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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS AND STANDARDS

Senate Democrats Introduce Legislation Mandating BPA Warnings on Food Packaging

Citing research studies alleging links between exposure to bisphenol A and various adverse health effects, U.S. Sens. Dianne Feinstein (D-Calif.) and Patrick Leahy (D-Vt.) have **introduced** the BPA in Food Packaging Right to Know Act.

"Knowledge is empowering, and knowledge about BPA ingredients can also stimulate further reforms by the marketplace," Leahy was quoted as saying.

Among other things, the draft bill would require the secretary of the Department of Health and Human Services to conduct a safety assessment of low-dose, long-term exposure to BPA and any resulting potential negative health effects on vulnerable populations (e.g., pregnant women, children, senior adults) as well any potential adverse health effects on populations with high exposure to the chemical, such as workers involved in product manufacturing processes. The proposal would also mandate labels on food packaging containing BPA to carry the warning statement: "This food packaging contains BPA, an endocrine-disrupting chemical, according to the National Institutes of Health." Health and advocacy groups including the Breast Cancer Fund and Center for Science in the Public Interest are reportedly championing the initiative. *See Press Release of U.S. Sen. Dianne Feinstein*, March 19, 2015.

USDA Schedules Meeting of GIPSA Advisory Committee

The U.S. Department of Agriculture (USDA) has **scheduled** an April 7-8, 2015, public meeting of the Grain Inspection, Packers and Stockyards Administration (GIPSA) Advisory Committee at the National Grain Center in Kansas City, Missouri. Topics of discussion will reportedly include service delivery updates, utilizing new technology to conduct inspections, quality assurance updates, and the reauthorization status of user fees paid by official agencies. *See Federal Register*, March 16, 2015.

WHO Seeks Comments on Childhood Obesity Report

The World Health Organization (WHO) has **issued** an interim report that seeks to identify policy options for mitigating the risk of childhood obesity. Published by WHO's Commission on Ending Childhood Obesity, the strategy document emphasizes "the importance of a life-course approach to simulta-

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neously address the risk factors for childhood obesity from before conception, through pregnancy and during childhood, as well as the obesogenic environment in which children and adolescents grow and develop."

Among other things, the interim report urges policymakers to "tackle the obesogenic environment" by adopting standardized food labeling schemes and addressing food and beverage marketing to children. "There is unequivocal evidence that unhealthy food and non-alcoholic beverage marketing is related to childhood obesity," states the commission. "The increasing number of voluntary efforts by industry and communities suggest that the need for change is widely agreed. Any attempt to tackle childhood obesity should, therefore, include a reduction in exposure of children to, and the power of, marketing as endorsed by the World Health Assembly."

In particular, WHO concludes that "governments have the essential role in coordinating and addressing the challenge of childhood obesity and providing an appropriate regulatory and statutory framework." Recommending "consistent multi-sectoral and multi-stakeholder approaches" that take into account issues of gender, equity and geography, the report also advocates the adoption of national monitoring and accountability frameworks to ensure compliance. The commission has requested comments on its findings by June 30, 2015.

UK FSA Announces Final Results of Aspartame Study

The U.K. Food Standards Agency (FSA) has announced the **final results** of an aspartame study commissioned by the Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment (COT), which peer-reviewed the initial findings in December 2013. Authored by Hull York Medical School researchers, the study relied on data from 48 individuals who self-identified as sensitive to the artificial sweetener aspartame.

After examining various factors—including psychological testing, clinical observation and biochemistry, and metabolomics—the authors found that the participants "showed no difference in their responses after consuming a cereal bar, whether it contained aspartame or not," according to FSA's March 19, 2015, press release. Additional details about COT's review of the study data appear in Issue **506** of this *Update*.

