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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Efforts to Curb Antibiotic Use in Livestock Fall Short, Says GAO

The Government Accountability Office (GAO) has issued a March 2017 report noting several oversight gaps in federal agencies' efforts to track and curtail antibiotic use in food animals. According to GAO, the Departments of Health and Human Services (HHS) and Agriculture (USDA) have implemented several measures designed to reduce antibiotic resistance by increasing veterinary supervision of animal drug use; altering drug labeling guidance; and collecting data from food producers on their antibiotic regimens.

But GAO notes that these initiatives fall short of the more stringent government regulations promulgated by Canada, Denmark and the European Union, which have reportedly achieved reductions in antibiotic use in food animals and improved data collection. "For example, changes to drug labels do not address long-term and open-ended use of antibiotics for disease prevention because some antibiotics do not define duration of use on their labels," states GAO. "FDA officials told GAO they are seeking public comments on establishing durations of use on labels, but FDA has not clearly defined objectives for closing this gap, which is inconsistent with federal internal control standards. Without doing so, FDA will not know whether it is ensuring judicious use of antibiotics."

To this end, GAO recommends, among other things, that (i) "HHS address oversight gaps," (ii) "HHS and USDA develop metrics for assessing progress in achieving goals," and (iii) "USDA develop a

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Mark Anstoetter
816.474.6550
manstoetter@shb.com

framework with HHS to decide when to conduct on-farm investigations." It also urges these agencies to address the oversight of antibiotics "administered in routes other than feed and water, such as injections and tablets," and "to establish appropriate durations of use on labels of all medically important antibiotics used in food animals."

DeLauro, Tester Target Brazilian Beef Following Corruption Allegations

Sen. Jon Tester (D-Mont.) and Rep. Rosa DeLauro (D-Conn.) have urged the federal government to act in response to a Brazilian investigation allegedly finding that more than 100 of the country's health inspectors allowed the sale of rancid meat, falsified export documents or failed to inspect meatpacking plants. Tester introduced a bill in the U.S. Senate purporting to temporarily ban Brazilian beef imports. "A 120-day ban will provide the U.S. Department of Agriculture time to comprehensively investigate food safety threats and to determine which Brazilian beef sources put American consumers [at] risk," Tester's March 21, 2017, press release asserts.

In a March 22 press release, the U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service announced additional pathogen testing of all raw beef and ready-to-eat products from Brazil. "Keeping food safe for American families is our top priority," Acting Deputy Secretary of Agriculture Mike Young was quoted as saying. "FSIS has strengthened the existing safeguards that protect the American food supply as a precaution and is monitoring the Brazilian government's investigation closely."

In a letter to Young, DeLauro called USDA's actions "shortsighted" and pressed the agency to "immediately suspend all importation of Brazilian meat until the health and safety of their products can be assured."

Proposed Ban on Totalitarian Symbols in Hungary May Criminalize Heineken's Logo

The Hungarian National Assembly is reportedly considering a proposed ban on Soviet and Nazi symbols that would impose fines of up to $6.97 million and a potential prison sentence on businesses using such marks, likely including Heineken and its red-

Madeleine McDonough
816.474.6550
202.783.8400
mmcdonough@shb.com

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 inspections, subject to FDA, USDA and FTC regulation.

star logo. The ban targets symbols related to Hungary's years of Nazi occupation and decades of communist rule, including the swastika, hammer and sickle, arrow cross and red star. Hungary's Deputy Prime Minister Zsolt Semjen, a co-sponsor of the bill, reportedly called Heineken's red star logo "obvious political content" and would not deny that the bill was retaliation for a lengthy legal battle between Heineken and a brewery in Transylvania, a region of Romania home to many ethnic Hungarians. *See Reuters*, March 20, 2017.

