Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Preliminary Commerce Ruling Will Raise Cost of Sugar from Mexico

The Department of Commerce has issued an affirmative preliminary determination in a countervailing duty (CVD) investigation of sugar imports from Mexico, and the United States is preparing to impose import duties as high as 17 percent on Mexican sugar. According to an International Trade Administration **fact sheet**, the CVD investigation was instituted in March 2014 after domestic sugar interests filed a petition seeking relief from "the market distorting effects caused by injurious subsidization of imports into the United States." Beginning the first week of September, Commerce will instruct U.S. Customs and Border Protection to require cash deposits based on the preliminary subsidy rates calculated for different Mexican exporters. A final determination in the matter is scheduled for January 2015.

An American Sugar Alliance spokesperson said that the August 26, 2014, determination "validates our claim that the flood of Mexican sugar, which is harming America's sugar producers and workers, is subsidized by the Mexican government." Meanwhile the president of Mexico's sugar chamber reportedly indicated that the country's sugar industry is ready to agree to a deal that would limit sugar exports to the United States, but the amount exported could not drop below 1 million metric tons per cycle. He believed that an agreement could be reached before Commerce resolves a separate anti-dumping case in October.

While the United States produces about 70 percent of the sugar used in the country, the remainder is, to a large extent, imported from Mexico. Added duties mean that U.S. food makers will have to pay up to 5 cents per pound more for imported Mexican sugar, on the basis of current prices. The Sweetener Users Association said that the ruling should not come as a surprise and claimed that Mexico has "unfairly become the scapegoat" for the purported shortcomings of the U.S. sugar program. "This case has been, and continues to be, a cynical effort to drive up prices for consumers and kill American jobs in the food manufacturing sector," the group said, adding that Mexico is "a critical U.S. ally and trading partner," and its sugar is essential because domestic producers cannot meet U.S. needs.

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U.S. sugar prices started rising in March and are at a nearly two-year high. A glut of Mexican sugar in 2013 caused U.S. prices to plunge and reportedly led to loan defaults by U.S. processors, at a cost to the U.S. government of more than $250 million. Mexico is reportedly expected to export nearly 2 million metric tons of sugar to the United States in the crop year that ends in September. *See Agweek, The Wall Street Journal, BNA International Trade Reporter™*, and *Reuters*, August 26, 2014.

APHIS Seeks Comments on Environmental Assessment of GE Moth

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) **seeks** public comments on its environmental assessment of the proposed field release of a genetically engineered (GE) diamondback moth. A plant pest that feeds on cruciferous crops, such as broccoli, Brussels sprouts, cabbage, Chinese cabbage, cauliflower, collard, kale, kohlrabi, mustard, radish, turnip, and watercress, the diamondback, also known as the cabbage moth, is said to be highly fecund, capable of migrating long distances when carried by the wind and short lived. Some researchers attribute the increasing significance of the moth as a plant pest to insecticide resistance.

The GE variety has been developed for "repressible female lethality and to express red fluorescence as a marker." According to APHIS, "The purpose of the field release is to assess the feasibility and efficacy of these moths in reducing populations of non-genetically engineered diamondback moths."

Cornell University requested the permitted field release of three strains of the GE diamondback moth in Geneva, New York, during a trial that would not exceed three years and would be limited to six sites not exceeding 10 acres per site, "surrounded by other agricultural fields" within an 870-acre tract. The release would involve 20,000 GE moths per release per site, with up to five releases per week per site, and monitoring with traps would occur for two weeks after each release concludes. Comments on the environmental assessment are requested by September 29, 2014. *See Federal Register*, August 28, 2014.

WTO Reportedly Decides Against U.S. in COOL Dispute

According to the *Wall Street Journal*, the World Trade Organization (WTO) has decided for Canada and Mexico and against the United States in a battle over country-of-origin labeling (COOL) of meat products. The decision has reportedly been disclosed to the three governments and is expected to be made public in late September or early October, after which the United States has 60 days to appeal. Canada and Mexico argued that the COOL rules harmed them by restricting their competitiveness. In recent months, members of the food industry and of Congress have argued against the COOL requirements. Additional information appears in Issues **529** and **533** of this *Update*.

SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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Mechanically Tenderized Beef Labeling Takes Effect in Canada

Health Canada has **announced** the implementation of new rules requiring mechanically tenderized beef (MTB) products to be labeled as such. Effective August 21, 2014, the mandatory labeling requirements—which previously applied only to federally registered producers of MTB cuts—now cover "all industry sectors selling uncooked MTB to other industry members or consumers," including retailers, butcher shops, meat processors, and importers. Under the new rules, the labels must also include instructions for safe cooking that "emphasize the importance of cooking MTB to a minimum internal temperature of 63°C (145°F) and turning over mechanically tenderized steaks at least twice during cooking to kill harmful bacteria."

