FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FTC and USDA Examine Consumer Perceptions of "Organic" Non-Agricultural Products

The Federal Trade Commission (FTC) and U.S. Department of Agriculture (USDA) have released an August 10, 2016, joint report examining consumers' perceptions of "recycled content" and "organic" claims, especially for non-agricultural products and services. Using data from Internet-based questionnaires completed by 8,016 respondents, the study sought to determine whether consumers view products marketed with such claims as having "particular environmental benefits or attributes."

Among other things, FTC and USDA asked consumers to assess the accuracy of recycled content and organic claims when applied to products made with varying types of recycled materials and varying proportions of "man-made" substances. While the agencies reported no significant difference among consumer perceptions of products that used either pre- or post-consumer recycled materials, "a significant minority of respondents disagreed that the organic claims accurately describe the product" when a small percentage of materials (i.e., "less than 1%; 1% to 5%; and 5% to 10%") was identified as "made by a man-made, chemical process."

"For organic claims, we asked how respondents understand the term 'organic' in a variety of contexts, focusing on products that may fall outside of USDA's existing National Organic Program requirements, in particular, non-food products with non-agricultural components, such as an 'organic' mattress," state the agencies. They also noted that respondents were equally split "between those who believe that organic claims have the same meaning for non-food products and food products, and those who believe they have different meanings."

"[R]oughly 35% of respondents believed that organic claims for shampoos or mattresses imply that the product meets some government standard," concludes the joint report. "About 30% of respondents believed that USDA certifies organic claims for these products."

To further explore these perceptions about organic claims and determine if FTC needs to update its guidance in this area, the agencies have also announced an October 20, 2016, roundtable in Washington, D.C., to gather additional feedback on organic claims for non-agricultural products. Open to the public, the roundtable brings together consumer advocates, industry representatives and academics to discuss "consumers' interpretations of 'organic' claims for products and services that generally fall outside the scope of the USDA Agricultural Marketing Service's National Organic Program," as well as "approaches to address potential deception."

FDA Extends Vending Machine Labeling Deadlines for Certain Food Products

The U.S. Food and Drug Administration (FDA) has extended until July 26, 2018, the deadline for posting the calorie counts of "certain gums, mints, and roll candy products" sold in glass-front vending machines, as well as for complying with type-size front-of-pack (FOP) labeling requirements. Published December 1, 2014, and effective December 1, 2016, the final rule requires businesses operating 20 or more vending machines to clearly disclose calorie counts "in a direct and accessible manner" if calories are not easily visible to prospective purchasers via FOP labeling.

According to FDA, "several trade associations requested the extension for glass-front vending machines because of concerns regarding the requirements for the size of front-of-pack (FOP) calorie disclosures." The trade associations apparently noted that "current voluntary FOP labeling programs require calorie information to be presented in a type size that ranges from 100 to 150 percent of the size of the net weight contents statement on the FOP label," while FDA's final rule "requires a type size of 50 percent of the size of the largest printed matter on the label."

To resolve these discrepancies and better coordinate with the roll out of new Nutrition Facts panels, FDA has agreed to extend compliance deadlines for products with visible FOP labeling as well as certain gums, mints and roll candy "in response to industry requests to provide flexibility for labeling these products." But, the agency concludes, "the December 1, 2016, compliance date still applies in most circumstances. For example, if packaged food sold in glass-front vending machines does not have visible FOP labeling, the calorie disclosures will have to appear in, on or adjacent to the vending machine consistent with the requirements in the final rule. In addition, the compliance date of December 1, 2016, still applies

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to vending machines that use electronic displays or sell unpackaged products." *See FDA Constituent Update,* July 29, 2016; *Federal Register,* August 1, 2016.

Alabama Board to Consider Proposed Beer Purchasing Rule with Privacy Implications

The Alabama Alcoholic Beverage Control Board (ABC) will reportedly vote on a proposed rule requiring brewers to collect personal information from purchasers of beer for off-premises consumption. The proposed rule, which requires gathering a customer's name, address, age and phone number, follows a rule enacted June 1 allowing craft breweries to sell six packs, large bottles and other containers of beer. The rule's purpose may relate to enforcement of Alabama's 288-ounce limit on single purchases, but the ABC has reportedly not publicly commented on the reasoning underlying the proposal. The board will vote on September 28, 2016. *See Associated Press*, August 5, 2016.

