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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

FIRM NEWS

Cruz-Alvarez and Canfield Examine Recent Ruling on Website Access for Visually Impaired

Food and beverage companies offering retail sales on the web are facing a wave of lawsuits filed by visually impaired plaintiffs alleging that the companies' failure to design websites that work with adaptive screen-reading software violates the Americans with Disabilities Act (ADA). In "Because of 'Winn-Dixie'?: Uncertainty over ADA's Applicability to Websites Deepens," Shook Partner Frank Cruz-Alvarez and Associate Rachel Canfield examine a recent ruling in the Southern District of Florida holding that a grocery chain violated Title III of the ADA because its website was inaccessible. Cruz-Alvarez and Canfield summarize *Gil v. Winn-Dixie Stores*, No. 16-23020 (S.D. Fla. June 12, 2017), and explain that federal courts are split on the issue of whether the ADA applies to non-physical spaces, leaving "a whole new host of legal challenges. . . . There is very little structure, and even less clarity, in this emerging area of the law."

In the interim, the authors say, businesses with operational websites should (i) familiarize themselves with the threshold requirements for sites that operate as gateways to brick-and-mortar stores; (ii) understand that the law is unclear about whether a website is a public accommodation and what obstacles are unduly burdensome; and (iii) recognize that it is still unclear which browsers and screen readers must be compatible with or accessible through the website.

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A number of restaurant chains have faced similar lawsuits, including Five Guys, Eatsa, Taco Bell and Panera; additional details appear in Issues 602, 611, 629 and 635 of this *Update*. In addition, two more suits have been filed: a putative class action against bakery chain Milk Bar (*Matzura v. Milk Bar*, No. 17-5030 (S.D.N.Y., filed July 5, 2017)) and an individual suit against online food delivery service GrubHub (*Reed v. GrubHub Holdings*, No. 17-4946 (N.D. Ill., filed June 30, 2017)).

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LEGISLATION, REGULATIONS & STANDARDS

Schumer Calls for Investigation into "Snortable Chocolate"

Sen. Chuck Schumer (D-N.Y.) has urged the U.S. Food and Drug Administration to launch a formal investigation into "Coco Loko," a "snortable chocolate" product that contains stimulants akin to those found in energy drinks. He argues that the product "isn't even pure chocolate" and is "chock full of concentrated energy drink ingredients masked and marketed under the innocence of natural and safe chocolate candy."

“I can’t think of a single parent who thinks it is a good idea for their children to be snorting over-the-counter stimulants up their noses,” Schumer said in a July 10, 2017, press release. “This product is like cocaine on training wheels.”

LITIGATION

Appeals Court Upholds Pause on Chicago SSB Tax

The Illinois Appellate Court has upheld a temporary restraining order that stopped a proposed one-cent per-ounce tax on sugar-sweetened beverages (SSBs) from going into effect in Cook County on July 1, 2017. *Illinois Retail Merchs. Ass’n v. Cook Cty. Dep’t of Revenue*, No. 2017L050596 (Ill. Cir. Ct., Cook Cty., filed June 27, 2017). The Illinois Retail Merchants Association filed for the order along with preliminary and permanent injunctions against imposition of the tax, arguing it violates the uniformity clause of the state constitution and is unconstitutionally vague. The plaintiffs allege that the tax applies to distributors and retailers who sell bottled sweetened beverages and syrups or powders used to produce SSBs but not to SSBs prepared by hand, such as those made by baristas, even if they contain more sugar than a comparable bottled or “pre-made” product.

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.

Florida Supreme Court Upholds Veto of Payments for Citrus-Tree Removals

After years of litigation over whether Florida should reimburse residents whose healthy citrus trees were cut down in an effort to eradicate citrus canker, the Florida Supreme Court has upheld Gov. Rick Scott's veto of $37.4 million appropriated by the state legislature that would have paid judgments to homeowners in two counties. *Bogorff v. Scott*, No. 17-1155 (Fla., order entered July 13, 2017). From 2000 to 2006, Florida attempted to eradicate citrus canker in the state, eventually chopping down more than 500,000 orange, grapefruit and key lime trees throughout the state located within 1,900 feet of an infected tree, even if the trees showed no signs of the disease.

In May 2017, lawmakers budgeted funds to pay previous judgments awarded to homeowners in Lee and Broward counties, two of the five counties affected. Gov. Scott used a line-item veto to stop the budgeted payments; the Lee county plaintiffs then sought and won an order of mandamus directing the state to pay $14.5 million in damages plus post-judgment interest. However, the state's highest court has now upheld the veto by a 6-1 vote, holding that the proper forum to challenge the governor's veto authority is the circuit court.

