FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 621 | NOVEMBER 4, 2016

SHOOK HARDY & BACON

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Cornucopia Institute Asks USDA to Investigate Hydroponic Produce Organic Certification 1

FTC Approves Order to Preserve Supermarket Competition 1

FDA Ponders the Nature of Nutella® 1

LITIGATION

Pennsylvania's High Court Declines to Consider SSB Tax 2

Sour Patch Slack Fill Case Dismissed 2

Octopus Mislabeling Suit to Continue 3

Organic Groups Target "100% Pure" Sioux Honey for Glyphosate 4

OTHER DEVELOPMENTS

WHO Report Recommends "Urgent Action" to Curtail Digital Food Marketing to Children 4

LEGISLATION, REGULATIONS AND STANDARDS

Cornucopia Institute Asks USDA to Investigate Hydroponic Produce Organic Certification

The Cornucopia Institute has filed a complaint with the U.S. Department of Agriculture "requesting an investigation into the organic certification of hydroponic operations in the U.S. that appear to conflict with the statutory language of the Organic Foods Production Act (OFPA) of 1990 and current federal regulations governing organic food production." The organization argues that two companies, Wholesum Harvest Family Farms and Driscoll's, sell hydroponically raised produce as certified organic despite failing to meet federal standards on the contents of their soil, which allegedly include peat moss, coconut cuir and hydrolyzed soy fertilizers made from genetically modified soybeans.

"Hydroponic and container systems rely on liquid fertilizers developed from conventional crops or waste products," said a Cornucopia Institute farm policy analyst in a November 1, 2016, press release. "Suggesting that they should qualify for organic labeling is a specious argument."

FTC Approves Order to Preserve Supermarket Competition

The Federal Trade Commission (FTC) has approved a modified final order settling charges that the $28-billion merger of Delhaize Group NV/SA and Koninklijke Ahold N.V. would be anticompetitive. *In re Koninklije Ahold N.V.*, No. C-4588 (F.T.C., order entered October 14, 2016). According to the modified order, the companies must divest 81 stores—including locations of Giant, Hannaford, Martin's, Food Lion and Stop & Shop—to seven companies before merging.

FDA Ponders the Nature of Nutella®

The U.S. Food and Drug Administration (FDA) has requested public input on how consumers use "flavored nut butter spreads and products that can be used to fill cupcakes and other desserts," as part of its effort to establish a reference amount customarily consumed (RACC) and serving size for these products. Responding to a March 4, 2014, citizen petition filed by Nutella®-manufacturer Ferrero Inc., which asked FDA to re-categorize nut cocoa-based spreads as a breakfast condiment similar

to "honey, jams, jellies, fruit butter, [or] molasses" as opposed to a dessert topping, the agency notes that it has since updated certain RACCs and needs additional data "to determine the customary consumption amounts of and appropriate product category for flavored nut butter spreads (e.g., cocoa, cookie, and coffee flavored)."

To decide if it needs to create a new RACC category for these products with a serving size of 1 tablespoon, FDA seeks responses to the following questions: (i) "What is the major intended use of flavored nut butter spreads (e.g., cocoa, cookie, and coffee flavored)?;" (ii) "What other products on the market, if any, are similar to flavored nut butter spreads (e.g., cocoa, cookie, and coffee flavored)?"; and (iii) "What product characteristics make these products similar? What dietary usage makes these products similar? Which product categories do flavored nut butter spreads (e.g., cocoa, cookie, and coffee flavored) compete with or take market share and volume from? What data and information are available regarding the customary consumption amounts and product category for these similar products?" In addition, FDA has asked similar questions about "products used as fillings for cupcakes and other desserts, such as cakes and pastries." FDA will accept data and comments until January 3, 2017. *See Federal Register,* November 2, 2016.

LITIGATION

Pennsylvania's High Court Declines to Consider SSB Tax

The Pennsylvania Supreme Court has denied an application for extraordinary relief filed by several industry groups in an effort to prevent Philadelphia's 1.5-cent-per-ounce tax on sugar-sweetened beverages (SSBs) from taking effect on January 1, 2017. *Williams v. City of Philadelphia*, No. 160901452 (Ct. C.P., Philadelphia Cty., order entered November 2, 2016). The one-page order does not provide any reasoning for the decision. The lower court currently presiding over the case has indicated that it will rule on the tax's legality before the January 1 enforcement date. *See The Philadelphia Inquirer*, November 2, 2016.

Details about the industry lawsuit appear in Issue 617 of this *Update*.

Sour Patch Slack Fill Case Dismissed

A New York federal court has dismissed a consumer's lawsuit alleging Mondelez International sells its Sour Patch Watermelon candy with unpermitted slack fill. *Izquierdo v. Mondelez Int'l Inc.*, No. 16-4697 (S.D.N.Y., order entered October 26, 2016). The lead plaintiff had

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.

asserted that the box he purchased contained 28 pieces of candy but had enough space for 50 pieces. Additional details about the complaint appear in Issue 609 of this *Update*.

