos and Cocoa Pebbles faced such lawsuits in 2019.

Plaintiffs also turned to federal regulations defining white chocolate to challenge the white chocolate content of Drizzalicious rice cakes and Clif bars, which allegedly did not meet the regulatory standard of cocoa butter, dairy ingredients and sweetener.

Animal Welfare Claims Challenged

As consumers prioritize animal welfare more highly when purchasing meat, more companies are claiming to hold their production facilities to high standards—and more plaintiffs are disagreeing. Advocacy groups have targeted multiple companies for their allegedly misleading marketing touting their humane housing or slaughtering practices. For example, the Organic Consumers Association and Food & Water Watch filed a lawsuit against Pilgrim's Pride Corp. challenging the conditions of its chickens in its production plants. Facing a similar lawsuit, Hormel Foods Corp. won summary judgment when the D.C. Superior Court found the Animal Legal Defense Fund's claims to be preempted by the U.S. Department of Agriculture.

In addition, the European Court of Justice considered what slaughter methods could warrant an “organic” label, determining that cows must be stunned before they are slaughtered. The National Advertising Division also recommended changes to a marketing campaign following a complaint that Clemens Food Group used misleading language to describe its animal welfare efforts, including “Ethically Raised by Family Farmers Committed

to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits.”

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