The lone dissenter, Justice Fred Lewis, reportedly criticized both the court's decision and the governor, pointing out that the plaintiffs won their class action cases years ago. "This is not a game, and our citizens should not be toyed with as if a yo-yo, and yet that is exactly what this veto accomplishes," Lewis wrote. "We simply cannot allow another 10 years to go by for the Executive to continue playing games of hide the money through a veto power and word games in the courts. . . . Furthermore, every day that goes by, the State owes more and more in post-judgment interest for a judgment that has long been final."

Concurring Justice Barbara Pariente said although the court's decision was correct on legal grounds, the homeowners deserved payment after winning in court after court. "These petitioners have the right to full compensation," she wrote. "The time has come for the state to pay up." *See Miami Herald* and *Sun Sentinel*, July 13, 2017.

Two Suits Claim Deceptive Labeling and Advertising of Salt-and-Vinegar Chips

A California couple has filed two putative class actions alleging that the makers of Lay's® and Pringles® salt-and-vinegar-flavored chips mislabel and deceptively advertise their products, leading customers to believe the chips are naturally flavored when they actually contain artificial chemical flavorings. *Allred v. Kellogg*, No. 17-1354 (S.D. Cal., removed to federal court July 5, 2017); *Allred v. Frito-Lay N. Am.*, No. 17-1345 (S.D. Cal., removed to federal court July 3, 2017). In both suits, the plaintiffs claim the manufacturers label and advertise the potato snacks "as if [they] were flavored only with natural ingredients" and as containing "no artificial flavors."

The plaintiffs allege that although both products contain "actual vinegar—but in an amount too small to flavor the product," the chips' vinegar flavors are artificial. The Lay's® complaint alleges that the label states the product contains malic acid; although l-malic acid can be found naturally in fruits and vegetables, the plaintiffs assert, Frito-Lay adds d-1-malic acid—made from benzene and butane—to produce the sour flavor associated with vinegar. The Pringles® complaint alleges that Kellogg adds both d-1-malic acid and sodium diacetate, manufactured from carbon monoxide and industrial methanol, to flavor its potato chips. The plaintiff concedes that d-1-malic acid may be used under current Generally Recognized As Safe (GRAS) regulations but argues that the use of the general term "malic acid" deceives consumers.

Claiming violations of California consumer-protection laws and breach of warranty, the plaintiffs seek class certification, disgorgement, restitution, damages and attorney's fees in both suits.

Lawsuit Challenges Veggie Straws' Nutritional Value

The makers of Sensible Portions Garden Veggie Straws face a proposed class action alleging the company misrepresented the vegetable content and nutritional value of the product. *Solak v. Hain Celestial Grp.*, No. 17-0704 (N.D.N.Y., filed June 29, 2017). The plaintiffs assert that Garden Veggie Straws are marketed as containing "garden grown potatoes [and] ripe vegetables" and display tomatoes, potatoes and spinach on the packaging, but the first ingredients listed are "potato starch, potato flour, corn starch, tomato paste and spinach powder." In addition, the plaintiffs assert that while tomatoes and spinach are "excellent sources" of vitamins A and C, Garden Veggie Snacks contain no vitamin A and only two percent of the recommended daily amount (RDA) of vitamin C. The complaint further alleges that the snacks are

advertised as containing 30 percent less fat than “the leading potato chip," but a single serving of Lay’s Classic potato chips apparently contains 10 percent of the RDA of vitamin C and has less sodium and more protein than a serving of Garden Veggie Snacks. Claiming violations of New York and California consumer-protection laws, the plaintiffs seek class certification, injunctive relief, damages, restitution and attorney’s fees.

Dunkin’s Steak Sandwiches Are Not Steak, Plaintiff Alleges

A New York plaintiff has filed a proposed class action against Dunkin’ Brands alleging the chain’s "Angus Steak" breakfast sandwiches contain beef patties rather than Angus steak. *Chen v. Dunkin’ Brands*, No. 17-3808 (E.D.N.Y., filed June 25, 2017). The complaint alleges that the restaurant’s “Angus Steak and Egg Sandwich” and “Angus Steak and Egg Snack N’ Go Wrap” do not contain “steak” but instead a beef patty of “minced meat which contains ‘fillers and binders.’” Claiming violations of state consumer-protection laws and the Magnuson-Moss Warranty Act, unjust enrichment, breach of warranties and negligent misrepresentation, the plaintiff seeks class certification, disgorgement, damages and attorney’s fees.

