



LEGISLATION, REGULATIONS & STANDARDS

Codex Office to Finalize Strategic Plan

The U.S. Codex Office has [scheduled a meeting](#) for November 2, 2018, to brief the public and receive comments on its 2019-2023 strategic plan. Written comments will be accepted at the meeting or until November 6, 2018.

Denmark Proposes Food Labels Denoting Environmental Impact

As part of a climate package, Denmark has [reportedly](#) proposed food labels that would indicate the environmental impact of the food's production. Danish Minister for the Environment Lars Christian Lilleholt [reportedly](#) told *The Local*, "We want to give consumers the means to assess in supermarkets the environmental impact of products." The Danish Agriculture & Food Council supported the measure but suggested that the environmental impact labels may need to consider the nutritional value of a product as well. "A bottle of soda may have a low environmental impact, but it is not a product you can live on," the organization's director is quoted as saying.

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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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[Mark Anstoetter](#)

LITIGATION

Advocacy Groups Sue to Compel FDA on FSMA Deadlines

The Center for Food Safety and the Center for Environmental Health have filed a lawsuit asserting that the U.S. Food and Drug Administration (FDA) has failed “to promulgate final regulations and complete actions by mandatory deadlines set by Congress in the Food Safety Modernization Act of 2011 (FSMA).” *Ctr. for Food Safety v. Azar*, No. 18-6299 (N.D. Cal., filed October 15, 2018). The organizations assert that FDA has failed to “classify and designate which foods that are classified as ‘high-risk’ for foodborne illness purposes” and “to create additional record keeping requirements for facilities handling such foods.” The complaint argues that “retailers now have the available technology (e.g., blockchain) to ‘identify the origin of certain produce shipments in as little as 2.2 seconds.’ ... In light of these advances in technology, FDA can no longer shirk the mandatory actions required of it by Congress to designate high-risk foods and issue a rule for enhanced recordkeeping for those foods.”

Plaintiff’s Firm Files Malic Acid, Slack-Fill Lawsuits

Two consumers represented by the same plaintiff’s attorneys have filed lawsuits alleging food companies misleadingly label their products as natural because they contain malic acid. *Morris v. Mott’s LLP*, No. 18-1799 (C.D. Cal., filed October 4, 2018); *Clark v. Hershey Co.*, No. 18-6113 (N.D. Cal., filed October 4, 2018). The plaintiffs assert that Mott’s Assorted Fruit Flavored Snacks and Brookside Dark Chocolate Acai & Blueberry are marketed as free from preservatives and artificial flavorings but contain d-l malic acid, “an undisclosed artificial flavor made from petrochemicals.” Both complaints note that “the natural and unnatural forms of malic acid are considered ‘GRAS’ (generally recognized as safe) for use as flavorings in foods marketed to adults,” but “the d-malic acid form, however, has never been extensively studied for its health effects in human beings.” The plaintiffs each allege violations of California’s consumer-protection statutes and seek class certification, injunctions, damages and attorney’s fees.

816.559.2497

manstoetter@shb.com



M. Katie Gates Calderon

816.559.2419

kgcalderon@shb.com



Lindsey Heinz

816.559.2681

lheinze@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.

Represented by the same plaintiff's firm, the plaintiff in the lawsuit targeting The Hershey Co. also filed a putative class action alleging Justin's Nut Butter LLC's packages of Peanut Butter Cups contain excessive slack fill. *Clark v. Justin's Nut Butter LLC*, No. 18-6193 (N.D. Cal., filed October 10, 2018). The plaintiff asserts that "[n]early 40% of the interior of the Product's container is comprised of empty space, or non-functional slack-fill." The complaint cites a study by Brian Wansink, the Cornell Food and Brand Lab director found to have committed academic misconduct in his research, to argue that "consumers are apt to choose the larger box because they think it's a better value." The plaintiff seeks class certification, injunctive relief, damages and attorney's fees for alleged violations of California's consumer-protection statutes.

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.



