ISSUE 669 | April 06, 2018

FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

China to Tariff U.S. Food Commodities

China has reportedly imposed tariffs on imports of U.S.-made agricultural products, including pork, soybeans, wheat, beef, orange juice, whiskey and corn, following the United States' imposition of tariffs on Chinese steel and other products. Several agriculture advocacy groups have expressed serious concerns about the projected effects of the tariffs. Max Baucus, former U.S. senator for Montana and chair of Farmers for Free Trade, reportedly told the *New York Times,* "American farmers appear to be the first casualties of an escalating trade war . . . [w]ith farm incomes already declining, farmers rely on export markets to stay above water."

"We regret that the administration has been unable to counter China's policies on intellectual property and information technology in a way that does not require the use of tariffs," an April 4, 2018, press release from the American Soybean Association stated. "We still have not heard a response from the administration to our March 12 letter requesting to meet with President Trump and discuss how the administration can work with soybean farmers and others in agriculture to find ways to reduce our trade deficit by increasing competitiveness rather than erecting barriers to foreign markets."

M. Katie Gates Calderon

Updated National List Includes Carrageenan

The U.S. Department of Agriculture (USDA) has announced the renewal of 17 substances for the National List of Allowed and Prohibited Substances, which determines which synthetic substances can be used in organic farming. Included on the list is carrageenan; USDA found that "potential substitutes do not adequately replicate the functions of carrageenan across the broad scope of use." The National Organic Standards Board previously recommended that carrageenan be removed from the National List, determining that materials such as guar gum and xanthan gum were available for use as alternative thickening and emulsifying agents.

USDA Releases Animal Traceability Report From Working Group

The U.S. Department of Agriculture (USDA) has released *Animal Disease Traceability: Summary of Program Reviews and Proposed Directions from State-Federal Working Group*, an overview report of the Animal Disease Traceability Program (ADT) that includes a summary of stakeholder feedback and preliminary recommendations to improve the program. According to the report, an internal review of ADT by USDA's Animal and Plant Health Inspection Service (APHIS) in 2015 concluded that the program was well-managed, had clearly defined goals and objectives, and had achieved "incremental improvements" in tracing capability. In 2017, APHIS established a State-Federal Working Group pursuant to the Federal Advisory Committee Act to help review ADT regulations, seek public comment on the program and offer proposals for improvements. The conclusions of the working group are published in the April report.

Several of the recommendations are related to electronic ID (EID) of cattle, including pursuing the standardization of technology and ear tagging, modifying EID requirements for some classes of cattle and providing subsidies for small producers. The group also recommended that ADT establish a mechanism to maintain and facilitate sharing of electronic records, better enforcement of program regulations and uniformity of state import rules.

816.559.2419
kgcalderon@shb.com

Lindsey Heinz
816.559.2681
lheinz@shb.com

James P. Muehlberger
816.559.2372
jmuehlberger@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.

FDA Announces Science Board Meeting

The U.S. Food and Drug Administration (FDA) has announced a public advisory committee meeting of the Science Board, which advises the agency on complex scientific and technical issues and emerging issues within the scientific community. Written submissions on issues pending before the committee will be accepted until April 18, 2018, for the April 23 meeting.

LITIGATION

Several Claims Dismissed in Aspartame Case

A California federal court has dismissed a putative class action against Dr Pepper Snapple Group without prejudice, finding the plaintiff may be able to amend her complaint to "plausibly allege" that aspartame causes weight gain. *Becerra v. Dr Pepper Snapple Grp.*, No. 17-5921 (N.D. Cal., entered March 30, 2018). Although the plaintiff is not required to "scientifically prove causation at the pleading stage," the court found, the studies she cited "do not allege causation at all—at best, they support merely a correlation or relationship between artificial sweeteners and weight gain, or risk of weight gain . . . [b]ut correlation is not causation, neither for purposes of science nor the law." The court dismissed the plaintiff's unfair competition claims, finding her "theory of deception fails to pass the 'reasonable consumer' test" because Diet Dr Pepper is not marketed as a weight-loss or weight-management product and is a "diet" product in relation to Dr Pepper because it contains fewer calories. "A reasonable consumer knows that this is and has always been true of soft drinks generally," the court held. For the same reasons, the court found that the plaintiff's claims for express and implied warranty also failed.