EFSA Says No Evidence of Ebola Risk from Food

The European Food Safety Authority (EFSA) has reportedly **concluded** that "[t]here is no evidence that the Ebola virus can be transmitted through food in the European Union." At the request of the European Commission, EFSA issued a scientific report detailing the risk pathway for the transmission of Zaïre Ebola virus (ZEBOV) via imported food consumed in the European Union. Although the report emphasizes that ZEBOV infections linked to the EU food chain have never been documented, it notes the gaps in scientific research stemming from the unlikelihood of this event.

"Due to lack of data and knowledge, which results in very high uncertainty, it is not possible to quantify the risk of foodborne transmission of ZEBOV derived from the consumption of these imported foods, or in fact whether or not this mode of transmission could occur at all," states EFSA. "The overall conclusions of both approaches are consistent and suggest that the risk of foodborne transmission of ZEBOV via food other than bushmeat imported into the EU remains a theoretical possibility only and has never been demonstrated in practice. However, the uncertainty in the combined assessment is considered high given the lack of data." *See EFSA News Release*, March 18, 2015.

LITIGATION

Prop. 65 Lead Testing Can Use Average Exposures, Appeals Court Confirms

A California appeals court has affirmed a lower court's ruling against plaintiff Environmental Law Foundation (ELF), which alleged that the products of Beech-Nut Nutrition Corp. and other food manufacturers, distributors and retailers contained sufficient amounts of lead to trigger warnings required under the state's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *Envtl. Law Found. v. Beech-Nut Nutrition Corp.*, No. A139821 (Cal. Ct. App., 1st App. D., Div. 1, order entered March 17, 2015). ELF argued that several products, including foods predominantly intended for babies and toddlers, contained more than the state's safe-harbor level of 0.5 micrograms per day.

On appeal, ELF challenged the trial court's decision to allow Beech-Nut's experts to average lead test results over multiple lots rather than evaluating each individually because the single highest result may have met the minimum threshold for Prop. 65 labeling. The court dismissed the challenge, finding that averaging the lots is not similar to "the deliberate mixing of adulterated food with good food," which has been rejected by the U.S. Food and Drug Administration.

With the support of an amicus brief from California Attorney General Kamala Harris, ELF also argued that averaging 14 days' worth of typical product intake violates Prop. 65 regulations, which are based on single-day exposures. Repeating the finding of an earlier decision, the court noted, "Proposition 65 'envisions a case-by-case approach which takes into account the totality of the quantitative risk assessment evidence presented.'" In the case of lead, "[s]ubstantial evidence established that the products here are eaten no more frequently than four times per month. Experts on both sides agreed that there is at least an eight-week 'window of susceptibility' to lead. In other words, eight weeks is the shortest period during which an exposure to lead at levels detected in the products would be expected to have an adverse reproductive effect." Thus, test results reflecting only single-day exposures are not necessarily required by Prop. 65, the court said, so ELF's challenge to Beech-Nut's evidence was dismissed.

Kind "No Refined Sugar" Claims Fail Reasonable Consumer Test, Court Finds

An Illinois federal court has dismissed a lawsuit alleging that Kind misleadingly labeled its Vanilla Blueberry Clusters as having "no refined sugars" despite containing evaporated cane juice (ECJ) and molasses. *Ibarrola v. Kind, LLC*, No. 12-50377 (U.S. Dist. Ct., N.D. Ill., E. Div., order entered March 12, 2015). The plaintiff had alleged that ECJ and molasses result from refining sugar cane—albeit less refining than what is required to produce table sugar—and as a result, the label's claim of "no refined sugar" was fraudulent, breached an express warranty and violated the state's consumer-protection law.

The court found the plaintiff's claim that she read the entire package, including the ingredients list, before purchasing the product contradicted her claim that she did not understand that the product contained partially refined sugars, noting that courts "have dismissed complaints premised on such logical inconsistencies." The court also compared what she claimed to believe to what a reasonable consumer would believe upon reading the entire package; the plaintiff "claims, somewhat obliquely, that she understood 'no refined sugars' to mean that the Vanilla Blueberry Clusters contained only 'naturally occurring' sugars that had not been refined at all. [] But this is not plausible," the court said. It found that the plaintiff knew the product contained a sweetener, but she apparently thought that it was "sugar cane in its natural state, not having gone through any process to refine it." However, "sugar cane in its natural state is a grass that contains jointed stalks resembling bamboo." The court further describes sugar cane and the process of extracting sucrose from the flesh of the stalk, finding that no reasonable consumer would believe that the Kind product contained sugar cane's "indigestible," unrefined form. Accordingly, the court dismissed the fraud and unjust enrichment claims.

