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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

FDA Extends Menu Labeling Compliance Date to 2018

The U.S. Food and Drug Administration (FDA) has extended the compliance date for calorie-count menu labeling from May 5, 2017, to May 7, 2018, and is inviting public comment on the issue. The menu-labeling rule applies to restaurants with 20 or more locations, as well as "grab-and-go" foodservice vendors such as supermarkets, coffee shops and bakeries, concession stands at movie theaters and amusement parks. While the rule is supported by the National Restaurant Association and many restaurant chains have already posted the required information, other trade groups say that the FDA underestimated the costs of compliance and that the rule is an unnecessary regulatory burden on businesses.

SSB Tax Initiative Fails in Santa Fe

Voters in Santa Fe, New Mexico, rejected a sugar-sweetened beverage (SSB) tax initiative that would have raised the price of SSBs by 2 cents per ounce. Political action committees, industry groups and advocacy organizations reportedly spent $3.25 million on the vote. Campaign finance reports show that Michael Bloomberg, who began his campaign for SSB taxes and portion caps during his term as mayor of New York City, contributed $1 million to a pro-tax committee.

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FDA Announces Decisions on Perchlorate in Food Seals, Packaging

The U.S. Food and Drug Administration (FDA) denied a citizen petition to ban the use of perchlorates in dry food packaging while revoking regulations permitting the use of potassium perchlorate in food-container seals, saying industry makers no longer use the chemical.

FDA said it will amend food additive regulations allowing the use of potassium perchlorate as a component in sealing gaskets for food containers. Trade groups petitioned for the change, arguing that plastics manufacturers have stopped using the compound.

The following day, FDA rejected a petition from public interest groups seeking to ban use of potassium perchlorate and sodium perchlorate monohydrate in dry food packaging and requesting that the agency issue new regulations prohibiting use of perchlorates in packaging. Neither request was "the proper subject of a food additive petition," the agency stated, but the groups could petition to revoke or reevaluate the Threshold of Regulation exemption.

OEHHA Accepting Comments on Lead Levels in Candy

California's Office of Environmental Health Hazard Assessment (OEHHA) has announced a public hearing on a petition to issue regulations setting "naturally occurring" lead levels in candy containing chili or tamarind. The hearing, which will be webcast, is tentatively scheduled for June 19, 2017. Comments on the petition may be submitted by email or in writing by July 3, 2017.

FDA Budget Includes GMO Information Campaign

A budget plan passed to fund the U.S. government until September 2017 reportedly includes $3 million to pay for an information campaign about genetically modified organisms (GMOs) in food. As a partnership between the U.S. Food and Drug Administration (FDA) and the Department of Agriculture, the campaign will apparently seek to counter "misinformation about agricultural biotechnology."

"It is not the responsibility of the FDA to mount a government-controlled propaganda campaign to convince the American public

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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.

that genetically modified foods are safe," Rep. Nita Lowey (D-N.Y.) said. *See The Washington Post*, May 3, 2017.

LITIGATION

Del Monte's $32-Million Arbitration Award Confirmed in Pineapple Seed Dispute

A Florida federal court has confirmed an arbitration tribunal's decision awarding $32 million to Del Monte International for Inversiones Y Procesadora Tropical Inprotsa's continued use of Del Monte pineapple seeds after the agreement permitting use had expired. *Inversiones Y Procesadora Tropical Inprotsa v. Del Monte Int'l*, No. 16-24275 (S.D. Fla., order entered May 1, 2017). Inprotsa argued that although it had stipulated "that Del Monte owned the MD-2 pineapple variety," "it only stipulated to that fact because Del Monte had falsely represented that it owned the MD-2 variety in letters to Costa Rican growers." In response, Del Monte pointed out that the arbitral tribunal "specifically held that the parties' agreement was not procured by fraud."

The court found that Inprotsa did not argue "that the two-year arbitration process was fraudulent, that the arbitration tribunal acted fraudulently, or that the final award was procured by fraud." Rather, the company argued that Del Monte fraudulently entered its agreement with Inprotsa, an argument considered and rejected by the arbitrators. "Inprotsa is asking this Court to rehash a losing argument before the arbitration panel," the court held. "Given the legal standard and the summary proceedings to confirm arbitral awards, the Court will not overrule the arbitrator." Further, the arbitration panel's ruling "does not violate the 'most basic notions of morality and justice,'" as Inprotsa argued.

