FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 574 | AUGUST 7, 2015

SHOOK HARDY & BACON

CONTENTS

LAW FIRM NEWS

Shook Attorneys Explore Slack-Fill Litigation for *Law360*

Shook Partner **Jim Muehlberger** and Associate **Iain Kennedy** have co-authored an article for *Law360* about slack-fill regulation and litigation. They note that although some product packaging uses unused space within a bottle or bag for functional purposes—transportation or theft protection, for example—companies have increasingly been targeted for litigation under the Fair Packaging and Labeling Act or U.S. Food and Drug Administration regulations. "All of the legitimate explanations in the world have not deterred some in the plaintiffs' bar, who have seized upon slack-fill litigation as the newest product packaging and labeling class action du jour," Muehlberger and Kennedy write.

The **article** summarizes the litigation landscape, including existing putative class actions challenging potato chip, eye drop and deodorant packaging, and notes that plaintiffs usually allege some combination of misrepresentation, fraud, unjust enrichment, breach of warranties and consumer-protection statutory claims. Muehlberger and Kennedy offer ideas for minimizing slack-fill litigation risk, including considering safe-harbor protections, maintaining design and complaint records and adding elements to packaging to display the product's contents.

LEGISLATION, REGULATIONS AND STANDARDS

FDA Issues Guidance About Nanomaterials in Food for Animals

The U.S. Food and Drug Administration (FDA) has **issued** guidance for industry about the agency's "current thinking regarding the use of nanomaterials or the application of nanotechnology in food for animals." According to FDA, the **recommendations** are intended to assist industry and other stakeholders identify potential safety or regulatory status issues. *See Federal Register*, August 5, 2015.

FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 574 | AUGUST 7, 2015

GMA Petitions FDA for Specific Uses of *Trans* Fat

The Grocery Manufacturers Association (GMA) has petitioned the U.S. Food and Drug Administration (FDA) "to approve specific low-level uses of partially hydrogenated oil (PHOs) in food products." According to an August 5, 2015, press release, the petition seeks approval to use PHOs for color, flavor and texture when "important for the production of safe food products." Because FDA revoked the generally recognized as safe (GRAS) status of *trans* fats on July 16, 2015, food manufacturers must now ask the agency to approve the ingredient for specific purposes.

"Our food additive petition shows that the presence of *trans* fat from the proposed low-level uses of PHOs is as safe as the naturally occurring trans fat present in the normal diet," said GMA Chief Science Officer Leon Bruner. "It's important to know that food and beverage companies have already voluntarily lowered the amount of *trans* fat added to food products by more than 86 percent and will continue lowering PHO use to levels similar to naturally occurring trans-fat found in the diet."

California to Update MADL for Lead

In response to a petition for administrative rulemaking filed by the Center for Environmental Health, the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) has **announced** its intention to update the existing maximum allowable dose level (MADL) for lead. The agency will post a notice for hearing on the petition on October 9, 2015, in Sacramento.

In particular, the petition **claims** that the current MADL for lead—0.5 micrograms per day—"is too high to protect Californians from the well-established reproductive effects of lead that do and can occur at levels below 500 micrograms per day." Faulting the courts for allowing defendants in enforcement actions "to average lead exposures over time," CEH also alleges that the existing regulation "has been interpreted to allow lead exposures of up to 7 micrograms a day." Based on the evidence provided in its petition, the organization has asked OEHHA to repeal or amend existing regulations "to establish a level that is protective of public health and compliant with Proposition 65."

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.

For additional information about Shook's capabilities, please contact

Mark Anstoetter
816.474.6550
manstoetter@shb.com

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 at mboyd@shb.com.

U.K. Slave Labor Law to Require Disclosures from 12,000 Companies

U.K. Prime Minister David Cameron has announced new measures added to the Modern Slavery Act, which took effect on July 31, 2015, that will require global companies to publish an annual slavery and human trafficking statement. The added provisions, which take effect in October, affect companies with a turnover of £36 million or more that conduct business within the United Kingdom. "This measure is one of the first of its kind in the world and it will be a huge step forward, introducing greater accountability on business for the condition of their supply chains," Cameron was quoted as saying in a July 29 press release.

LITIGATION

Ninth Circuit Upholds Dismissal of Challenge to Shark Fin Law

The Ninth Circuit Court of Appeals has affirmed a lower court's ruling dismissing a challenge to California's law criminalizing the sale or distribution of shark fin. *Chinatown Neighborhood Ass'n v. Harris*, No. 14-15781 (9th Cir., order entered July 27, 2015). The plaintiffs, two groups representing Asian-Americans who seek to serve shark-fin soup, a traditional Chinese dish, argued that the law violates the Commerce Clause of the U.S. Constitution and is preempted by the Magnuson-Stevens Act. The Ninth Circuit rejected the claims, finding that the lower court did not err in refusing to grant leave to the organizations so that they could fully brief the preemption issue. Further, the shark-fin ban does not violate the Commerce Clause, the court found, because the effects on interstate commerce result from regulation of in-state conduct. Additional details about the groups' complaint appear in Issue 447 of this *Update*.

Idaho "Ag-Gag" Statute Struck Down

An Idaho federal court has invalidated a state law that criminalized undercover investigations at agricultural manufacturing plants, finding that the law criminalized speech in violation of the First Amendment. *Animal Legal Def. Fund v. Otter*, No. 14-0104 (D. Idaho, order entered August 3, 2015). The 2014 Idaho statute passed after an animal-rights organization publicized a video recorded during an undercover investigation at a dairy.

The statute criminalized "interference with agricultural production," specifically interference by non-employees who obtain access to a facility by trespass or misrepresentation—or employees who obtain employment by misrepresentation—who then create audio or video recordings without the facility owner's consent or intentionally cause physical damage to facility operations. The Animal Legal Defense Fund challenged the law on First Amendment and Equal Protection grounds soon after it took effect.

