FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

CONTENTS

FIRM NEWS

Muehlberger and Lingwall Highlight the Role of Refunds in Avoiding Class Actions

Shook, Hardy & Bacon Partner **Jim Muehlberger** and Associate **Jeff Lingwall** assert in an April 29, 2015, **Law360 analysis** that offering refunds to dissatisfied consumers can benefit companies by lessening the impact of a class action or averting one altogether.

"If *many* refunds are claimed, a court may find that named plaintiffs are not adequately protecting class interests and that a class action is not the superior method for resolving the dispute. If *few* refunds are claimed, this is evidence that plaintiffs' counsel is creating litigation when none existed, again strengthening superiority arguments. If the *named plaintiffs* receive refunds, this can defeat their standing to bring a lawsuit and end the class action before a motion for class certification," they argue. "In each circumstance, a refund policy provides valuable preemptive insurance that can help stop a class action in its tracks."

Muehlberger and Lingwall provide examples for each proposition, citing cases in which courts looked to refund policies to determine whether a class action was the appropriate method of resolving the dispute and ultimately denied class certification. "Whether a company's refund policy is widely used by consumers, largely ignored by consumers or only affects the named plaintiffs in a lawsuit, it can provide a valuable tool for combating class actions," they conclude.

LEGISLATION, REGULATIONS AND STANDARDS

USDA Proposes Revisions to Origin of Livestock Rules

The U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service has **proposed** revisions to the origin of livestock requirements that govern the transition of dairy animals to organic production. Clarifying that a producer can transition dairy animals into organic

production only once, the amendments would ensure that "after completion of this one-time transition, any new dairy animals that a producer adds to a dairy farm would need to be managed organically from the last third of gestation or sourced from dairy animals that already completed their transition into organic production." The proposed rule also includes provisions for the management of breeder stock on organic livestock farms.

"This proposed rule would create greater consistency in the implementation of a standard for the transition of dairy animals into organic production and for the management of breeder stock," explains AMS in an April 28, 2014, *Federal Register* notice. "This proposed rule would update the regulation by explicitly requiring that milk or milk products labeled, sold or represented as organic be from dairy animals organically managed since at least the last third of gestation, with a one-time exception for transition." AMS will accept comments on the proposed action until July 27, 2015.

FTC Settles First Complaint Against Company Accused of Trading Discounts for Good Reviews

The Federal Trade Commission (FTC) has **approved** a final consent order barring an automobile shipment broker from touting its "highly ranked ratings" without disclosing that consumers were offered a $50 discount to write favorable reviews. According to the agency, the complaint against AmeriFreight is the first time FTC "has charged a company with misrepresenting online reviews by failing to disclose that it gave cash discounts to customers to post the reviews." *See FTC Press Release,* February 27, 2015.

FTC apparently flagged AmeriFreight's website and advertising materials for claiming that the company had "more highly ranked ratings and reviews than any other company in the automotive transportation business." Consumers were apparently offered $50 discounts in exchange for good reviews, with the opportunity to win $100 if their review was selected for a monthly prize. In addition, the agency claimed that the respondents (i) "contacted consumers after their cars had been shipped to remind them of their obligation to complete a review to receive the 'online review discount,' and qualify for the $100 award"; (ii) "failed to disclose the material connection between the company and their consumer endorsers—namely, that AmeriFreight compensated consumers to post online reviews"; and (iii) "deceptively represented that its favorable reviews were based on the unbiased reviews of customers."

Shook 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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"Companies must make it clear when they have paid their customers to write online reviews," said FTC Bureau of Consumer Protection Director Jessica Rich. "If they fail to do that—as AmeriFreight did—then they're deceiving consumers, plain and simple." *See FTC Press Release,* April 20, 2015.

Mad Cow Disease Risk on the Agenda of Upcoming TSE Advisory Committee Meeting

The Food and Drug Administration has **announced** a June 1, 2015, public meeting of the Transmissable Spongiform Encephalopathies (TSE) Advisory Committee in Silver Spring, Maryland. Presentations at the meeting will reportedly target the (i) current bovine spongiform encephalopathy (BSE) "situation" domestically and worldwide; (ii) U.S. Department of Agriculture's regulatory approaches to decreasing the risk of food-borne exposure to BSE; and (iii) variant Creutzfelt-Jakob Disease "situation" domestically and worldwide, and status of the U.K.'s Transfusion Medicine Epidemiological Review. Written comments must be submitted by May 25. *See Federal Register*, April 29, 2015.