"Without clear labels, it is difficult for consumers to know which beef products have been mechanically tenderized," said Minister of Health Rona Ambrose in an August 21, 2014, press release. "Today's announcement, along with new industry labelling guidelines we have released, will help Canadians know when they are buying these products and how to cook them. This regulatory change is another step in our government's commitment to make certain that consumers have the food safety information they need."

New York City Bill Seeks to Restrict Incentives in Kids' Meals

New York City Council Member Benjamin Kallos (D-Upper East Side) has introduced legislation (**442-2014**) that would allow toy giveaways, digital rewards and other incentives only in children's meals that meet strict nutritional requirements. If adopted, the Healthy Happy Meals Act would define "incentive item" as (i) "any toy, game, trading card, admission ticket or other consumer product, whether physical or digital, with particular appeal to children, which is provided directly by the restaurant," or (ii) "any coupon, voucher, ticket, token, code or password which is provided directly by the restaurant and is redeemable for or grants digital or other access to any toy, game, trading card, admission ticket, or other consumer product with particular appeal to children."

The proposed rules would require children's meals that offer such items to contain one serving of fruit, vegetable or whole grains and less than 500 calories and 600 milligrams of sodium. In addition, these meals must also derive less than 35 percent of their calories from fat, 10 percent of their calories from saturated fats and 10 percent of their calories from added sugars.

"An estimated one-fourth of a child's meals come from restaurants or fast food places. These could be healthy calories," Kallos told reporters. "It is difficult enough for parents to give their children healthy food without the fast food industry spending hundreds of million [sic] dollars per year advertising." Additional details about a similar measure appear in Issue **455** of this *Update*. *See CBS New York*, August 21, 2014.

LITIGATION

Seventh Circuit Vacates Judgment, Allows Grove Square Coffee Pods Putative Class Action to Continue

A district court erred in denying class certification and granting summary judgment to Sturm Foods and its parent company Treehouse Foods in a putative class action accusing the coffee manufacturer of misleading consumers to believe its Keurig-compatible coffee pods contained high-quality coffee rather than low-quality instant coffee, the Seventh Circuit Court of Appeals has decided. ***Suchanek v. Sturm Foods, Inc.*, No. 13-3843 (7th Cir., order entered August 22, 2014)**. The court found that the district court's reasoning for denying class certification would make consumer class actions nearly impossible.

Combined from four separate consumer protection lawsuits, the case centers on Sturm's Grove Square Coffee (GSC) pods. The Keurig K-Cup typically contains ground coffee beans and a filter system, but the filter technology was protected by a patent until 2012. In 2010, Sturm began manufacturing pods that could be used in Keurig brewers, but to avoid infringing the patent, the company apparently used a mixture of about 95 percent instant coffee and a small amount of microground coffee. The GSC label showed fresh roasted coffee beans and touted that the product contained "naturally roasted soluble and microground Arabica coffee," with no clarification that "soluble" meant "instant." After consumers purchased the GSC product, they filed lawsuits against Sturm alleging that the packaging misrepresented what the pods contained as being high-quality ground beans like those in other K-Cups sold at the time.

The district court denied class certification, and the Seventh Circuit identified two errors in its analysis: it failed to recognize that the question of whether the GSC packaging was likely to mislead consumers was common to all claims, and it "applied too strict a test when it considered whether common questions predominate over individual questions." The district court pointed to a change in GSC packaging that identified the product as instant coffee to find that the plaintiffs had not been subject to the same allegedly injurious conduct, but the Seventh Circuit noted that the in-store distribution of the adjusted packaging was apparently minimal and that all members of the class were alleging an injury from the marketing and packaging of GSC. In addition, the district court had erred by focusing its discussion on whether each member of the potential class could prove an injury. "If the court thought

that no class can be certified until proof exists that every member has been harmed, it was wrong," the Seventh Circuit said. In addition, the circuit court found an error in the district court's assessment of the packaging. "[T]he district court had almost nothing to say. This is it: 'The Court has seen the packaging at issue—Plaintiffs bring it to each hearing—and finds that it is not designed to mislead consumers. It is what it says it is.' That is a conclusion, not a reason." The circuit court noted that a package does not have to contain literal falsehoods to be misleading under the law. "Moreover—ironically—it appears the district court itself was confused about the product: the court's analysis reveals that it failed to understand that 'soluble' coffee and 'micro-ground' coffee are not the same thing."

