Shook, Hardy & Bacon L.L.P.

ISSUE 539 | OCTOBER 3, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Citizen Petition Calls on USDA to Declare *Salmonella* Strains Adulterants

The Center for Science in the Public Interest (CSPI) has **filed** a citizen petition with the U.S. Department of Agriculture (USDA) seeking a declaration that four antibiotic-resistant (ABR) strains of *Salmonella* are adulterants under federal law. This is CSPI's second petition on the matter and attempts to respond to data gaps identified by USDA's Food Safety and Inspection Service (FSIS) when it denied the consumer advocacy organization's 2011 petition in July 2014. Details about the denial appear in Issue **532** of this *Update*. CSPI bolsters the first petition with additional information on ABR *Salmonella* outbreaks, including numbers of individuals sickened and types of antibiotics to which the infections were resistant.

CSPI also emphasizes that FSIS has already been declaring these pathogens adulterants on a case-by-case basis in issuing certain recalls, but its inconsistency in this regard, in CPSI's view, is "putting consumers at risk."

While CSPI argues that its first petition was sufficient under the law to support the requested relief, it includes in its appendix references to studies that show consumer meat-handling, preparation and cooking practices do not adequately control for bacteria or pathogens present on or in the meat, because many are misinformed about proper practices or simply do not apply them. CSPI contends that FSIS's request for studies on the heat resistance of ABR *Salmonella* are not relevant based on research showing that nearly half of "finished" chicken "did not achieve the temperature necessary to deactivate *Salmonella*. Such a finding means that *Salmonella* may well survive 'ordinary' cooking practices."

CSPI details the serious illness conditions that can be caused by *Salmonella* infections to demonstrate that they merit the same consideration as the conditions that led FSIS to declare that seven serotypes of *E. coli* adulterants in raw, non-intact beef products were adulterants. The organization also estimates that *Salmonella* kills 378 people annually, while *E. coli* causes just 20 deaths each year; it calculates the economic costs of *Salmonella* in meat and poultry in excess of $1.4 billion in medical expenses and lost productivity. *See CSPI News Release*, October 1, 2014.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 539 | OCTOBER 3, 2014

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.

For additional information on SHB's Agribusiness & Food Safety capabilities, please contact

Mark Anstoetter
816-474-6550
manstoetter@shb.com

or

Madeleine McDonough
816-474-6550
202-783-8400
mmcdonough@shb.com

If you have questions about this issue of the Update, or would like to receive supporting documentation, please contact Mary Boyd (mboyd@shb.com) or Dale Walker (dwalker@shb.com); 816-474-6550.

NOP Adds Biodegradable Biobased Mulch Film to National List

The U.S. Department of Agriculture's National Organic Program (NOP) has **issued** a final rule amending the National List of Allowed and Prohibited Substances (National List), which governs the use of synthetic and non-synthetic substances in organic crop production and processing. Effective October 30, 2014, the final rule adds biodegradable biobased mulch film to the National List and defines third-party standards for compostability, biodegradability and biobased content. The agency also removed nonorganic hops (*Humulus lupulus*) and unmodified rich starch from the National List, as their use exemptions have expired, and rejected recommendations to include *Citrus hystrix* and curry leaves on the National List. *See Federal Register*, September 30, 2014.

FDA Looks to Ease FSMA Burdens

To ease producer burdens under the Food Safety Modernization Act (FSMA), the U.S. Food and Drug Administration (FDA) has revised four proposed rules related to **produce safety**; preventive controls for **human food** and **animal food**; and the **foreign supplier verification program**. After receiving feedback from consumers and industry stakeholders, the agency has (i) updated water quality testing provisions; (ii) exempted farms with less than $25,000 in sales from produce-safety rules; (iii) addressed the use of spent grains in animal food by clarifying that brewers and distillers subject to the human-food rules do not need to comply with all animal-food rules; and (iv) granted importers more flexibility under the proposed foreign-supplier verification program "to determine appropriate supplier verification measures based on risk and previous experience with their suppliers." FDA has requested comments on the proposed changes by December 15, 2014.