The breach of express warranty claim was also dismissed because the purpose of its notice element is to provide the parties a chance to resolve the situation without proceeding to litigation, the court said, and the plaintiff failed to provide Kind with that notice. Because the plaintiff had amended the claims once and failed to cure the deficiencies, the claims were dismissed with prejudice.

Jamba Juice® "All Natural" Smoothie Kit Settlement Approved

A California federal court has approved the proposed settlement in a class action alleging that Jamba Juice® mislabels its smoothie kits as "all natural" despite containing synthetic ingredients gelatin, xanthan gum, ascorbic acid, steviol glycosides, and modified corn starch. *Lilly v. Jamba Juice Co.*, No. 13-2998 (U.S. Dist. Ct., N.D. Cal., settlement approved March 18, 2015). The December 2014 proposed settlement was reached three months after the court certified the class for liability but not for damages. Under the agreement, Jamba Juice® will remove "all natural" on the product packaging and the company website by March 31, 2015. Additional information about the settlement appears in Issue **547** of this *Update*.

Denied Certification, Energy Drink Plaintiffs Settle for Cost of One Product

Two plaintiffs who alleged that Vital Pharmaceuticals Inc. conceals the unsafe nature of its Redline® Xtreme energy drink have settled with the company for the approximate purchase price of a single product plus interest. *Mirabella v. Vital Pharm., Inc.*, No. 12-62086 (U.S. Dist. Ct., S.D. Fla., joint stipulation and notice of settlement filed March 16, 2015).

According to a notice filed with the court, the company has agreed to pay each plaintiff the cost of one drink—$2.50 to one, $2.99 to the other—along with accrued interest within 10 days of receiving general releases from the plaintiffs. A Florida federal court refused to certify the plaintiffs' proposed class on February 27, 2015. Additional details about that decision appear in Issue 557 of this *Update*.

"Barefoot Contessa" and Seafood Company Reach Settlement

Food Network's "Barefoot Contessa" and her company have reportedly reached a settlement agreement with Aqua Star (USA) Co. less than one month after the celebrity chef filed a complaint alleging trademark infringement for frozen dinners bearing the phrase "Contessa Chef Inspired." *Barefoot Contessa Pantry LLC v. Aqua Star (USA) Co.*, No. 15-1092 (U.S. Dist. Ct., S.D.N.Y., settlement reached March 12, 2015).

Ina Garten and her company, Barefoot Contessa, alleged that Aqua Star and its subsidiary, OFI Imports, manufactured and sold frozen dinners too similar to products made by a former licensee of Garten's name and likeness. Aqua Star has reportedly agreed to stop selling products with the Barefoot Contessa mark, remove and destroy the products from shelves by early May, and pay an undisclosed amount of money. Additional information about the complaint appears in Issue 556 of this *Update*. *See SeafoodSource.com*, March 13, 2015.

European Court Affirms Ruling Against Dole on Banana Price Fixing

The European Court of Justice has refused to void a lower court's decision against Dole Foods confirming an $83-million fine shared with other companies resulting from a finding of collusion to fix the prices of bananas sold in several European countries. *Dole Food & Dole Germany v. Commission*, No. C-286/13 P (E.C.J., order entered March 19, 2015).