Celebrity Chef Jamie Oliver Sued for Trademark Infringement

The Gluten Intolerance Group of North America (GIG), a nonprofit consumer-advocacy and food-safety certification group, has filed a lawsuit against celebrity chef Jamie Oliver alleging that his website displays a designation on gluten-free recipes that infringes the group’s trademarks. *Gluten Intolerance Grp. of N. Am. V. Jamie Oliver Enters.*, No. 17-1028 (W.D. Wash., filed July 7, 2017). GIG alleges that Oliver’s website displays the letters “GF” inside a circle near gluten-free recipes, a mark which is identical or substantially similar to one of GIG’s registered word and design marks. Claiming trademark infringement, counterfeit of a registered mark, unfair competition and false designation of origin under the Lanham Act, the plaintiffs seek injunctive relief, recall of all materials using the contested mark, a public disclaimer of connection with GIG, corrective advertising, damages and a designation of the lawsuit as an exceptional case entitling GIG to an award of attorney’s fees.

Lawsuit Claims Blue Buffalo Dog Food Contains Lead

Blue Buffalo Pet Products faces a proposed class action alleging that three of its dog-food products contain unsafe levels of lead despite being advertised as "healthy" and "holistic." *Zakinov v. Blue Buffalo Pet Products*, No. 17-1301 (S.D. Cal., filed June 26, 2017). The plaintiff, who asserts that his four-year-old dog died from kidney disease after eating "Blue Wilderness Chicken Recipe for Small Breed Adult Dogs," "Blue Freedom Grain-Free Chicken Recipe for Small Breed Adult Dogs" and "Blue Basics Grain-Free Turkey & Potato Recipe for Adult Dogs," alleges that independent lab testing found the products contained between 140 and 840 parts per billion of lead. Claiming negligent misrepresentation, negligence per se and violations of California consumer-protection laws, the plaintiff seeks class certification, injunctive relief, corrective advertising, restitution, disgorgement, damages and attorney's fees.

Plaintiff Claims Legal Malpractice in Product Liability Suit Against Townsend Farms

A California man has filed a legal malpractice claim against lawyers who allegedly failed to represent him adequately in his suit against fruit processor Townsend Farms, in which he claimed he contracted hepatitis A after eating the company's Organic Antioxidant Blend. *Durrell v. Taylor, Sullivan & Mondorf*, No. BC667419 (Cal. Sup. Ct., Los Angeles Cty., filed July 6, 2017). In 2013, the U.S. Food and Drug Administration announced that it was working with the Centers for Disease Control and Prevention as well as state and local officials to investigate a multistate outbreak of hepatitis A and confirmed that 162 people had become ill after eating the product. In 2014, Durrell sued Townsend Farms in Yolo County, California, and his case was later consolidated with others in Los Angeles County. The complaint alleges that his attorney failed to respond to discovery requests or motions to compel, resulting in the levy of $2,700 in sanctions and the dismissal of his claims with prejudice. The plaintiff seeks compensatory and actual damages, including the cost of his medical expenses.

Putative Class Action Challenges Blueberry and Maple Flavorings

A California consumer has filed a putative class action against Dunkin' Brands Group alleging that Dunkin' Donuts deceived customers into believing its blueberry and maple products contained "real" blueberries and maple syrup or sugar instead of artificial flavorings. *Babaian v. Dunkin' Brands Grp.*, No. 17-4890 (C.D. Cal., filed July 3, 2017). The plaintiff contends that the chain's use of the terms "blueberry" and "maple" in doughnut names represent to consumers that the products contain "real ingredients" and that Dunkin' has a duty to disclose the use of artificial flavorings. Further, the plaintiff asserts that whether the doughnuts actually contain "real ingredients" is material to a "reasonable" consumer's purchase decision because of the antioxidant properties and health benefits of both blueberries and maple syrup. Claiming breach of warranties, breach of contract, fraud, intentional and negligent misrepresentation, quasi-contract and violations of California consumer-protection laws, the plaintiff seeks class certification, damages, restitution and attorney's fees. A similar action was filed against Krispy Kreme over its blueberry, maple and raspberry doughnuts in 2016; additional details appear in Issue 622 of this *Update*.

SCIENTIFIC/TECHNICAL ITEMS

AHA Advisory Examines Dietary Fats and Cardiovascular Disease

The American Heart Association (AHA) has issued an advisory concluding that replacing saturated fats with unsaturated fats will lower the incidence of cardiovascular disease (CVD), especially if combined with an "overall healthful dietary pattern." Frank M. Sacks, et al, "Dietary Fats and Cardiovascular Disease: A Presidential Advisory From the American Heart Association," *Circulation*, June 15, 2017. AHA reviewed multiple studies on the effects of dietary saturated fat intake and its replacement with other types of fats, as well as replacement with carbohydrates, and concluded that replacing saturated fat with polyunsaturated vegetable fat and changing dietary patterns reduces the risk of CVD by as much as 30 percent.

Key recommendations of the review include lowering intake of saturated fat, increasing intake of polyunsaturated fat and avoiding coconut oil, which more than 70 percent of Americans regard as "healthy," despite that it actually increases LDL cholesterol.

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