FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 587 | DECEMBER 11, 2015

SHOOK HARDY & BACON

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

New Chief Technologist Starts at FTC in January 2016

Lorrie Faith Cranor will reportedly succeed Askan Soltani as Chief Technologist at the Federal Trade Commission (FTC) as of January 2016. The role focuses on advising FTC Chair Edith Ramirez and the Commission on technology and policy issues.

"Technology is playing an ever more important role in consumers' lives, whether through mobile devices, personal fitness trackers or the increasing array of Internet-connected devices we find in homes and elsewhere," Ramirez said in announcing Cranor's appointment.

Cranor currently directs the **CyLab Usable Privacy and Security Laboratory** at Carnegie Mellon University, where she is a professor of Computer Science and Engineering and Public Policy. She has authored more than 150 papers about online privacy and usable security. *See FTC News Release*, December 3, 2015.

EU Report Urges Action on *Trans* Fat Limits

A new **report** issued by the European Commission advocates that the European Parliament take action on *trans* fat levels in foods by introducing (i) a mandatory label for foods with *trans* fat, (ii) legislation setting a limit on allowable *trans* fat content, (iii) voluntary agreements to reduce *trans* fat content, or (iv) guidance for national legal limits on *trans* fats in food. The report analyzes each option, noting possible benefits and drawbacks.

"Mandatory [*trans* fat] labeling would serve two purposes: (i) to provide incentives to the industry towards reducing [*trans* fat] from food products and (ii) to enable consumers to make informed food choices," the report explains, noting the labels would have a limited impact if consumer awareness of the negative effects associated with *trans* fat is low. The report further finds that a legal limit on allowable *trans* fat content would provide the highest public health benefits, but an assessment of the problems associated with *trans* fat and an analysis of the proportionality of the action should be completed first.

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LITIGATION

Foie Gras Suit Revived in Ninth Circuit

The Ninth Circuit Court of Appeals has ruled that the Animal Legal Defense Fund (ALDF) can sue the U.S. Department of Agriculture (USDA) for its Food Safety and Inspection Service's denial of a petition for rulemaking on prohibiting force-fed foie gras. *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. 13-55868 (9th Cir., order entered December 7, 2015). The district court had dismissed the action sua sponte after determining the denial was equivalent to a non-enforcement decision and thus not reviewable by the court.

The appeals court described two exceptions that limit when an individual can challenge a final agency decision in court under the Administrative Procedure Act (APA), finding the district court had erred in determining the foie gras denial fell into one of the exceptions. The court distinguished "agency decisions not to take enforcement actions," which cannot be subjected to judicial review and involve past breaches of existing laws, and "agency decisions not to initiate rulemaking," which can and involve future effects.

The discretion at issue in the former situation shields decisions from judicial review because of the technical conclusions required, but the denial to issue a rulemaking here only requires an evaluation of the APA and the Poultry Products Inspection Act, which the court can complete without additional technical knowledge. Accordingly, the Ninth Circuit reversed the district court decision and remanded the case for further consideration.

ALDF filed an additional lawsuit against USDA in November 2015 asserting APA violations for a refusal to respond to a 2011 petition requesting mandatory labeling on force-fed foie gras. Additional details appear in Issue **584** of this *Update*.

Slave Labor Suit Against Nestlé Dismissed

A California federal court has dismissed a putative class action alleging Nestlé USA Inc. violates state laws about notifying consumers of products sourced from forced labor because of Nestlé's partnership with a company accused of using slave labor to catch and supply its fish. *Barber v. Nestlé USA Inc.*, No. 15-1364 (C.D. Cal., order entered December 9, 2015). The plaintiffs asserted that some of Nestlé's Fancy Feast® cat food

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products include fish supplied by Thai Union Frozen Products, which acknowledges that some of its smaller fishing boats use forced labor, but "it is virtually impossible to say how pervasive the problem is," according to the court.