Dole sought to annul or reduce its fine, arguing the commission had not proven that the weekly communications between banana-producing companies just before prices were set were intended to fix prices. The company also argued that the lower court had lumped price quotes for green bananas and yellow bananas when the price-quoting schemes are separate. The prices of some bananas were set weeks before they were sold, while other companies sold their inventories at different times, Dole argued; as a result, the bananas from different companies were not in direct competition. The court disagreed, first finding that Dole could not argue new issues on appeal, then finding that

the lower court properly considered how quotation prices work when ruling against Dole. "The claim that sales were not synchronized, even if it were proven, would not in any event affect the general court's findings, based on evidence provided by the undertakings in question themselves from which it is apparent that green and yellow quotation prices were convertible and that Chiquita's setting of the yellow quotation price was, of its own admission, influenced by the development of the quotation prices issued by Dole Food."

Putative Class Action Alleges Low-Cost Wines Contain "Dangerously High" Arsenic Levels

Citing independent product tests, four consumers seeking to represent a class have **filed** a lawsuit in California state court alleging that dozens of wineries in the state manufacture and sell wine that contains as much as five times the maximum safe daily limit of arsenic. *Charles v. The Wine Grp., Inc.*, No. BC576061 (Cal. Super. Ct., Los Angeles Cnty., filed March 19, 2015). "[J]ust a glass or two of these arsenic-contaminated wines a day over time could result in dangerous arsenic toxicity to the consumer," the complaint alleges.

The plaintiffs apparently hired **BeverageGrades**, an independent laboratory in Colorado, to test for levels of inorganic arsenic, which is "substantially more toxic and dangerous to humans" than organic arsenic, the complaint says. Ingestion is reportedly linked to a variety of health issues, including nausea, vomiting, disturbances of the cardiovascular and nervous systems, and type 2 diabetes. The complaint asserts that in 83 samples, the lab found levels of inorganic arsenic exceeding the U.S. Environmental Protection Agency's maximum contaminant level of 10 parts per billion for water. The products at issue include wines produced by Beringer, Franzia, Sutter Home, and Wine Cube as well as Charles Shaw, the brand sold by co-defendant Trader Joe's.

The plaintiffs allege violations of California's Consumer Legal Remedies Act, unfair business practices, misleading and deceptive advertising, unjust enrichment, and negligent misrepresentation/omission. They seek class certification, a declaratory judgment, an order requiring the defendants to label their wines with a disclosure that warns of the risks of consuming inorganic arsenic, an order for a corrective advertising campaign, an injunction, compensatory and punitive damages, and attorney's fees.

Putative Class Action Filed Against "Just Mayo"

A Florida consumer has filed a proposed class action against Hampton Creek, maker of vegan spread "Just Mayo," in Florida state court alleging that the product is falsely labeled and advertised because it does not contain eggs. *Davis v. Hampton Creek Inc.*, No. 2015-5993-CA (Fla. 11th Jud. Cir. Ct., filed March 13, 2015).

The complaint cites definitions of "just" and "mayo" to argue that the product name fools reasonable consumers into believing that it is mayonnaise despite containing no eggs. The plaintiff further points to the label, which includes an egg-shaped outline, and to the **website**, which previously advertised

the product as "an outrageously delicious mayonnaise that's better for your body, for your wallet, and for the planet." She alleges a violation of Florida's consumer-protection statute and unjust enrichment and seeks class certification, damages, restitution, an injunction, and attorney's fees.

Unilever, producer of Hellmann's mayonnaise, challenged Hampton Creek's "Just Mayo" labeling and voluntarily dismissed the case in December 2014. Additional details appear in Issue **549** of this *Update*.

OTHER DEVELOPMENTS

World Obesity Federation Conference to Target Dietary Sugars and Metabolic Disease Risk

The World Obesity Federation is **convening** clinicians, researchers and policymakers in Berlin, Germany, for a June 29-30, 2015, conference titled, "Dietary Sugars, Obesity and Metabolic Disease Risk." Sessions will include those addressing studies allegedly linking dietary sugars to the development of type 2 diabetes, cardiovascular disease and fatty liver disease; global consumption patterns; and policy solutions.

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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.