



LEGISLATION, REGULATIONS & STANDARDS

Ban on SSB Taxes Passes in Washington, Fails in Oregon

Washington voters have reportedly approved a ballot measure that will prevent the state legislature from implementing a tax on sugar-sweetened beverages (SSBs). The measure will not repeal Seattle's tax but will prevent other local governments within the state from imposing new SSB taxes. A similar initiative in Oregon failed to pass; critics of the measure reportedly argued that the language could be broadly construed to apply beyond groceries to food served in restaurants.

FDA Releases Reports and Guidance on Nutritional Panels, Recalls, Serving Sizes, More

The U.S. Food and Drug Administration (FDA) has released several reports and guidance documents on food-related issues, including draft guidance on reasonable serving sizes and a report on foodborne illnesses in restaurants.

- Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed At One Eating Occasion, Reference Amounts Customarily Consumed, Serving Size-Related Issues, Dual-

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Mark Anstoetter

Column Labeling, and Miscellaneous Topics. This draft guidance details how food companies determine reasonable serving sizes for the nutritional panels on their products. Comments submitted before January 4, 2019, will be considered before FDA begins working on the final version of the guidance.

- Nutrition and Supplement Facts Labels: Questions and Answers Related to the Compliance Date, Added Sugars, and Declaration of Quantitative Amounts of Vitamins and Minerals; Guidance for Industry. FDA has provided a series of questions and answers on quantifying added sugars, vitamins and minerals. Several questions focus specifically on calculating added sugars in fruit juices and products created from juice concentrates.
- Questions and Answers Regarding Mandatory Food Recalls: Guidance for Industry and FDA Staff. This guidance “provides answers to common questions that might arise about these mandatory recall provisions and FDA’s current thinking regarding their implementation.” The seven-page guidance briefly answers basic questions about the recall process.
- FDA Report on the Occurrence of Foodborne Illness Risk Factors in Fast Food and Full-Service Restaurants, 2013-2014. This report represents the first portion of a 2013-2023 study that is “investigating the relationship between food safety management systems, certified food protection managers, and the occurrence of risk factors and food safety behaviors/practices commonly associated with foodborne illness in restaurants.” The researchers purportedly found that many restaurants had incidents in which employees failed to practice proper food-safety techniques, including (i) failure to practice proper handwashing (65.64 percent of fast food restaurants and 82.4 percent of full-service restaurants); (ii) failure to properly sanitize food-contact surfaces (40.94 percent and 62.12 percent); (iii) failure to cook raw animal foods to required temperatures (10.65 percent and 21.05 percent); and (iv) failure to keep foods requiring refrigeration at the proper temperature (68.24 percent and 86.11 percent).
- Meetings scheduled about Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption. FDA has scheduled four public meetings to hear comments about guidance issued in October 2018. The meetings will occur on November 27, 2018; November 29, 2018; December 11, 2018; and December 13, 2018.

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.

LITIGATION

Challenge to Ginger Content in Canada Dry to Continue

A California federal court has granted partial summary judgment in a class action alleging Keurig Dr Pepper falsely marketed Canada Dry as “Made from Real Ginger.” *Fitzhenry-Russell v. Keurig Dr Pepper Inc.*, No. 17-0564 (N.D. Cal., entered November 2, 2018). The court considered the results of multiple consumer surveys aiming to determine whether a reasonable consumer would interpret “Made from Real Ginger” as describing a product that is made from ginger root or a product that is made from ginger oleoresin, a flavoring made from ginger root. The surveys determined that some respondents were confused about the source of the ginger flavor based on Canada Dry’s marketing. Finding that an issue of material fact remains, the court denied the motion for summary judgment on that claim.

The court then turned to allegations about whether Dr Pepper misled consumers about the levels of ginger in the product. “The label makes no claims as to the amount of ginger in Canada Dry,” the court noted, and the plaintiffs failed to support their argument that consumers would expect the product to contain more than “trace amounts” of ginger. Accordingly, the court granted summary judgment to that claim.

As to the allegation that Dr Pepper intended to mislead consumers about the health effects of Canada Dry—although “[t]he parties do not dispute that Canada Dry does not provide any measurable health benefit”—the court refused to grant summary judgment. “Dr. Pepper’s internal marketing documents strongly suggest that Dr. Pepper’s push to get consumers to associate Canada Dry with ginger-related health benefits may have been successful,” the court found. “In a 2014 study, Dr. Pepper’s third-party consultant concluded that over 30% of consumers who increased their ginger ale consumption did so because of the perceived health benefits. ... Simply put, it would be odd for the Court to conclude that Dr. Pepper’s advertisements do not affect consumer expectations regarding Canada Dry, when Dr. Pepper itself believes that it had.”

“Vegan Butter” is not Butter, Plaintiff Argues

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.



A consumer asserts that Miyoko's Kitchen Inc.'s "vegan butter" misleads consumers into believing the product is "a 'form' of butter" despite lacking "any milk or dairy ingredients and the functional, nutritional, sensory and organoleptic attributes which consumers associate with butter." *Brown v. Miyoko's Kitchen Inc.*, No. 18-6079 (E.D.N.Y., filed October 30, 2018). The products "bask in dairy's 'halo' by using familiar terms to invoke positive traits—including the significant levels of various nutrients typically associated with real dairy foods," the complaint alleges. The plaintiff argues that consumers "prefer butter over its imitators" because of its "unique and unduplicated taste," "mouthfeel" and "ability to enhance the texture of and other qualities of (mashed) potato products."

