FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 590 | JANUARY 15, 2016

SHOOK HARDY & BACON

CONTENTS

FIRM NEWS

Category Liability Doctrine Bars Certain Design Defect Claims, Schwartz and Silverman Explain

In the law of product liability, lawyers representing manufacturers have underutilized the broad prohibition on "category liability." Shook Public Policy Partners Victor Schwartz and Cary Silverman explain this doctrine and show how a Mississippi trial court judge applied it to dismiss design defect claims against respirator manufacturers in a Bloomberg BNA *Product Safety & Liability Reporter* article.

Category liability arises when there is no true reasonable alternative design for a lawful product. For example, it is inappropriate to compare the safety of a convertible with an open roof design to a car with a solid roof design. Roller skates should not be compared to rollerblades. Bicycles and motorcycles should not be compared to tricycles and scooters.

In the Mississippi litigation, plaintiffs presented elastomeric respirators (sealed to face with inhalation/exhalation valves, cleaned and reused) as a safer alternative to disposable respirators (known as N-95s). A perceptive trial court judge applied category liability principles to preclude this comparison. In *Mealer v. 3M Co.* (and a similar case, *Harris v. 3M Co.*), Judge Dal Williamson (Jones County) found that the two types of respirators are "completely different products." While the products serve the same general purpose, the court concluded that the alternative presented by the plaintiffs would have eliminated the core features of the type of respirator at issue—its single-use and disposable qualities. "The law of products liability demands that manufacturers take feasible steps to make their products reasonably safe," Judge Williamson observed. "It is not rational, however, to impose liability in such a way as to eliminate whole categories of useful products from the market."

The Mississippi court's rulings show the viability of the category liability doctrine and its application to a wide range of contexts. While the risk-utility test followed in many jurisdictions implicitly considers the factors underlying the category liability doctrine, this doctrine provides a distinct defense. As the reporters of the Restatement Third of Products Liability have observed, courts avoid category liability "like the plague."

LEGISLATION, REGULATIONS AND STANDARDS

USDA Issues Final Guidance on Post-Harvest Handling of Organic Products

The National Organic Program has issued final guidance for accredited certifying agents and certified and exempt organic operations to clarify federal regulations about substances used in the post-harvest washing, packing and storage of organic products. The document specifically addresses: "(1) What substances may be used for post-harvest handling; (2) the difference between 'post-harvest handling of raw agricultural commodities' and 'further processing'; and (3) the regulatory requirements for facility pest management." *See Federal Register*, January 15, 2016.

U.S. Codex Delegates Schedule Food Additives Meeting

The U.S. Department of Agriculture's Office of the Under Secretary for Food Safety and the U.S. Food and Drug Administration are convening a February 16, 2016, public meeting in College Park, Maryland, to discuss draft U.S. positions for consideration at the 48th Session of the Codex Committee on Food Additives (CCFA) in Xi'an, China, on March 14-18. Among other things, CCFA is responsible for establishing or endorsing permitted maximum levels of individual food additives, proposing risk assessments to the Joint FAO/WHO Expert Committee on Food Additives and recommending labeling standards for food additives.

Agenda activities for the February 16 meeting will include discussion of a paper about the use of specific food additives in wine production; draft revisions to the food category 01.1 "Milk and dairy-based drinks"; and use levels for paprika extract. *See Federal Register*, January 11, 2016.

Baltimore Considers SSB Health Warnings

Baltimore City Councilman Nick Mosby (D) has introduced legislation that would require health warnings for sugar-sweetened beverages (SSBs) in certain advertisements, menus, menu boards and point-of-sale signage.

"The beverage industry specifically targets youth and communities of color with its marketing efforts, spending $395 million in marketing directed at youth and $28.6 million on marketing campaigns specifically targeting African-American and Hispanic youth," according to Council Bill 16-0617. The draft ordinance further asserts, among other things,

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.

that some 25 percent of school-age Baltimore City children drink one or more soda daily.

The proposed health notice would state: "Warning: Drinking beverages with added sugar contributes to tooth decay, obesity, and diabetes. This message is from the Baltimore City Health Department."

Violators of the ordinance would face misdemeanor fines as high as $1,000. The proposal has been referred to the Department of Health. *See The Baltimore Sun*, January 11, 2016.

UK Chief Medical Officers Publish Strict New Guidelines for Alcohol Consumption

The U.K. Chief Medical Officers have advised consumers to drink less than 6 pints of beer per week under new guidelines for alcoholic beverage intake. Revising previous standards that set weekly limits at 21 units of alcohol for men and 14 units for women, the updated recommendations urge all consumers to imbibe fewer than 14 units weekly and warn that drinking even a moderate amount of beer, wine or spirits on a regular basis allegedly raises the risk of developing certain cancers. They also caution individuals to spread consumption over three or more days instead of engaging in "binge" drinking sessions.