Farmers Plead Guilty to Organic Fraud

Three Nebraska farmers have pleaded guilty to charges of fraud stemming from the sale of grain misrepresented as organic. According to a Department of Justice press release, the men "admitted to growing grain between 2010 and 2017 that was not organic. Each further admitted that they knew the grain was being marketed and sold as organic, even though it was not in fact organically grown. The charging documents allege that, during the 2010 to 2017 period, each of the three farmers received more than \$2.5 million for grain marketed as organic." Each defendant faces a possible 20 years in prison and a \$250,000 fine.



Switch Juices' "No Added Sugar" Label Deceives About Calorie Count, Consumer Alleges

A consumer has alleged that Apple & Eve markets its Switch Sparkling Juices as containing no added sugar or preservatives despite containing citric and ascorbic acids and having a "high calorie count when compared to competitors' products that do not have the 'No Sugar Added' claim." *Reaves v. Apple & Eve LLC*, No. 18-5728 (E.D.N.Y., filed October 12, 2018). The complaint asserts that consumers believe the juices to be "a low-calorie product" because of the "no sugar added" marketing message.

“Consumers associate claims about the absence of sugar with lower calorie counts when there is no disclaimer stating otherwise,” the complaint alleges. “The [U.S. Food and Drug Administration] has reached the same conclusion: ‘Consumers may reasonably be expected to regard terms that represent that the food contains no sugars or sweeteners e.g., ‘sugar free,’ or ‘no sugar,’ as indicating a product which is low in calories or significantly reduced in calories.’” The plaintiff also argues that the citric and ascorbic acids in the products are used as preservatives, allegedly amounting to violations of New York consumer-protection statutes. The plaintiff seeks class certification, damages, restitution, attorney’s fees and injunctions.

Putative Class Action Alleges “Olive Oil” is 80 Percent Sunflower Oil

A plaintiff has filed a putative class action alleging Iberia Foods Corp. misleads consumers by selling its oil as Extra Virgin Olive Oil despite containing 80 percent sunflower oil. *Okoe v. Iberia Foods Corp.*, No. 18-9161 (S.D.N.Y., filed October 5, 2018). The front label of the product, the complaint alleges, features a dark green background with the phrase “Sunflower Oil &” in black text and “Extra Virgin Olive Oil” in gold, allegedly causing the sunflower oil disclosure to be “barely distinguishable from the background” and “readily overlooked by consumers.” The plaintiff cites a number of sources—including the BBC, Quora, activationproducts.com and finecooking.com—to assert that sunflower oil is less desirable to consumers than extra virgin olive oil because of the purported health benefits of the latter. For allegations of fraud and violations of New York consumer-protection statutes, the plaintiff seeks class certification, damages, an injunction and attorney’s fees.

Lawsuit Alleges Honey Bunches of Oats Sweetened By Sugar, Not Honey

Two plaintiffs have filed a putative class action alleging Post Consumer Brands sweetens its Honey Bunches of Oats cereals with “sugar, corn syrup, and other processed substances, and [they] contain only miniscule amounts of honey.” *Lima v. Post*

Consumer Brands LLC, No. 18-12100 (D. Mass., filed October 5, 2018). The complaint lists the alleged risks of consuming sugar to argue that Post intentionally misleads consumers into believing that Honey Bunches of Oats is healthful by implying that it is sweetened only or primarily by honey. “A product branded ‘Honey Bunches of Oats’ that pictorially conveys cereal being covered with honey and a bee in flight hardly means to a reasonable consumer that the product is mostly sweetened with sugar or other processed substances or, moreover, that it contains only a miniscule amount of honey,” the complaint asserts. The plaintiff alleges violations of consumer-protection statutes in 35 states and seeks damages and attorney’s fees.

SCIENTIFIC / TECHNICAL ITEMS

Survey Finds About A Quarter of Consumers Confused By Plant-Based Milk Labels

A survey of 1,000 participants conducted by the International Food Information Council Foundation has purportedly found that between 24 and 28 percent of respondents either believed or did not know whether plant-based milks contained cow’s milk. The organization reported that between seven and nine percent of respondents identified rice, cashew, almond, soy and coconut milk as containing cow’s milk, while between 16 and 20 percent of respondents answered that they did not know whether the products contains cow’s milk. The survey also asked about the participants’ understanding of almond butter and peanut butter; eight percent answered that they believed almond butter contains cow’s milk, while 15 percent believed that peanut butter contains the ingredient.

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