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LEGISLATION, REGULATIONS AND STANDARDS

CSPI Urges USDA to Label Processed Meat and Poultry Products with Cancer Warnings

The Center for Science in the Public Interest (CSPI) has petitioned the U.S. Department of Agriculture (USDA) for "a Label on Processed Meat and Poultry Products Warning the Public that Frequent Consumption May Increase the Risk of Colorectal Cancer."

Citing the International Agency for Research on Cancer's finding that smoked, salted and/or cured bacon, hot dogs, ham, sausages and similar products are "carcinogenic to humans," CSPI argues that epidemiological studies backed by "mechanistic evidence" support the alleged link between processed meat and an increased risk of colorectal cancer. The group also points to similar conclusions drawn by the World Cancer Research Fund International, American Institute for Cancer Research, Imperial College London and the American Cancer Society, the latter of which "advises the public to 'minimize consumption of processed meats such as bacon, sausage, luncheon meats, and hot dogs' based on evidence that the risk of colorectal cancer increases by 15 to 20 percent for every 50 grams consumed daily."

CSPI claims that the Federal Meat Inspection Act and Poultry Products Protection Act give USDA's Food Safety and Inspection Service (FSIS) "broad authority" to make the labeling changes requested by the petition. In particular, the group opines that meat is misbranded "if its label fails to reveal material facts 'with respect to consequences which may result from the use of the food... under conditions of use as are customary or usual.'" As CSPI concludes, "Concern that the label may constitute prohibited compelled speech under the Constitution does not pose a barrier to FSIS granting this petition. The label requested serves a substantial governmental interest in protecting public health, directly advances that interest, and is no more intrusive than necessary to achieve that interest. It provides consumers with information that is factual and uncontroversial in that the link between consumption of processed meat and colorectal cancer is well supported by the evidence."

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LITIGATION

Olive Oil Industry Group Sues Dr. Oz

The North American Olive Oil Association (NAOOA) has filed a lawsuit against Mehmet Oz of "The Dr. Oz Show" alleging he falsely told his audience in a May 2016 episode that 80 percent of olive oil sold in supermarkets is fraudulent. *N. Am. Olive Oil Ass'n v. Oz*, No. 283156 (Ga. Super. Ct., Fulton Cty., filed November 29, 2016).

The complaint asserts that Oz told viewers: "So how does it become fake, if it's just fresh olive juice? . . . Adulterated oil . . . takes some of the real oil and mixes it with fake olive oil substitute. To make the fake olive oil, you take an oil with no flavor or color like sunflower oil, add some coloring in there like chlorophyll to give it that rich green hue, then you mix that in with some of the real stuff, into extra virgin olive oil, and then, here's the key, it'll slap a little label on there saying 'packed in Italy' and then you ship it to U.S. supermarkets." Oz further implied that a shipment of 7,000 tons of olive oil seized by Italian police was tainted by non-olive oils despite the fact that none of the olive oil was alleged to have come from non-olive sources, according to the complaint.

NAOOA argues that it tests random samples of olive oil each year and has found that about 95 percent meet or exceed the International Olive Council's quality and purity standards, while the "non-compliant olive oils represent less than two percent (2%) of the United States retail market share for olive oil." The organization's claims against Oz include tortious interference with business relations and negligent misrepresentation as well as a claim under Georgia law creating an action for disparagement of perishable food products.

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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If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd at mboyd@shb.com.

Chipotle Customers Argue Chorizo Poster Misrepresented Calorie Count

Three consumers have filed a lawsuit against Chipotle Mexican Grill, Inc. alleging the company misrepresents the calorie counts of its food in store menus, boards and advertising. *Desmond v. Chipotle Mexican Grill, Inc.*, No. BC640700 (Cal. Super. Ct., Los Angeles Cty., filed November 15, 2016). The complaint asserts that the defendants each relied upon a menu board displaying a photo of a burrito with chorizo and "300 calories" to order what they believed to be a low-calorie option, then realized after eating it that "the burrito couldn't have been just 300 calories." The plaintiffs seek damages and attorney's fees for alleged violations of California's consumer-protection statutes.

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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.



Old Charter Bourbon Misrepresented as Aged for 8 Years, Projected Class Action Alleges

A consumer has filed a putative class action against Buffalo Trace Distillery, Inc., Old Charter Distillery Co. and Sazerac Co. alleging the companies misrepresent Old Charter Bourbon as aged for eight years before entering the market. *Parker v. Buffalo Trace Distillery, Inc.*, No. 16-8986 (S.D.N.Y., filed November 18, 2016). The complaint argues that Old Charter was aged for eight years before a switch in manufacturing practices in 2014, and the bottle's labels were adjusted to remove the eight-year claim. Where the label once said "Aged 8 years," the label was changed to merely display an 8; in another spot on the label, the text reads, "gently matured for eight seasons." The plaintiff alleges negligent misrepresentation, fraud, breach of warranty, unjust enrichment and violations of New York and federal law.

Counterfeiters of 5-Hour Energy Convicted

Two people have been convicted of conspiracy in charges related to a scheme to distribute counterfeit 5-Hour Energy drinks. *United States v. Shayota*, No. 15-CR-0264 (N.D. Cal., verdict entered November 28, 2016). The couple, Joseph and Adriana Shayota, produced several million bottles of a drink manufactured under unsanitary conditions and labeled the drink with 5-Hour Energy's packaging. Before beginning that scheme, the couple reportedly bought 5-Hour Energy drinks intended for the Mexican market, repackaged them and sold them in the United States for a price well below the retail price. Six other defendants pleaded guilty to similar charges, and 5-Hour Energy maker Living Essentials won a \$20-million civil judgment in March 2016. See *Los Angeles Times*, November 30, 2016.