



LEGISLATION, REGULATIONS & STANDARDS

GAO Issues Food Safety Reports for Arsenic and Pathogens

The U.S. Government Accountability Office (GAO) has announced new food safety recommendations for managing the risk of arsenic in rice and efforts to reduce pathogens in meat and poultry products. Following a request to review issues related to arsenic in rice, GAO determined that the U.S. Food and Drug Administration (FDA) has not updated its risk assessment of the human health effects in two years and was unable to provide a timeline for either an update or final draft guidance. GAO has recommended that FDA develop such timelines, work with other agencies to coordinate risk assessments and work with the U.S. Department of Agriculture (USDA) to develop methods to detect contaminants in food.

GAO also reviewed USDA's approach to reduction of pathogens in meat and poultry, finding the agency has failed to develop standards for some products—including turkey breasts and pork chops—and has not fully documented its process for deciding which products to consider for new standards. GAO also noted that USDA draft guidelines for controlling *Salmonella* in hogs do not contain information on the effectiveness of on-farm safety practices. The report recommends that the USDA Food Safety and Inspection Service begin documenting agency processes for

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deciding which products to consider for new pathogen standards and make information on the effectiveness of *Salmonella* reduction efforts in hogs available as it finalizes its draft guidelines.

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Advocacy Groups File Letter in Opposition to Meat Labeling Petition

The Good Food Institute (GFI), with a group of plant-based and “clean” meat companies, has sent a letter to the U.S. Department of Agriculture (USDA) responding to a petition filed by the U.S. Cattlemen’s Association requesting that the agency restrict the definitions of “beef” and “meat” to products derived from live animals. GFI argues that USDA cannot grant the petition because the agency lacks authority over plant-based products, which are governed by the U.S. Food and Drug Administration. USDA is “authorized only to regulate meat labels to protect the health and welfare of consumers, not to prop up an industry or favor one production method over another,” the group asserts.



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In addition, the group argues that plant-based or clean meat product labels that “clearly and accurately disclose the nature of the product” do not violate the labeling requirements of the Food, Drug and Cosmetic Act or the Federal Meat Inspection Act. The government can restrict commercial speech, such as limiting particular labeling language, only when the restriction “directly advances a substantial government interest,” the group argues. “Privileging one sector of an industry over another does not qualify.”

Finally, GFI asserts that the U.S. Cattlemen’s Association puts USDA in “the untenable position of policing the methods of meat production for ‘traditionality’” by urging USDA to limit the definition of “beef,” potentially diverting the agency’s resources from food safety and inhibiting industry innovation in production methods.

ASA Upholds Challenge to Pret A Manger’s “Natural” Claims

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.

The U.K. Advertising Standards Authority (ASA) has upheld an advocacy group’s challenge to the use of the term “natural” by Pret A Manger but rejected a challenge to the company’s advertising claim that its breads are fresh-baked at each location. Ads on Pret A Manger’s website and Facebook page claimed that the chain makes “handmade natural food,” “avoiding the obscure chemicals, additives and preservatives common to so much of the ‘prepared’ and ‘fast food’ on the market.” Pret A Manger argued that the ads did not imply that it uses only natural ingredients or that its food is additive- and preservative-free; rather, the terminology was used to express the company’s mission, which is partly to “avoid (as opposed to entirely eliminate) ‘obscure’ (as opposed to all)” chemicals. ASA upheld the challenge, determining that consumers were likely to interpret the claims to mean that the chain’s food was “natural” and free from added chemicals.



ASA rejected the advocacy group’s challenge to Pret A Manger’s claim that its breads and pastries are baked in-store daily, deciding that most consumers were familiar with stores’ practice of baking dough prepared offsite. Consumers were “unlikely to interpret ‘baked in store’ to mean only products that were made from scratch using basic raw materials such as flour and butter,” ASA held, ruling the ad was not misleading.

U.K. to Ban Plastic Straws, Stirrers

The United Kingdom has announced plans to ban the sale of plastic straws and drink stirrers in an effort to combat plastic waste in oceans. Previous initiatives to further that goal have included a ban on microbeads in personal care products, fees for single-use plastic bags and a proposal for a deposit-return process for single-use drink containers. Plastic straws necessary for medical treatment may be exempted from the ban.

“Alongside our domestic action, this week we are rallying Commonwealth countries to join us in the fight against marine plastics, with £61.4 million funding for global research and to improve waste management in developing countries,” Prime Minister Theresa May said in a statement.

China Imposes 178.6 Percent Trade Duty for U.S. Sorghum

China's Ministry of Commerce has reportedly announced that it will require importers of U.S.-grown sorghum to pay a 178.6 percent deposit in anticipation of anti-dumping tariffs, which may discourage imports and directly affect American growers. A Chinese investigation apparently concluded that U.S. sorghum is being dumped on the Chinese market, despite denials from U.S. officials. "This approach is in line with Chinese law and [World Trade Organization] rules; it aims at correcting unfair trade practices, maintaining normal trade and competition order," Wang Hejun, director of the ministry's trade remedy and investigation bureau, reportedly said in a statement.

