Shook, Hardy & Bacon L.L.P.

ISSUE 545 | NOVEMBER 14, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

USDA Approves GE Potato for Market

The U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) has **approved** for commercial planting a new variety of potato genetically engineered (GE) for low acrylamide and reduced black spot bruise. The potatoes in question use a technique known as RNA interference to silence genes involved in bruising and the production of acrylamide, which USDA defines as "a human neurotoxicant and potential carcinogen that may form in potatoes and other starchy foods under certain cooking conditions."

Submitted by J. R. Simplot Co., the petition for Innate™ potatoes (E12, E24, F37, J3, J55, J78, G11, H37, and H50) underwent plant and environmental risk assessments as well as a review period that generated more than 40,000 public comments—many of them identical—raising concerns about "potential effects on conventional potato production, export markets, and plant fitness." After reviewing all available data, APHIS issued a final environmental assessment with a finding of no significant impact. The agency also concluded that Innate™ potatoes "are unlikely to pose a plant pest risk and therefore are no longer subject to our regulations governing the introduction of certain GE organisms."

Meanwhile, consumer groups such as the Center for Food Safety (CFS) and Food & Water Watch have urged restaurants and fast food chains to reject the spuds, arguing that RNA interference is not well understood. "This is supposed to be very specific to the gene that you are targeting to turn off. But other genes in the plant may also be turned off in the process. Sometimes it's of no consequence, but in other cases this might have unintended consequences for the farmer, for example," one CFS spokesperson told media sources. *See The New York Times*, November 7, 2014; *Bloomberg BNA*, November 10, 2014.

In a related development, APHIS **announced** the availability of a petition for a determination of nonregulated status for an additional variety of Innate™ potato designated as Russet Burbank event W8, which is genetically engineered "for late blight resistance, low acrylamide potential, reduced black spot bruising, and lowered reducing sugars." The agency will accept public comments on this petition until January 9, 2015. *See Federal Register,* November 10, 2014.

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SHB 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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APHIS Rules GE Alfalfa Not a Plant Pest Risk

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) has **determined** that KK179 alfalfa, a genetically engineered (GE) crop that was created "to express reduced levels of guaiacyl lignin, a major subunit component of total lignin that slows the digestion of cellulose in livestock, as compared to conventional alfalfa at the same stage of growth," is unlikely to constitute a plant pest, thus granting Monsanto Co. and Forage Genetics International's petition for nonregulated status. APHIS found no significant impact following several opportunities for public comment on the petition and the preparation of an environmental assessment. *See Federal Register*, November 10, 2014.

New York Legislator Renews Call for SSB Warning Labels

According to press reports, New York Assemblyman Karim Camara (D-Brooklyn) announced this week that he intends to propose legislation requiring sugar-sweetened beverages (SSBs) to carry labels cautioning that their consumption contributes to "obesity, diabetes and tooth decay." He introduced a similar bill (**A10172**) in August 2014, but no action was apparently taken on that initiative.

"We can't sit back and pretend that sugary drinks aren't harmful to people," Camara was quoted as saying. "The research is clear—too much sugar leads to health problems such as obesity and diabetes."

A California Assembly committee defeated like-minded legislation earlier in 2014. More details about that proposal appear in Issue **527** of this Update. *See The New York Post*, November 13, 2014.

LITIGATION

Missouri Court Allows Tainted Cantaloupe Claims Against Safety-Audit Firm

A federal court in Missouri has denied the motion to dismiss filed by a food-safety company responsible for auditing conditions at the Jensen Farms cantaloupe facility some six weeks before the U.S. Food and Drug Administration inspected the farm and found the *Listeria* strains associated with a nationwide outbreak that allegedly sickened the plaintiff. *West v. Frontera Produce Ltd.*, No. 13-0943 (U.S. Dist. Ct., W.D. Mo., W. Div., decided November 7, 2014).