"Drinking any level of alcohol regularly carries a health risk for anyone, but if men and women limit their intake to no more than 14 units a week it keeps the risk of illness like cancer and liver disease low," said Chief Medical Officer of England Sally Davies in a January 8, 2016, press release. "What we are aiming to do with these guidelines is give the public the latest and most up to date scientific information so that they can make informed decisions about their own drinking and the level of risk they are prepared to take."

Meanwhile, a January 13 editorial published in *Nature* describes the new guidelines as "a sound example of evidence-based policymaking," calling out Britain's "curious relationship with alcohol" and praising David Bowie for his decision to forgo alcohol in his later years. As the article concludes, "The statement that there is no 'safe' level of alcohol consumption is a solid one… And—contrary to the legion of newspaper stories—the minor health benefits of drinking are realized only by women over the age of 55, and then only at very low consumption levels… Decades hence, society may look back at today's acceptance and even celebration of alcohol and shake its collective head in the same way that we now view the acceptance of tobacco smoking, or the use of opium as a tonic."

EFSA Backs Safety of UV-Treated Milk

Responding to a novel food application submitted pursuant to Regulation (EC) No 258/97, the European Food Safety Authority's (EFSA's) Panel on Dietetic Products, Nutrition and Allergies (NDA) has verified the safety of cow's milk treated with ultraviolet (UV) radiation to extend its shelf life. According to the NDA, the UV treatment increased the milk's D3 concentrations but not in amounts likely to exceed the tolerable upper intake levels established by EFSA for children ages 1–10 years, adolescents and adults.

"UV-treated milk is comparable to non-UV-treated milk, except for the vitamin D3 content," states the NDA opinion. "No adverse effects regarding the contribution of milk to nutrient intakes are expected from the consumption of UV-treated milk in substitution of non-UV-treated milk. The Panel considers that the novel food is not nutritionally disadvantageous."

LITIGATION

Olive Oil Class Voluntarily Dismisses "Extra Virgin" Claims to Pursue "Made in Italy" False Ad Allegations

A California federal court has allowed plaintiffs in a false advertising putative class action to dismiss their claims of fraud based on the "extra virgin" quality of Filippo Berio olive oil in favor of pursuing their allegations that the products are falsely labeled as "made in Italy." *Kumar v. Salov N. Am. Corp.*, No. 14-2411 (N.D. Cal., Oakland Div., order entered January 8, 2016). The plaintiff sought to dismiss the "extra virgin" portion of the claims after the discovery process revealed the olive oil was sold in both clear-glass bottles—which the plaintiff asserted could damage the quality of the oil because of the light allowed through the glass—and tinted-glass bottles.

Additional details about the claims' survival of a motion to dismiss appear in Issue 554 of this *Update*. In February 2015, Shook Partner Ann Havelka authored an article for *Law360* examining the case, arguing that it is "an example of a second wave of food labeling litigation" because of an increase in independent testing for compliance with labeling and regulatory standards.

Tito's False Ad Suit to Continue

A New York federal court has denied Fifth Generation, Inc.'s motion to dismiss a lawsuit arguing that its Tito's Handmade Vodka® is falsely advertised as handmade because machines are used in the process of manufacturing the product. *Singleton v. Fifth Generation, Inc.*, No. 15-0474 (N.D.N.Y., order entered January 12, 2016).

The court rejected the company's claim that its adherence to U.S. Alcohol and Tobacco Tax and Trade Bureau standards does not relieve it from liability for false advertising claims. Further, the court found that "Tito's labels could plausibly mislead a reasonable consumer to believe that its vodka is made in a hands-on, small-batch process, when it is allegedly mass-produced in a highly-automated one." Accordingly, the court allowed several claims to continue, but dismissed allegations of breach of express warranties and negligent misrepresentation.

The decision echoes a November 2015 ruling from a California federal court, which also refused to find that the safe harbor provision excused Fifth Generation from liability. *Hofmann v. Fifth Generation*, No. 14-2569 (S.D. Cal., order entered November 20, 2015).

Second Circuit Dismisses Kellogg "Great Ideas" Online Portal Suit

The U.S. Court of Appeals for the Second Circuit has affirmed a lower court's dismissal of a lawsuit against Kellogg Co. alleging the company owed a man compensation after it implemented an idea for a portable breakfast the man had submitted through the company's online portal for innovative ideas. *Wilson v. Kellogg Co.*, No. 15-2237 (2nd Cir., order entered January 13, 2016).