LITIGATION

Plaintiff Alleges Panera Salad Cause E. Coli Infection

A New Jersey woman has filed a lawsuit alleging Panera Bread Co. sold her salad greens contaminated with *E. coli*, causing her to develop hemolytic uremic syndrome after she consumed the meal. *Fraser v. Freshway Foods, Inc.*, No. 18-7734 (D.N.J., filed April 16, 2018). Filed against Panera and its lettuce supplier Freshway Foods Inc., the complaint asserts that Panera sold contaminated lettuce sourced from Yuma, Arizona, which the Centers for Disease Control (CDC) has linked to an *E. coli* outbreak. Alleging the lettuce was "defective and unreasonably dangerous" in violation of the New Jersey Products Liability Act, the plaintiff seeks damages for physical and mental pain and suffering, loss of enjoyment of life, medical expenses and attorney's fees.

Mashed Potato Labels Are Misleading, Lawsuit Alleges

A consumer has filed a putative class action alleging the labels for Crystal Farms Refrigerated Distribution Co.'s Diner's Choice mashed potatoes assert that the products are made with real butter and fresh whole potatoes while the products contain margarine and preservatives. *Reyes v. Crystal Farms*

Refrigerated Distrib. Co., No. 18-2250 (E.D.N.Y., filed April 16, 2018). The complaint alleges that despite the prominent package labeling, the products' nutrition labels list margarine as the third ingredient, misleading consumers who expect the potatoes to contain only butter. The complaint also asserts that "fresh mashed potatoes have a shelf life between 7 and 10 days. The Products' 3-month shelf life is due to artificial chemical preservatives including sodium benzoate, disodium pyrophosphate, potassium sorbate and sodium bisulfite." Alleging violations of New York's General Business Law, negligent misrepresentation and fraud, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

Plaintiff Alleges Collective Terms in Ingredient List Mislead Consumers

A consumer has filed a putative class action alleging Trader Joe's Co.'s two-ingredient fruit bars are deceptively labeled with collective terms such as "apples" on the ingredient list instead of the specific name for an apple-based ingredient. *Jamison v. Trader Joe's Co.*, No. 18-2216 (E.D.N.Y., filed April 14, 2018). The plaintiff asserts that the use of a collective term misleads consumers into believing that the products are made from whole, unprocessed fruit, which would require "an additional binding ingredient such as a gel, pectin, juice concentrate or syrup." A solid bar made without a binding agent, the complaint asserts, would require fruit powder and water, which are not listed on the product labels. Alleging negligent misrepresentation, breach of warranties, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

"Natural" Bai Beverages Contain Artificial D-Malic Acid, Plaintiff Alleges

Bai Brands faces a potential class action alleging that it labels its Bai fruit-flavored beverages as containing "natural" ingredients but fails to disclose the inclusion of artificial malic acid. *Branca v. Bai Brands, LLC*, No. 18-0757 (S.D. Cal., filed April 19, 2018). The plaintiff alleges that the ingredient list is misleading because it contains only the generic term "malic acid" while the product

contains artificial d-malic acid. According to the complaint, both forms add a “tart, fruity” flavor to food and drink products. The complaint further alleges that the products, which are named for fruits and fruit combinations, bear “pictorial representations” that “imply to the consumer by operation of law that the Products consist of and are flavored only with natural juices and fruit flavors.” Alleging violations of California consumer-protection statutes, breach of warranties, negligent misrepresentation and fraud by omission, the plaintiff seeks class certification, damages, corrective advertising and attorney’s fees.

MEDIA COVERAGE

Gene-Edited Food Groups Plan Public Perception Approach

As gene-edited foods advance and move “closer to supermarket shelves,” agricultural and biotechnology groups are looking to avoid a dispute over public perception of the technology, according to the *Wall Street Journal*. Gene-editing technologies such as CRISPR/Cas9, TALEN and zinc-finger nucleases are different from techniques that create genetically modified organisms (GMOs), which involve the insertion of genes from external species to create plants with new characteristics. In contrast, gene-editing technology allows researchers to alter the plant’s DNA; the industry reportedly describes the process as “an extension of plant breeding, the centuries-old practice of crossing plant strains to create improved offspring.”

Industry regulators, including the U.S. Department of Agriculture, have indicated that they will not regulate gene-edited plants as strictly as those engineered with external DNA. However, the Non-GMO Project has barred gene-edited plants and animals from bearing its verification label, and opponents reportedly refer to the new technique as “GMO 2.0.” Some organic food makers have decided not to use gene-edited crops in their products. In response, trade groups have circulated talking points for crop scientists and industry participants to use in public discussions of gene-editing biotechnologies, recommending they focus on the benefits of the products rather than the technology itself. Public relations experts are reportedly skeptical of the approach, saying

arguments that technology is necessary to feed a growing global population do not resonate with U.S. consumers.

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