LITIGATION

Non-Fortified Skim Milk is Skim Milk, Eleventh Circuit Holds

The U.S. Court of Appeals for the Eleventh Circuit has overturned a Florida court's summary judgment against Ocheesee Creamery, finding that the company can sell its milk product as skim milk despite its refusal to follow a Florida law requiring skim milk to be fortified with vitamin A. *Ocheesee Creamery LLC v. Putnam*, No. 16-12049 (11th Cir., order entered March 20, 2017). Additional details on the lower court's rulings appear in Issues 555 and 599 of this *Update*.

Florida initially told Ocheesee that it could sell its skim milk as "imitation skim milk," but Ocheesee objected to the description of its natural, unfortified milk as "imitation." Ocheesee rejected other suggested labels as well, including "Non-Grade 'A' Milk Product, Natural Milk Vitamins Removed," then filed a lawsuit asserting a First Amendment right to describe its product as "skim milk." The lower court granted summary judgment in favor of Florida, finding that "skim milk" is inherently misleading if the product does not have the same vitamin content as whole milk.

Analyzing Ocheesee's free speech claims, the Eleventh Circuit found that while a state can propose a definition for a term, "it does not follow that once a state has done so, any use of the term inconsistent with the state's preferred definition is inherently misleading."

"All a state would need to do in order to regulate speech would be to redefine the pertinent language in accordance with its regulatory goals," the court stated. "Then, all usage in conflict with the regulatory agenda would be inherently misleading." Citing a dictionary's definition, the court found that "[c]alling the Creamery's product 'skim milk' is merely a statement of objective fact," which is "not inherently misleading absent exceptional circumstances."

"This is not to say that a state's definition of a term might not become, over time and through popular adoption, the standard meaning of a word, such that usage inconsistent with the statutory definition could indeed be inherently misleading," the court noted. "But the state must present evidence to that effect, and that has not been done here." Accordingly, the appeals court vacated the judgment and remanded the case to the district court.

Federal Court Dismisses Part of Wendy's Data Breach Putative Class Action

A Florida federal court has dismissed part of a data breach complaint against Wendy's, calling two of the claims "shotgun pleadings" and noting that the plaintiffs "misconstrue the basic legal principles of statutory law." *Torres v. Wendy's Int'l, LLC*, No. 16-0210 (M.D. Fla., order entered March 21, 2017). Additional details on the case appear in Issues 594 and 612 of this *Update*.

The plaintiffs originally filed suit in February 2016 after a data breach of Wendy's credit card payment system, but the Florida court dismissed the suit for failure to plead an injury sufficient to prove standing. Ruling on the amended complaint, the court found that the plaintiffs could establish standing based on "particularized, concrete injuries," including late fees, loss of credit card reward points and loss of cashback awards.

The court refused to dismiss a breach of implied contract count, reasoning that when a merchant invites a customer to pay with a credit card containing confidential information, an implied agreement that the merchant will safeguard the information may exist. In addition, the court sided with the plaintiffs on a negligence count, agreeing the facts pleaded supported a conclusion that the data breach was foreseeable.

The court rebuked plaintiffs for bundling claimed violations of state consumer protection laws in six separate states into a single count, failing to separate individual causes of action and claims for relief. "Although these laws share similarities, they are distinct causes of actions with unique requirements and defenses," the court said. "By lumping all six causes of action into one count in the Amended Complaint, Wendy's and this Court face the onerous task of sifting through the Amended Complaint to determine whether the facts alleged sufficiently state a claim for relief under the six different state consumer protection laws."

For the same reason, the court also dismissed a count claiming violations of data breach statutes in five different states but addressed some of Wendy's substantive arguments as to the

allegations. Four of the five statutes do not create a private right of action, but the plaintiffs argued that statutes can "set forth a relevant duty of care for a common law tort claim." The court disagreed, saying, "Plaintiffs misconstrue the basic legal principles of statutory law. A statute does not give rise to a civil cause of action unless the language of the statute explicitly so provides, or it can be determined by clear implication." The court granted the plaintiffs leave to amend, but limited it to "statutes that do provide a private right of action."