"Ensuring a safe and high-quality food supply is one of the FDA's highest priorities, and we have worked very hard to gather and respond to comments from farmers and other stakeholders regarding the major proposed FSMA regulations," said FDA Commissioner Margaret Hamburg in a September 19, 2014, press release. "The FDA believes these updated proposed rules will lead to a modern, science-based food safety system that will better protect American consumers from potentially hazardous food. We look forward to public comment on these proposals." *See Federal Register*, September 29, 2014.

NAD Refers Talking Rain to FTC After Insufficient Advertising Changes

The National Advertising Division (NAD) has referred Talking Rain Beverage Co. to the Federal Trade Commission (FTC) after the company failed to comply with a previous NAD determination finding that certain aspects of its advertising could be misleading. After a July 2014 NAD investigation, Talking Rain's advertising for Sparkling ICE—which it presents as "the adventurous side of water," "the vibrant side of water" and "the bold side of water"—was found to be misleading if the product was not shown because consumers may believe that the product is water without additional flavoring. NAD found that Talking Rain's claim "Naturally flavored sparkling mountain spring water" was not misleading when displayed with the product, which is brightly colored and bears a list of ingredients indicating the inclusion of flavoring agents. In July, Talking Rain said it disagreed with the conclusion but would take NAD's recommendation into consideration, but following several months of inaction and a refusal to participate in a compliance hearing by Talking Rain, NAD has now referred the matter to FTC for review. *See NAD Press Releases*, July 17 and September 24, 2014.

EU Seeks Comments on Endocrine Disruptors, GM Plant Guidance

The European Commission (EC) and European Food Safety Authority (EFSA) have launched public consultations seeking comments on **endocrine active substances** and draft **genetically modified (GM) plant guidance**. In accordance with regulations governing biocides and plant protection products, the commission has asked the public "to help define criteria for endocrine disruptors" as part of its effort to identify and regulate substances that interact with human and animal hormone systems.

"Endocrine disrupting chemicals have triggered a substantial debate: there are strong signals from science, there is increasing public and political concern and awareness, while some stakeholders still have doubts," said European Commissioner for the Environment Janez Potočnik. "Europe is watching—we need these criteria to improve protection and give industry the certainty it requires. Citizens and stakeholders can help us make an informed decision." *See EC Press Release*, September 29, 2014.

In addition, EFSA's Panel on Genetically Modified Organisms has requested views on draft guidance intended to present "a more comprehensive and harmonized approach to the agronomic and phenotypic characterization of GM plants using data collected from field trials and under controlled circumstances." The guidance would make recommendations related to field trial sites and design; the quality of test materials; the selection of ecologically relevant endpoints; data analysis; and environmental risk assessments. *See EFSA News Release*, September 25, 2014.

ASA Nixes "Snake Venom" Beer Claims

The U.K. Advertising Standards Authority (ASA) has **upheld** two complaints against a website advertising Brewmeister Ltd.'s "Snake Venom" beer as "THE WORLD'S STRONGEST BEER." In response to the first complaint, which disputed the beer's stated alcohol by volume (ABV), the agency questioned whether the independent analysis that determined Snake Venom's ABV differed from the process used for standard beer. Noting that the beer's fermented alcohol content was concentrated via freeze distillation and possibly augmented with ethyl alcohol, ASA found the advertisement misleading because "consumers would interpret the claim 'Snake venom 67.5%' to mean the product had an alcohol volume of 67.5%, as per the standard ABV measure, without having been through any other additional processes to standard beer."

