ISSUE 643 | AUGUST 04, 2017

FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Schumer Urges FDA to Investigate Phthalates in Food Packaging

Sen. Charles Schumer (D-N.Y.) has sent a letter to Scott Gottlieb, commissioner of the U.S. Food and Drug Administration (FDA), calling for an investigation into the use of phthalates in food and fast-food packaging. Citing a *Journal of American Medicine Association Pediatrics* report, Schumer argues that the health risks of phthalates are known but FDA has done little to protect the public.

"Consumers are not giving these everyday packaging products a second thought," Schumer said in a July 30, 2017, press release. "They assume they are safe—and they should be, especially when their reach extends to millions upon millions of Americans. So, the FDA must take my order for a fast food packaging investigation very seriously and take this long-sitting health data off the backburner."

Advocacy Groups Battle Over Citizen Petition to Define "Milk"

In the absence of action by the U.S. Food and Drug Administration (FDA), consumer-advocacy and dairy trade groups are disputing whether plant-based beverages, such as those made from soy or almonds, can be called "milk." The Good Food Institute (GFI) sent a July 31, 2017, letter to FDA requesting action on a 1997 citizen petition filed by the Soyfoods Association

Mark Anstoetter
816.474.6550
manstoetter@shb.com

of America seeking recognition of the term “soy milk.” The National Milk Producers Federation (NMPF) answered with a statement the same day, saying the effort to alter food-labeling standards “falsely suggests that the products are nutritionally equivalent.”

Although FDA has previously issued letters to producers of plant-based beverages warning that their use of the term “milk” is improper because such products do not contain dairy, the agency has never responded to the 1997 petition.

NMPF argued that GFI “is mistaken” for trying to revive the 1997 petition and that “[n]othing has happened in the intervening time period to allow the combination of soy powder, water, emulsifiers, stabilizers, sugar, sodium and added vitamins to magically become milk.”

In the meantime, the European Court of Justice ruled in June that the term “milk” could only be used for animal-derived products rather than plant-based beverages and foods. Additional details appear in Issue 638 of this *Update*.

Horse Meat Fraud Conspirators Sentenced

Three men have been convicted and sentenced for their roles in a conspiracy to sell at least 30 metric tons of horse meat as beef. The owner of a Danish supplier was sentenced to 3.5 years, while the company’s accountant received a suspended sentence. In addition, the owner of a London meat processor was given a 4.5-year sentence.

The fraud was discovered in 2013, when the Food Safety Authority of Ireland found horse meat in a shipment detained for inspection in Northern Ireland. According to *The Guardian*, inspectors found microchips for three horses previously owned as pets or riding horses. The scheme reportedly may have involved as many as 50,000 horses from across Europe. Additional details about the scheme appear in Issues 560 and 641 of this *Update*.

Kuster Introduces Organic-Farming Bill

Rep. Ann Kuster (D-N.H.) has introduced a bill that aims to help farmers transition to organic agriculture and boost American production of organic products to reduce dependence on imports. The Homegrown Organic Act of 2017 would amend the Food Security Act of 1985 by modifying existing conservation programs

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.

to help farmers who are working toward organic certification. It would also remove a payment limit under the Environmental Quality Incentives Program Organic Initiative, which provides financial assistance for implementing environmentally friendly practices. In addition, the bill would expand the Conservation Stewardship Program, providing assistance to farms in transition as well as those already in organic production. The bill has been referred to the House Committee on Agriculture.

French Wine Executive Indicted in Fake Wine Scheme

The chairman of French wine merchant Raphaël Michel has been indicted on charges that he masterminded a scheme to label nearly 4 million cases of ordinary table wine as Rhône Valley wines, including Châteaunneuf-du-Pape and Côtes du Rhône. Guillaume Ryckwaert has been charged with fraud, deception and violations of consumer and tax codes. Several other company executives were taken into custody in Marseilles but released without charges. Agents of the French National Customs Judicial Service discovered the alleged scheme during a company audit in 2016. *See The Times*, August 4, 2017.

LITIGATION

Court Dismisses Truffle-Oil Class Action

A federal court has dismissed a putative class action alleging Monini North America's truffle olive oils do not contain truffles, holding that the plaintiffs' concession that the oil tasted and smelled like truffles was fatal to their claims. *Jessani v. Monini N. Am.*, No. 17-3257 (S.D.N.Y., entered August 3, 2017). Additional details about the complaint appear in Issue 633 of this *Update*.

