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LEGISLATION, REGULATIONS & STANDARDS

FDA Seeks Input on Plant-Based Milks

The U.S. Food and Drug Administration (FDA) has solicited public input on questions related to plant-based substitutes for dairy products such as almond or soy milk. The agency's request for information (RFI) seeks responses on three points:

- "How do you use plant-based products?"
- "What is your understanding of dairy terms like milk, yogurt and cheese when they are used to label plant-based products?"
- "Do you understand the nutritional characteristics of plant-based products? Do you know how they're different from each other? Do you know how their nutritional qualities compare with dairy products?"

"The RFI opened today is an important step in our efforts to take a look at how we have been applying the Food Drug and Cosmetic Act with respect to food names and our existing standards of identity," FDA Commissioner Scott Gottlieb said in a statement. "The comments we receive will help inform the development of draft guidance to provide greater clarity on appropriate labeling of plant-based alternatives. As always, we're carefully assessing products currently on the market to determine whether any have misleading labels that would prompt us to take action to ensure

that consumers are not under the misconception that their plant-based beverage is a dairy product in disguise."

ASA Upholds Complaints on Ad Discouraging Fresh Fruit Consumption

The U.K. Advertising Standards Authority (ASA) has upheld two complaints against Costa Coffee for a radio ad comparing the difficulty associated with the length of time for which an avocado is ripe—"sure, they'll be hard as rock for the first 18 days, three hours and 20 minutes, then they'll be ready to eat, for about 10 minutes, then they'll go off"—to the ease of buying a breakfast sandwich at the coffee company's store locations. Two complainants argued to ASA that the ad "discouraged the selection of fresh fruit," and ASA agreed, finding that "comparisons between foods must not discourage the selection of options such as fresh fruit and fresh vegetables, which generally accepted dietary opinions recommended should form a greater part of the average diet." Upholding the complaints, ASA noted that, "although the ad was light-hearted, it nevertheless suggested avocados were a poor breakfast choice, and that a bacon roll or egg muffin would be a better alternative, and in doing so discouraged the selection of avocados."

HHS Issues Report on BPA Toxicity

U.S. Health and Human Services' National Toxicity Program has issued a research report on the toxicity of bisphenol A (BPA) in rats. The study "was designed to characterize and evaluate the toxicological potential of BPA following perinatal only or chronic exposure in rats under the conditions of a chronic, extended-dose response design." The report is one component of Consortium Linking Academic and Regulatory Insights on BPA Toxicity (CLARITY-BPA), which will issue a final report in the autumn of 2019 compiling the National Toxicity Program's results with reports from university researchers.

Pesticide Monitoring Report Shows Residue Levels Below Federal Limits, FDA Announces

816.559.2497
manstoetter@shb.com

M. Katie Gates Calderon
816.559.2419
kgcalderon@shb.com

Lindsey Heinz
816.559.2681
lheinz@shb.com

James P. Muehlberger
816.559.2372
jmuehlberger@shb.com

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.

The U.S. Food and Drug Administration (FDA) has announced the results of its annual Pesticide Residue Monitoring Program. From samples collected between October 1, 2015, and September 30, 2016, the agency analyzed 7,413 samples and reportedly found that more than 99 percent of domestic and 90 percent of imported foods complied with federal standards. FDA also examined samples of corn, soybeans, milk and eggs and found zero samples that violated federal limits. FDA Commissioner Scott Gottlieb said in a statement, "Like other recent reports, the results show that overall levels of pesticide chemical residues are below the Environmental Protection Agency's tolerances, and therefore don't pose a risk to consumers."

2014 Farm Bill Expires

The 2014 Farm Bill has expired without an updated bill or stopgap measure in place. The U.S. House of Representatives rejected the proposed Agriculture and Nutrition Act of 2018, with detractors focused on changes to the Supplemental Nutrition Assistance Program. Funding for some programs will reportedly continue beyond the expiration date of September 30, 2018.

