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LEGISLATION, REGULATIONS & STANDARDS

"Accurate Labels Act" Introduced in Congress

U.S. Sen. Jerry Moran (R-Kan.) and Reps. Adam Kinzinger (R-Ill.) and Kurt Schrader (D-Ore.) have introduced the Accurate Labels Act, a proposed amendment to the Fair Packaging and Labeling Act that would require information about the "chemical composition of, and radiation emitted by" a food product to be based on the "best available science." According to a press release from Moran, the bill "ensures that consumers have access to accurate and easy-to-understand product information" by (i) "[e]stablishing science-based criteria for all additional state and local labeling requirements"; (ii) "[a]llowing state-mandated product information to be provided through smartphone-enabled 'smart labels' and on websites, where consumers can find up-to-date, relevant ingredients and warnings"; and (iii) "[e]nsuring that covered product information is risk-based."

"Consumers deserve full transparency on the products they're buying, no matter where they live or shop," Kinzinger said in a statement. "Often times, due to various state laws, items are incorrectly labeled with warnings about harms that do not exist. This inaccuracy creates confusion and fear for the consumers, desensitizes the public from heeding serious warnings on health

risks, and imposes unnecessary and costly regulatory burdens for producers."

EU Targets Single-Use Plastic

The European Commission has proposed rules intended to reduce the buildup of single-use plastic in oceans. The rules would ban plastic products with a readily available and affordable alternative, such as cutlery, plates, straws and drink stirrers. In addition, manufacturers "will help cover the costs of waste management and clean-up, as well as awareness raising measures" for several plastic products, including "food containers, packets and wrappers (such as for crisps and sweets)" and "drink containers and cups."

LITIGATION

Toddler Formulas Contain Lead, CA Attorney General Alleges

California Attorney General Xavier Becerra has filed a lawsuit alleging two companies' toddler formula products contain lead levels higher than U.S. Food and Drug Administration (FDA) standards. *California v. Nutraceutical Corp.,* No. RG18907841 (Cal. Super. Ct., Alameda Cty., filed June 7, 2018). The state alleges that Sammy's Milk Free-Range Goat Milk Toddler Formula, manufactured and sold by Graceleigh Inc., and Peaceful Planet Toddler Supreme Formula, manufactured and sold by Nutraceutical Corp., contain more than six micrograms of lead—the daily intake limit set by FDA—and fail to include lead warnings on the products' labels. Both companies purportedly market their products as "clean" and "pure."

"Toddler formula should contain nutrients that help children grow, not poisonous substances that can threaten their healthy development. No parent should have to worry that the formula they purchase could endanger their child," said Becerra in a press release. "The levels of lead we found in these formulas are not acceptable – not in California, not anywhere. The legal action we take today puts all manufacturers on notice: the California

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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.

Department of Justice will hold you accountable for gambling with our children's health."

Cattlemen's Challenge to COOL Removal Rule Dismissed

A Washington federal court has granted summary judgment to the U.S. Department of Agriculture (USDA) in a lawsuit filed by ranchers and cattle producers challenging the agency's regulations governing the removal of country-of-origin labeling (COOL) for beef and pork. *Ranchers-Cattlemen Action Legal Fund v. USDA,* No. 17-0223 (entered June 5, 2018). The complaint alleged that the 2016 COOL Requirement Removal Rule conflicted with the Tariff Act of 1930, which stated that "every article of foreign origin . . . imported into the United States shall be marked . . . in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."

The court found that the relevant provisions in the 2016 rule were enacted to comply with World Trade Organization (WTO) decisions finding that the COOL requirements of the Agricultural Marketing Act discriminated against imported meat. The court held that USDA's implementation of the 2016 rule "directly reflects statutory language enacted by Congress" and that "the Court must give effect to the unambiguously expressed intent of Congress." Because the plaintiffs had not shown USDA's actions to be arbitrary, capricious or unsupported by substantial evidence, the court dismissed the complaint with prejudice and granted summary judgment to USDA.

Data Breach Lawsuits Filed, Dismissed and Settled

Brinker International Inc. faces a putative class action alleging hackers stole customers' personally identifiable information (PII) from point-of-sale systems at Chili's Grill & Bar in April and May 2018. *Steinmetz v. Brinker Int'l, Inc*, No. 18-0981 (D. Nev., filed May 30, 2018). The plaintiff seeks damages, an injunction and attorney's fees for negligence and alleged violations of the Fair Credit Reporting Act and Nevada consumer-protection law.

