FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

USDA Renews Approvals for Seven Substances Used in Organic Production and Handling

The U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service has completed the 2016 sunset process for five synthetic and two non-synthetic (natural) substances on the National List of Allowed and Prohibited Substances that governs the use of synthetic and non-synthetic substances in organic production, processing and handling.

Per the National Organic Standards Board's recommendations, AMS has renewed approvals for the following synthetic substances used in organic crop production: (i) ferric phosphate for use as slug bait; and (ii) hydrogen chloride for delinting cotton seed for planting. It has also renewed approvals for the following non-agricultural ingredients used in or on organic products: (i) L-malic acid; (ii) any food grade bacteria, fungi, and other microorganism; (iii) activated charcoal from vegetative sources, for use only as a filtering aid; (iv) peracetic acid/peroxyacetic acid when used in wash and/or rinse water according to Food and Drug Administration limitations, for use as a sanitizer on food contact surfaces; and (v) sodium acid pyrophosphate, for use only as a leavening agent. AMS will next reconsider these substance as part of Sunset Review 2021. *See Federal Register,* February 23, 2016.

LITIGATION

Ninth Circuit Affirms Invalidation of California Slack-Fill Law as Applied to Meat and Poultry Products

The Ninth Circuit Court of Appeals has affirmed a lower court's decision that California cannot enforce its statute regulating the empty space between a product and its packaging against producers of meat and poultry products, finding that the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) preempt the statute. *Del Real v. Harris*, No. 13-16893 (9th Cir., order entered February 12, 2016).

California Attorney General Kamala Harris appealed a district court's permanent injunction barring enforcement of the slack-fill law against Del Real, which produces heat-and-serve meat and poultry products. The appeals court's opinion cites precedent interpreting the FMIA and PPIA as creating a uniform national labeling standard. "When the FMIA and PPIA's express preemption clauses are read in light of Congress's concern for uniformity and a lesser level of regulation, it is unlikely that Congress intended for the states to be allowed to develop and apply a more specific standard for slack fill when the Secretary [of Agriculture] has not yet done so," the court held, noting that the opinion "should not be read to prevent California from exercising its concurrent authority under both the FMIA and PPIA to address misleading packaging of meat and poultry products."

DOJ Closes Maine Seafood Company for Unsanitary Conditions

A Maine federal court has granted the U.S. Department of Justice (DOJ) a permanent injunction against Mill Stream Corp., a seafood company that allegedly failed to take measures preventing the formation and growth of *Clostridium botulinum*, the cause of botulism, or *Listeria monocytogenes*, the cause of listeriosis. *U.S. v. Mill Stream Corp.*, No. 16-0080 (D. Me., order entered February 12, 2016).

The injunction prevents the company and its employees from processing or distributing food produced at Mill Stream's facilities or by its owner until several conditions have been satisfied, including: (i) retention of an independent laboratory to test for *Listeria*, (ii) development of Hazard Analysis and Critical Control Point plans by an independent expert, (iii) implementation of such plans, (iv) completion of additional employee training, and (v) approval to reopen by the U.S. Food and Drug Administration (FDA).

"The failure to plan for and control the presence of bacteria and neurotoxins commonly found in seafood-processing facilities can pose a significant risk to the public health," a DOJ attorney said in a February 12, 2016, press release. "The Department of Justice will continue to work aggressively with FDA to prevent the distribution of adulterated food."

Court Rejects Settlement Terms in Underfilled Tuna Can Suit

A California federal court has rejected a May 2015 settlement agreement reached by StarKist Co. and a class of consumers who alleged the company underfilled its cans of tuna. *Hendricks v. StarKist Co.*, No. 13-0729 (N.D. Cal., order entered February 19, 2016). The court identi-

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fied two issues with the settlement: (i) the notice sent to class members did not notify the class of the amended release of future claims, so the settlement notice was inadequate; and (ii) the scope of the original and amended releases violates the identical factual predicate rule. Specifically, the release was too broad because it released StarKist from claims relating to any purchase of StarKist products rather than limiting it to a release from claims related to the purchase of underfilled StarKist tuna products. Details about the settlement agreement appear in Issue 566 of this *Update*.