The court first detailed the legislative history of the bill, noting the intentions of the bill's drafters—including the "desire to shield Idaho dairymen and other farmers from undercover investigators and whistleblowers who expose the agricultural industry to 'the court of public opinion.'" Under the statute, meat-processing muckraker and author of *The Jungle*, Upton Sinclair, could be subject to criminal prosecution, the court noted. The state argued that the statute "is not designed to suppress speech critical of certain agricultural operations but instead is intended to protect private property and the privacy of agricultural facility owners. But, as the story of Upton Sinclair illustrates, an agricultural facility's operations that affect food and worker safety are not exclusively a private matter. Food and worker safety are matters of public concern," the court found. "Moreover, laws against trespass, fraud, theft, and defamation already exist. These types of laws serve the property and privacy interests the State professes to protect through the passage of [the statute], but without infringing on free speech rights."

Resealable Cookie Packaging Patent Invalidated as Obvious in Kraft-Kellogg Dispute

An Illinois federal court has granted summary judgment in favor of Kellogg North America Co. in a lawsuit disputing the patented design of resealable cookie packaging. *Intercontinental Great Brands LLC v. Kellogg N. Am. Co.*, No. 13-0321 (N.D. Ill., order entered August 3, 2015). Intercontinental Great Brands (formerly Kraft Foods Global Brands) sued Kellogg and its affiliates alleging patent infringement, and Kellogg argued that the patent was invalid. Kellogg's resealable container, which "was designed to 'circumvent [] the Kraft patent while maintaining similar properties,'" allows consumers to open a package of cookies then reattach the plastic flap to maintain freshness.

Kellogg argued that the patent was invalid because the asserted claims in the patent are obvious, and the court agreed. The standard of obviousness includes considerations of four factors: (i) the scope of

prior art, (ii) differences between the prior art and the claim at issue, (iii) the level of ordinary skill and (iv) secondary considerations like commercial success, "long felt but unsolved needs" and the failure of others to create the art at issue. The court assessed previous incarnations of resealable packages, such as a 2002 patent for a package that keeps meat and cheese from drying out in a refrigerator and a 2001 system for keeping sushi, and found that the claims in Kraft's patent are obvious as machinery updates to the prior art. Accordingly, the court granted Kellogg's motion for summary judgment, invalidating the patent.

Red Stripe® Misrepresented as Jamaican Beer, Projected Class Action Alleges

Two consumers have filed a lawsuit against Diageo PLC alleging that Red Stripe® is falsely marketed as Jamaican because it has been brewed and bottled in Latrobe, Pennsylvania, since 2012. *Dumas v. Diageo PLC*, No. 15-1681 (S.D. Cal., filed July 29, 2015). Red Stripe® packaging "boldly states that it is a 'Jamaican Style Lager' that contains 'The Taste of Jamaica,'" and displays the logo of the Jamaican brewery that previously made it, the complaint asserts. "The only clue that Red Stripe is no longer a Jamaican beer is that on the border of the new labels, in obscure white text, the bottle says: 'Brewed & Bottled by Red Stripe Beer Company Latrobe, PA.'" The plaintiffs argue that the text cannot be seen on packages of 12 bottles of Red Stripe® and is only visible on packages of six if a single bottle is removed and examined. Consumers pay higher prices for imported beer and believe it to be of a higher quality, the complaint argues, so the alleged false misrepresentation resulted in unjust enrichment. The plaintiffs seek class certification, an injunction, damages and costs.

Tuna Companies Accused of Price Fixing in Supermarket Cooperative's Lawsuit

Bumble Bee Foods, Starkist Co. and Thai Union Frozen Products have been fixing tuna prices since 2011, according to a putative class action brought by Olean Wholesale Grocery Cooperative, Inc. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, No. 15-1714 (S.D. Cal., filed August 3, 2015). The complaint notes that while tuna consumption has fallen in the United States, prices have risen, which cannot be explained by raw material costs, the cooperative says. The complaint also details opportunities for the companies to meet and collude, such as industry conferences and various mergers and acquisitions within

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.

the "oligopolistic structure" of the industry. For claims of Sherman Act violations, the cooperative seeks to represent a nationwide class of those affected by the alleged price-fixing, court declarations of conspiracy, treble damages and an injunction from continuing any sort of agreement or understanding about maintaining prices.

"All Natural" Lawsuits Filed in New York over Hummus, Cheese Crisps

A consumer has filed a putative class action in New York federal court against Tribe Mediterranean Foods alleging that its hummus is not "all natural" because the product contains genetically modified (GM) ingredients, including canola oil and citric acid. *Magier v. Tribe Mediterranean Foods*, No. 15-5781 (S.D.N.Y., filed July 23, 2015). The complaint asserts that the "all natural" claim on the label precludes Tribe from using any artificial or synthetic ingredients in the hummus, and the plaintiff argues that she paid a higher price for the product believing it to be free of synthetic or GM ingredients. She claims that Tribe violated the Magnuson-Moss Warranty Act and New York consumer protection statutes and further alleges fraud, unjust enrichment and misrepresentation claims.

Meanwhile, in New York state court, a group of consumers has reportedly filed a lawsuit alleging that John Wm. Macy Cheese Crisps, Cheese Sticks and Sweet Sticks contain synthetic ingredients such as niacin, riboflavin and folic acid, which they argue conflicts with the "all natural" packaging claim. The complaint alleges that the company takes advantage of consumers because they cannot test the products for particular ingredients before purchasing them. The consumers reportedly seek refunds, corrections to the packaging and attorney's fees. *See New York Daily News*, July 31, 2015.