France Challenges Trademark Application for "Beardeaux" Wines

The French agency responsible for protecting the country's agricultural appellations of origin has filed a notice of opposition to a California winery's application for the trademark "Beardeaux," arguing that the use would dilute the protected term "Bordeaux" used to designate wines from southwestern France. *Institut National de l'Origine et de la Qualité v. Bear River Winery LLC*, No. 91240350 (T.T.A.B., notice of opposition filed March 29, 2018). The notice asserts that wines from the Bordeaux region of France are entitled to use an "appellation d'origine contrôlée (AOC)" that "delimits the specific areas to which the appellation pertains, but also specifies the agricultural products from which the product may be derived and production methods and techniques that may be used to make the product." Further, it argues that U.S. law recognizes the Bordeaux AOC "as a foreign nongeneric name of geographic significance which is also a distinctive designation of a specific grape wine." U.S. regulations restrict the use of Bordeaux as a brand name to wines entitled to bear the AOC, according to the notice, and the proposed pun "Beardeaux" would dilute the brand by "blurring and by tarnishment" and "disparagement."

"Heart-Check Mark" Misleads, Consumer Alleges

A consumer has filed a putative class action alleging StarKist Co. misleads consumers by displaying the American Heart Association's Heart-Check Mark on its products. *Warner v. StarKist Co.*, No. 18-0406 (N.D.N.Y., filed April 4, 2018). The complaint asserts, "Reasonable consumers see the Heart-Check Mark and mistakenly believe that a product with a Heart-Check Mark is healthier than a product without a Heart-Check Mark. In fact, a food manufacturer must pay the American Heart Association [] in order to place the Heart-Check Mark on its products. The Heart-Check Mark is a paid endorsement." The plaintiff alleges that StarKist "takes advantage of health-conscious consumers who are looking for heart-healthy foods by manipulating them in to believing that Star-Kist's products are more heart-healthy than products sold by other food manufacturers." Alleging violations of New York's consumer-protection statutes as well as unjust enrichment, the plaintiff seeks class certification, damages and attorney's fees.

Dairy Challenges FDA Skim Milk Labeling on First Amendment Grounds

A Maryland dairy has filed a First Amendment lawsuit challenging a U.S. Food and Drug Administration (FDA) regulation requiring skim milk without vitamins A and D added to be labeled "imitation." *S. Mountain Creamery, LLC v. FDA*, No. 18-0738 (M.D. Pa., filed April 4, 2018). According to the complaint, South Mountain Creamery cannot selling its "all-natural, additive-free, pasteurized skim milk" in Pennsylvania because of FDA regulations mandating that skim milk sold in interstate commerce must contain the added vitamins. The creamery asserts that the fat-soluble vitamins dissipate before skim milk reaches the consumer, and FDA's "own official materials discuss this issue." According to the complaint, "The effect of the relevant regulations and laws is that any product consisting entirely of skim milk can never be labeled as 'skim milk' . . . [it] must be labeled as 'imitation.'" The dairy alleges that the FDA definition misleads and confuses the public and that "pure pasteurized skim milk without additives still meets the FDA's requirements for being Grade 'A.'" The creamery also asserts that it would use labels that indicate the only ingredient is skim milk, that vitamins A and D are removed when cream is skimmed, or that no vitamins have been added or replaced. Such labels would be similar to those used in Florida following a 2017 decision in which the Eleventh Circuit sided with a dairy that filed a free speech challenge to a similar state law.

Lawsuits Challenge Fruit Content in V8, Sunny Delight

Represented by the same attorneys, consumers have filed lawsuits alleging that two beverage companies misrepresent the amount of fruit in their fruit-flavored beverages.