To prevail on a claim of deceptive advertising, a plaintiff must allege that the deceptive behavior was likely to mislead a reasonable customer, the court noted, but Monini's product label calls the product "White Truffle Flavored Olive Oil" and identifies only two ingredients: olive oil and aroma. "Courts routinely conclude that where a product describes itself as substance-flavored despite not containing the actual substance, and the ingredient label truthfully reflects that fact, as a matter of law the product would not confuse a reasonable consumer acting reasonably under the circumstances," the court held. In addition, the court dismissed the plaintiffs' warranty claims, finding that

the complaint did not allege the product was unfit for use as a flavored oil.

Slack-Fill Putative Class Action Filed Against Pret A Manger

Pret A Manger faces a putative class action alleging the chain's wrap packaging hides inches of empty space between sandwich halves. *Lau v. Pret A Manger (USA) Ltd.*, No. 17-5775 (S.D.N.Y., filed July 31, 2017). The complaint alleges that Pret's wraps are packaged in clear plastic sleeves with an opaque cardboard band hiding nonfunctional slack fill between the cut halves. The plaintiff also argues that the sandwiches are misbranded under the Food, Drug and Cosmetic Act and that the act's safe harbor provisions allowing extra space in packaging do not apply to the wraps because they are made and sold at the restaurant's locations. Claiming violations of New York consumer-protection law and fraud, the plaintiff seeks class certification, damages, restitution, injunctive relief and attorney's fees.

Naked Juice Faces Proposed Class Action for "Cold-Pressed" Labeling

A consumer has filed a putative class action against PepsiCo alleging that Naked Juice products are mislabeled as "cold pressed" because they also undergo high-pressure processing, "render[ing] the composition of the final product distinct from the intermediate, cold pressed product." *Davis v. PepsiCo*, No. 17-4551 (E.D.N.Y., filed August 2, 2017). The complaint alleges that Naked Juice's "Naked Pressed" product line, which includes nine fruit and vegetable juice blends, are cold pressed but then subjected to high hydraulic pressure, causing the temperature of the juice to rise, degrading "enzymatic, biological and cellular activity" and diminishing overall nutrient content. The plaintiff also asserts that a food product name is intended to refer to a final product, not the product that exists at an "intermediate" stage of manufacturing. Claiming violations of New York consumer-protection laws, fraudulent misrepresentation, implied warranty of merchantability and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

California Farmer Sues to Block Coastal Land-Use Plan Intended to Encourage

Family Farms

A former turkey farmer has filed a lawsuit against Marin County, California, alleging that a land-use ordinance intended to encourage multigenerational housing on family farms places an unconstitutional burden on landowners by requiring them to farm "in perpetuity." *Benedetti v. County of Marin* (Cal. Super. Ct., Marin County, filed July 14, 2017).

In May 2017, Marin County certified a new land-use plan that requires dwelling units on agricultural lands to be owned by a "farmer or operator actively and directly engaged in agricultural use of the property." The plaintiff alleges that the plan prevents him from building a second house on his property for his son, who is not involved in his farming business. The plaintiff argues that the policies violate his due process, are an unconstitutional taking of his right to develop his property, and may deprive him of his liberty by forcing him off the land he has lived on for 45 years. He seeks a declaratory judgment that the policy violates the Fifth and Fourteenth amendments to the U.S. Constitution and Article I of the California state constitution as well as writs of peremptory and administrative mandate to block the policy.

TTAB Says No Likelihood of Confusion Between "Cannibal" Beer and "Cannibal" Restaurant

The Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office has reversed a refusal to register "The Cannibal" as a mark for beer to Iron Hill Brewery, finding little likelihood of confusion between the beer and a restaurant called "The Cannibal Beer & Butcher." *In re Iron Hill Brewery*, No. 86682532 (TTAB, entered July 28, 2017). The board found that Cannibal Beer & Butcher failed to show that consumers would be confused by Iron Hill's use of "Cannibal" because the beer product that the brewery provides is different from the restaurant services provided by Cannibal Beer & Butcher. "In light of the large number of restaurants in the United States, the facts that a single mark is sometimes used [to] identify restaurant services and beer, that some restaurants are associated with breweries, and that restaurants may sell beer are not sufficient to establish a relationship between restaurant services in general and beer," the board held.

SHB.COM

CHICAGO | DENVER | HOUSTON | KANSAS CITY | LONDON
MIAMI | ORANGE COUNTY | PHILADELPHIA
SAN FRANCISCO | SEATTLE | TAMPA | WASHINGTON, D.C.