Primus Group, Inc. had argued that it owed no duty to the plaintiff, but the court disagreed, citing Missouri case law, which is consistent with the *Restatement (Second) of Torts*, Section 324A, allowing liability for third persons who render services that should be recognized "as necessary for the protection of a third person or his things." According to the court, the plaintiff sufficiently stated a cause of action against the defendant, "given that Primus assumed a

duty pursuant to contract and the performance of that duty was designed in part to protect the public from contaminated food products." So ruling, the court agreed with a similar ruling rendered in the district in July 2014.

State AGs Appeal Dismissal of Challenge to California's Hen-Confinement Rules

According to a news source, Iowa Gov. Terry Branstad (R) and the attorneys general (AGs) of Missouri, Nebraska, Oklahoma, Alabama, and Kentucky have filed a notice that they will appeal a district court dismissal of their challenge to a California law that allegedly forces egg producers in other states to comply with a voter-approved ballot measure that bans the sale of eggs which have been produced by hens in conventional cages. *Missouri ex rel. Koster v. Harris*, No. 14-17111 (9th Cir., notice of appeal filed October 24, 2014). Information about a related complaint appears in Issue 512 of this *Update*.

The district court apparently dismissed the complaint in early October on the ground that the officials lack standing to bring the lawsuit because California's law affects only a subset of farmers who plan not to comply with it. Missouri Attorney General Chris Koster claims that the state's farmers, who export some one-third of their eggs to California, must decide whether to invest in excess of $120 million to comply with the law, which requires larger cages for hens, or cease selling their products in the nation's largest egg market. Some states are reportedly following California's lead—Michigan, Oregon and Washington have passed similar laws requiring more space for egg-laying hens, while Ohio has banned construction of new conventional cages, known as "battery" cages. Ninety-five percent of eggs in the United States are apparently produced in battery cages, which practice is opposed by animal-rights organizations that are also involved in the litigation. *See Stateline.org*, November 9, 2014.

Yogurt Sugar Content and "Non-GMO" Almond Milk Labels Challenged

Whole Foods Market Inc. is the target of two new putative nationwide class actions, one filed in a Texas federal court regarding the amount of sugar in the company's plain Greek yogurt and the other filed in a California state court over alleged false advertising and sales of Blue Diamond almond milk products with a "Non-GMO Project Verified" label. *Kubick v. Whole Foods Mkt., Inc.*, No. 14-1013 (U.S. Dist. Ct., W.D. Tex., Austin Div., filed November 10, 2014); *Richard v. Whole Foods Mkt. Cal., Inc.*, No. BC563304 (Cal. Super. Ct., Los Angeles Cnty., filed November 7, 2014).

The Texas complaint alleges that Whole Foods 365 Everyday Plain Greek Yogurt represents that it contains 2 grams of sugar per serving, when testing shows that it actually contains more than 11 grams of sugar per serving, or "more than five and a half times the labeled amount." According to the plaintiff, a California resident, this is particularly significant because 2 grams of sugar would be "lower than any competitors' Greek yogurt, which contain at least 5 to 10 grams of sugar per serving. By falsely listing a lower sugar

content, Defendant was able to sell the Yogurt for a premium in the market place and at a higher price than it would have had it labeled the sugar content correctly."

Invoking California statutory and common-law violations, the plaintiff requests disgorgement, injunctive relief, damages, equitable remedies, attorney's fees, costs, and interest. He seeks to certify a nationwide class of purchasers of the product since November 7, 2010, and a California subclass of purchasers.

Meanwhile, the California complaint contends that "Whole Foods misbranded Blue Diamond Refrigerated Almond Breeze Original Almond Milk and Blue Diamond Refrigerated Almond Breeze Vanilla Almond Milk by advertising and selling these products with the Non-GMO Project Verified labels when these products have not been verified by the Non-GMO Project. In so doing, Whole Foods has violated California's Sherman Law and California consumer protection statutes." Alleging that genetically modified organisms (GMOs) "have been linked to thousands of toxic and allergic reactions, sick, sterile and dead livestock, and damage to almost every organ and system studied in lab animals," the plaintiff contends that "maintaining a diet free from GMOs has become important to a growing number of consumers."