Labeling Claims Dismissed in Taco Shell *Trans* Fat Suit

A California federal court has dismissed portions of a lawsuit alleging that B&G Foods mislabeled its taco shells as containing "0g Trans Fat" despite the product's use of partially hydrogenated oil as an ingredient. *Walker v. B&G Foods*, No. 15-3772 (N.D. Cal., order entered February 8, 2016).

Five of the plaintiff's seven claims involved alleged mislabeling of the taco shells as free of *trans* fat; the court disposed of the claims, finding that the Nutrition Labeling and Education Act required the *trans* fat level be listed as 0 grams if the content is less than one-half of a gram, thus preempting the claims. The court then turned to the non-labeling claims, through which the plaintiff argued the taco shells were unsafe for consumption based on the *trans* fat content and thus amounted to a breach of an implied warranty of merchantability and a violation of California's Unfair Competition Law. Citing primary jurisdiction, the court declined to rule on the claims and paused the lawsuit until the U.S. Food and Drug Administration determines its position on *trans* fats as a food additive.

Court Dismisses Whole Foods Yogurt MDL for Reliance on *Consumer Reports* Data

A Texas federal court has dismissed multidistrict litigation (MDL) alleging that Whole Foods Market Inc. lists incorrect amounts of sugar on its yogurt labels, concluding the *Consumer Reports* data relied on by the plaintiffs did not meet federal standards. *In re Whole Foods Mkt. Inc. Greek Yogurt Mktg. & Sales Practices Litig.*, MDL No. 2588 (W.D. Tex., Austin Div., order entered February 16, 2016). The consumers claimed Whole Foods' store-brand yogurt contains 11.4 grams of sugar per serving, while the listed sugar content is 2 grams. Details about some of the 11 consolidated lawsuits appear in Issues 533 and 534 of this *Update*.

Whole Foods argued that the consumers' claims were preempted by the federal Food, Drug, and Cosmetic Act (FDCA) because the scientific testing techniques used by *Consumer Reports* failed to comply with the testing methodology determined by the U.S. Food and Drug Administration. The court agreed, noting that the plaintiffs "expressly plead that *Consumer Reports* used a different testing methodology" of analyzing six samples rather than the mandated "composite of twelve subsamples taken from twelve randomly chosen shipping cases." Accordingly, the court found that all state law claims were preempted because the plaintiffs sought to impose liability inconsistent with the FDCA and dismissed all claims.

Court Rejects Injunction in NYC Salt Warning Case

A New York state court has reportedly refused to grant the National Restaurant Association's request for a preliminary injunction to stall the enforcement of New York City's new requirement that chain restaurants label menu items containing 2,300 mg of salt or more, which is set to take effect March 1, 2016. *Nat'l Restaurant Assoc. v. New York City Dept. of Health*, No. 654024/2015 (N.Y. Super. Ct., New York Cnty., order entered February 24, 2016).

During the hearing, the court reportedly distinguished the rule from a ban on the ingredient, noting, "It's not a ban. It's information. It's a warning." Under the rule, chain restaurants must display a logo of a triangle with the image of a salt shaker next to applicable menu items or risk a $200 fine for each infraction. *See Bloomberg*, February 24, 2016.

Parties in Stevia in the Raw® "All Natural" Lawsuit Reach Settlement Agreement

Cumberland Packing Corp. and a group of consumers have reached a settlement agreement in a lawsuit alleging that Cumberland Packing Corp. misrepresents its Stevia in the Raw® sweetener products as all natural despite containing genetically modified organisms. *Frohberg v. Cumberland Packing Corp.*, No. 14-0748 (E.D.N.Y., motion filed February 22, 2016). Under the agreement, Cumberland will pay up to $1,547,000 to reimburse class members with $2.00—or 40 percent of the average purchase price—per purchase of Stevia in the Raw®, to a maximum of $16 per person. In addition, Cumberland will remove "100% Natural" or "All Natural" label claims.