"The plant-based Product is not butter because it is derived from coconut (lauric) oil and nut ingredients, among others, and lacks any fat derived from cow's milk," the plaintiff argues. The product meets U.S. Food and Drug Administration standards for margarine rather than butter, the complaint asserts, but even then, "the Products are nutritionally inferior to butter and margarine, because they lack Vitamin A, Vitamin D and Calcium, among others." For allegations of negligent misrepresentation, fraud, unjust enrichment and breach of warranties, the plaintiff seeks class certification, damages, injunctive relief and attorney's fees.

Plaintiff Alleges "Octopus" Products Are A "Bait-and-Switch"

A consumer has alleged that Iberia Foods misleads consumers by substituting giant squid for octopus in three of its octopus products. *Zapata Fonseca v. Iberia Foods Corp.*, No. 18-6279 (E.D.N.Y., filed November 5, 2018). The plaintiff's putative class action asserts that Iberia and its supplier, Orbe, either knew or should have known that the products were not octopus, which the plaintiff purportedly discovered through third-party DNA testing. "Squid is significantly cheaper and of a lower quality than octopus," the complaint argues. "In fact, the squid undergoes a chemical treatment in order to make it more similar to octopus in its texture. This process also eliminates a very characteristic taste of the *dosidicus gigas* with chemical substances to obtain a neutral flavor. Additional testing has revealed that this bait-and-

switch, and active concealment, is occurring throughout the Orbe Cross-Brand Octopus Products as well.” For alleged violations of New York consumer-protection statutes and unjust enrichment, the plaintiff seeks class certification, restitution, damages and attorney’s fees.

Mott’s Applesauce Not “Natural,” Plaintiff Alleges

A consumer has filed a putative class action alleging that Mott’s Applesauce and Apple Juice products are mislabeled as “natural” because they contain traces of an insecticide. *Yu v. Dr Pepper Snapple Grp. Inc.*, No. 18-6664 (N.D. Cal., San Jose Div., filed November 1, 2018). The plaintiff alleges that reasonable consumers would not expect to find acetamiprid, a synthetic chemical, in a product labeled as “natural.” The complaint echoes a [similar lawsuit](#) filed by Beyond Pesticides in May 2017; an amended complaint in that lawsuit was filed in October 2018.

Sunkist, Welch’s Fruit Snacks Makers Settle Trademark Dispute

Kervan USA has agreed to change the packaging of its Sunkist fruit snacks and the shape of its candy following a [lawsuit](#) filed by Promotion in Motion Inc., which produces Welch’s fruit snacks. *Promotion in Motion Inc. v. Kervan USA LLC*, No. 18-11670 (D.N.J., entered November 6, 2018). Kervan will change the background color of the packages for its fruit snacks to avoid confusion with packages of Welch’s fruit snacks, and it will change the shape of its watermelon candies to avoid the use of the “distinctive three-dimensional trapezoid shape” of Promotion in Motion’s Sour Jacks. Kervan will also sell off its existing supply of allegedly infringing products and destroy any remaining units after 90 days.

SCIENTIFIC / TECHNICAL ITEMS

Researchers Aim to Find “Optimal Tax Levels” to Combat Effects of Meat on

Health

U.K. and U.S. researchers have published a study on “a market-based approach of taxing red and processed meat according to its health impacts.” Springmann et al., “[Health-motivated taxes on red and processed meat: A modelling study on optimal tax levels and associated health impacts](#),” *PLOS One*, November 6, 2018.

The researchers predict that meat-related health care costs will amount to \$285 billion in 2020, and they created a model to determine what level of tax or pricing change would account for the associated costs. They purportedly determined that doubling the price of processed meats and raising the price of red meat by about 20 percent would result in enough revenue to account for costs of the reduced consumption rates that would be associated with a rise in price.

“I hope that governments will consider introducing a health levy on red and processed meat as part of a range of measures to make healthy and sustainable decision-making easier for consumers,” a University of Oxford [press release](#) quotes the head researcher as saying. “A health levy on red and processed meat would not limit choices, but send a powerful signal to consumers and take pressure off our healthcare systems.”

MEDIA COVERAGE

Report Predicts Large Market for Cannabis-Infused Products

Food Navigator reports that a [market research company](#) has predicted a “coming flood of mainstream investment in cannabis in general and the edibles sector in particular.” The firm suggests that legalization of cannabis products across the United States could create a market between \$40 billion and \$70 billion. Growth in the edibles category outpaced growth in other cannabis categories, the report authors note, with sales especially focused on the candy and chocolate categories, which account for about 60 percent of edibles sales.

On November 6, 2018, Michigan voters passed a ballot measure to allow recreational marijuana in the state, making it the tenth state to legalize cannabis products; a similar measure in North Dakota failed to pass. Missouri and Utah voters also approved a ballot initiative to allow marijuana for medical purposes, which is now legal in 33 states.

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