Nestlé argued the plaintiffs' claims were barred by the safe harbor doctrine created by the California Transparency in Supply Chains Act of 2010, which "requires any retailer who does business in California and has annual worldwide gross receipts exceeding $100 million to make specific disclosures on its website about efforts it makes to 'eradicate slavery and human trafficking from its direct supply chain.'" In passing this statute, Nestlé argued, the legislature already considered whether additional related disclosures beyond those mandated by the act could subject companies to liability under other laws. The court examined precedent and the act's legislative history to determine that California's legislature had adequately considered the disclosures and decided against requiring them. Accordingly, the court granted Nestlé's motion to dismiss with prejudice.

Black Pepper Slack-Fill Cases Consolidated

The Judicial Panel on Multidistrict Litigation has consolidated three putative consumer class actions and a competitor lawsuit challenging McCormick's alleged under-filling of its non-transparent black-pepper containers. *In re McCormick & Co. Inc. Pepper Prods. Mktg. & Sales Practices Litig.*, MDL No. 2665 (D.D.C., transfer order filed December 8, 2015). The court found that the actions involved common factual questions "about the propriety of McCormick's pricing and packaging of its pepper products under various federal and state laws." The transfer order notes that the plaintiffs of one consumer suit argued the competitor action be excluded, but the court found the action had a "clear factual overlap with the other cases." The cases will continue in the District of District of Columbia and may involve additional tag-along actions as well.

Additional information about the competitor action, brought by Minnesota-based Watkins Inc., appears in Issue 568 of this *Update*; details about a putative consumer class action in New York federal court appear in Issue 569.

Safeway Grocery Markup Dispute Concludes with $41.9-Million Settlement

Safeway Inc. will pay $41.9 million to customers who ordered groceries online and were charged a 10-percent markup on the items they ordered compared to the prices charged in-store, a court has confirmed. *Rodman v. Safeway Inc.*, No. 11-3003 (N.D. Cal., order entered November 30, 2015). A California federal court approved the settlement amount of $31 million in damages and $10.9 million in prejudgment interest. Additional details about the case appear in Issues 549 and 577 of this *Update*.

California Federal Court Dismisses Trader Joe's Soy Milk Mislabeling Suit

A California federal court has dismissed a lawsuit against Trader Joe's Co. alleging the retailer's soy milk is mislabeled because it does not contain cow's milk, which the plaintiffs argued amounts to a violation of the federal Food, Drug, and Cosmetic Act and California's consumer-protection statute. *Gitson v. Trader Joe's Co.*, No. 13-1333 (N.D. Cal., order entered December 1, 2015).

"Often in food labeling cases," the court noted, "courts jump straight to the question of whether a plaintiff may state a claim under California's Unfair Competition Law. But there is a threshold question." The court explained that questions related to food labeling must be considered in the context of the federal Food, Drug, and Cosmetic Act because "if the alleged conduct would not violate the federal statute, it doesn't matter whether the plaintiff could pursue a state law claim based on that conduct. If a food label does not violate the federal statute, any state law claim arising from that label is automatically preempted, because when it comes to food labels, state law may only impose liability for what the federal statute proscribes."

Applying that reasoning, the court concluded the plaintiffs failed to show a violation of the federal act in their two arguments. "At one point the plaintiffs seem to suggest the term ["soymilk"] is misleading because people might mistake soymilk for actual milk from a cow, but that is not plausible. The reasonable consumer (indeed, even the least sophisticated consumer) does not think soymilk comes from a cow. To the contrary, people drink soymilk in lieu of cow's milk."

In their second argument, plaintiffs asserted that the U.S. Food and Drug Administration (FDA) has standardized the definition of "milk" as a term, and Trader Joe's soy milk allegedly interferes with that definition.