The man submitted an idea for a beverage flavored like cereal milk, but Kellogg apparently told him it was not interested in pursuing the idea. The company later obtained a trademark for "Kellogg's Breakfast to Go" and began selling a similar product under the name in 2013. The man sought compensation for the idea, but Kellogg argued that the terms and conditions the man had agreed to upon submission limited his ability to recover any money for a successful submission. The Second Circuit agreed, finding that the terms and conditions served as an express contract that could not sustain the man's claims of breach of implied contract and unjust enrichment.

Duck Dynasty Infringement Case Dismissed Despite "Needlessly Offensive" Jurisdictional Argument

A Kentucky federal court has granted a motion to dismiss an action against the owner of *Duck Dynasty* trademarks alleging infringement based on jurisdictional issues. *Chinook USA v. Duck Commander, Inc.*, No. 14-1015 (W.D. Ky., Louisville Div., order entered January 8, 2015). In 2014, Duck Commander licensed the rights to several trademarks related to *Duck Dynasty*, including "Duck Commander Family Foods," "Uncle Si" and "Si Robertson," to Chinook for use on several types of beverages. Chinook later learned that Duck Commander also licensed the same rights to other companies, including Go-Time and Checkered Flag Business. Chinook sued, arguing that it held exclusive rights to the use of the trademarks on beverages. In "colorful" filings recounting "Bill Russell's collegiate basketball career, the Scottish jurist and poet Sir Walter Scott's *Marmion*, and Jackie Gleason's role in an short-lived television series from the late 1940s," Chinook argued that Duck Commander and the beverage companies tortiously interfered with a contractual relationship and infringed upon Chinook's rights to the trademarks.

The defendants moved to dismiss and for a change in venue to Louisiana. The court assessed the forum selection clause in the contract, which stated that Louisiana law governed the agreement, and found that the clause was valid. Further, Chinook failed to show that the transfer was unwarranted, the court noted. The company argued that Louisiana citizens would be unable to fairly decide a case in which the defendants were central to the local economy. "In concocting this argument, Chinook imputes Robertson family members' statements on homosexuality and racism to all of the inhabitants of West Monroe and Monroe, Louisiana," the court said. "This argument is intellectually dishonest, logically flawed, and needlessly offensive."

Soy Fiber Food Additive Too Obvious for Patent, Appeals Court Confirms

The U.S. Court of Appeals for the Federal Circuit has affirmed a Patent Trial and Appeal Board ruling that a method of enzymatic hydrolysis of soy fiber for use in creating food additives is not patentable because it would have been obvious in light of previous inventions. *In re Urbanski*, No. 15-1272 (Fed. Cir., order entered January 8, 2016). The plaintiffs challenged the U.S. Patent and Trademark Office's denial of a patent for their technique of creating food additives from soy fiber, which the examiner found to be "readily combinable" from two prior inventions.

The Federal Circuit agreed with the examiner's and appeals board's determinations that a person of ordinary skill would have expected that adjusting the process as the plaintiffs did would have yielded the results they reached. Accordingly, the court affirmed the prior dismissal.

Dannon, Chobani Dispute Yogurt Ads

Chobani has filed a lawsuit seeking a declaratory judgment that its advertisements claiming competitor Dannon's yogurt contains chlorine are not false or misleading, prompting Dannon to file a counterclaim seeking a preliminary injunction. *Chobani v. The Dannon Co., Inc.*, No. 16-0030 (N.D.N.Y., complaint filed January 8, 2016, counterclaim filed January 11, 2016).

Chobani's complaint details its campaign, launched January 6, 2016, that asserts "Dannon's Light & Fit Greek Yogurt contains sucralose, an artificial sweetener processed with added chlorine." The company seeks a declaration that its claims are not false, misleading, disparaging or deceptive under the Lanham Act or New York state law.

Dannon's response argues that the ad campaign "has been misinforming consumers about the health and safety of Dannon's products while exaggerating the relative health benefits of its own product." The counterclaim defends sucralose and its use, arguing that it "is not 'bad' or harmful." Further, "Chobani's campaign falsely states that Dannon Light & Fit® Greek has 'chlorine added to it,' which, combined with prominent image of a swimming pool conveys the false message literally and by necessary implication that Dannon Light & Fit® Greek contains the type of 'chlorine' used to clean swimming pools.'" The claim distinguishes between calcium hypochlorite, the substance used to clean pools, and chloride, the element in sucralose.

Potato Trademark Dispute Centers on "Buttery Homestyle" Name

Idahoan Foods LLC has filed a lawsuit against Basic American Inc. alleging the company's line of potato products marketed under the name "Buttery Home-Style" infringes on Idahoan's rights to "Buttery Homestyle," its brand of potato products. *Idahoan Foods LLC v. Basic Am. Inc.*, No. 16-0005 (D. Idaho, filed January 6, 2016). Idahoan's trademark application to the U.S. Patent and Trademark Office was filed in May 2015 and remains pending, but the company argues that it has used "Buttery Homestyle" commercially since 2003. Idahoan notified Basic American in December 2015 of its allegedly superior rights to the

mark; the complaint asserts that Basic American then filed a lawsuit in California federal court seeking a declaratory judgment that "Buttery Home-Style" does not infringe "Buttery Homestyle." Idahoan seeks an injunction, destruction of the infringing mark, damages and maturation of its trademark application.

