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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Oregon Sens. Request Changes To USDA Hemp Rule

In a letter to the U.S. Department of Agriculture (USDA), Sens. Ron Wyden (D-Ore.) and Jeff Merkley (D-Ore.) have requested changes to the interim final rule on hemp production. Wyden and Merkley, who co-wrote the legislation that legalized hemp farming, passed along feedback from Oregon farmers, researchers and regulators, according to a press release. The letter cites five key complaints:

- Testing within 15 days of harvest may be "an impossible obstacle for growers to overcome" because it is insufficient time, "particularly if there are a limited number of registered laboratories with sufficient expertise to perform the necessary tests";
- The requirement to submit hemp to laboratories registered with the Drug Enforcement Administration (DEA) could "cause tremendous bottlenecks and unnecessary delays," and the 2018 Farm Bill only granted USDA and the Food and Drug Administration "sole regulatory authority over hemp production";
- "The interim final rule introduced a new requirement, contrary to the specific language of the 2018 Farm Bill, that hemp samples must be tested using methods where 'THC concentration level reported accounts for the conversion of delta-9-tetrahydrocannabinolic acid (THCA) into THC'";

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- The rule requires a sample from "the flower or bud located at the top one-third of the plant," but "many farmers will be utilizing the entire hemp plant including stalks, leaves, and stems"; and
- Setting "the negligence threshold for hemp at 0.5% THC" is "arbitrary" and "far too low" because a "reasonably prudent hemp producer could take the necessary steps and precautions to produce hemp, such as using certified seed, using seed that has reliably grown compliant plants in other parts of the country, and engaging in other best practices, yet still produce hemp plants that exceed this 0.5% THC concentration."

DeLauro, Gillibrand Urge Transparency In USDA Testing

Sen. Kirsten Gillibrand (D-N.Y.) and Rep. Rosa DeLauro (D-Conn.) have sent a letter to the U.S. Department of Agriculture (USDA) urging the agency to "adopt a policy of greater transparency with respect to the microbiological testing" that the agency collects from meat slaughter and processing establishments. The letter cites a *Salmonella* outbreak in ground beef announced by the Centers for Disease Control and Prevention and notes that investigators "have not identified a single, common supplier" for the affected meat. DeLauro and Gillibrand urge USDA's Food Safety and Inspection Service to provide data on the samples it collects to "allow companies, government researchers and members of the scientific community to identify links between pathogenic strains" found in meat samples and in patients identified as affected by the *Salmonella* outbreak. The Congress members request answers to four questions before December 13, 2019, including an identification of which establishments had samples that resulted in positive *Salmonella* tests.

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LITIGATION

Brookside Malic Acid Lawsuit Dismissed

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.

A California federal court has granted summary judgment to The Hershey Co. in a lawsuit alleging that its Brookside chocolates are misleadingly labeled as made with "no artificial flavors" because they contain malic acid. *Clark v. Hershey Co.*, No. 18-6113 (N.D. Cal., entered November 15, 2019). The court found that the named plaintiffs admitted in depositions that they did not rely on the contested label. One plaintiff "did suffer an injury as required by California law—he would not have purchased the Brookside products if he had known they contained artificial ingredients," the court noted. "However, his injury was not caused by the alleged mislabeling of the product, but rather his misunderstanding that the 'No Artificial Flavors' statement meant there were no artificial ingredients whatsoever in the product. Accordingly, regardless of defendant's alleged mislabeling, [the plaintiff] would have suffered the injury." A second and third plaintiff argued that they had relied on the "no artificial flavors" label claim when they began purchasing Brookside chocolates, but they both first bought the chocolates years before the "no artificial flavors" labeling was added in 2017. Accordingly, the court granted summary judgment on all three plaintiffs' claims, but it granted permission for "plaintiff to promptly move for another named plaintiff to intervene and to amend the complaint accordingly."

Vegan Alleges Burger King Deceptively Marketed Impossible Whopper

A plaintiff has filed a putative class action alleging that Burger King Corp. represented its Impossible Whopper in association with the Impossible Burger, which is "well known as a meat-free and vegan meat alternative," but cooked the Impossible Whoppers "on the same grills as its traditional meat products, thus covering the outside of the Impossible Whopper's meat-free patties with meat by-product." *Williams v. Burger King Corp.*, No. 19-24755 (S.D. Fla., filed November 18, 2019). Burger King advertised the Impossible Whopper as "100% Whopper" and "0% Beef," leading the plaintiff, a vegan, to rely "on Defendant's deceptive representations about the Impossible Whopper and believing that the 'Impossible' vegan meat patty would be prepared in a manner that maintained its qualities as a vegan (meat-free) burger patty." The plaintiff alleges breach of contract, unjust enrichment and violation of Florida's consumer-protection statute and seeks class

certification, damages and a declaration "that Defendant be financially responsible for actually providing a meat-free 'Impossible' meat patty when selling its 'Impossible Whoppers' to consumers."

Whole Foods Oatmeal Hides Sugar Content, Plaintiff Alleges

A consumer has filed a putative class action alleging Whole Foods Market Group Inc. lists "organic dehydrated cane juice solids" as an ingredient in its 365 Everyday Value instant oatmeal rather than "sugar." *Warren v. Whole Foods Mkt. Grp. Inc.*, No. 19-6448 (E.D.N.Y., filed November 15, 2019). "Consumers expect ingredients on a product to be declared by their common or usual name," the complaint asserts. "Where an ingredient contains the term 'juice,' consumers expect that ingredient to be derived from a consumable fruit or vegetable." The plaintiff seeks class certification, injunctive relief, damages and attorney's fees for alleged negligent misrepresentation, fraud and breach of express warranty.

MEDIA COVERAGE

France Backs Down On "Dry January" Campaign

The French government has reportedly abandoned a campaign suggesting French people abstain from drinking alcohol during the month of January following pressure from wine producers. The plan was apparently inspired by a promotion launched by a U.K. advocacy group in 2013 that encourages alcohol abstinence during January and mindful alcohol consumption in the months that follow. The French health minister reportedly confirmed that discussion for a Dry January campaign would not be held until a ministerial health prevention committee meeting in February 2020.

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