"But the fact that the FDA has standardized milk does not categorically preclude a company from giving any food product a name that includes the word 'milk,'" the court held. "Rather, as the language of [the federal act] indicates, the standardization of milk simply means that a company cannot *pass off* a product as 'milk' if it does not meet the regulatory definition of milk. Trader Joe's has not, by calling its products 'soymilk,' attempted to pass off those products as the food that the FDA has standardized (that is, milk)." The court dismissed the plaintiffs' argument that FDA warning letters supported their argument, finding the crux of the letters involved issues of proper storage rather than labeling. Accordingly, the court dismissed the plaintiffs' claims related to soy milk labeling but allowed to continue claims related to chemical preservatives and evaporated cane juice.

Clean Air Act Rehearing Request Denied in Whiskey Fungus Suit

The Sixth Circuit Court of Appeals has denied a request for an en banc rehearing in a lawsuit alleging that the distilleries of two Diageo Americas Supply Inc. brands, J&B® and Johnnie Walker®, caused the growth of a black fungus on outdoor surfaces near the plants. *Merrick v. Diageo Ams. Supply Inc.*, No. 14-6198 (6th Cir., order entered December 7, 2015).

Diageo had sought to dismiss the suit by arguing the claims conflicted with emissions regulations under the Clean Air Act, but a lower court and the Sixth Circuit disagreed upon hearing the arguments. Diageo then requested en banc reconsideration, but the one-page denial noted that "the issues raised in the petition were fully considered upon the original submission and decision of the case." Details about the case appear in Issues **519** and **546** of this *Update*.

OTHER DEVELOPMENTS

Rudd Center Survey Finds Support for Laws Against Weight Discrimination

The University of Connecticut's Rudd Center for Food Policy & Obesity has conducted a **study** assessing public support for policies and laws that would prohibit discrimination based on weight. Rebecca M. Puhl, et al., "Potential Policies and Laws to Prohibit Weight Discrimination: Public Views from 4 Countries," *The Milbank Quarterly*, December 2015.

In an online survey, the researchers questioned 2,866 adults in the United States, Canada, Australia and Iceland about their opinions on several policy measures related to weight discrimination, including (i) "adding body weight to existing civil rights statutes," (ii) "extending disability protections to persons with obesity," and (iii) "instituting legal measures to prohibit employers from discriminating against employees because of body weight."

The propositions with the most support referred to protection of employees from discriminatory practices in hiring and wage determinations. A majority of respondents in the United States and Canada supported the inclusion of weight discrimination in federal civil rights laws, while 21.2 percent of Icelandic respondents expressed the same opinion.

"Weight discrimination is a social injustice and a public health issue that remains widespread," Rebecca Puhl, the study's lead author, said in a December 2, 2015, press release. "Understanding the public mindset about this problem is critical to help identify what kinds of policy actions should be prioritized."

U.S. and Japanese Consumer Groups Denounce GE Salmon

The Center for Food Safety and the Seikatsu Club Consumers Cooperative have joined to jointly decry the U.S. Food and Drug Administration's (FDA's) recent determination that genetically engineered (GE) salmon produced by AquaBounty Technologies, Inc. is as safe to eat as conventional salmon and will have little effect on the environment. At the time of FDA's announcement, the Center for Food Safety vowed to file a lawsuit against the agency.

"FDA's decision to approve this GE salmon was irresponsible and unlawful and it will have global repercussions," said George Kimbrell, a Center for Food Safety attorney. "We are honored to join with our colleagues in Japan in opposing GE fish and the Aquabounty salmon. Together, we will work to stop its expansion in order to preserve our native fisheries and protect the markets so many depend on around the world."

According to the consumer groups, Japan imported $2 billion worth of salmon and trout in 2014. *See Center for Food Safety Press Release*, December 8, 2015.

Alleged Climate Change Threats Target of Upcoming Harvard Webcast

"Climate Change: Health and Disease Threats" is the focus of an upcoming **live webcast** from the Harvard T.H. Chan School of Public Health slated for December 16, 2015.

According to promotional materials for the program, health impacts have not featured prominently in international climate change discussions. "Yet, droughts, floods, heat waves, and air pollution related to climate change produce rippling effects that impact food production, infectious disease spread, chronic illnesses, and more."

The event was planned in conjunction with **The GroundTruth Project**.