California Senate Health Committee Rejects SSB Warning Label Proposal

Proposed legislation (**S.B. 203**) that would have required all sugar-sweetened beverages (SSBs) containing more than 75 calories per 12-ounce serving to carry safety warnings has failed to garner the requisite five votes needed to clear the California Senate Health Committee and move forward in the legislative process.

Introduced by Sen. Bill Monning (D-Carmel), the Sugar-Sweetened Beverage Safety Warning Act directed manufacturers, distributors and retailers to place the following notice on sealed containers, multipacks and vending machines, as well as any premises where SSBs are sold in unsealed containers: "STATE OF CALIFORNIA SAFETY WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." A similar proposal (S.B. 1000) failed to receive adequate support from state lawmakers in 2014.

The legislation was co-sponsored by the **California Center for Public Health Advocacy**, which issued a statement on its website declaring that "It is unfortunate that of all places, the health committee is where this bill died. Senators—entrusted to do what's right for the health of Californians—stopped this bill in its tracks." *See Los Angeles Times*, April 29, 2015.

LITIGATION

Vermont GMO-Labeling Law to Take Effect as Scheduled; Case to Continue

A Vermont federal court has **denied** a preliminary injunction that would have prevented from taking effect the nation's first state law requiring the labeling of food products manufactured with genetically modified organisms (GMOs). *Grocery Mfrs. Ass'n v. Sorrell*, No. 14-0117 (D. Vt., order entered April 27, 2015). Several food industry groups challenged the statute's provisions requiring GMO labeling and preventing foods with GMO ingredients from bearing a "natural" label.

The court first examined the industry groups' claim that the statute violates the dormant Commerce Clause of the U.S. Constitution. It agreed with the groups' argument that the statute seems to prohibit the use of "natural" in signage and advertising "regardless of where or how those activities take place," and accordingly refused to dismiss Vermont's motion to dismiss that aspect of the Commerce Clause claim. The rest of the Commerce Clause claims, based on the argument that the statute would require food manufacturers to change the labels they use nationwide, were dismissed; the statute "does not *require* [genetically engineered (GE)] manufacturers to alter their labeling, production, and distribution practices nationwide, and it is indifferent regarding whether and how GE products are labeled in other states," the court said.

The court also denied the groups' contentions that the state law was preempted by federal law and that the statute must be struck down in its entirety under the First Amendment, but it allowed to proceed the groups' First Amendment claim that the "natural" restriction is vague because the statute does not define the term. Because the court declined to issue a preliminary injunction, the statute is set to take effect on July 1, 2016.

Suit Challenging Smart Balance® Cholesterol-Blocking Claims to Continue

A California federal court has denied Boulder Brands, Inc.'s motion to dismiss a lawsuit alleging that the company misrepresents the cholesterol-blocking effect of the plant sterols in its Smart Balance® butter products because the amount of plant sterols is "not enough to generate a 'clinically meaningful cholesterol blocking effect.'" *Mitchell v. Boulder*

Brands, Inc., No. 12-1862 (S.D. Cal., order entered April 16, 2015). The court declined to reconsider its earlier decision that "the products' labels could plausibly be read as implying a 'clinically meaningful cholesterol blocking benefit' and that this implied representation is 'specific, measurable, and falsifiable.'" The expert report upon which the court has based its decision stated that a minimum of 800 milligrams of plant sterols—eight times the content in one serving of the Smart Balance® product—would be the minimum to meaningfully block cholesterol.

Texas Settles Alamo Trademark Suit with Beer Cos.

Texas has settled a trademark dispute with Alamo Beer Co. and Old 300 Brewing after the state intervened in Alamo Beer's lawsuit alleging Old 300 infringed its trademarked Alamo silhouette. *Alamo Beer Co. v. Old 300 Brewing, LLC*, No. 14-285 (W.D. Tex., San Antonio Div., consent order entered April 28, 2015). According to court documents, the settlement establishes that Texas owns the premises of the Alamo in downtown San Antonio and "[a]s the owner, the State also owns the image of the Alamo and the right to commercialize that image to whatever extent the State, as owner, decides to do so. Such commercialization includes the right to use or license the use of the image on product labels." The consent order further lists the state's federally registered trademarks related to the Alamo, which it uses to sell products at the landmark's gift shop. Under the final judgment, Alamo Beer and Old 300 are permanently enjoined from using their current logos, which display the Alamo's silhouette, and Old 300 must cancel its federal trademark registration.

