Shook, Hardy & Bacon L.L.P.

ISSUE 549 | DECEMBER 19, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

USDA Proposes Expansion of Organic Products Assessment Exemption

The U.S. Department of Agriculture has **proposed** a rule that would allow anyone producing, handling, marketing, or importing certified organic products to be exempt from paying the assessments associated with commodity promotion activities like advertising. The exemption would cover all "organic" and "100 percent organic" products certified under the National Organic Program. The current rule allows the exemption to apply only to those who exclusively produce and market products certified as 100-percent organic, but the proposed rule would broaden application to include all organic products regardless of whether the person or company imports or handles nonorganic products as well. Comments on the proposed rule must be received by January 15, 2015. *See Federal Register*, December 16, 2014.

France Implements New BPA Rules; EFSA Announces Forthcoming Scientific Opinion

The French Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) has **released** a guidance document detailing the implementation of new rules that ban the use of bisphenol A (BPA) in all food contact materials in their finished state as of January 1, 2015. The second part of a law that first prohibited BPA in products intended for children younger than age 3, the new rules apparently bar the use of BPA in (i) packaging and articles intended to come into contact with food, and (ii) containers and utensils, including kitchen utensils, tableware and dishes. These rules do not apply to industrial materials and equipment used in the production, processing, storage, or transportation of foodstuffs. *See DGCCRF Guidance,* December 8, 2014.

In a related development, the European Food Safety Authority (EFSA) has announced that it has finalized a scientific opinion on BPA. Slated for release in January 2015, the opinion will reflect the views that the Panel on Food Contact Materials, Enzymes, Flavorings and Processing Aids adopted during its annual plenary meeting. According to a December 12, 2014, news release, "EFSA has carried out an extensive consultation and engaged with national authorities and stakeholders to ensure the widest possible range of scientific views and information have been considered, including similar scientific assessments currently underway at the Member State level."

Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 549 | DECEMBER 19, 2014

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.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com

or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com

If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com).

LITIGATION

Court Dismisses V8 V-Fusion® Misleading Labeling Lawsuit

A Florida federal court has dismissed a case alleging that Campbell Soup Co. misleadingly labeled its V8 V-Fusion® Pomegranate Blueberry and Acai Mixed Berry products as "100% juice" in a way that implied they contained only the flavoring juices rather than a base mix of fruit and vegetable juices. *Bell v. Campbell Soup Co.*, No. 14-291 (U.S. Dist. Ct., N.D. Fla., Tallahassee Div., order entered December 11, 2014).

The plaintiff argued that the label was misleading because the "100% juice" statement appeared so close to the flavor name on the label, but after examining each labeling statement, the court disagreed. "[W]hen a product's flavor comes from a juice that is not the primary ingredient, the name may include the flavoring juice, without including other juices, so long as the label includes the statement 'that the named juice is present as a flavoring.' [] [T]he flavor—in this instance pomegranate and blueberry—must be 'followed by the word 'flavored' in letters not less than one-half the height of the letters in the name of the characterizing flavor.'" The plaintiff's claims relied on Florida state law, but the court found that the federal Food, Drug, and Cosmetic Act preempted state law on the relevant points. Finding no valid claims, the court dismissed the case without leave to amend.

Safeway Breached Contract by Adding Online-Only Markup, Says Federal Court

A California federal court has granted plaintiffs' motion for summary judgment in a case alleging that Safeway charged a class of consumers more than the prices permitted under the terms of its online service contract when the consumers purchased groceries from the grocer's website. *Rodman v. Safeway*, No. 11-3003 (order entered December 10, 2014).

Safeway sells groceries via its Safeway.com site, where it requires users to accept its Terms and Conditions upon registration. That agreement includes a provision about prices varying from order to order: "The prices quoted on our web site at the time of your order are estimated prices only. You will be charged the prices quoted for Products you have selected for purchase at the time your order is processed at checkout. The actual order value cannot be determined until the day of delivery because the prices quoted on the Web site are likely to vary either above or below the prices in the store on the date your order is filled and delivered." At the site's inception, Safeway charged the prices available at the brick-and-mortar location, but after April 2010, the supermarket chain began adding a markup of approximately 10 cents per dollar.