ASA also upheld its own complaint challenging "whether the ad implied the drink may be preferred because of its alcohol or intoxicating effect, and whether the factual information about the strength of the drink had been given undue emphasis." Despite a warning label affixed to the neck of the bottle, ASA ruled that statements such as "THE WORLD'S STRONGEST BEER" and "SAY GOODBYE TO BORING BEER!" "contributed to the overall impression that the product might be preferred because of its claimed alcohol content or intoxicating effect." Directing Brewmeister to remove the claims from its website, the agency asked the company to ensure that "future marketing communications did not place undue emphasis on the alcoholic strength of a product or imply that a drink may be preferred because of its alcohol content or intoxicating effect."

LITIGATION

Federal Court Allows Suit Against Cantaloupe Farm Auditing Firm

A federal court in Maryland has allowed the personal representative of the estate of a man who died in 2011 during a nationwide *Listeria* outbreak linked to a Colorado cantaloupe farm to sue the company responsible for auditing the cantaloupe producer's processing facilities, finding that it owed him a duty of care. *Wells Lloyd v. Frontera Produce, Ltd.*, No. 13-2232 (U.S. Dist. Ct., D. Md., order entered September 24, 2014). An Oklahoma court refused to allow claims against the auditor in December 2013, finding that the plaintiff, who was sickened during the *Listeria* outbreak, could not show that the auditor owed him a duty under Oklahoma law. Details about that ruling appear in Issue **509** of this *Update*.

In contrast, the Maryland court found that the food safety auditor owed a duty to the decedent, because its allegedly negligent audit of the facility—finding that it complied with applicable standards of care for food processing—met the elements for liability under Maryland state law. According to the court, the audit was conducted "to ensure that Jensen Farms' cantaloupe was safe for human consumption and free of dangerous contaminants, and that Jensen Farms's [sic] facilities and procedures met applicable standards of care. It follows that a poorly conducted audit could foreseeably produce the opposite result: unsafe and contaminated cantaloupe being made available to consumers. This is what [the plaintiff] alleges." The court further found potential liability under the *Restatement (Second) of Torts*' "Good Samaritan" doctrine.

The court rejected claims that the decedent was a third-party beneficiary under the 2011 auditing contract and that the auditor negligently hired and supervised those who actually conducted the audit. As to the latter, the court found the claim insufficiently alleged.

The court dismissed claims against the company that made and sold the equipment that Jensen Farms used to process cantaloupe, finding its contacts with the state insufficient for the court to exercise personal jurisdiction over it. Among other matters, the court ruled that the company's website did not change this outcome, stating, "That Pepper Equipment 'place[d] information on the Internet' without 'direct[ing] electronic activity into [Maryland], . . . with the manifested intent of engaging in business' in Maryland, does not establish personal jurisdiction over Pepper Equipment." The court further denied a request for jurisdictional discovery into the equipment company's relationship to Maryland.

FDA Warnings on *Salmonella* in Tomatoes Not a Taking, Court Says

The U.S. Court of Federal Claims has ruled that the U.S. Food and Drug Administration (FDA) is not required to compensate tomato growers for a regulatory taking after incorrectly warning the public in 2008 that a *Salmonella* outbreak was linked to tomatoes. *Dimare Fresh Inc. v. U.S.*, No. 13-519 (Fed. Cl., order entered September 18, 2014). The growers argued that FDA had "appropriated a benefit" through the seizure of tomatoes, but "[a] regulatory takings claim is not plausible and cannot proceed when the government action at issue has no legal effect on the plaintiff's property interest," the court said. "Advisory pronouncements, even those with significant financial impact on the marketplace, are not enough to effect a taking of property under the Fifth Amendment." The growers were attributing independent consumer behavior to FDA, the court found, and the argument that consumer advisories alone constituted takings had no support in caselaw.

Class Certified in Olive Oil Misbranding Litigation

A New York bankruptcy court and federal court have issued orders certifying classes in litigation against Kangadis Food, Inc. d/b/a The Gourmet Factory and related entities, alleging that the company falsely labeled its products as "100% Pure Olive Oil" when they actually contain the industrially processed substance "olive-pomace oil," "olive-residue oil" or "Pomace." *In re Kangadis Food Inc.*, No. 14-72649 (U.S. Bankr. Ct., E.D.N.Y., order entered September 19, 2014); *Ebin v. Kangadis Family Mgmt. LLC,* No. 14-1324 (U.S. Dist. Ct., S.D.N.Y., order entered September 18, 2014). Additional information about the federal court proceeding appears in Issue **507** of this *Update*.