California Court Allows Snoop Dogg's Suit Against Pabst to Continue

A California state court has reportedly rejected Pabst Brewing Co.'s attempt to dismiss a lawsuit brought by Snoop Dogg asserting the rapper is entitled to a portion of the proceeds obtained through the $700-million sale of the company in 2014. *Spanky's Clothing Inc. v. Pabst Brewing Co. LLC*, No. BC584365 (Cal. Super. Ct., Los Angeles Cnty., rulings issued February 24, 2016).

In the June 2015 complaint, the rapper argued that through a phantom equity clause in his three-year deal to endorse Blast by Colt 45®, a line of fruit-flavored alcohol beverages, he is owed part of the sale price realized by Pabst stockholders. The parties reportedly disputed over whether the court should take judicial notice of the securities sale agreement, but the court found that considering it was inappropriate at this stage of the litigation and denied the motions to dismiss the case. *See Law360*, February 24, 2016.

Chipotle Wins Dismissal of GMO False-Ad Suit, Loses Gender Discrimination Case

A California federal court has dismissed a lawsuit against Chipotle Mexican Grill Inc. alleging the company falsely advertises its food as free of genetically modified organisms (GMOs) despite selling meat and dairy produced from animals fed GMO products as well as soft drinks manufactured with GMO corn syrup. *Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-3952 (N.D. Cal., order entered February 5, 2016). The plaintiff had failed to plausibly plead her allegations, the court found, because she failed to specify which products she purchased. Accordingly, the court granted Chipotle's motion to dismiss but allowed the plaintiff leave to amend. Additional information about the complaint appears in Issue 577 of this *Update*.

Meanwhile, a jury ordered Chipotle to pay $351,936 in back pay and $255,000 in punitive damages to three female former managers at restaurants near Cincinnati, Ohio, over allegations of gender discrimination. *Rogers v. Chipotle Mexican Grill Inc.*, No. 13-0146 (S.D. Ohio, verdict entered February 8, 2016). The women argued that Chipotle fired them for performance issues despite that several male managers with similar or worse performance scores were not fired. In addition, the man who later fired the three women reportedly told one of them that there was "too much estrogen" in the restaurant because the manager and assistant manager were both female. Another trial for additional claims by two other women is scheduled for April. *See Law360*, February 9, 2016.

Alberta Court Approves CAN$4-Million Settlement in Tainted Beef Lawsuit

An Alberta court has reportedly approved a settlement agreement in a class action stemming from an *E. coli* outbreak that resulted in the recall of nearly 4 million pounds of beef in Canada and the United States, amounting to the largest meat recall in Canadian history. *Harrison v. XL Foods Inc.*, No. 1203-14727 (Can. Alta. Q.B., order entered February 17, 2016). Under the settlement agreement, the class is open to consumers in Canada and the United States who either purchased XL Foods Inc.'s beef, thereby suffering an economic injury, or consumed it, causing them to contract an illness. Eligible class members can receive a full refund with proof of purchase or CAN $25 without. *See CBC News*, February 17, 2016.

Grated-Parmesan Tests by *Bloomberg Business* Prompt Mislabeling Lawsuit, Retailer Response

A consumer has filed a lawsuit against Kraft Heinz Foods Co. alleging the company sells its grated Parmesan as "100% Grated Parmesan Cheese" despite containing "significant amounts of adulterants and fillers," including cellulose, or "wood pulp." *Lewin v. Kraft Heinz Foods Co.*, No. 16-0823 (N.D. Cal., filed February 18, 2016). The lawsuit comes in the wake of a *Bloomberg Business* article investigating the content of several leading companies' grated-Parmesan products. The plaintiff alleges that the 3.8 percent of the product composed of cellulose precludes Kraft from labeling its cheese as "100% Grated Parmesan." For allegations of misrepresentation, fraud and violations of California's consumer-protection statutes, the plaintiff seeks class certification, damages and an injunction.