The plaintiff argued that the language in the contract provision promised that the customer would be charged the same prices as those in the physical grocery store where the products were gathered for the order, while the defendant asserted that "the prices in the store" meant "the prices in the *online* store" that appeared on the site the day the order was actually

compiled. The court found that the language was "reasonably susceptible" to both interpretations, which allowed it to consider extrinsic evidence. It criticized Safeway's interpretation for arguing that "very different words in the same sentence mean the same thing" because the store asserted that "'on the Web site' means 'on the Web Site' and that 'in the store' also means 'on the Web site.' This is not a very compelling explanation of the objective meaning of these words." The plaintiff's interpretation, the court found, "does some (lesser) violence to the language as well" because he interpreted "prices quoted" as "prices charged in the physical store," despite that "[i]t is not all that common to think of grocery store tags as 'quoting' prices."

The court then considered the extrinsic evidence offered by each party and found that the plaintiff's evidence was unneeded because Safeway's evidence supported the plaintiff's interpretation. "The Special Terms promise that, with the exception of the actually disclosed special charges and delivery fees, the prices charged for safeway.com products will be those charged in the physical store where the groceries are delivered. Since Safeway actually marked up the charges for the in-store prices beyond the disclosed delivery and special charges, the Court grants summary judgment that Safeway breached its contract with its customers." The court also dismissed Safeway's argument that its November 2011 revision to its contract limited its liability to orders occurring before the revisions, citing the Ninth Circuit's "skeptical view of contracts in which online retailers have sought to alter the offer and acceptance structure by contending that assent can be inferred by a customer's continued use of a service even in the absence of notice of the terms in question." Finding otherwise would be "particularly lopsided," the court said, because "beyond the impracticality of expecting consumers to spend time inspecting a contract they have no reason to believe has been changed," Safeway would unfairly know about changes to the contract that governs its actions because it did not notify its users of the updated terms.

Class Decertified in Blue Diamond ECJ Almond-Milk Labeling Case

A California federal court has granted Blue Diamond's motion to decertify a statewide class of consumers who alleged that the company's almond milk product labels were misleading because they cited "evaporated cane juice" on the ingredient list rather than the alleged common name for the substance, sugar. *Werdebaugh v. Blue Diamond Growers*, No. 12-2724 (U.S. Dist. Ct., N.D. Cal., order entered December 15, 2014).

The court had preliminarily certified the class in May 2014 on the condition that the plaintiff could provide a damages model that limited recovery to those injured by the alleged mislabeling. Upon reviewing the proposed model, the court found fundamental flaws with the method of determining damages "because Dr. Capps' model is incapable of isolating the damages attributable to Defendant's alleged wrongdoing. [] Instead, Dr. Capps' methodology measures the '*combined effect*' of Blue Diamond's brand value and Blue Diamond's use of 'evaporated cane juice' and/or 'All Natural' on the prices of the challenged products." The model also failed to account for the fact that

many of Blue Diamond's competitors use similar labeling claims, the court said, and it accordingly granted Blue Diamond's motion to decertify. Additional information about the case appears in Issues 499, 525 and 536 of this *Update*.

Unilever Drops False Ad Claims Against "Just Mayo"

Hellmann's producer Unilever has filed a notice of voluntary dismissal in a case alleging that Hampton Creek's plant-based mayonnaise substitute, "Just Mayo," could not call itself mayo because it contains no eggs as required by U.S. Food and Drug Administration standards for the product. *Conopco Inc. v. Hampton Creek Inc.*, No. 14-6856 (U.S. Dist. Ct., D.N.J., notice filed December 18, 2014).

Unilever filed the complaint in October 2014, arguing that Just Mayo is a misleading brand name because the substance behaves differently than real mayonnaise when used in recipes; the plant-based product can apparently separate into parts rather than binding ingredients together. "Unilever has decided to withdraw its lawsuit against Hampton Creek so that Hampton Creek can address its label directly with industry groups and appropriate regulatory authorities," said Mike Faherty, Vice President for Foods, Unilever North America, in a statement. "We applaud Hampton Creek's commitment to innovation and its inspired corporate purpose. We share a vision with Hampton Creek of a more sustainable world. It is for these reasons that we believe Hampton Creek will take the appropriate steps in labelling its products going forward."

Groups Sue EPA for Alleged Failure to Regulate Novel Nanotechnology Pesticide Products

Several consumer and environmental groups, including the Center for Food Safety and Center for Environmental Health, have filed a lawsuit against the U.S. Environmental Protection Agency (EPA) seeking declaratory and injunctive relief for EPA's alleged failure to respond to the groups' 2008 petition calling for regulation of consumer products containing nano-sized versions of silver. *Ctr. for Food Safety v. EPA*, No. 14-2131 (U.S. Dist. Ct., D.C., filed December 16, 2014).