After finding that the plaintiff did not have standing for an injunction, the court turned to the candy company's arguments, dismissing its assertion that the accurate net weight released it from liability. Further, the court found it inappropriate to consider at the motion-to-dismiss stage whether a consumer could determine the contents of the package by shaking or squeezing it.

The court was persuaded by Mondelez's argument that the plaintiffs had failed to state a claim because they did not clarify what premium they paid on the product. "Simply because Plaintiffs here recite the word 'premium' multiple times in their Complaint does not make Plaintiffs' injury any more cognizable," the court held. "Plaintiffs have not alleged that they paid a *higher* price for the Candy than they otherwise would have, absent deceptive acts. And Plaintiffs' pointing out that the Candy is more expensive per ounce than other sweets on the market brings them no closer to stating a claim for injury. Comparing the Candy to Hot Tamales and Junior Mints is the saccharine equivalent of comparing apples with oranges." Accordingly, the court granted Mondelez's motion to dismiss the plaintiffs' claims.

Octopus Mislabeling Suit to Continue

A California federal court has denied Vigo Importing Co.'s motion to dismiss a lawsuit alleging the company mislabels its products as containing octopus when they are actually composed of jumbo squid. *Fonseca v. Vigo Importing Co.*, No. 16-2055 (N.D. Cal., San Jose Div., order entered October 26, 2016). Vigo Importing sought to dismiss the claim on jurisdictional grounds, arguing that based on its sales figures, the amount in controversy could not possibly meet the $5-million threshold required by the Class Action Fairness Act to allow a federal court to consider the case. The court disagreed, noting that the sales price was only part of the calculation; the potential damages determination requires information on the cost of the products as well as the value of the product if composed of jumbo squid. Details on the complaint appear in Issue 602 of this *Update*.

Organic Groups Target "100% Pure" Sioux Honey for Glyphosate

The Organic Consumers Association (OCA) and Beyond Pesticides have filed a complaint against the Sioux Honey Association alleging the company's Sue Bee® honey products contain the herbicide glyphosate despite being marketed as "Pure" and "Natural." *Organic Consumers Assoc. v. Sioux Honey Assoc. Coop.*, No. 008012 (D.C. Super. Ct., filed November 1, 2016). The complaint acknowledges that the glyphosate "may be due to the application of glyphosate on crops by neighboring farms and unrelated to beekeeping activities" but argues that the labeling is inaccurate regardless. The plaintiff organizations seek an injunction enjoining the labeling and mandating a corrective advertising campaign as well as costs.

"A consumer seeing the words 'Pure,' '100% Pure' or 'Natural' on a honey product would reasonably expect that product to contain nothing other than honey," OCA International Director Ronnie Cummins said in a November 1, 2016, press release. "Regardless of how these products came to be contaminated, Sioux Honey has an obligation to either prevent the contamination, disclose the contamination, or at the very least, remove these deceptive labels."

OTHER DEVELOPMENTS

WHO Report Recommends "Urgent Action" to Curtail Digital Food Marketing to Children

The World Health Organization (WHO) has issued a November 4, 2016, report titled *Tackling food marketing to children in a digital world: trans-disciplinary perspectives*, which urges policymakers "to reduce children's exposure to all forms of marketing for foods high in fats, salt and sugars [HFSS], including via digital media." In particular, the report claims digital marketing campaigns take advantage of regulatory loopholes to amplify the traditional media advertising of HFSS foods, "achieving greater ad attention and recall, greater brand awareness and more positive brand attitudes, greater intent to purchase and higher product sales."

The report calls attention to the privacy issues that purportedly surround the digital marketing of foods to children, including the collection and use of geo-location and personal data. It also warns that "some food chains partner with gaming companies in order to, for example, make the chain's restaurants important game locations," while other advertisers

reportedly rely on advergames, social media, or "powerful peer influencers such as video bloggers" to "engage children in emotional, entertaining experiences and encourage them to share these experiences with their friends—a dubious cocktail when used to promote unhealthy foods."

Outlining the key components of policies designed to curb digital food marketing to children, the report asks European Union member states to acknowledge their duty "to protect children online with statutory regulation," as well as extend offline protections to online media. To this end, WHO calls on policymakers to define what constitutes marketing directed to children, "compel private Internet platforms to remove marketing of foods high in saturated fat, salt and/or free sugars," and develop appropriate penalties. It also recommends that stakeholders (i) "strengthen corporate social responsibility" initiatives to protect children's rights online; (ii) "address the ethics of conducting digital research with data from children"; (iii) "audit algorithms and supervise data mining practices"; and (iv) "disclose marketing spending, activities and reach and children's engagement." *See WHO Press Release,* November 4, 2016.

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.