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LEGISLATION, REGULATIONS & STANDARDS

AGs Submit Comment to FDA on Cannabis

A group of 38 state attorneys general have submitted a letter to the U.S. Food and Drug Administration (FDA) in response to the agency's call for comments on possible regulatory approaches for cannabis and cannabis-derived products such as cannabidiol (CBD). "As the primary enforcers of our respective states' consumer protection laws, we offer a unique perspective as to the new legalized market of certain cannabis and cannabis-derived compounds, including CBD products," the letter states. "A crucial element of FDA regulation and oversight should be an on-going assessment of the potential risks or benefits of these products, particularly for specific populations such as pregnant women, adolescents and children, and the elderly. How these products interact with other dietary or pharmaceutical products should be included in this assessment. It is also important that companies not mislead consumers. Scientific and medical data from the FDA would assist in meaningful enforcement of advertising laws and regulations by the states."

The public comment period concluded July 16, 2019, and FDA received nearly 4,000 comments, including from advocacy groups —such as the Center for Science in the Public Interest—and

industry groups, including the National Cannabis Industry Association and National Grocers Association.

Shook's Cannabis Law team partnered with ALM Media for a white paper on the legal landscape for the global cannabis market. Read more >>

EPA Declines to Ban Chlorpyrifos

The Environmental Protection Agency (EPA) has reportedly rejected efforts to ban chlorpyrifos, finding that "the data available are not sufficiently valid, complete or reliable to meet petitioners' burden to present evidence demonstrating that the tolerances are not safe." The decision follows a 2015 ban and 2017 reversal, which prompted legal challenges. EPA will reportedly continue to review the safety of chlorpyrifos through 2022.

Baby Food Contains Excess Sugars, WHO Argues

The World Health Organization (WHO) has released a pair of studies purportedly finding that "a high proportion of baby foods are incorrectly marketed as suitable for infants under the age of six months, when in fact much of it contains inappropriately high levels of sugar." Researchers reviewed 7,955 baby-food products in Austria, Bulgaria, Hungary and Israel and reportedly found that more than half of the products available in three of the countries provided more than 30% of their calories from sugars. WHO also noted that between 28% to 60% of products indicated that they were appropriate for infants under six months, which contradicts WHO guidance on exclusively breastfeeding until that age.

LITIGATION

EU High Court Affirms BPA as "Substance of Very High Concern"

The General Court of the European Union has confirmed that bisphenol A (BPA) is a substance of very high concern under the

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.

EU's REACH Regulation. PlasticsEurope, which represents four companies that sell BPA-related materials, challenged the categorization. The organization argued that the listing should exclude intermediate uses of BPA, including as an on-site isolated intermediate or a transported isolated intermediate. The General Court ruled that the uses were not exempt from the REACH Regulation, noting that "one of the objectives of the candidate list of substances is the establishment of information sharing obligations in respect of substances of very high concern within the supply chain and with consumers. The identification of a substance as a substance of very high concern serves to improve information for the public and professionals as to the risks and dangers incurred. The General Court therefore considers that the contested decision is consistent with the objective of sharing information on substances of very high concern within the supply chain and with consumers. It finds that the legal effects of that decision do not go beyond what is appropriate and necessary to achieve that aim."

Consumer Alleges Vanilla in Friendly's Ice Cream is Artificial

Friendly's Manufacturing and Retail markets its ice-cream products as "flavored exclusively from vanilla beans" but uses artificial flavors in at least 57 products, including cakes, cartons, cones, bars and sandwiches, according to a consumer's putative class action. *Charles v. Friendly's Mfg. & Retail LLC*, No. 19-6571 (S.D.N.Y., filed July 15, 2019). The complaint asserts that Friendly's sells its products as "vanilla" flavored but does not use vanilla-derived flavor. "The Products are misleading because they are marketed as vanilla ice cream adjacent to other vanilla ice cream products which contain vanilla flavoring exclusively from vanilla beans," the plaintiff argues, providing a competitor's label showing "vanilla extract" as an ingredient. "Where two similarly labeled products are situated in the same category or section of a store and their representations as to quality and/or fill are identical, yet the former is lacking the quantity of the characterizing ingredient (vanilla) or qualities, the reasonable consumer will be deceived." The plaintiff alleges negligent misrepresentation, fraud, unjust enrichment and breach of warranty and seeks class certification, preliminary and permanent injunctive relief, damages, costs and attorney's fees.

