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ISSUE 635 | MAY 19, 2017



LEGISLATION, REGULATIONS & STANDARDS

APHIS Hosts Public Meetings on GMOs

The U.S. Department of Agriculture has announced that the Animal and Plant Health Inspection Service (APHIS) will host public meetings to hear comments on proposed revisions to regulations governing importation, interstate movement and environmental release of certain genetically modified organisms (GMOs). Public meetings will be held in Kansas City, Missouri; Davis, California; Riverdale, Maryland; and via webcast in June 2017. Written comments may also be submitted.

NAD Recommends Kauai Coffee Change “Compostable” Ads for Its Single-Serve Pods

Even if Kauai Coffee pods are “certified 100% compostable,” as its ads claim, the National Advertising Division (NAD) says the company does not make clear to consumers that the pods can only be composted in industrial facilities rather than backyard compost piles. NAD has recommended that Kauai discontinue existing print and website advertising or modify it to “clearly and conspicuously disclose” that the single-serve pods are only compostable in certain facilities. The ad board confirmed that the pods have been certified by the Biodegradable Products Institute, the official agency for recognition of compostable products, but noted that the lack of disclosure may be a violation of the Federal Trade Commission’s Green Guides.

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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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Canadian Lawmakers Reject GMO Labeling Bill

The Canadian House of Commons has voted 216-67 against a proposal to require mandatory labeling of genetically modified organisms (GMOs) in food. The proposed bill would have amended Canada's Food and Drug Act to state "No person shall sell any food that is genetically modified unless its label contains information . . . to prevent the purchaser or consumer of the food from being deceived or misled in respect of its composition." Opponents argued that Bill C-291 did not contain a definition of the term "genetically modified" and that the wording was too vague.

LITIGATION

Court Denies Red Bull's Motion to Dismiss \$60-Million Wrongful-Death Suit

Red Bull North America lost its motion to dismiss a \$60-million wrongful-death lawsuit involving a man who drank four cans of the energy drink every day for five years. *Lemley v. Red Bull N. Am.*, No. 17-33 (S.D. Ga., order entered May 16, 2017). The suit alleges that reports dating back to 2000 show energy drinks cause fatal cardiovascular injuries to consumers. The court found the plaintiff had adequately pleaded the elements of fraud and the complaint stated a valid claim for relief. The U.S. Food and Drug Administration released adverse reports involving energy drinks in 2012—including reports of cardiovascular symptoms—but its investigation found no causal link between the drinks and the alleged injuries and deaths. In addition to damages for tort claims, the plaintiff is seeking \$30 million in punitive damages.

Creation Foods Charged with Falsifying Kosher Certification for Cheese

The Canadian Food Inspection Agency has reportedly filed charges against Creation Foods and its vice president Kefir Sadiklar alleging the company sold cheddar cheese falsely labeled as kosher to Jewish summer camps. The agency asserts that Creation Foods edited a digit in the product code to match the code of a cheese product approved as kosher. According to the *Toronto Star*, the Canadian government has never before brought an enforcement



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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.



action against anyone accused of misrepresenting kosher food. *See Toronto Star*, May 9, 2017.

California Growers Sue to Stop Imports of Argentine Lemons

A group of California citrus growers has sued the U.S. Department of Agriculture seeking to stop implementation of a new rule that would lift the ban on importation of lemons from Argentina, claiming the rule violates both “sound science and good public policy.” *U.S. Citrus Sci. Council v. USDA*, No. 17-0680 (E.D. Cal., filed May 17, 2017). The plaintiffs assert that the United States has banned Argentine lemon imports since 1947 because “highly destructive plant pests and diseases plague Argentine citrus” and the Argentine government agency charged with plant protection “has a long and problematic history of failing to report pest and disease outbreaks promptly and of failing to ensure compliance” with basic plant protection measures.

The plaintiffs argue that the Animal and Plant Health Inspection Service violated both the Plant Protection Act and the Administrative Procedure Act when it promulgated the new rule relying on conclusions reached during a 2015 visit to Argentina without permitting public review of or comment on the information gathered. The complaint also asserts that Argentina is home to a “significant number” of pests which, if introduced into the United States, could be catastrophic for California’s agricultural industry.

Court to Consider Whether ADA Applies to Five Guys’ Website

Five Guys has moved to dismiss an Americans with Disabilities Act (ADA) complaint from a blind plaintiff allegedly unable to use the burger chain’s website, arguing that the plaintiff cannot prove she was denied access to a “place of public accommodation” because the statute is limited to physical facilities. *Marett v. Five Guys Enters*, No. 17-0788 (S.D.N.Y., memorandum filed May 15, 2017). The plaintiff points to a federal circuit split on the issue and has asked a New York federal court to follow the Second Circuit, which has held that the ADA guarantees “more than mere physical access” and that the “website is a service of the physical location.” The plaintiff claims that Five Guys’ website, which allows online ordering in addition to general restaurant and menu information,

is inaccessible to blind patrons despite the existence of “readily available technological solutions.”

Chobani, Alex Jones Settle Defamation Claims

Infowars founder Alex Jones has reportedly agreed to retract his statements concerning Chobani LLC's production facility in Twin Falls, Idaho, after Chobani filed a defamation lawsuit. Jones' website published a video asserting that Chobani's Idaho facility, which employs a number of refugees, was linked to a crime and a rise in incidents of tuberculosis. "During the week of April 10, 2017, certain statements were made on the *Infowars* Twitter feed and YouTube channel regarding Chobani LLC that I now understand to be wrong. The tweets and video have now been retracted, and will not be re-posted," Jones reportedly said. "On behalf of *Infowars*, I regret that we mischaracterized Chobani, its employees and the people of Twin Falls, Idaho, the way we did." Additional details on the lawsuit appear in Issue [632](#) of this *Update*. See *Los Angeles Times*, May 17, 2017.

Cracker Barrel ADA Class Action Settlement Gets Preliminary Approval

A federal court has given preliminary approval to a class action settlement in which Cracker Barrel restaurants will develop a disability-access compliance policy for parking facilities at its locations. *Heinzl v. Cracker Barrel Old Country Store*, No. 14-1455 (W.D. Pa., order entered May 15, 2017). The settlement agreement requires Cracker Barrel to develop a survey form to assess whether the parking facilities at all of its locations comply with the 2010 Americans with Disabilities Act Standards For Accessible Design. The company will then assess and ensure that parking at the 107 locations identified by the plaintiff are brought into compliance. The agreement also includes annual reporting and monitoring provisions. The court will accept objections to the settlement from members of the class until July 13, 2017, and hold a fairness hearing in August.

MEDIA COVERAGE

Washington Post Details Fraudulent Corn and Soybean Imports

A *Washington Post* report tracking multiple shipments of corn and soybeans imported from Turkey has purportedly found that the food was sold in the U.S. market fraudulently labeled as organic. The article argues that U.S. Department of Agriculture organic standards create loopholes that allow fraud to slip through. Organic corn and soybeans grown outside of the United States are required to be inspected, the *Post* asserts, but they are not required to be tested for pesticide residue, and inspectors that do test have apparently found high levels of pesticide use on the supposedly organic foods. The *Post* tracked three shipments: the first was rejected by the importing company for failing to have proper documentation, the second was fraudulently relabeled as organic soybeans before being accepted by its importing company, which has since stopped selling "all potentially affected product," and the third was rejected by importers but continued to be marketed to other customers. See *The Washington Post*, May 12, 2017.

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