ISSUE 647 | SEPTEMBER 08, 2017

# FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON



LEGISLATION, REGULATIONS & STANDARDS

## FDA Seeks Comment on Regulation Changes for "Meaningful Burden Reduction"

Implementing an executive order titled "Reducing Regulation and Controlling Regulatory Costs," the U.S. Food and Drug Administration (FDA) has opened a comment period to identify "existing regulations and related paperwork requirements that could be modified, repealed, or replaced, consistent with the law, to achieve meaningful burden reduction while allowing us to achieve our public health mission and fulfill statutory obligations." FDA will accept comments related to "general regulatory and information collection requirements that affect multiple FDA Centers and/or Offices" and "products regulated by the Center for Food Safety and Applied Nutrition" until December 7, 2017.

## USDA Releases GMO Electronic Disclosure Study

Following a Center for Food Safety lawsuit seeking information on requirements in the 2016 Federal Bioengineered Food Safety Disclosure Standards Act, the U.S. Department of Agriculture (USDA) has released a study identifying potential challenges to implementation of electronic disclosure of genetically modified organism (GMO) content on food labels. The study considered whether consumers or retailers would have sufficient access to smartphones or broadband internet to easily obtain ingredient information, purportedly finding that about 85 percent of consumers experience technical challenges scanning digital links such as QR codes and less than 40 percent of small retailers provide in-store Wi-Fi access. Additional details about the lawsuit appear in Issue 646 of this *Update*.



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## FDA to Permit Baby Food Allergy-Reduction Claims

The U.S. Food and Drug Administration (FDA) has announced the approval of a qualified health claim that baby food with ground peanuts can reduce the development of peanut allergies. On the labels of foods suitable for infant consumption that contain ground peanuts, companies can now include the claim that "for most infants with severe eczema and/or egg allergy who are already eating solid foods, introducing foods containing ground peanuts between 4 and 10 months of age and continuing consumption may reduce the risk of developing peanut allergy by 5 years of age."

"The new claim on food labels will recommend that parents check with their infant's healthcare provider before introducing foods containing ground peanuts. It will also note that the claim is based on one study," Commissioner Scott Gottlieb said in a September 7, 2017, statement. "The FDA will continue to monitor the research related to peanut allergy. If new scientific information further informs what we know about peanut allergy, the FDA will evaluate whether the claim should be updated."

LITIGATION

## Tenth Circuit Overturns "Ag-Gag" Lawsuit Dismissal

The U.S. Court of Appeals for the Tenth Circuit has overturned a lower court's dismissal of a coalition of advocacy groups' lawsuit challenging the constitutionality of Wyoming's statute supplementing criminal and civil trespass laws with additional penalties when the perpetrators "collect resource data." *W. Watersheds Project v. Michael*, No. 16-8083 (10th Cir., entered September 7, 2017). The statutes at issue barred individuals from trespassing on "open land for the purpose of collecting resource data," which is data related to "air, water, soil, conservation, habitat, vegetation or animal species." After the groups filed their challenge, Wyoming amended the statutes to remove "open lands" and redefine "collect," and the district court dismissed the lawsuit on the grounds that the amended statutes did not implicate protected speech.

The appeals court disagreed, finding that a subsection of the statute that barred collecting data on land "adjacent or proximate to private property" could affect protected speech on public property. The court then turned to "whether the act of collecting resource data on public land qualifies as protected speech." The "expansive definitions of 'resource data' and 'collect'" could include a number of protected activities, the court found, including "collecting water samples, taking handwritten notes about habitat conditions, making an audio recording of one's observation of vegetation, or photographing animals." Finding that the statute regulates protected speech, the court reversed the lower court's ruling and remanded for further proceedings.

### 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.


## Court Approves Quorn Settlement Requiring New Labels and Warning

A federal court has approved the settlement agreement in a class action against Quorn Foods, which has agreed to warn consumers that its products contain mold. *Birbrower v. Quorn Foods*, No. 16-1346 (C.D. Cal., entered September 1, 2017). Additional details appear in Issues 514, 535, 560 and 592 of this *Update*.

Under the agreement, the labels will state, “Mycoprotein is a mold member of the fungi family. There have been rare cases of allergic reactions to products that contain mycoprotein.” The Center for Science in the Public Interest was not a party to the suit but filed documents stating it would object to any settlement that did not include disclosure and allergy warnings.

The settlement does not preclude "any claims for personal injuries for those customers who may have suffered adverse reactions from mold allergies after consuming Quorn products,” the agreement notes.

## Kefir Projected Class Action Survives Motion to Dismiss

A federal court has denied Lifeway Foods’ motion to dismiss a putative class action alleging the company fraudulently marketed its kefir beverage as 99 percent lactose-free despite containing 4 percent lactose. *Block v. Lifeway Foods*, No. 17-1717 (D.N. Ill., entered September 6, 2017).

"[I]n some other cases, consumers have brought consumer fraud claims against food manufacturers based on discrepancies between the quality of the food and the manufacturer’s representations that are so minor as to be immaterial," the court noted. "[The plaintiff's] allegation that Lifeway’s plain, low-fat kefir contains 4%—instead of less than 1%—lactose may seem on its face to constitute a similarly immaterial discrepancy. But [the plaintiff] alleges that he purchased Lifeway’s kefir because it is nearly lactose-free and he wanted the health benefits that come from not consuming lactose. Products with 4% lactose—such as regular milk—are anything but lactose-free." The court dismissed two breach-of-warranty claims, noting that a buyer must notify a seller of “the troublesome nature of the transaction or be barred from recovering,” but allowed five claims to continue.

## “Pretzel Crisps” Again Ruled Generic Term by TTAB

For a second time, the Trademark Trial and Appeal Board (TTAB) has granted Frito-Lay North America’s petition for cancellation of Snyder's-Lance Inc.’s application to trademark “Pretzel Crisps,” finding the term is generic. *Frito-Lay N. Am.v. Princeton-Vanguard, LLC*, No. 91195552 (TTAB, entered September 6,

2017). TTAB initially found "pretzel crisp" to be generic following Frito-Lay's opposition to the application, but the Court of Appeals for the Federal Circuit vacated and remanded the decision, holding that TTAB had used an incorrect legal standard for its opinion. Additional details on the decision appear in Issue 566 of this *Update*.

On remand, TTAB first considered the genericness of the individual terms then analyzed the whole term, again finding that "the primary significance of the term in the minds of the consuming public is to identify a product rather than to identify a single producer of that product, and that indeed the 'Pretzel Crisps' product may derive from more than one source." In addition, TTAB ruled that Snyder's-Lance failed to establish that the mark had acquired distinctiveness.

## "Organic" Agave Nectar Contains High Fructose Corn Syrup, Proposed Class Action Alleges

A consumer has filed a putative class action alleging that American Sugar Refining mislabeled its agave syrup as "organic" because it contains isomaltose, an ingredient "not naturally found in pure agave syrup." *Valdes v. Am. Sugar Refining*, No. 17-5213 (E.D.N.Y., filed September 5, 2017). The complaint asserts that while the only ingredient listed on the product label is organic agave nectar, independent testing revealed the presence of isomaltose, which is "commonly found in high fructose corn syrup" and "other non-natural, non-organic sweeteners." Alleging violations of state consumer-protection laws, fraud, breach of express warranty and unjust enrichment, the plaintiff seeks class certification, damages, an injunction, restitution and attorney's fees.