The named plaintiff claims that she has a son who has been diagnosed with autism and that she regularly purchases and pays a premium for non-GMO products. She relied on the product labeling, but "would not have purchased the products, would have purchased less of the products, and/or would have paid less for the products," had the company not marketed, advertised and labeled them as verified by the Non-GMO Project. Seeking to certify a nationwide class of those who purchased the products within the last four years, the plaintiff alleges violations of the state's Unfair Business Practices Act, False Advertising Act and Consumers Legal Remedies Act; negligent misrepresentation and breach of quasi-contract. She requests changes to the product labels and corrective advertising; actual, punitive and statutory enhanced damages; attorney's fees; costs; and interest.

"All Natural" Snack Foods Targeted in Florida Class Action

A Florida resident has filed a putative statewide and nationwide class action against the Snack Factory, LLC, alleging that it deceptively represents that its Pretzel Crisps are "All Natural" despite including "unnatural, synthetic, and/or artificial ingredients, including but not limited to maltodextrin and soybean oil." *Seidman v. Snack Factory, LLC*, No. 14-62547 (U.S. Dist. Ct., S.D. Fla., Ft. Lauderdale Div., filed November 7, 2014). The plaintiff asserts claims as to a number of flavor varieties, some of which also contain the "unnatural" ingredients dextrose and caramel color.

The plaintiff contends that he and class members paid a price premium for the product "over and above other comparable products that do not claim to

be 'All Natural,'" relying on the product labels to their economic detriment. The complaint specifies in what way the ingredients are not natural, including that some are derived from genetically modified organisms. Alleging violation of Florida's Deceptive and Unfair Trade Practices Act, negligent misrepresentation, breach of express warranty, violation of the Magnuson-Moss Warranty Act, and unjust enrichment, the plaintiff seeks declaratory and injunctive relief, restitution, actual damages, attorney's fees, and costs.

New Jersey Suit Joins Others Challenging "Handmade" Vodka Label

According to a news source, New Jersey residents have filed a putative class action in state court against the Texas-based company that makes Tito's Handmade Vodka®, the fourth such action filed within the past two months, alleging that promoting and labeling the product as "handmade" deceives consumers because the vodka is made in an industrial facility and the company sells more than 15 million bottles a year. *McBrearty v. Fifth Generation, Inc*. The first complaint was filed in California in September 2014 and subsequently removed to federal court, *Hofmann v. Fifth Generation, Inc.*; the second followed in early October in an Illinois state court, *Aliano v. Fifth Dimension, Inc.*; the third was filed in a Florida federal court, *Pye v. Fifth Generation, Inc*.

The complaints variously refer to the company's Website and a *Forbes* article purportedly featuring images of old-time pot-still production ("i.e., in a shack containing a pot still cobbled from two Dr. Pepper kegs and a turkey-frying rig to cook bushels of corn"). In essence, the complaints contend that consumers pay a premium for the product, believing that something "handmade" is of higher quality because it is "produced in small batches using little to no machinery or automation." The Illinois plaintiffs allege that the company refers to itself as a "microdistillery," while industry standards place the cutoff for this designation "at about 25,000 to 40,000 cases per year. However, Defendant produces around 850,000 cases per year—roughly 30 times the maximum production capacity to be considered a 'microdistillery.'"

Alleging violations of state consumer protection laws, unjust enrichment, negligence, and breach of warranties, the plaintiffs seek either statewide or nationwide class certification, restitution, disgorgement, injunctive relief, punitive and treble damages, attorney's fees, and costs.

Fifth Generation owner Tito Beveridge promised a vigorous defense, saying, "All of our labels have gone through the approval process of the Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). After sending a field agent to Austin to review our processes, the TTB has approved our use of 'Handmade' on our label. We think our pot still batch distillation is one of the key things that differentiates us from a great majority of other vodkas. We disagree with these claims and will defend ourselves against this misguided attack." A leading distributor who handles the product questioned what "handmade" means. "It's not easy to define, as hands obviously are

involved throughout the process." *See Shanken News Daily*, September 23, 2014; *Courthouse News Service*, November 10, 2014.