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.

Wendy's International LLC has agreed to settle a lawsuit alleging that a similar point-of-sale breach exposed customers' PII at more than 1,000 locations nationwide. *Jackson v. Wendy's Int'l LLC*, No. 16-0210 (M.D. Fla., entered May 25. 2018). The lawsuit was previously dismissed, then an amended complaint proceeded. Terms of the settlement were not disclosed.

An Illinois federal court dismissed a putative class action without prejudice after the plaintiffs voluntarily dismissed claims related to a data breach of Panera Bread Co.'s customer records because none of them were affected by a "white hat" hacking incident. *Boykin v. Panera Bread Co.,* No. 18-2461 (N.D. Ill., entered June 5, 2018).

Couple Challenges Texas' Definition of "Pickle"

A couple has reportedly filed a lawsuit against the Texas Department of State Health Services alleging that "burdensome" regulations bar them from selling their canned pickled vegetables at farmers' markets. The plaintiffs own a farm near Austin and sell vegetables locally, but when they sought to expand into sales of pickled beets, okra and carrots, they learned that Texas bars sales of all pickled vegetables except cucumbers.

Under state law, bakers can sell goods at markets, fairs and festivals without becoming licensed food manufacturers. The Health Services Department has limited sales to pickled cucumbers, specifically excluding other canned pickled vegetables. State Rep. Eddie Rodriguez (D-Austin), who sponsored an amendment to the law to allow the sale of pickles, reportedly told the *Texas Tribune* that he did not know the department's rules construed "pickles" to mean only pickled cucumbers. "That pickle definition is kind of flying in the spirit of the legislation," he is quoted as saying.

The lawsuit reportedly accuses the state of "frustrating the financial viability" of the plaintiffs' farm and violating the couple's constitutional right "to earn an honest living in the occupation of their choice, free from unreasonable governmental interference."

Ninth Circuit Upholds Dismissal of

Twinings Labeling Suit

The U.S. Court of Appeals for the Ninth Circuit has affirmed summary judgment dismissing a putative class action alleging that Twinings North America Inc.'s teas contained fewer antioxidants than claimed on product labels, holding the plaintiff had failed to establish standing. *Lanovaz v. Twinings N. Am. Inc.,* No. 16-16628 (9th Cir., entered June 6, 2018). The court focused on the plaintiff's statement that she would not purchase Twinings tea again even if the company changed the allegedly misleading labels. To establish standing, a plaintiff must show an imminent or actual threat of future harm, the court held, and the plaintiff's "some day intention" of professed intent, "without any description of concrete plans, or indeed even any specification of *when* that some day will be—do[es] not support a finding of the 'actual or imminent' injury."

Federal Circuit Vacates PTAB's Fruit Dehydration Patent Rejection

The U.S. Court of Appeals for the Federal Circuit has vacated the Patent Trial and Appeal Board's (PTAB's) rejection of a patent application for a fruit dehydration apparatus. *In re Durance,* No. 2017-1486 (Fed. Cir., entered June 1, 2018). The inventors applied for a patent for a microwave dehydration container containing a rotating chamber to tumble organic materials during the drying process, but the examiner rejected it for prior art and structural identity and PTAB affirmed.

The Federal Circuit found that "the Patent Office continually shifted its position" on its grounds for rejection, resulting in the applicants responding to "moving target rejections." In addition, the court held that PTAB failed to review the applicants' reply brief arguments, directing the board to consider them on remand and to determine whether a structural identity rejection can be used to find a prima facie case of obviousness for method claims.

"Glen Buchenbach" Suit to Continue After CJEU Ruling

The Court of Justice of the European Union (CJEU) has held that the name of German whisky Glen Buchenbach may mislead consumers into believing the product is manufactured in Scotland. *Scotch Whisky Assoc. v. Klotz*, No, C-44/17 (CJEU, entered June 7, 2018). CJEU clarified EU law on registered geographical indications, holding that an "indirect commercial use" can occur if the product at issue includes an element either identical or phonetically and visually similar to the registered indication but does not occur if the "element is liable to evoke in the relevant public some kind of association with the indication concerned or the geographical area relating thereto." CJEU remanded the case to German court for a final determination, which may consider a magistrate's preliminary finding that "'glen' does not have a sufficiently clear and direct link with the protected geographical indication in question."