While the federal court dismissed the direct claims against the company's owners, it found that the claims could proceed against them "under the veil piercing and alter ego theories." The court further rejected the defendants' "ascertainability" challenge to class certification, noting that "whether or not an individual purchased during the class period a tin of Capatriti in the United States labeled '100% Pure Olive Oil' that actually contained Pomace is about as objectively determinable a question as one can ask. . . . Although the limitations of both [the defendant's] records and the retailers' records may make it somewhat challenging to identify every single class member, there is no requirement that all class members be identified; what is required is merely individual notice to those class members 'who can be identified through reasonable effort.' Finally, concerns that fraudulent claims would dilute recovery are misplaced and should not preclude class certification."

Jamba Juice Class Certified for Liability

A California federal court has certified a statewide liability class in a lawsuit accusing Jamba Juice of labeling its home smoothie kits as "all natural" despite containing five synthetic ingredients—ascorbic acid, xanthan gum, steviol glycosides, modified corn starch, and gelatin—but it refused to certify the class for damages. *Lilly v. Jamba Juice Co.*, No. 13-2998 (U.S. Dist. Ct., N.D. Cal., order entered September 18, 2014). The court dismissed Jamba Juice's argument that the class was unascertainable because no purchase records existed for the kits, finding that such an approach would "have significant negative ramifications for the ability to obtain redress for consumer injuries." The court agreed, however, with Jamba Juice's proposition that the plaintiffs could not provide a plausible class-wide damages model, because they did not show "any evidence, expert reports, or even detailed explanation about how those damages models can be fairly determined or at least estimated." *See Bloomberg BNA*, September 19, 2014.

Waiter Claims Upscale Eatery Forced Tip Sharing

According to a news source, a Smith & Wollensky waiter has filed a putative class-action lawsuit in a Nevada state court alleging that he was forced to share tips with assistant and general managers and even had to pay them hundreds of dollars for preferential customers, tables, shifts, or time off. Waiter Mario Viggiani has reportedly estimated that on an average night, he paid managers $65, but on busy nights he paid them "upwards of $200." The complaint cites a Nevada law that makes it unlawful for employers "to require an employee to rebate, refund or return any part of the wage, salary or compensation earned and paid," as well as a law making it unlawful "for any person to take all or part of any tips or gratuities bestowed upon the employees of that person." The upscale steakhouse chain apparently has eight other facilities in the United States, and Viggiani alleges that he knows of similar requirements imposed on waiters in the eatery's Miami location. *See Las Vegas Review-Journal*, September 25, 2014.

Third Circuit Upholds Nutella False Advertising Settlement

The Third Circuit Court of Appeals has found that a lower court did not abuse its discretion in approving a $3-million settlement offer in a nationwide class action alleging that Ferrero USA falsely advertised Nutella hazelnut spread as nutritious for children. *In re Nutella Mktg. & Sales Practices Litig.*, No. 12-3456 (3rd Cir., order entered September 29, 2014). Several class members had objected to the size of the attorney's fees award and the deduction of the award from the settlement fund. More details about the settlement appear in Issue **444** and Issue **530** of this *Update*.

Settlement Approved in Pret A Manger Don-Doff Class Action

A New York federal court has approved a $910,000 settlement in a class action contending that Pret A Manger failed to pay employees for the time it took them to put on uniforms or time spent waiting for the changing room. *Trinidad v. Pret A Manger (USA) Ltd.*, No. 12-6094 (U.S. Dist. Ct., S.D.N.Y., order entered September 19, 2014). Under the settlement agreement, Pret will pay $910,000 to the class to be distributed on a sliding scale, with $5 to class members employed for less than a week, and about $4.50 per week to class members who worked there longer.