According to the complaint, the 2008 petition requested that EPA classify nano-silver products as pesticides and provided EPA with a legal, policy and scientific blueprint for necessary action. EPA opened a comment period on the matter later that year but allegedly failed to take any further action. The petition also included an index of products that contained nano-silver, including food storage containers, food/produce cleaners, cutlery, cutting boards, and ingestible "health" drink supplements.

The groups assert that nanomaterials "create unique human health and environmental risks, which require new health and safety testing paradigms," for a variety of reasons, including their "unprecedented mobility in human bodies and the environment." Nano-silver particles in particular "will likely threaten

the beneficial bacteria that underpin ecosystem functions," the complaints assert. "If the EPA fails to regulate pesticide products that incorporate nano-silver," Steve Suppan of the Institute of Agriculture and Trade Policy said in a December 17, 2014, press release, "farmers will soon be exposed to the unique health risks of nanomaterials, and will be uninformed about what they must do to protect themselves, and their families, neighbors, land, water and livestock from nano-pesticide drift." Beyond Pesticides Executive Director Jay Feldman was also quoted as saying, "Like any toxic pesticide, nano-silver must be subject to the full force of the law and label restrictions intended to protect people's health and the environment."

Supermarkets Sued over Fresh Bread Claims

Three consumers have filed three separate putative class actions against Whole Foods Inc., Wegmans Food Markets Inc. and Acme Markets Inc. in New Jersey state court alleging that the grocery chains falsely represent their bread and bakery products as freshly made in-store. *Mladenov v. Whole Foods*, docket number unavailable (Super. Ct. N.J., Camden Cnty., filed December 16, 2014); *Mladenov v. Wegmans Foods Mkts., Inc.*, docket number unavailable (Super. Ct. N.J., Camden Cnty., filed December 16, 2014); *Mao v. Acme Mkts.*, Inc., docket number unavailable (Super. Ct. N.J., Camden Cnty., filed December 16, 2014).

The complaints allege violations of the New Jersey Consumer Fraud Act based on advertisements indicating that the bread and bakery products sold by the three companies were made in-store daily despite being "frozen, delivered to its stores, and then re-baked or partially baked in store," according to the complaint against Acme. Each plaintiff seeks class certification, injunctive and declaratory relief, treble damages, and attorney's fees.

Chia Crisps Contain Insufficient Amount of Chia Seeds, Purported Class Action Alleges

A consumer has filed a putative class action in Florida federal court alleging that LesserEvil LLC falsely advertises its Chia Crisps as containing "a significant amount of chia seeds, when, in actuality, the Product is primarily composed of black beans, a less expensive ingredient." *Crane v. LesserEvil LLC*, No. 14-62854 (U.S. Dist. Ct., S.D. Fla., filed December 16, 2014).

The plaintiff asserts that LesserEvil attempted to capitalize on increasing consumer demand for antioxidant-rich chia seeds by creating a black-bean product with an insignificant amount of the seeds and advertising it as a chia-seed product. She alleges unjust enrichment and a violation of the Florida Deceptive and Unfair Trade Practices Act; she seeks class certification, compensatory damages, restitution, an injunction, and attorney's fees.

Shook, Hardy & Bacon L.L.P.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 549 | DECEMBER 19, 2014

SCIENTIFIC/TECHNICAL ITEMS

Study Claims "Obese Children's Brains More Responsive to Sugar"

A University of California, San Diego, study has reportedly claimed that the brains of obese children "literally light up differently when tasting sugar," according to a December 11, 2014, press release. Kerri Boutelle, et al., "Increased brain response to appetitive tastes in the insula and amygdala in obese compared to healthy weight children when sated," *International Journal of Obesity,* December 2014. Researchers apparently scanned the brains of 10 obese and 13 healthy weight children "while they tasted one-fifth of a teaspoon of water mixed with sucrose (table sugar)."

The results evidently showed that the obese children "had heightened activity in the insular cortex and amygdala, regions of the brain involved in perception, emotion, awareness, taste, motivation and reward." As the lead author explained, "The take-home message is that obese children, compared to healthy weight children, have enhanced responses in their brain to sugar. That we can detect these differences in children as young as eight years old is the most remarkable and clinically significant part of the study."

OFFICE LOCATIONS
Denver, Colorado
+1-303-285-5300
Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
Philadelphia, Pennsylvania
+1-215-278-2555
San Francisco, California
+1-415-544-1900
Seattle, Washington
+1-206-344-7600
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400

FOOD & BEVERAGE LITIGATION UPDATE

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.