Review of Class Certification Denied, Ascertainability Split Remains

The Ninth Circuit Court of Appeals has denied a request for interlocutory review of a class certification ruling in an action alleging that Blue Diamond Growers' almond milk is mislabeled as "All Natural" and the company hides its added sugar content by listing "evaporated cane juice" (ECJ) on its label instead. *Blue Diamond Growers v. Werdebaugh*, No. 14-80084 (9th Cir., order entered August 22, 2014). Additional details about the suit appear in Issue 525 of this *Update*.

Blue Diamond challenged the district court's ruling that the class was ascertainable, arguing that the decision "exacerbates a split of authority amongst district courts in this Circuit over the threshold showing that putative class representatives must make to demonstrate an ascertainable class in food mislabeling cases. The Third Circuit Court of Appeals—the only circuit to squarely resolve the issue—holds that sales records or other reliable evidence of product purchases must be available for a class to be found ascertainable, and several district-court decisions in this Circuit have applied that rule. Others, like Judge Koh here, have rejected the Third Circuit's approach and found that a plaintiff can demonstrate an ascertainable consumer class based only on the expectation that class members will identify themselves with affidavits describing their product purchases." The company also argued that the ascertainability standard "is critical for wholesaler class-action defendants, like Blue Diamond, who do not sell their products directly to consumers and have no independent, reliable means of identifying class members or their purchases."

Blue Diamond further claimed district court error in finding that common questions predominate and argued that the ruling "created a split of decision when it found that [the plaintiff] met his burden to propose a workable model to calculate damages." Specifically, the company challenged the plaintiff-

expert's regression damages model, noting that class counsel have about 50 currently pending food-labeling class actions in the circuit and "all appear poised to rely on [this expert's] damages modeling to justify class certification." Its brief concluded by contending that without interlocutory review, the issues would remain unsettled, "because, as a practical matter, these cases settle in the face of prolonged litigation."

Battle for Stoli Trademark Can Continue

A New York federal court has allowed Lanham Act claims for the Stolichnaya trademark to proceed in a long-running case between a Russian state-chartered company and several international beverage companies. *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, No. 14-712 (U.S. Dist. Ct., S.D.N.Y., order entered August 25, 2014). Federal Treasury Enterprise Sojuzplodoimport (FTE), owned by the Russian Federation, alleges that it owns the Stolichnaya trademarks, but SPI Spirits purports to be the private successor to the state-owned company that owned the trademarks before the Soviet Union dissolved and several public entities became private companies. The Second Circuit previously held that FTE lacked standing because it was neither an assign nor legal representative under the Lanham Act. Since that ruling, the Russian Federation assigned its rights to the Stolichnaya trademark to FTE, and the New York federal court has found that the assignment cures FTE's previous lack of standing issue. The court found that several of FTE's claims are barred by res judicata—including its unfair competition claims and state trademark claims, which could have been brought earlier but were only just introduced—but because FTE alleged new facts with its new assignment, the Lanham Act claims can proceed. Additional information on the Second Circuit ruling appears in Issue 494 of this *Update*.

Hershey Accuses Importer of Infringing Reese's, Cadbury Trade Dress

Hershey Co. has filed a complaint in Pennsylvania federal court alleging that LLB Imports infringes its trademarks and trade dress for several of its products, including Reese's, York, Cadbury, Malteser, Kit Kat, and Rolo. *Hershey Co. v. LLB Imports LLC*, No. 14-1655 (U.S. Dist. Ct., M.D. Penn., filed August 25, 2014). According to the complaint, LLB Imports has been selling Toffee Crisp, Yorkie, Maltesers, Cadbury, Kit Kat, and Rolo products manufactured outside of the United States bearing nutritional information panels required by other countries, and the sale of the products allegedly infringes trademarks and trade dress owned by or exclusively licensed to Hershey. In addition to several trademark infringement claims, the candy company alleges that Toffee Crisp

infringes the trade dress for Reese's, citing its shade of orange and outlined yellow script, as well as the trade dress of Cadbury, Kit Kat and Rolo. Hershey asks for an injunction, a declaration that LLB violated the Lanham Act as well as Pennsylvania trademark dilution and business injury laws, an order directing LLB to begin a corrective advertising campaign, the recall and destruction of any infringing materials, damages, and attorney's fees.