Grocers File Another Tuna Price-Fixing Lawsuit

Three major grocers—Albertsons Companies, Hy-Vee and The Kroger Co.—have reportedly filed a lawsuit against three tuna companies alleging they conspired to fix prices of canned tuna. The companies join other grocers and consumers in pursuing damages from Tri-Union Seafoods, Starkist and Bumble Bee Foods for alleged price fixing, a practice the plaintiffs argue began in 2008 and continued until July 2015. *See Undercurrent News*, January 11, 2016.

Details about lawsuits by other grocers appear in Issue 574 of this *Update*, while information about the consolidation of the suits by the U.S. Judicial Panel on Multidistrict Litigation appears in Issue 588.

SCIENTIFIC/TECHNICAL ITEMS

Warning Labels Linked to Reduction in SSB Purchases

A new study suggests that warning labels on sugar-sweetened beverages (SSBs) could dissuade parents from purchasing these products for children. Christina A. Roberto, et al., "The Influence of Sugar-Sweetened Beverage Health Warning Labels on Parents' Choices," *Pediatrics*, February 2016. Based on research involving tobacco warning labels, the study aimed to determine if SSB warning labels could (i) educate consumers about potential "health harms" "above and beyond" existing calorie declarations; (ii) "influence parents' intentions to buy SSBs for their children"; and (iii) "influence parents' perceptions and intentions toward nonlabeled beverages." It also evaluated warning label phrasing and "parents' beliefs about proposals to put warning labels on SSBs."

Surveying 2,381 primary caregivers of children ages 6 to 11, researchers randomly assigned parents to one of six conditions: "(1) no warning label (control); (2) calorie label; or (3–6) 1 of 4 text versions of a warning label (eg, Safety Warning: Drinking beverages with added sugar[s] contributes to obesity, diabetes, and tooth decay)." Parents then "selected a beverage for their child in a vending machine task, rated perceptions of different beverages, and indicated interest in receiving beverage coupons."

The results evidently showed that "significantly fewer parents chose an SSB for their child in the warning label condition (40%) versus the no label (60%) and calorie label conditions (53%)." Participants in the warning label group "also chose significantly fewer SSB coupons, believed that SSBs were less healthy for their child, and were less likely to intend to purchase SSBs."

Researchers Discuss Tools for Assessing Food Addiction

A research article examining the Yale Food Addiction Scale (YFAS) and Palatable Motives Eating Scale (PEMS) has concluded that together these tools "offer a rigorous way to evaluate whether an addictive process contributes to certain eating disorders, such as obesity and binge eating." Jose Manuel Lerma-Cabrera, et al., "Food addiction as a new piece of the obesity framework," *Nutrition Journal*, January 2016. Summarizing various "food addiction" studies, the authors posit that these models suggest "certain highly processed foods can have a high addictive potential and may be responsible for some cases of obesity and eating disorders."

In particular, the article notes that despite the evidence for food addiction, "it is highly unlikely that all foods have addictive potential." It claims that manufacturers "have designed processed foods by adding sugar, salt, or fat, which can maximize the reinforcing properties of traditional foods (fruits, vegetables). The high palatability (hedonic value) that this kind of processed food offers, prompts subjects to eat more. Thus, certain processed food may have a high addictive potential and be responsible for some eating disorders such as obesity."

To better assess individuals who exhibit compulsive overeating when exposed to highly palatable foods, the authors recommend using both YFAS and PEMS to design personalized obesity treatments that target psychological and behavioral factors as well as biological ones.

Using criteria modeled on "the symptoms of substance dependence as outlined in the Diagnostic and Statistical Manual of Mental Disorders IV," YFAS seeks to identify individual personality traits associated with impulsivity as well as signs of "dependence" on certain foods. By comparison, PEMS attempts to detect "motives for eating tasty foods," such as eating for social reasons; as a coping mechanism or reward; or to conform with expectations.

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.

"While the YFAS probes the consequences of consuming highly palatable foods, the PEMS probes the motives for such consumption," the authors explain. "It is known that some cases of excessive food intake do not respond to physiological needs but to a psychological behavioral component that needs to be identified. Finding this component would allow the inclusion of behavioral therapy among the cornerstones of obesity treatment, thus achieving a multidisciplinary approach in accordance to the multifactorial origin of the obesity."