Court Rules Class Action Against Campbell Soup Preempted

A California federal court granted Campbell Soup Co.'s motion to dismiss a putative class action claiming the company "falsely and misleadingly labeled and advertised" one of its soups, ruling that the plaintiff's claims are expressly preempted by federal law. *Brower v. Campbell Soup Co.*, No. 16-1005 (S.D. Cal., order entered March 21, 2017). The plaintiffs alleged that Campbell's Chunky Healthy Request Grilled Chicken & Sausage Gumbo was mislabeled and advertised as healthy despite containing artificial *trans* fat. Additional details about the complaint appear in Issue 602 of this *Update*.

Campbell contended that the plaintiff's claims were preempted by the Poultry Products Inspection Act (PPIA) and the Federal Meat Inspection Act (FMIA), both of which prohibit the sale of products with false or misleading labeling or marketing. Pursuant to both statutes, the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) inspects and approves product labels. The court agreed, noting that "it is undisputed that FSIS approved Healthy Request Gumbo's label." Once a label is approved, the PPIA and FMIA bar a state from deeming a label "false, misleading or otherwise unlawful."

The court also dismissed both Campbell's motion and the plaintiff's cross-motion for sanctions. Campbell's moved for sanctions contending that numerous courts had held claims similar to the plaintiffs' preempted under the PPIA and FMIA; however, the plaintiffs relied on the Food, Drug and Cosmetic Act to argue against preemption, and the court ruled that their arguments were neither frivolous nor legally baseless. On the other hand, the court said, Campbell's reliance on federal and statutory case law to file a Rule 11 motion for sanctions was not baseless either, dismissing the plaintiff's cross-motion.

Court Orders Publicity Plan for Proposed Settlement of Safeway Tuna Cases

A California federal court has postponed issuing a final dismissal order in Safeway Inc.'s proposed settlement with a putative class, ordering the parties to develop a plan for publicizing the settlement to alert other potential plaintiffs that the statute of limitations will begin to run. *In re Safeway Tuna Cases*, No. 15-5078 (N.D. Cal., order entered March 13, 2017).

The class action, involving allegations of underfilled cans of tuna sold in Safeway grocery stores and those of its subsidiary Vons, received significant media coverage in outlets such as the *Los Angeles Times* and the *San Francisco Chronicle*. The court said it "is concerned that potential class members who may have seen such coverage would now be unaware that the case has been dismissed, and that the limitations period for filing a further suit therefore may run upon dismissal." The U.S. Supreme Court has held that the filing of a class action lawsuit in federal court tolls the statute of limitations for the claims of unnamed class members. The Safeway Tuna stipulation would dismiss only the named plaintiffs with prejudice, leaving unnamed plaintiffs free to file future suits before the statute of limitations expires. Although the settlement itself must be publicized, the terms of the settlement will not be disclosed.

Plaintiff Claims Coconut Water Contains No Coconut

An Oregon plaintiff has filed a putative class action against the makers of Cascade Ice Coconut Water alleging the product contains no coconut. *Silva v. Unique Beverage Co., LLC*, No. 17-0391 (D. Or., filed March 9, 2017). The complaint alleges that "[d]espite the large colorful coconuts and the word 'Coconut' that defendant puts on the front of its label, defendant's product actually contains no coconut water, no coconut juice, no coconut pulp, no coconut jelly." The plaintiff also claims that consumers buy coconut water for its "special health qualities," making its sales a "billion-dollar industry." Washington-based Cascade Ice's label lists the primary ingredients of the coconut water product as carbonated water, strawberry puree, citric acid, pear juice concentrate and "natural flavors." For violations of the Oregon Unlawful Trade Practices Act, the plaintiff seeks equitable and injunctive relief, actual, statutory and punitive damages and attorney's fees.