For its investigation, *Bloomberg* hired a laboratory to test grated-Parmesan products for levels of cellulose, an additive often described as "wood pulp" approved for use in food in amounts up to 4 percent. The tests apparently found higher or mislabeled levels from several products, including 8.8 percent from Jewel-Osco's store-brand Parmesan and 0.3 percent from Whole Foods', which did not list cellulose as an ingredient. Jewel-Osco reportedly pulled its product from shelves following the article.

The news outlet began its investigation while reporting on the expected guilty plea by the president of Castle Cheese Inc. over adulterated cheese products. In that case, the U.S. Food and Drug Administration alleges the company's grated Parmesan and Romano products were

adulterated through deviation from the standards of identify for those cheeses, amounting to a misdemeanor count of aiding the introduction of misbranded and adulterated food into interstate commerce. The company president faces up to one year in prison and a $100,000 fine. *See Bloomberg Business*, February 16, 2016.

Consumer Lawsuit Targets "Healthy" Coconut Oil Claims

A consumer has filed a putative class action against Carrington Tea Co. alleging the company advertises its coconut oil as "a healthy alternative to butter and various cooking oils, despite that coconut oil is actually inherently *unhealthy*, and a *less healthy* option to these alternatives." *Boulton v. Carrington Tea Co.*, No. B609360 (Cal. Super. Ct., Los Angeles Cnty., filed February 4, 2016).

Coconut oil "is approximately 90 percent saturated fat" and "increases the risk of [coronary heart disease] and stroke" as well as other negative health effects, the complaint asserts. Despite these effects, the plaintiff argues, Carrington markets its coconut oil as healthy, and further, "Carrington's labeling claims are designed to conceal or distract consumers from noticing that its Carrington Farms coconut oils are pure fat" by including the phrase "Healthy Foods for a Healthy Soul" and claiming that "Carrington Farm's cold-pressed organic extra virgin coconut oil is the most nutritious oil and the perfect choice for your health and energy!" The plaintiff seeks class certification, a compelled corrective advertising campaign, destruction of misleading materials, disgorgement of profits and restitution for alleged violations of California's consumer-protection statutes.

Wendy's Data Breach Was Preventable, Proposed Class Action Argues

A consumer has filed a putative class action against The Wendy's Co. alleging a failure to sufficiently secure customer payment card data. *Torres v. Wendy's Co.*, No. 16-0210 (M.D. Fla., filed February 8, 2016). Wendy's announced in late January 2016 that it had discovered in its processing systems a software program designed to steal credit and debit card information, several weeks after the plaintiff discovered that his debit card had been used in fraudulent purchases totaling almost $600.

"Wendy's could have prevented this Data Breach," the complaint asserts. "The malicious software used in the Data Breach was more than likely a variant of 'BlackPOS,' the identical malware strain that hackers used in last year's data breach at many other retail establishments. While many

retailers, banks and card companies responded to recent breaches by adopting technology that helps make transactions more secure, Wendy's has acknowledged that it has retained a security consultant to review and look into its systems."

The plaintiff calls the existing measures "suspect," arguing that the situation requires "judicial intervention and consumer and independent oversight." For allegations of breach of implied contract, negligence and a violation of Florida's consumer-protection statute, he seeks class certification, damages, attorney's fees and injunctions compelling Wendy's to stop using its current security system and to "utilize appropriate methods and policies with respect to consumer data collection, storage and safety."