Campbell Soup Co. "sells artificially-flavored sugar-water labeled as if it were fruit juice," the plaintiff in one lawsuit alleges. *Sims v. Campbell Soup Co.*, No. 18-0668 (C.D. Cal., filed April 2, 2018). The complaint asserts that V8 labels "convey to California consumers that they are purchasing a healthful, natural juice product made solely from fresh fruits and vegetables," but the

beverages "consist of 95% water and high fructose corn syrup, topped up with 3% reconstituted carrot juice and 2% *or less* of the juice of all the fruits and berries for which the Products are named." For example, the plaintiff argues, "Berry Blend" contains "less than 1/2 of 1%" of juice from each of the "luscious ripe berries displayed on the label." The plaintiff also alleges that Campbell fails to disclose the presence of artificial flavoring d-l malic acid on the front of the product's bottle in violation of California's health and safety code; in addition, "the labels incorrectly identify the artificial flavoring ingredient only as a general 'malic acid' instead of using the specific, non-generic name of the ingredient, d-l malic acid," which misleads consumers into assuming that the malic acid in the product is the type that can occur naturally in some fruits and vegetables, according to the complaint.

Two consumers allege that Sunny Delight Beverages Co. names its products after fruits that the products do not contain. *Hunt v. Sunny Delight Beverages Co.*, No. 18-0557 (C.D. Cal., filed April 2, 2018). For example, the "'Cherry Limeade' Product contains no cherries or cherry juice," the "'Strawberry Guava' Product contains no strawberries or strawberry juice—or guavas or guava juice, for that matter," and the "'Orange Passionfruit' Product contains neither passionfruit nor passionfruit juice." The complaint asserts that Sunny Delight is required to disclose the presence of artificial flavoring on the front label, and because the products fail to do so, they are allegedly misbranded. As in *Sims*, the plaintiffs also argue that listing "malic acid" on the label violates state and federal law for failing to include the specific substance name.

In both lawsuits, the plaintiffs allege violations of California's consumer-protection statutes and seek damages and attorney's fees as well as injunctions to prohibit the allegedly deceptive practices and to compel corrective advertising.

Court Allows Citrus-Related Claims in Cold-Pressed Juice Suit to Proceed

A New York federal court has dismissed most of the claims in a cold-pressed juice putative class action but will allow to proceed allegations related to heat-processing of citrus juices. *Davis v. Hain Celestial Grp., Inc.,* No. 17-5191 (E.D.N.Y., entered April 3,

2018). The court dismissed the complaint's allegations involving high-pressure processing, finding that "the label taken as a whole makes clear that the juice was subjected to pressure for food safety purposes." Even if consumers "are not generally aware of non-thermal processing methods, the Cold-Pressed Line labels clearly indicate that such methods exist," the court held. "'Cold pressed' does not cease to be a truthful moniker for the juice simply because there were subsequent steps in the juice's production process." The court declined to dismiss the plaintiff's allegations that all citrus juices—including lemon juice, which appears in all of the contested products—must be heat-processed. If true, the court found, the statements on the product labels would be misleading.

Court Denies Summary Judgment in Pizza Puff Trademark Dispute

A federal court in Illinois has denied summary judgment to both parties involved in a trademark dispute over the use of "pizza puffs," finding that a reasonable jury could rule for either on the question of whether the term is generic. *Illinois Tamale Co. v. El-Greg, Inc.*, No. 16-5387 (N.D. Ill., entered March 29, 2018). Illinois Tamale Co. alleges that El-Greg Inc.'s products infringe trademark and trade dress rights held since 1976. The court also refused Illinois Tamale's motion for summary judgment on El-Greg's fair-use defense, finding that a reasonable jury could find in favor of either party on each element of the defense.

Olive Oil Maker Settles Class Action for $7 Million

The maker of Bertolli olive oil has agreed to pay $7 million to settle a class action alleging the company misrepresented the origin and quality of its products. *Koller v. Med Foods, Inc.*, No. 14-2400 (N.D. Cal., motion filed April 3, 2018). Deoleo USA previously removed the contested phrase "Imported from Italy" from the challenged products and has agreed to avoid using similar phrases, including "Made in Italy," unless the oil is made entirely from olives grown and pressed in Italy. In addition to paying the plaintiff class $7 million, the company will bottle its extra virgin olive oil in dark green bottles to prevent light

degradation, shorten the “best by” period and disclose of the date of harvest.