Shook, Hardy & Bacon Partner Bert Ocariz served on the arbitration panel; additional details on the panel's decision appear in Issue 609 of this *Update*.

Summary Judgments in Strawberry-Breeding Dispute Favor Both Sides

A federal court has granted summary judgment on a majority of issues in a dispute between scientists and the University of California, Davis centered on the intellectual-property rights of two strawberry varieties. *Cal. Berry Cultivars, Inc. v. Regents of U. of Cal.*, No. 16-2477 (N.D. Cal., filed May 2, 2015). Two former

UC Davis scientists and their company sued the university alleging it refused to license the strawberry varieties they invented; additional details on the complaint appear in Issue 604 of this *Update*.

The court granted summary judgment on most of the issues, leaving open the scientists' assertions that UC Davis breached the implied covenant of good faith and fair dealing as well as the unfair competition claim. However, because the court also ruled in favor of UC Davis' breach of contract claim, it noted that the jury verdict and final judgment may "sock it to both sides . . . and it may make sense from an equitable standpoint as well."

Class Actions Claim "Truffle" Oil Contains Chemical Flavoring, Not Real Truffles

Two putative class actions allege that Trader Joe's "Black Truffle Flavored" olive oil and Monini's "White Truffle Flavored" olive oil are flavored with synthetic chemicals rather than truffles. *Brumfield v. Trader Joe's*, No. 17-3239 (S.D.N.Y, filed May 2, 2017); *Jessani v. Monini N. Am.,* No. 17-3257, filed May 2, 2017). The plaintiffs argue that the products are sold for significantly more—34 percent more for Trader Joe's and 459 percent more for Monini—than olive oil without additional flavoring. Claiming violations of the Magnuson-Moss Warranty Act and state consumer-protection statutes, the plaintiffs seek class certification, an injunction, damages, restitution and attorney's fees.

Putative Class Action Alleges Burger King Overcharged Consumers

A Maryland consumer alleges that when she used coupons offering a free sandwich with the purchase of an initial sandwich, Burger King locations in Maryland, Virginia, the District of Columbia and Florida charged her more than they would have if she had purchased sandwiches without the coupons. *Anderson v. Burger King*, No. 17-1204 (D. Md., filed May 2, 2017). The complaint asserts that Burger King's coupon promotion offers a "free" sausage, egg and cheese breakfast "Croissan'wich" to customers who buy one Croissan'wich at the regular price. The plaintiff claims she went to a Maryland location, presented a coupon and was charged $3.19 for the two sandwiches she received. She later purchased a single sandwich and was charged only $2.16, the complaint alleges. She found similar results at locations in (i) the

District of Columbia, where the two coupon sandwiches cost $4.61 and the single sandwich cost $1; (ii) Virginia, where the coupon sandwiches cost $2.99 and the single $1.79; and (iii) Florida, where the coupon sandwiches cost her $3.45 and the single $2.29. Claiming violations of several consumer-protection statutes, the plaintiff seeks class certification, damages, an injunction and attorney's fees.

Sazerac Limited to Attorney's Fees in Trade-Dress Suit

A federal court has ruled that Sazerac Co. may take Fetzer Vineyards, Inc. to trial for its trade-dress claims but cannot seek damages because it failed to disclose damage calculations in a timely manner. *Sazerac Co. v. Fetzer Vineyards, Inc.*, No. 15-4618 (N.D. Cal, order entered April 27, 2017). Sazerac, maker of Buffalo Trace bourbon, alleged Fetzer's use of a buffalo and the words "bourbon barrel aged" on the label of its 1000 Stories zinfandel infringed its federal trademark and trade dress rights.

Sazerac "demonstrated a triable issue whether consumers are likely to be confused by Fetzer's buffalo and trade dress," the court found. However, Sazerac indicated it would provide damage calculations based on expert testimony, but it failed to propose a valid methodology until shortly before the settlement conference, when it instead presented calculations based on third-party licensing agreements. Because of the irremediable prejudice to Fetzer, the court ruled that Sazerac's recovery at trial would be limited to attorney's fees.