OTHER DEVELOPMENTS

Hamburg Imposes Coffee-Pod Ban in City Government Facilities

Citing environmental concerns, the German city of Hamburg has reportedly banned the use of coffee pods in government buildings. Hamburg's *Guide to Green Procurement* reportedly states that coffee pods cause "unnecessary resource consumption and waste generation, and often contain polluting aluminum."

"It's 6 grams of coffee in 3 grams of packaging," a Hamburg Department of the Environment and Energy official said. "We in Hamburg thought that these shouldn't be bought with taxpayers' money." *See VICE.com*, February 24, 2016; *The Telegraph*, February 25, 2016.

SCIENTIFIC/TECHNICAL ITEMS

CDC Issues Latest Numbers on SSB Consumption

The Centers for Disease Control and Prevention (CDC) has released the latest statistics on sugar-sweetened beverage (SSB) consumption in 23 states and the District of Columbia, concluding that, in 2013, approximately 30 percent of surveyed adults reported drinking at least one SSB per day. Sohyun Park, et al., "Prevalence of Sugar-Sweetened Beverage Intake Among Adults—23 States and the District of Columbia, 2013," *Morbidity and Mortality Weekly Report*, Feb. 26, 2016. Relying on data gathered via Behavioral Risk Factor Surveillance System (BRFSS) telephone survey, the study refined previous questionnaires to solicit information about the consumption of sweet tea and energy drinks in addition to regular soda and sweetened fruit beverages.

The results evidently indicate that "at least once daily SSB intake was most common among persons aged 18–24 years (43.3%), men (34.1%), blacks (39.9%), persons who reported being unemployed (34.4%), and persons with less than a high school education (42.4%)." Across all age groups in Mississippi—the state with the highest prevalence of SSB consumption—47.5 percent of respondents said they drink at least one SSB daily and 27.3 percent said they drink two or more SSBs daily. By comparison, Vermont was the state with the lowest prevalence, with 18 percent of respondents consuming at least one SSB daily.

"As has been reported in other studies that used National Health Interview Survey and BRFSS data, the prevalence of at least once daily SSB intake in this analysis was higher in southern states," note the report authors. "Higher SSB intake frequency in certain states could result, in part, from variations in beverage retail environments, including access and availability, cultural norms, and advertising... Considering potential adverse health effects of SSB intake and the substantial contribution that SSBs make to excess dietary sugar, continuation of public health efforts aimed at decreasing high SSB intake is important."

New Data Eases Concerns over Arsenic Content of California Wine

Refuting earlier claims that California wines allegedly contain "dangerously high" levels of arsenic, a new study has concluded that inorganic arsenic in blush, white and red California wines "does not represent a health risk for consumers." Dennis Paustenbach, et al., "Analysis of Total Arsenic Content in California Wines and Comparison to Various Health Risk Criteria," *American Journal of Enology and Viticulture,* January 2016. Using inductively coupled plasma mass spectrometry to characterize the arsenic content of 101 wines produced or bottled in California, the authors evidently found that blush wines contained the greatest total arsenic concentration, followed by white and then red wines.

In particular, the study tested 28 wines singled out in media reports as exceeding the U.S. Environmental Protection Agency's maximum contaminant level for arsenic in drinking water of 10 μg/L. But even though these wines contained more total arsenic than randomly selected products, "no more than 0.3% of California wines (if any) may contain arsenic concentrations greater than the 100 μg/L guideline" that is used for arsenic concentration in wine.

"Chronic daily intake of arsenic as a result of wine consumption was estimated to account for a small fraction (< 8.3%) of a typical adult's dietary arsenic intake, indicating that wine consumption is not a significant source of total arsenic exposure," state the authors, who will also present their findings at the Society of Toxicology 55th Annual Meeting slated for March 13-17, 2016, in New Orleans, Louisiana. "These results indicate that the presence of arsenic in wine does not represent a health risk for consumers." Additional details about a previous study of arsenic in wine as well as a lawsuit appear in Issues 559, 562 and 581 of this *Update*.

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.