Cereal Misleads on Primary Sweetener, Plaintiff Alleges

A consumer has filed a putative class action alleging that Post Consumer Brands' Honey Bunches of Oats is misleadingly named because the cereals are sweetened primarily by "sugar, corn syrup, and other refined substances, and contain only miniscule amounts of honey." *Tucker v. Post Consumer Brands LLC*, No. 19-3993 (N.D. Cal., filed July 11, 2019). The complaint details the alleged "negative health effects of consuming excess amounts of sugar" and asserts that "the branding and packaging of the Products convey the clear message that honey is the primary sweetener or—at a minimum—that honey is a significant sweetener compared to sugar and other refined substances that are perceived by consumers to be unhealthy or less healthy. Unfortunately for consumers, this message is simply untrue." The plaintiff includes the ingredient lists for several Honey Bunches of Oats varieties, which show "sugar" as the second or third ingredient along with "brown sugar," "corn syrup" and "molasses" appearing before "honey" or "wildflower honey."

"The branding and packaging of 'Honey Bunches of Oats' deceptively conveys that honey is the primary recognizable flavor or the characterizing flavor of the Products," the plaintiff argues. "However, this is deceptive and misleading as the Products all contain flavoring ingredients in far greater quantities than honey, and many of these ingredients—such as molasses, brown sugar, nuts, and dried fruit—have flavor characteristics that are far more prominent than honey. Indeed, even a cereal variety that doubles-down on honey—'Honey Bunches of Oats, Crunchy Honey Roasted'—contains a number of flavoring ingredients that are each present in greater proportions than honey." The plaintiff seeks class certification, injunctive relief, monetary relief, costs and attorney's fees for alleged violations of California's consumer-protection law.

Malic Acid Challenged in Laffy Taffy, Nerds

A plaintiff has alleged that Ferrara Candy Co. misleads consumers by labeling its candies as containing no artificial flavors while including malic acid as an ingredient. *Gruber v. Ferrara Candy Co.*, No. 19-4700 (N.D. Ill., E. Div., filed July 12, 2019). The complaint echoes other putative class actions alleging that the "malic acid" listed as an ingredient is more specifically "dl-malic acid," a synthetic food additive that can add tartness. The plaintiff alleges that he paid money for products—including Nerds, Sprees, Laffy Taffy and Everlasting Gobstoppers—that he would not have purchased if he had known that they contained artificial ingredients; further, "[w]orse than the lost money, the Plaintiff, the Class, and Sub-Class were deprived of their protected interest to choose the foods and ingredients they ingest." For an alleged violation of Illinois consumer-protection law as well as fraud, unjust enrichment and breach of express warranty, the plaintiff seeks class certification, injunctive relief and attorney's fees.

PTAB Refuses to Register "Scoop" for Ice Cream

The U.S. Trademark Trial and Appeal Board (TTAB) has affirmed the denial of Yarnell Ice Cream LLC's application to register a trademark on a mascot named "Scoop." *In re Yarnell Ice Cream, LLC*, No. 86824279 (TTAB, entered July 9, 2019). The examining attorney rejected the application, finding "scoop" to be merely descriptive, and the appeals board agreed, pointing to examples from competitors identifying their serving sizes in scoops. The board also dismissed the argument that Yarnell's "scoop" has two meanings—the ice cream serving and the breaking-news description—because the latter intended meaning only became clear within the context of Yarnell's trade dress. "The dictionary definitions, third-party uses and registrations, and webpages and articles discussed and displayed above make it clear that 'scoop' is a common portion size and measuring unit for frozen confections and ice cream," the court held. "We find that 'scoop' has little, if any, source-identifying capacity as a mark for those goods."

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