LITIGATION

Court Grants Certification in Non-GMO Chipotle Suit

A California federal court has granted class certification to a group of consumers alleging that Chipotle Mexican Grill Inc. misrepresented its food as made without genetically modified organisms (GMOs). *Schneider v. Chipotle Mexican Grill Inc.*, No. 16-2200 (N.D. Cal., entered September 29, 2018). Chipotle has faced a number of similar suits, but other iterations have been dismissed.

The court found that the plaintiffs met each of the requirements for class certification, rejecting Chipotle's argument that each class member may have seen significantly different marketing messages. "Plaintiffs rely primarily on the advertisements and

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.

statements issued and installed in all of Chipotle's stores," the court found, noting that three advertisements supported the plaintiffs' claims. "Based on Plaintiffs' theory that 'reasonable consumers understood Non-GMO to include meat and dairy ingredients that were not sourced from animals fed GM feed,' [] the Court finds that the representations made on these three in-store signs are not so disparate as to preclude cohesion among class members. [] Neither party has offered any evidence or argument that members of the proposed classes could have purchased Chipotle meat and/or dairy products without setting foot inside the restaurants, and therefore without having been exposed to any of this signage. The Court therefore concludes that Plaintiffs have sufficiently alleged class-wide exposure."

Consumers Challenge D-Malic Acid in Ocean Spray, Neuro Beverages

Consumers have filed lawsuits alleging that companies misrepresent their products as "natural" because they contain d-malic acid. One lawsuit targets Ocean Spray Cranberries Inc., alleging it mislabels its juices as free from artificial flavors despite containing d-malic acid rather than the naturally occurring l-malic acid. *Froio v. Ocean Spray Cranberries Inc.*, No. 18-12005 (D. Mass., filed September 24, 2018). The complaint further alleges that the juices contain furmaric acid, which is "manufactured from petrochemical feedstock, either benzene or butane, through chemical transformation to maleic anhydride." The plaintiffs argue that a "reasonable consumer understands Defendant's claims that the Products contain no 'artificial' flavoring to mean that the flavoring is derived from a natural source." For allegations of fraud, negligent misrepresentation, unjust enrichment and violations of New York and Massachusetts consumer-protection statutes, the plaintiffs seek class certification, damages, injunctive relief, restitution and attorney's fees.

Two consumers have alleged that Neurobrands LLC also flavors its "natural" beverages with d-malic acid. *Young v. Neurobrands LLC*, No. 5907 (N.D. Cal., filed September 26, 2018). The complaint asserts that Neurobrands' ingredient lists "violate federal and state law because they identify, misleadingly, the malic acid flavoring only as the general 'malic acid' instead of

using the specific, non-generic name of the ingredient." The plaintiffs contend that the malic acid "simulates, resembles, and reinforces the characterizing fruit flavors for the Products" such that under federal law, "Defendant was required to place prominently on the Products' front labels a notice sufficient to allow California consumers to understand that the products contained artificial flavorings." For allegations of fraud by omission, negligent misrepresentation and violations of California's consumer-protection statutes, the plaintiffs seek class certification, restitution, damages, injunctions barring unfair practices and compelling corrective advertising, costs and attorney's fees.

Claims Cut From One Suit While Pret A Manger Faces Another

A New York federal court has dismissed allegations from a putative class action arguing that Pret A Manger Ltd. sold sandwich wraps with excess slack fill between the wrap's halves. *Lau v. Pret A Manger (USA) Ltd.*, No. 17-5775 (S.D.N.Y., entered September 28, 2018). The court held that the plaintiffs lacked standing for an injunction despite their argument that they would consider purchasing the wraps in the future, finding "no sufficient basis for inferring that plaintiffs would ever seek to purchase a Pret wrap again as long as the status quo persists."

The court also disagreed with the plaintiffs' argument that the slack fill in the wraps amounted to an intent to defraud consumers. "Specifically, plaintiffs state that less than half, or 45 percent, or Pret wraps surveyed contained slack-fill," the court noted. "Drawing all reasonable inferences in plaintiffs' favor, the Court finds that the facts are insufficient to nudge the plaintiffs' allegations of intent 'across the line from conceivable to plausible.'" The court dismissed the allegation of fraud under New York law but allowed other New York consumer-protection allegations to continue.