Jimmy John's Data Breach Prompts Class Action Claims

An Arizona resident has filed a putative class action in an Illinois federal court claiming that Jimmy John's Franchise, LLC failed to secure its customers' personal and financial data, which were purportedly accessed through the company's point-of-sale systems at some 216 restaurant locations, between June and September 2014. *Irwin v. Jimmy John's Franchise, LLC*, No. 14-2275 (U.S. Dist. Ct., C.D. Ill., Urbana Div., filed November 6, 2014). While the named plaintiff alleges that access to her credit-card information led to "five fraudulent charges to the credit card that she used during the aforesaid transactions at Jimmy John's," she seeks to represent 39 separate statewide classes and a District of Columbia class of all those who used a debit or credit card at Jimmy John's during the data breach regardless of whether they actually experienced a loss or identity theft.

The plaintiff alleges that Jimmy John's failed to promptly discover and block the data breach, relied on a "grossly inadequate information system[] and security oversight," and failed to promptly and adequately inform its customers about the data breach thus placing class members "at serious risk of ongoing financial loss and identity theft." According to the complaint, the company collects and stores information relating to credit and debit cards, including the account number, expiration date, card verification value, and personal identification number for debit cards. It also allegedly "collects and stores customer names, mailing addresses, phone numbers, and email addresses." The plaintiff further contends, "While the Company's collection of customer information may itself be legal, by collecting and storing such extensive and detailed customer information, the Company creates an obligation for itself to use every means available to it to protect this information from falling into the hands of identity thieves and other criminals."

Alleging violations of state data breach statutes, breach of implied contract, bailment, unjust enrichment, as well as violations of the Arizona and Illinois consumer fraud laws, the plaintiff seeks an order "requiring Defendants to pay for three years of credit card fraud monitoring services" and other injunctive relief; actual, statutory and punitive damages; restitution; disgorgement; interest; attorney's fees; costs; and the establishment of a "fluid recovery fund for the distribution of unclaimed funds."

OTHER DEVELOPMENTS

Australian Public Health Coalition Advocates National Tax on SSBs

Calling Berkeley, California, voters' recent passage of a 1-cent-per-ounce tax on sugar-sweetened beverages (SSBs) a "victory for the health of Americans,"

Australia's **Rethink Sugary Drink Campaign** is urging state and local governments to enact comparable measures. The initiative is a partnership among the groups Cancer Council Australia, Diabetes Australia and Heart Foundation (Victoria).

"Australia is among the top 10 countries for per capita consumption of soft drinks," Cancer Council Australia's Craig Sinclair said. "Research shows that a retail price increase of around 20 percent would be the most effective in reducing the consumption of these sugar-laden drinks."

The Campaign asserts that SSB consumption is linked to a variety of weight-related health issues and also champions state and local regulations to (i) limit children's exposure to SSB marketing; (ii) restrict the sale of SSBs in primary and secondary schools; and (iii) reduce the availability of SSB sales in workplaces, government offices, health care institutions, and other public venues. *See Rethink Sugary Drink Campaign Press Release*, November 8, 2014.

UCSF, CSPI Tackle Science of Sweeteners

Researchers with the University of California, San Francisco (UCSF), and two other universities have launched a campaign targeting added sugar consumption. Led by UCSF Health Policy Professor Laura Schmidt, the **Sugar-Science Initiative** bills itself as "the authoritative source for the science about added sugar and its impact on our health." The resulting Website features public health messages gleaned from 8,000 scientific papers that the group reportedly vetted for accuracy and conflicts of interest. Among other things, the initiative focuses on the alleged toxicity of fructose and high-fructose corn syrup, arguing that added sugar consumption contributes to liver and cardiovascular disease, diabetes and obesity.

As contributor Robert Lustig explained, "It used to be a condiment, now it's a diet staple. As pediatricians, we had evidence of the connection between sugar and diabetes, heart disease and liver disease for years, but we haven't had this level of definitive scientific evidence to back up our concerns."

"There's a lot of confusion and misperception and conflicting information out there around sugar and health," Schmidt was quoted as saying. "We wanted to develop an authoritative, go-to place where people can get truthful information, and we wanted to package it in a way that's accessible to the average person." *See SFGate.com*, November 10, 2014.