LITIGATION

Quaker Oats Maple Suit Transferred to California

A New Jersey federal court has transferred to California a lawsuit alleging that The Quaker Oats Co. misleads consumers with the packaging of its Maple & Brown Sugar oatmeal product because it does not contain maple syrup or maple sugar. *Gates v. Quaker Oats Co.*, No. 16-1944 (D.N.J., order entered August 3, 2016). The complaint "makes essentially identical allegations against Quaker" as three other putative class actions pending in other federal courts, the court notes, including the first-filed case in California. The Judicial Panel on Multidistrict Litigation denied an Illinois plaintiff's request to consolidate the cases into multidistrict litigation, but the panel suggested that the other parties transfer their lawsuits to California to streamline the process. Quaker moved to transfer the case from New Jersey to California, and the plaintiff did not oppose; accordingly, the court granted the motion to transfer.

Tasty Burger Threatens Infringement Action Against Chipotle's "Tasty Made" Burger Concept

Restaurant chain Tasty Burger has reportedly threatened to file an infringement action against Chipotle Mexican Grill Inc. following the announcement of Chipotle's new burger restaurant concept, Tasty Made. Tasty Burger argues that Tasty Made's name and logo infringe upon Tasty Burger's established marks, which have been used in commerce since 2010; in addition to the similar name, both logos feature white writing on a red background, albeit in different typefaces.

Tasty Burger sent a cease-and-desist letter to Chipotle on July 19, 2016, but CEO David DuBois told the *Chicago Tribune* that the company ignored it. DuBois also told the paper he contacted the media about the dispute because he is "sick of getting calls from people asking me if we got absorbed." In response, Chipotle told the *Tribune* that "there is sufficient difference between the names and logo marks so as not to cause consumer confusion, and we believe both brands can co-exist." *See Chicago Tribune*, August 11, 2016.

OTHER DEVELOPMENTS

Ad Board Recommends Kellogg Adjust Fruit Snacks Packaging

The Children's Advertising Review Unit (CARU) has advised Kellogg Co. to revise the packaging for Fruit Flavored Snacks, recommending against statements that the product is "made with real fruit."

The front of the package featured cartoon characters and the statement "made with real fruit" superimposed on the image of an apple. The side panel clarified that the snacks are "made with equal to 20% fruit." Based on a typical child's interpretation of the message, CARU found that children may be confused because "although the fruit flavored snacks were made with fruit puree concentrate, at the end of the process, only a very small amount of actual fruit puree concentrate was included in each serving of the product." In a statement, Kellogg indicated that it disagreed with CARU's findings but would modify the language and remove the apple logo in deference to the self-regulatory process.

SCIENTIFIC/TECHNICAL ITEMS

Study Claims Carrageenan Causes No Adverse Effects

A study commissioned by the International Food Additives Council (IFAC) has claimed that when used as a gelling or thickening agent in foods, carrageenan (CGN) causes no adverse effects in human cells. James McKim, Jr., et al., "Effects of carrageenan on cell permeability, cytotoxicity, and cytokine gene expression in human intestinal and hepatic cell lines," *Food and Chemical Toxicology*, July 2016. After testing three forms of carrageenan *in vitro* to evaluate "intestinal permeability, cytotoxicity, and CGN-mediated induction of proinflammatory cytokines," researchers evidently concluded that intestinal cells did not absorb CGN, which, in turn, was not cytotoxic and did not induce oxidative stress or inflammation.

"This study was unable to reproduce any of the previously reported *in vitro* findings. As a result, it is unlikely that CGN causes inflammation or that it disrupts insulin signaling pathways reported by Bhattacharyya et al. (2012)," note the study's authors. "This work also demonstrates that when *in vitro* systems are used to identify potential hazards for humans, the results should be reproducible outside of the discovery laboratory prior to using the data for risk assessment, [regulatory] decisions, or policy statements."

"Dr. McKim's research confirms what we have known for decades—carrageenan has no impact on the human body when consumed in food," said IFAC Executive Director Robert Rankin in an August 10, 2016, press release. "Carrageenan producers have taken very seriously claims that the ingredient is unsafe, thoroughly investigated the research supporting those claims and found them to be baseless."