Fast-Food Worker Alleges Pregnancy-Related Discrimination

A fast-food worker in Oregon has reportedly sued her former employer, seeking $242,000 in damages on the ground that she was discharged because she became pregnant, after being told by general managers during a staff meeting that workers such as the plaintiff were not allowed to become pregnant because "they needed to be present and available at any time in order to perform their duties." *Melesio-Rojas v. Si-Pac Foods d/b/a Del Taco Gresham*, No. n/a (Multnomah Cnty. Cir. Ct., unknown filing date). According to a news source, the plaintiff claims that she was fired when she became noticeably pregnant after a customer complained that he did not receive all of his food, a reason she claims was "an excuse to terminate her because of her pregnancy." The restaurant's attorney has apparently indicated that the worker's pregnancy-discrimination complaint with the Oregon Bureau of Labor and Industries lacked sufficient evidence to support her allegations. *See Oregon Live*, August 20, 2014.

Restaurant Manager Alleges Obesity Discrimination

According to a news source, a 600-pound man, who worked as a Hometown Buffet restaurant manager, has filed a lawsuit under the Americans with Disabilities Act against OCB Restaurant Co. in a Connecticut federal court, alleging that he was fired and replaced with a worker who "is not morbidly obese and does not suffer from chronic knee pain." *Flanders v. OCB Restaurant Co., LLC*, No. 14-1239 (U.S. Dist. Ct., D. Conn., filed August 27, 2014). *See Courthouse News Service*, August 28, 2014.

Slaughterhouse Co-Owner Pleads Guilty

Former Rancho Feeding Operations co-owner Robert Singleton has agreed to plead guilty to one count of aiding and abetting the distribution of condemned and diseased cattle in violation of the Federal Meat Inspection Act and will testify against the other owner of the now-defunct slaughterhouse operation and its employees. *United States v. Singleton*, No. 14-cr-441 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., entered August 22, 2014). Additional details about the criminal allegations appear in Issue **535** of this *Update*.

As part of the agreement, Singleton, who is 77, will cooperate with the U.S. attorney's office, surrender any assets acquired as a result of the alleged illegal conduct, and permanently cease and desist from owning, operating or managing a meat-processing facility or slaughterhouse. The agreement contains admissions as to all of the conduct alleged in the information filed against Singleton, including instructing employees to swap the heads of healthy cattle for those of diseased cattle before inspection and removing "USDA Condemned" stamps from cattle carcasses that were processed for transport and distribution. *See Law360*, August 25, 2014.

OTHER DEVELOPMENTS

Ad Watchdog Calls on Chobani to Discontinue "Farmland" Commercials

The National Advertising Division (NAD) of the Council of Better Business Bureaus' Advertising Self-Regulatory Council (ASRC) has recommended that Chobani, Inc. cease airing what it called "Farmland" commercials, "the centerpiece of the company's campaign to promote its 'Simply 100' Greek yogurt." A rival yogurt company challenged a number of Chobani TV ads that "featured two 'farm' settings—a synthetic farm where 'other 100-calorie yogurts' were made from the contents of test tubes and plastic cows were filled with powdered chemicals and a real farm with boxes of fresh fruit and live cows."

While the ads did not name other yogurt makers or products, the challenger contended that the message conveyed was that its products do not contain real fruit; they are made with fake milk or milk with chemical additives; its Greek yogurt is "entirely artificial, and unwholesome, unhealthful, and/or harmful to consumers"; and Chobani's product is the best-tasting 100-calorie Greek yogurt. NAD determined that the commercial conveyed a broad, comparative message that competitor products are made with artificial coloring, fruit flavoring and milk, which, as to the challenger's products is not true, and thus violated NAD standards. NAD also recommended that Chobani revise its Facebook advertising "so that it no longer suggests that most competing 100-calorie products use aspartame." The company can, however, continue to promote its use of natural sweeteners when compared to the artificial sweeteners in other brands.

While Chobani was disappointed in NAD's ruling, it reportedly indicated that the "ad has run its scheduled course" and that the company "respects the decisions of the NAD and will consider their recommendation in future campaigns." *See ASRC Press Release*, August 21, 2014.

NARB Recommends Advertising Changes to Blue Buffalo

In an appeal from a National Advertising Division investigation initiated by Hill's Pet Nutrition, a National Advertising Review Board (NARB) panel has recommended that Blue Buffalo Co. cease implying that other pet food manufacturers are "fooling" their customers on pet food nutrition. They found that the message of "fooling" was expressly or impliedly in several of Blue Buffalo's advertisements without support. In addition, the NARB panel recommended that Blue Buffalo change its "True BLUE Test" chart on its Website because it "reasonably conveyed the inaccurate message that the absence of checkmarks for a manufacturer meant that all of that manufacturer's pet food products had specified 'undesirable' ingredients and none of that manufacturer's pet food products has specified 'desirable' products." The chart includes lines indicating that a brand's products either always or never contain particular ingredients, and NARB found that the phrasing, though accurate, could imply inaccurate information to consumers. For example, a checkmark under "ALWAYS has real meat as the First Ingredient" accurately showed that every product in that brand's line satisfied that condition, but the chart also implied to consumers that if a brand did not receive a checkmark in that category, none of that brand's products satisfied that condition—an inaccurate implication. The panel also recommended that any advertising referencing the chart also make clear that the chart compares brands and not specific food products. Blue Buffalo disagreed with NARB's conclusions, but said that it would "strive to abide by this NARB decision" in future advertisements. *See ASRC Press Release*, August 21, 2014.