Vodka Maker Argues Against MDL in "Handmade" Labeling Dispute

Fifth Generation, Inc., maker of Tito's® Handmade Vodka, has filed an opposition to a motion to consolidate eight proposed class actions alleging the vodka is mislabeled as "handmade" because it is manufactured with an automated process. *In re Tito's Handmade Vodka Mktg. & Sales Practices Litig.*, MDL No. 2634 (J.P.M.L., motion filed April 28, 2015). The company argues that the eight lawsuits are in seven jurisdictions and include claims based on the laws of several different states. Further, several of its motions to dismiss are already fully briefed, Fifth Generation says. If the panel determines that multi-district litigation (MDL) is appropriate, the company argues that the Western District of Texas or the Northern District of Florida would be venues better suited for the litigation than the proposed Southern District of California because the average duration of cases in California is longer than in the former two jurisdictions.

SCIENTIFIC/TECHNICAL ITEMS

Reduced Daily Soft Drink Consumption Linked to Decreased Diabetes Risk

University of Cambridge researchers report that replacing one soft drink per day with water or unsweetened coffee/tea reduced the incidence of diabetes by 14 to 25 percent in a prospective cohort of 25,639 adults enrolled in the European Prospective Investigation into Cancer and Nutrition. **Laura O'Connor, et al., "Prospective associations and population impact of sweet beverage intake and type 2 diabetes, and effects of substitutions with alternative beverages," *Diabetologia*, May 2015.** Funded by Medical Research Council and Cancer Research UK, the study relied on food diaries completed over 11 years of follow-up, during which time 874 participants developed type 2 diabetes.

The findings evidently show a 22-percent increase in diabetes risk per additional daily serving of soft drink, sweetened milk beverage or artificially sweetened beverage (ASB)—although the association with ASB consumption disappeared when researchers accounted for body mass index and waist girth as markers of obesity. As the authors observed in a May 1, 2015, press release, "For each 5% increase of a person's total energy intake provided by sweet drinks including soft drinks, the risk of developing type 2 diabetes may increase by as much as 18%."

At the same time, the study suggests that replacing one soft-drink serving per day with water or unsweetened coffee/tea cuts diabetes risk by 14 percent, while replacing one sweetened milk beverage per day cuts the risk by 20 to 25 percent. "However, consuming artificially sweetened beverages instead of any sugar-sweetened drink was not associated with a statistically significant reduction in type 2 diabetes, when accounting for baseline obesity and total energy intake," notes the press release.

"The good news is that our study provides evidence that replacing a habitual daily serving of a sugary soft drink or sugary milk drink with water or unsweetened tea or coffee can help to cut the risk of diabetes, offering practical suggestions for healthy alternative drinks for the prevention of diabetes," the lead author is quoted as saying. "This adds further important evidence to the recommendation from the World Health Organization to limit the intake of free sugars in our diet."

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Danish Study Allegedly Links PFAS Exposure to Increased Miscarriage Risk

A study involving 2,874 pregnant women enrolled in the Odense Child Cohort has noted "significant associations" between serum concentrations of perfluorinated alkylated substances (PFASs) and miscarriage. Tina Kold Jensen, et al., "Association between Perfluorinated Compound Exposure and Miscarriage in Danish Pregnant Women," *PLOS One,* April 2015. According to the study, two types of PFASs—perfluorooctanoic acid (PFOA) and perfluorooctanoic sulfate (PFOS)—widely used in consumer products and food packaging for their stain-, grease- and water-resistance properties are now being replaced with newer PFASs such as perfluorononanoic acid (PFNA) and perfluorodecanoic acid (PFDA), which have shorter elimination half lives in humans.

In particular, researchers report that women in the highest tertile for PFNA and PFDA exposure in pregnancy "had odds ratios of 16.5 percent... and 3.71 percent, respectively, as compared to the lowest tertile." Though these associations still require confirmation, the study authors warn that their findings "are of potential public health importance, as all pregnant women were exposed to PFAS compounds."