Class counsel sought 33 percent of the settlement fund for attorney's fees, but the court found fault with some of counsel's billing practices. It noted that approximately 70 percent of the billed hours were worked by a partner at the rate of $550 per hour, but "a close review of the tasks that [the attorney] performed reveals that much and perhaps most of this work could have been performed by junior associates who, in his firm, bill at $175 per hour," including "drafting routine affidavits, preparing letters to the Court, performing administrative tasks such as scheduling, and writing non-substantive correspondence." The court also noted that the $550 billing rate "is higher than the norm, which, for wage-and-hour cases in this District, appears to be between $300 and $400 per hour," so it calculated the billing rate at $400 instead. In addition, "many of [the attorney's] time entries are thinly worded and non-specific," the court found. To account for these deficiencies, the court discounted the total amount of hours worked by that attorney by 25 percent. After these deductions, the total the court identified as fairer neared about 13 percent of the total settlement fund, but after considering case magnitude and complexity, requested fee and public policy implications, the court awarded class counsel 25 percent of the fund.

Court Rejects Wax Maker's Bid to Leave Kellogg's Cereal Bag Recall Suit

A Michigan federal court has denied The International Group Inc.'s (IGI's) motion for summary judgment in a case alleging that the wax maker and FPC Flexible Packaging Corp. provided Kellogg with non-merchantable cereal bags. Kellogg Co. v. FPC Flexible Packaging Corp., No. 11-272 (U.S. Dist. Ct., W.D. Mich., order entered September 30, 2014). IGI supplied wax to FPC, which used it to construct cereal bags sold to Kellogg. The bags were then used as liners in boxes of Corn Pops, Froot Loops, Apple Jacks, and Honey Smacks, and after consumers complained of nausea and diarrhea, Kellogg destroyed its inventory of the cereals and issued vouchers to consumers who had already purchased boxes.

After ruling that Canadian law applied, the court assessed the contract between FPC and IGI, determining when it began, what terms were implicit and what warranties existed as a result. "Questions of fact exist as to whether the wax was merchantable," the court found, and thus held that summary judgment was inappropriate. Details about a rejected spoliation motion in the case appear in Issue **534** of this *Update*.

Court Dismisses John Wayne Estate's Suit Against Duke University

A California federal court has granted Duke University's motion to dismiss in a lawsuit filed by John Wayne Enterprises seeking a declaratory judgment that its registration and use of Duke trademarks are not likely to cause consumer confusion and do not violate or dilute the school's trademarks. *John Wayne*

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 539 | OCTOBER 3, 2014

Enterprises, LLC v. Duke Univ., No. 14-1020 (U.S. Dist. Ct., C.D. Cal., order entered September 30, 2014). The case was dismissed on procedural grounds after the court found that it did not have jurisdiction over the North Carolina-based university. Additional information about the lawsuit appears in Issue 530 of this *Update*.

German Appeals Court Dismisses Challenge to Ritter Sport's "Natural" Vanilla Flavor

A German appeals court has dismissed a lawsuit brought by consumer group Stiftung Warentest accusing candy-manufacturer Ritter Sport of labeling its Whole Hazelnut bar as natural despite containing piperonal, which the group contends can only be obtained using unnatural chemicals. The ruling prevents Stiftung Warentest from claiming Ritter is misleading customers but does not yet allow claims for damages. A representative of Stiftung Warentest expressed disappointment with the decision, saying that they still did not know how Ritter produced the piperonal, but a Ritter representative said that the company, along with its piperonal supplier Symrise, had filed patents on how the substance could be obtained naturally. *See Confectionary News*, September 15, 2014.

OFFICE LOCATIONS
Denver, Colorado
+1-303-285-5300
Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
Philadelphia, Pennsylvania
+1-215-278-2555
San Francisco, California
+1-415-544-1900
Seattle, Washington
+1-206-344-7600
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400