MEDIA COVERAGE

Wired Reviews Obesity Research Initiatives Focused on Sugar

Examining the evolution of the Nutrition Science Initiative (NuSI), a recent *Wired* magazine article by Sam Apple explores how NuSI's latest research efforts seek to test long-standing assumptions about the health effects of sugar and fat. Titled "Why Are We So Fat? The Multimillion-Dollar Scientific Quest to Find Out," the article highlights the work of NuSI founders Peter Attia, a medical researcher, and Gary Taubes, a science journalist who has made a career out of exposing the allegedly tenuous evidence linking dietary nutrients to specific disease outcomes.

"Taubes and Attia are firmly in the sugar-bad, saturated-fat-good camp," reports Apple, pointing to an alternative hypothesis now popular in some scientific circles that blames table sugar and refined carbohydrates—as opposed to fats—for rising obesity rates. "But even they acknowledge they

can't be certain. That's because, as Taubes eloquently argues, most of the existing knowledge gathered in the past five decades of research comes from studies marred by inadequate controls, faulty cause-and-effect reasoning, and animal studies that are not applicable to humans."

To overcome these limitations, NuSI has used more than $40 million granted by the Laura and John Arnold Foundation to support major research initiatives "designed to answer a question you'd think we'd have answered long ago: Do we get fat because we overeat or because of the *types* of food we eat?" In particular, the studies funded by NuSI use human subjects in carefully controlled environments to assess how the body actually metabolizes carbohydrates, fats and proteins and measure the impact of dietary changes on overall health and weight loss. "The NIH [National Institutes of Health] has a very limited amount of money at a time when science requires increasingly expensive research to answer much more sophisticated questions," said New Balance Foundation Obesity Prevention Center Director David Ludwig, who is co-principal investigator for one study taking place at Boston's Children's Hospital. "One key study could be the hammer that dislodges the loose brick in the prevailing paradigm." Additional details about NuSI appear in Issue 465 of this *Update*.

SCIENTIFIC/TECHNICAL ITEMS

Study Examines Effect of Early Microbiota Disruption on Obesity

A recent study examining early microbiota disruption has purportedly suggested "that antibiotic exposure during a critical window of early development disrupts the bacterial landscape of the gut, home to trillions of diverse microbes, and permanently reprograms the body's metabolism, setting up a predisposition to obesity." Laura Cox, et al., "Altering the Intestinal Microbiota during a Critical Developmental Window Has Lasting Metabolic Consequences," *Cell*, August 2014. Researchers with New York University's (NYU's) Langone Medical Center apparently used low-dose penicillin (LDP) to disrupt the gut microbiota of mice in the week before birth or immediately after weaning to measure the life-long metabolic effects.

The results evidently showed that mice receiving LDP in the womb and early in life had increased fat mass compared with mice that received no antibiotics at all. "When we put mice on a high-calorie diet, they got fat. When we put mice on antibiotics, they got fat," reported lead author Martin Blazer, director of NYU's Human Microbiome Program. "But when we put them on both antibiotics and a high-fat diet, they got very, very fat."

To determine whether these metabolic changes were attributable to the antibiotics themselves or the altered microbiota, the study's authors then transferred bacterial populations from LDP-exposed mice to germ-free mice, discovering "that mice inoculated with bacteria from the antibiotic-treated donors were indeed fatter than the germ-free mice inoculated with bacteria from untreated donors." The researchers also noted that, contrary to expectations, the penicillin did not reduce "total microbial numbers in the gut" but only temporarily suppressed *Lactobacillus*, *Allobaculum*, *Candidatus Arthromitus*, and an unnamed member of the *Rikenellaceae* family. "We're excited about this because not only do we want to understand why obesity is occurring, but we also want to develop solutions," said co-author Laura Cox. "This gives us four potential new candidates that might be promising probiotic organisms. We might be able to give back these organisms after antibiotic treatments." *See NYU Press Release*, August 14, 2014.

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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.