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LEGISLATION, REGULATIONS & STANDARDS

French Agency Finds Unlabeled Titanium Dioxide Nanoparticles in Food

The Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF), a French agency for consumer affairs and fraud prevention, has reportedly tested samples of consumer goods throughout France and found titanium dioxide in 17 of the 19 samples. DGCCRF reportedly found nanoparticles in confectionery, sauces, spices, cake toppings and decorations that did not include the ingredient on package labeling as required by EU regulations. The European Food Safety Authority has approved the use of titanium dioxide but has not set an acceptable daily limit for the additive due to lack of data.

PLOS Article Claims SRF Terminated Research Funding in 1970

PLOS has published an article asserting that in 1970, the Sugar Research Foundation (SRF) terminated its funding of research into the health risks of sugar and did not publish the research results. C. Kearns, et al., “Sugar industry sponsorship of germ-free rodent studies linking sucrose to hyperlipidemia and cancer: An historical analysis of internal documents,” *PLOS Biology*,

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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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November 21, 2017. Echoing a September 2016 JAMA article also from the University of California, San Francisco Center for Tobacco Control Research and Education, the article reportedly claims the research showed that sugar increased high triglyceride levels and was a possible carcinogen.

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U.S. Customs Issues Rule on Coffee Bean Sourcing

U.S. Customs and Border Protection (CBP) has issued a final determination that the country of origin of coffee beans is the country in which the coffee beans are roasted. CBP ruled that “roasting green coffee beans substantially transforms the beans into a new and different article of commerce.” The agency issues country-of-origin rulings “for the purpose of granting waivers of certain ‘Buy American’ restrictions in United States law or practice” for government procurement.

Beech-Nut Pulls Baby Food Ads

The Beech-Nut Nutrition Co. has reportedly told the National Advertising Division (NAD) it will no longer use the terms “natural,” “sensitive” and “complete” nutrition or claim that its baby cereals have zero grams of sugar, were “formulated to be gentle on baby’s tummy,” and have “all the tastiness of oatmeal with smaller proteins that are gentler on your baby’s tummy.” Beech-Nut discontinued the ads for “unrelated business reasons” before they were challenged, so NAD will not review the claims on the merits.

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.

LITIGATION

Consumer Alleges Ocean Spray Mislabeled Juices

A consumer has filed a projected class action alleging Ocean Spray Cranberries’ CranGrape and CranApple juice products contain artificial flavorings despite bearing “No High Fructose Corn





Syrup, Artificial Colors or Flavors” labels. *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17-2335 (S.D. Cal., removed to federal court November 16, 2017). Originally filed in San Diego County, the complaint alleges that CranApple contains synthetic dl-malic acid made from petrochemicals but lists “malic acid”—a generic term that can be used to describe a “naturally occurring compound”—on the label. The plaintiff further alleges that CranGrape contains fumaric acid, also synthesized from petrochemicals, and that both fumaric and malic acid are used to enhance flavor. Claiming violations of California’s consumer-protection statutes as well as breach of warranties, the plaintiff seeks class certification, disgorgement, restitution, punitive damages, injunctive relief, corrective advertising and attorney’s fees.

Lawsuit Alleges Dole Salad Caused Listeria Meningitis

A father has filed a lawsuit alleging that eating Dole Food Co.’s ready-to-eat salad greens caused his son to develop *Listeria* meningitis, leaving the son with long-term impairment of motor, cognitive and communication skills. *Robinson v. Dole Food Co.*, No. 17-13644 (E.D. Mich., filed November 8, 2017). The complaint alleges that the son was served packaged salads at his group-care facility and developed meningitis, which the Centers for Disease Control and the Michigan Department of Community Health apparently concluded was caused by the same strain of *Listeria* that infected 30 people in a 2015-2016 outbreak linked to Dole salad greens.

The complaint further alleges that the U.S. Food and Drug Administration (FDA) conducted an inspection of Dole’s Springfield, Illinois, facility where the bagged salads were produced and concluded that the facility violated a number of food-safety rules, including failing to test for *Listeria* on food contact surfaces and failing to notify FDA of a persistent *Listeria* problem at the facility. Claiming breach of implied warranty of merchantability and fitness, negligence and negligence per se, the father seeks general, special, incidental and consequential damages.

Eleventh Circuit Denies Rehearing in

Chipotle GMO Lawsuit

The Eleventh Circuit has denied a petition for rehearing in a putative class action against Chipotle Mexican Grill alleging false advertising related to genetically modified organisms (GMOs). *Reilly v. Chipotle Mexican Grill, Inc.*, No. 16-17461 (11th Cir., entered November 14, 2017). The appeals court previously denied the plaintiff's appeal from the trial court's entry of summary judgment.

The plaintiff alleged that she stopped eating Chipotle's chicken burritos after learning from the company website that although the meat and dairy products it uses are not genetically modified, "most animal feed in the U.S. is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed." She began eating at a different Mexican restaurant, where she paid more for a similar chicken burrito despite the restaurant not claiming its food was non-GMO. The district court ruled that the plaintiff had not alleged an injury and entered summary judgment for Chipotle.

Proposed Class Action Alleges "Healthy" Belvita Foods Are Full of Sugar

Two consumers have filed a putative class action alleging Mondelez International's Belvita breakfast foods are marketed to consumers interested in "health and wellness" but contain between 8 and 14 grams of added sugar per serving. *McMorrow v. Mondelez Int'l*, No. 17-2327 (S.D. Cal., filed November 16, 2017). The complaint asserts that the packaging and labeling claims are deceptively marketed to consumers as "healthy" but contribute to excess sugar consumption. Alleging violations of California's consumer-protection laws and breach of warranties, the plaintiffs seek class certification, injunctive relief, corrective advertising, damages, restitution and attorney's fees.

European Endive Producers May Face Price-Fixing Fines

The Court of Justice of the European Union (ECJ) has issued a ruling that may result in price-fixing fines of up to \$5 million for 18 endive producers alleged to have created a “complex and continuous cartel” intended to enforce minimum producer prices. *President of the Autorité de la concurrence v. Assoc. des producteurs vendeurs d’endives*, No. C-671/15 (E.C.R., entered November 14, 2017). The dispute began in 2007 after French officials for consumer affairs and fraud prevention referred an investigation of industry practices to the French Competition Authority (FCA). After an appeals court reversal holding that the producers had not engaged in price-fixing, FCA brought an appeal in cassation; that court stayed proceedings and asked the ECJ for a preliminary ruling on the matter.

ECJ held that practices related to the collective fixing of prices, control of products or exchanges of strategic trade information violate the Treaty on the Functioning of the European Union if they involve entities not recognized by a member state “in order to achieve an objective defined by the EU legislature under the common organisation of the market concerned.” In this case, there was no official legislative objective. The case will return to the court of cassation for a final ruling.

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