



LEGISLATION, REGULATIONS & STANDARDS

USDA, FDA Issue Joint Statement On Transmissibility Of COVID-19 On Food Packaging

The U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA) have issued a [joint statement](#) stating that “there is no credible evidence of food or food packaging associated with or as a likely source of viral transmission of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), the virus causing COVID-19.” The statement was issued one week after the World Health Organization [reportedly](#) stated that the virus could be transmitted on frozen food packaging.

“The USDA and the FDA are sharing this update based upon the best available information from scientific bodies across the globe, including a continued international consensus that the risk is exceedingly low for transmission of SARS-CoV-2 to humans via food and food packaging. For example, a recent opinion from the [International Commission on Microbiological Specifications for Foods \(ICMSF\)](#), stated: ‘Despite the billions of meals and food packages handled since the beginning of the COVID-19 pandemic, to date there has not been any evidence that food, food packaging or food handling is a source or important transmission route for SARS-CoV-2 resulting in COVID-19.’ Additional [literature reviews](#) and [analyses](#) from other countries agree.”

Vilsack Confirmed As Agriculture Secretary

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The U.S. Senate has voted 92-7 to confirm Tom Vilsack as head of the U.S. Department of Agriculture. Vilsack, who served in the position under former President Barack Obama, stated that his priorities include addressing “the pandemic, racial justice and equity and climate change.”

FDA Responds To Baby Foods Congressional Reports As Class Actions Are Filed

The U.S. Food and Drug Administration (FDA) has issued a constituent update responding to the Senate’s report on elevated levels of heavy metals in baby foods. “While the report released on February 4, 2021 by the U.S. House of Representatives Committee on Oversight and Reform Subcommittee on Economic and Consumer Policy raises important questions on what more can be done to reduce toxic elements in baby foods, the FDA has been actively working on this issue using a risk-based approach to prioritize and target the agency’s efforts,” the update states. “Firms and individuals who manufacture or sell food have a legal responsibility under the Federal Food, Drug, and Cosmetic Act to ensure the safety of their products. The FDA reviews information and takes action on a case-by-case basis. If the FDA finds that a product violates the law, the agency takes steps to stop the product from being imported, takes court action to stop its sale or recalls it if it is in the domestic market.”

The response comes amid pressure for the agency to set limits across all baby foods for heavy metals content rather than specifically for rice cereal. Dozens of lawsuits relying on the Congressional report have been filed following its release, including lawsuits against Beech-Nut Nutrition Co., Hain Celestial Group and Plum Organics.

EFSA Issues Guidance On Smoke Flavoring

The European Food Safety Authority has issued scientific guidance on the inclusion of smoke flavoring in food products. The guidance includes notes on the characterization of the flavoring, proposed uses, exposure assessments and safety data.

Smoke flavoring has increasingly been a target of putative class actions in the United States, including lawsuits targeting smoked gouda and smoked provolone.



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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.

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



Appeals Court Affirms Dismissal Of Foster Farms Animal Welfare Lawsuit

A California appeals court has declined to revive a lawsuit alleging that packaging for Foster Poultry Farms Inc. products misleads consumers by featuring a certification that the animals are treated humanely. *Leining v. Foster Poultry Farms Inc.*, No. B291600 (Cal. App. Ct., 2nd Dist., entered February 23, 2021). The plaintiff had alleged that she believed the logo to indicate that the animals were treated humanely according to a reasonable consumer's standard rather than according to the industry's standards; the trial court granted Foster Farms summary judgment, finding that the American Humane Association's certification program was "independent, reasonable, and involved some level of expertise."

The appeals court found that the plaintiff's causes of action were preempted by the Poultry Products Inspection Act (PPIA) because the labels were preapproved by the Food Safety and Inspection Service. If the plaintiff "were to prevail on her tort claims that the labels were nonetheless misleading, California courts would be imposing an additional requirement to those imposed by the PPIA," the court held.



New York Court Dismisses Vanilla Lawsuit

A New York federal court has dismissed a lawsuit against Oregon Chai Inc. for failure to state a claim in litigation centered on whether using the term "vanilla" on packaging is misleading to consumers. *Cosgrove v. Oregon Chai Inc.*, No. 19-10686 (S.D.N.Y., entered February 22, 2021). "In the past two years, counsel for Plaintiffs [] has filed numerous class action complaints across the country, including several in this District, challenging food manufacturers' use of the term 'vanilla' in their descriptions or advertising," the decision begins. "In nearly all of these cases, the district court ultimately found that the plaintiffs had failed to state a viable claim for relief. This time, Plaintiffs challenge Defendant Oregon Chai, Inc. [], claiming that Defendant's use of the term 'vanilla' and other statements on the packaging of its chai tea latte powdered mix is misleading to consumers. As set forth in the remainder of this Opinion, this Court agrees with the majority of district courts to have considered the matter, and dismisses the complaint for failure to state a claim."

Summarizing the plaintiffs' arguments, the court stated, "Plaintiffs argue that Defendant's prominent use of the term

‘Vanilla,’ along with the identifying description of ‘Vanilla and honey combine with premium black tea and chai spices,’ foster the misimpression that the vanilla flavor is present in an amount greater than the honey and the chai spices, when in fact there is more honey and cinnamon in the products []. Plaintiffs reason that the prominent use of the term ‘Vanilla’ also fosters the misimpression that the vanilla flavor is derived from vanilla beans, rather than artificial vanillin. []. Finally, Plaintiffs argue that the products’ reference to ‘Made with Natural Ingredients’ is misleading on several levels: it reinforces the impression that the vanilla flavor is derived from vanilla beans and not artificial vanillin, and it suggests (falsely, according to Plaintiffs) that the products do not contain any synthetic or artificial ingredients.”

The court reviewed several cases in other district courts, finding that the courts were generally unpersuaded by arguments analogous to the plaintiffs’. Noting the placement of “vanilla” under “Oregon Tea Latte” on the product’s packaging, the court noted that “the term appears to describe a flavor more than an ingredient — more particularly, to distinguish the vanilla flavor from Defendant’s other chai tea latte flavors, including ‘The Original,’ ‘Salted Caramel,’ and ‘Spiced.’” The court also observed that “there is no reference to ‘vanilla bean’ or ‘vanilla extract’ anywhere on the packaging; nor is there any reference to the product being ‘made with’ or ‘made from’ any part of the vanilla plant (the reference instead being ‘Made with Natural Ingredients’).” Accordingly, the court dismissed the complaint and denied the plaintiffs’ request for leave to amend because they had already amended the complaint twice and not specified how they could cure any further deficiencies.

Post Foods To Pay \$15 Million To Settle Added Sugar Lawsuit

A California federal court has approved the settlement of a lawsuit alleging Post Foods LLC misrepresented the nutritional value of its cereals because of the added sugar content. *Krommenhock v. Post Foods LLC*, No. 16-4958 (N.D. Cal., entered February 24, 2021). Under the settlement agreement, Post will pay \$15 million to the nationwide class and remove phrases related to nutritional benefits on its packaging if more than 10% of the cereal’s calories per serving come from added sugar.

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