Pret also faces a putative class action challenging its use of "natural" to describe its products because they allegedly contain traces "an unnatural biocide." *Daly v. Pret A Manger Ltd.*, No. 18-5368 (E.D.N.Y., filed September 24, 2018). The plaintiffs argue that "[r]easonable consumers do not expect a synthetic chemical

with suspected health concerns to be found in a product marketed as 'natural,' which makes Pret A Manger's 'Natural Food' representation a misrepresentation."

Kern's Juices "Almost Entirely Sugar-Water," Lawsuit Alleges

A consumer has filed a putative class action alleging that Stremick's Heritage Foods misrepresents its Kern's juice as a "healthful, natural juice product made solely from fresh fruits" despite being "almost entirely sugar-water, with a small amount of fruit juice added for color and texture." *Levin v. Stremick's Heritage Foods*, No. 18-1748 (C.D. Cal., filed September 26, 2018). The complaint alleges that the juices "consist of 70% water and high fructose corn syrup, topped with 30% *or less* of the juice of the fruit for which the Products are named." The complaint also alleges that "pictorial representations" of "life-like" fruits on the packaging mislead consumers about the beverages' juice content.

The plaintiff further argues that the products contain "massive amounts of refined sugar. The 'Apricot Nectar' Product, for example, contains 47 grams of sugar per serving—more than Grape Kool-Aid." According to the complaint, the juices are not healthful because excess sugar consumption "damages cells," "promotes nutrient deficiency," "depletes vitamins and minerals, including those necessary for beneficial antioxidant health effects," "interferes with the body's metabolism of vitamins including vitamin C" and "depletes and blocks the absorption of vitamin D, calcium, magnesium, potassium, and chromium." The plaintiff seeks class certification, injunctions, damages and attorney's fees for allegations of fraud by omission and violations of California's consumer-protection statutes.

Putative Class Action Challenges Barilla's "No Preservatives" Label

A consumer has filed a putative class action alleging that Barilla America Inc. misleads consumers because its pasta sauces, which are labeled as including "No Preservatives," contain citric acid. *Kubilius v. Barilla Am. Inc.*, No. 18-6656 (N.D. Ill., E. Div., filed October 1, 2018). The complaint contends that several authorities

identify citric acid as a preservative, including "insiders in the preservative manufacturing and distribution industries" and the U.S. Food and Drug Administration, which allegedly "expressly classifies citric acid as a preservative in its Overview of Food Ingredients, Additives, and Colors." The plaintiff seeks class certification, damages, restitution, injunctions and attorney's fees for allegations of fraud and violations of New York and Illinois consumer-protection statutes.

Court Dismisses EEOC Complaint on Behalf of Muslim Meatpackers

A Colorado federal court has dismissed the U.S. Equal Employment Opportunity Commission's (EEOC's) lawsuit alleging JBS USA discriminated against Muslim workers by denying prayer breaks. *EEOC v. JBS USA*, No. 10-2103 (D. Colo., entered September 24, 2018). The court found that EEOC failed to prove that JBS suspended or fired the workers in an effort to deny requested religious accommodations. A Nebraska court dismissed similar claims against the company in October 2013.

MEDIA COVERAGE

New York Times Asks: Can Lab-Grown Meat Be Kosher?

The New York Times has reported on the Orthodox Union's efforts to determine whether meat grown in a lab from animal cells can be kosher. The reporter follows a rabbi tasked with researching the process. The rabbi distinguishes between products grown from muscle cells—which must be from an animal properly slaughtered in kosher standards rather than still alive—and products potentially grown from animal saliva or hair, which are reportedly under research. The latter products would not be considered meat under Jewish law, the *New York Times* notes. "The identity of a given cell, and ensuring that its identity is preserved and verifiable, would be crucial to our being able to certify a product," the report quotes the rabbi as saying.

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