Subway Announces Intent to Sue Broadcast Network Over Chicken Story

Subway has issued a notice of action in Canada against the Canadian Broadcasting Corporation (CBC) following a February broadcast of the network's "Marketplace" program that claimed DNA testing of the chain's sandwiches showed its chicken was half processed soy. The sandwich chain is reportedly asking for $210 million in damages for defamation. According to the *Toronto Star*, Subway asked the CBC to retract the story but decided to file suit after the network refused. Additional details about a U.S. projected class action filed against Subway after the CBC report appear in Issue 627 of this *Update*. *See Fortune*, March 17, 2017.

Class Action Plaintiffs Claim Canada Dry Ginger Ale Contains No Ginger

Three plaintiffs have filed a putative class action against Dr Pepper Snapple Group, Inc., claiming that although the label on the company's Canada Dry Ginger Ale product says "Made With Real Ginger," the product contains "no detectable amount of ginger." *Hashemi v. Dr. Pepper Snapple Grp., Inc.*, No. 17-2042 (C.D. Cal., filed March 14, 2017). The plaintiffs argue that they hired an independent lab to test for ginger in the product, which is advertised on television with footage of the cans attached to ginger plants and a voiceover that asserts, "For refreshingly real ginger taste, grab a Canada Dry Ginger Ale. Real Ginger. Real Taste." Seeking class certification, restitution, declaratory and injunctive relief, damages and attorney's fees, the plaintiffs allege violations of the California and Colorado consumer-protection statutes as well as breaches of warranties, fraud and misrepresentation.

Just Born Faces Second Class Action over Movie Box Candy Slack-Fill Allegations

Just Born, Inc. is facing a putative class action alleging its boxes of candy are underfilled by 35 percent. *Escobar v. Just Born, Inc.*, No. 17-1826 (C.D. Cal., removed to federal court March 17, 2017). The plaintiff allegedly bought a box of the company's Mike and Ike® candy at a movie theater and claims Just Born is "falsely and deceptively misrepresenting" the amount of product contained in movie boxes of Mike and Ike® and Hot Tamales® candies it sells at movie theaters and retail outlets nationwide.

The plaintiff claims that because she bought the product at a movie theater, where it was stored in a glass showcase, she paid for the product before she took possession of it and had no opportunity to inspect the packaging for "other representations of quantity of candy product contained therein other than the size of the box itself." The plaintiff also relies on a *Consumer Reports* article claiming "75 to 80 percent of consumers don't even bother to look at any label information" and are likely to choose a large box believing it to be a good value.

For violations of California's consumer-protection statutes, the plaintiff seeks class certification, injunctive relief, restitution and damages, an order requiring Just Born to "disclose its misrepresentations," and attorney's fees.

DOJ Reaches Consent Decree with Valley Milk Over Contaminated Milk Powders

The U.S. Department of Justice (DOJ) has obtained a consent decree against Valley Milk Products LLC prohibiting the sale of more than four million pounds of milk powder products and preventing the company from manufacturing the products in the future. *U.S. v. All 50 pound high heat nonfat dry milk powder (Grade A)*, No. 16-0076, (W.D. Va., order entered March 17, 2017). DOJ seized dry milk and dry buttermilk products at the company's Strasburg, Virginia, facility in November 2016 after FDA inspections found unsanitary conditions and confirmed samples of *Salmonella* and *Listeria*.

According to the U.S. Food and Drug Administration, the *Salmonella* strains were "nearly identical" to strains found at Strasburg in 2010, 2011 and 2013, indicating "the existence of persistent/resident strain and harborage" of the bacteria at the facility. DOJ also alleged the products were "contaminated with filth" after inspectors found dark brown droplets forming on metal surfaces of processing equipment, water dripping from overhead pipes onto a finishing vat, and buildup of dried residues in tanks and pipes even after Valley Milk performed a site cleaning.

Valley Milk cannot use the milk powder products unless the company can prove to the FDA that they are no longer contaminated. The company also is enjoined from producing milk powders at any of its other facilities. Valley Milk issued a recall for the products in December 2016.

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