Meanwhile, the Center for Science in the Public Interest (CSPI) has released a report on non-caloric sweeteners that questions the safety of aspartame. According to a November 12, 2014, press release, *Sweet Nothings* examines the science surrounding sugar substitutes, including newer formulations such as brazzein, monatin, monk fruit extract, stevia leaf extract, and thaumatin. Noting that recent studies have called into question the impact of artificial sweeteners on weight loss, the report still finds that "people are more likely to gain weight drinking sugar-sweetened beverages."

"Aspartame tops our list of sugar substitutes to avoid, because it caused cancer in three independent studies using laboratory rats and mice," state the report authors. "Based on those studies, FDA should ban aspartame. We also recommend avoiding saccharin because of evidence from human and animal studies, albeit inconsistent, that it may increase the risk of cancer."

S&P 500 Likely to Face Pressure to Report Nanotech Use and Investments

According to a Sustainable Investments Institute **report**, corporations globally invest some $9 billion annually in nanotechnology, yet less than one-tenth of S&P 500 companies make this information public to shareholders and other stakeholders and none has discussed purported health, environmental or safety risks in their Securities and Exchange Commission Form 10-Ks. Shareholders are apparently beginning to engage companies in discussions about these risks; the first ever nano-related shareholder resolution was brought to a vote in 2014 (garnering 18.6 percent support before Dunkin' Brands' shareholders), and "[c]oncerned investors are promising to step up their efforts in 2015."

The report outlines issues that investors should consider regarding companies that rely on, develop or use nanotechnology and nanomaterials; the current state of S&P 500 company disclosures; the history of the 30-year development of nanotechnology in the United States, including the most promising areas; currently identified areas of risk; EU and U.S. approaches to nanomaterial regulation; and shareholder proposal efforts begun as early as 2008 by groups such as the As You Sow Foundation, Calvert Investments and members of the Interfaith Center on Corporate Responsibility. *See The Harvard Law School Forum on Corporate Governance and Financial Regulation*, November 3, 2014.

EWG Advises Consumers to Avoid Certain Food Additives in Updated Guide

Consumer advocacy watchdog Environmental Working Group (EWG) has **issued** a new iteration of its "Dirty Dozen Guide to Food Additives." Reportedly based on hundreds of studies and information culled from EWG's Food Scores database, the resource purports to cover "food additives associated with serious health concerns, ingredients banned or restricted in other countries, and other substances that shouldn't be in food."

The substances that EWG deems the "dirty dozen" include nitrites and nitrates; potassium bromate; propyl paraben; butylated hydrosyanisole (BHA); butylated hydroxytoluene (BHT); propyl gallate; theobromine; secret flavor ingredients; artificial colors; diacetyl; phosphate-based food additives; and aluminum-based food additives. *See EWG Press Release*, November 12, 2014.

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SCIENTIFIC/TECHNICAL ITEMS

Prevalence of Fast-Food Outlets Allegedly Linked to Diabetes Rates

A new study has reportedly found that U.K. residents with at least two fast-food restaurants within 500 meters of their homes have significantly increased odds of developing Type-2 diabetes. Danielle Bodicoat, et al., "Is the number of fast-food outlets in the neighborhood related to screen-detected type 2 diabetes mellitus and associated risk factors?," *Public Health Nutrition*, November 2014. After analyzing data from three cross-sectional studies with a total of 10,000 participants, University of Leicester researchers estimated that for every additional two outlets per neighborhood, the population would have one additional diabetes case, "assuming a causal relationship between the fast-food outlets and diabetes."

"The observed association between the number of fast-food outlets with obesity and type 2 diabetes does not come as a surprise; fast-food is high in total fat, trans-fatty acids and sodium, portion sizes have increased two to fivefold over the last 50 years and a single fast-food meal provides approximately 5860 kJ (1400 kcal). Furthermore, fast-food outlets often provide sugar-rich drinks," said one of the study authors. *See University of Leicester Press Release*, November 11, 2014.

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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.

SHB 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.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.