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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Interior Dept. to Allow GMO Cultivation on National Lands

The U.S. Department of the Interior has reportedly withdrawn a 2014 memorandum prohibiting the cultivation of genetically modified organisms (GMOs) in National Wildlife Refuge areas. "There may be situations [] where use of GMO crop seeds is essential to best fulfill the purposes of the refuge and the needs of birds and other wildlife as described above. A blanket denial of GMOs does not provide on-the-ground latitude for refuge managers to work adaptively and make field level decisions about the best manner to fulfill the purposes of the refuge," a memorandum from U.S. Fish & Wildlife Service Principal Deputy Director Greg Sheehan states. "Therefore, by this memorandum, I am withdrawing the July 17, 2014 memorandum in full, thereby reversing the decision to universally ban the use of genetically modified crops on refuges."

AMS Permits Younger Chickens To Be "Roasters"

The U.S. Department of Agriculture's Agricultural Marketing Service (AMS) has lowered the age requirement for poultry carcasses to be classified as "roaster chickens." The previous standard required chickens to be eight weeks old and weight 5.5 pounds; according to a petition from the National Chicken Council, this standard prevented companies from labeling and marketing chickens as "roasters" even if they "met all the physical

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attributes apart from the minimum age requirement." Because of "continuous improvements in breeding and poultry management techniques," producers are able "to raise chickens with the characteristics of roasters in under 8 weeks," AMS has determined. The change took effect on August 6, 2018, the notice's publication date.

LITIGATION

Advocacy Groups Sue USDA For Failure to Implement GMO Labeling Act

The Center for Food Safety and the Center for Environmental Health have filed a lawsuit alleging that the U.S. Department of Agriculture (USDA) failed to comply with mandatory deadlines established by the 2016 Federal Bioengineered Food Disclosure Standards Act, which would require labeling of foods that contain genetically modified organisms (GMOs). *Ctr. for Food Safety v. Perdue*, No. 18-4633 (N.D. Cal., filed August 1, 2018).

The act's statutory deadline for the completion of final regulations implementing the statute and establishing the national disclosure standard was July 29, 2018. The complaint alleges that "[t]he statute preempted state laws requiring [genetic engineering (GE)] labeling, but until USDA issues the regulations, the statute is an empty vessel: there can be no federally required disclosures."

"Due to the lack of mandatory labeling, many American consumers are under an incorrect assumption as to whether the food they purchase is produced with GE," the plaintiffs allege. "Disclosure of whether or not foods are genetically engineered will reduce this consumer confusion and deception." According to the Center for Food Safety, 64 U.S. trade partners, including the European Union, Japan, China and Australia, require GMO package labeling, and consumers purportedly believe that the sale of food containing unlabeled GMO ingredients is "deceptive and misleading or, at best, confusing."

Claiming violations of the Administrative Procedure Act and the Bioengineered Food Disclosure Standards Act, the plaintiffs seek an order mandating USDA to finalize and issue the regulations implementing the statute "as soon as reasonably practicable."

11th Circuit Reverses Dunkin' Donuts ADA Dismissal

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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

The Eleventh Circuit has reversed the dismissal of a lawsuit against Dunkin' Donuts LLC, ruling that a blind plaintiff who alleged the company's website was not compatible with screen-reading software showed a plausible claim for relief under the Americans with Disabilities Act (ADA). *Haynes v. Dunkin' Donuts LLC*, No. 18-10373 (11th Cir., entered July 31, 2018).

The Southern District of Florida previously dismissed the complaint, reasoning that the plaintiff had "failed to allege a nexus between the barriers to access that he faced on the website and his inability to access goods and services at Dunkin' Donuts' physical store." The appellate panel found that "the prohibition on discrimination is not limited to tangible barriers that disabled persons face but can extend to intangible barriers as well. … It appears that the website is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation. And the ADA is clear that whatever goods and services Dunkin' Donuts offers as a part of its place of public accommodation, it cannot discriminate against people on the basis of a disability, even if those goods and services are intangible."

Court Dismisses Junior Mints Slack-Fill Suit

A New York federal court has dismissed a putative slack-fill class action against Tootsie Roll Industries, finding that the packaging of Junior Mints contains sufficient information for consumers to determine its volume and that "[t]he law simply does not provide the level of coddling plaintiffs seek. … The court declines to enshrine into the law an embarrassing level of mathematical illiteracy." *Daniel v. Tootsie Roll Industries LLC*, No. 17-7541 (S.D.N.Y., entered August 1, 2018).

The court found that "consumers can easily calculate the number of candies contained in the Product boxes simply by multiplying the serving size by the number of servings in each box, information displayed in the nutritional facts section on the back of each box." In addition, the court rejected arguments that consumers depend on the size of the candies as shown on the package.

Moreover, the court found that the plaintiffs did not show that the slack fill in the candy boxes was unnecessary with their comparison to similar candy packaging, noting that the U.S. Food and Drug Administration has recognized that the level of functional slack fill in packages of similar types of food can vary. "Plaintiffs have not demonstrated, with factual assertions, that the

inspections, subject to FDA, USDA and FTC regulation.

slack-fill in the Products is unnecessary to protect the Junior Mints, or does not reflect the requirements of the machines used for enclosing the packages, or is not the result of unavoidable product settling, or is not the consequence of an inability to increase the level of fill or to further reduce the size of the package," the court held.

Superpower Beer and Juice Can Coexist, TTAB Rules

The Trademark Trial and Appeal Board (TTAB) has dismissed The Wonderful Co.'s opposition to Comrade Brewing Co.'s application to register "Superpower" as a mark used in relation to beer. *Wonderful Co. v. Comrade Brewing Co.*, No. 91230877 (T.T.A.B., entered August 2, 2018). The Wonderful Co. uses its mark "Antioxidant Superpower" to describe its POM pomegranate juice, which it alleged will be sold in the same aisle as beer in some stores. TTAB was unpersuaded, finding that consumers are not likely to view fruit juices and beer as produced by a common source under one brand's mark. TTAB also found the term "antioxidant superpower" to be "somewhat suggestive of the identified goods, and thus conceptually is somewhat weaker than an arbitrary mark."

Chipotle Facing Foodborne Illness Lawsuits

Multiple consumers have reportedly filed lawsuits against Chipotle Mexican Grill following the distribution of allegedly contaminated food that purportedly resulted in more than 700 customers becoming ill. The cause of the illnesses is unknown, as *E. coli*, *Salmonella*, norovirus and shigella tests reportedly returned negative results. One plaintiff seeks $25,000 in damages for his medical treatment.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.