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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

FIRM NEWS

Shook Attorneys Explore Limits On Photography During FDA Inspections

Shook Partners Lindsey Heinz and Katie Gates Calderon, with Associate Hillary Nicholas, have authored an article for *Law360* discussing regulations related to the use of photography during a U.S. Food and Drug Administration (FDA) inspection of a production facility.

"Despite the void of statutory authority, the FDA continues to instruct its inspectors to 'not request permission from management to take photographs during an inspection' and to instead simply begin taking photos and video," the authors explain. "Should a company object to these tactics, inspectors are encouraged to '[a]dvise management the U.S. Courts have held that photographs may lawfully be taken as part of an inspection.' However, the two cases the FDA cites in support of this assertion —*Dow Chemical Co. v. U.S.* and *U.S. v. Acri Wholesale Grocery Co.*—do not stand for the unequivocal proposition suggested by the FDA."

Heinz, Gates Calderon and Nicholas advise companies to determine their approach to photography before inspections begin and explain the policy during the inspection if needed. "Companies who decide to enforce a 'no-photo' policy during an FDA inspection are certainly well within their legal rights, but should be prepared to be labeled as 'uncooperative' by the FDA," they conclude. "To ease these tensions, preparation is key: Should a company determine it will not allow photography during an inspection, it is important that the company work closely with corporate and legal counsel to determine an approach that will protect the company's rights while remaining cooperative with the FDA so as to not impede the inspection."

LEGISLATION, REGULATIONS & STANDARDS

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.

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"Competing Priorities" Keep FDA From Ruling On Food Names Petition

The U.S. Food and Drug Administration's (FDA's) Center for Food Safety and Applied Nutrition has notified the Good Food Institute (GFI) that the agency has been unable to reach a decision on the advocacy group's March 2017 petition requesting recognition for commonly used—if technically inaccurate, per FDA definitions—food names such as "almond milk," "soymilk," "almond butter" and "cashew butter." The letter informs GFI that the agency was "not able to reach a decision on your petition within the first 180 days of its receipt, nor as of the date of this letter, because of other agency competing priorities."

LITIGATION

NYC Delays Enforcement Of Menu-Labeling Law

Following a delay of federal rules requiring restaurants, retailers and other foodservice establishments to post calorie counts, New York City has agreed to postpone enforcement of its comparable municipal codes until May 7, 2018, matching the implementation date of the federal rules. *Nat'l Assoc. of Convenience Stores v. New York City Dep't of Hygiene*, No. 17-5324 (S.D.N.Y., stipulation filed August 25, 2017). The plaintiffs filed a lawsuit July 2017 to prevent the city from enforcing a municipal regulation requiring calorie and nutrition information to be posted in their establishments. The plaintiffs stipulated that they will "encourage" their members to comply with the municipal code "to the extent those provisions impose requirements that are identical to the requirements" of the Food, Drug and Cosmetic Act and U.S. Food and Drug Administration regulations. In addition, the parties agreed to delay arguments on the plaintiff's motion for a preliminary injunction and the city's motion to dismiss until May 2018. Additional details appear in Issues 597, 603, 633 and 641 of this *Update*.

Federal Court Clears Way For Seafood Traceability Program

A federal court has granted the U.S. Department of Commerce's motion for summary judgment in a lawsuit aiming to block implementation of the Seafood Import Monitoring Program, which will require importers to document the catch-to-table distribution chain. *Alfa Int'l Seafood, Inc. v. Sullivan*, No. 17-0031 (D.D.C., entered August 28, 2017). A group of seafood processing, distribution and retail companies argued that the agency violated federal law in promulgating the rule, alleging it was issued without proper authority or supporting evidence. Several

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.

environmental groups previously sought to intervene in the lawsuit to defend the rule, but the court denied their motion.

The court found for the defendants on all issues, finding that Commerce's authority is broader than the plaintiffs asserted. The plaintiffs argued that the U.S. Food and Drug Administration has exclusive regulatory authority over food labeling, but the court pointed to other relevant authorities that can affect labeling, including the trademark protections in the Lanham Act. The court further found sufficient evidence to support Commerce's conclusions, including the identification of priority species and the determination of a compliance date. Accordingly, the court granted summary judgment to the defendant. The monitoring program is scheduled to launch on January 1, 2018.

Advocacy Group Sues To Compel USDA To Proceed With GMO Disclosure Act

The Center for Food Safety has filed a lawsuit seeking to compel the U.S. Department of Agriculture (USDA) to proceed with the studies and public comment required to implement the 2016 Federal Bioengineered Food Disclosure Standards Act. *Ctr. for Food Safety v. Perdue*, No. 17-4967 (N.D. Cal., filed August 25, 2017). Passed by Congress in 2016, the act will require food producers to disclose the presence of any genetically modified organisms (GMOs). The complaint contends that USDA has failed to conduct the studies required by the act to inform its rulemaking, including a specific Congressional mandate to study whether digital or electronic disclosures would be an acceptable alternative to package labeling. If the agency finds no significant barriers to consumer access, food manufacturers could provide a QR code, website link or toll-free number for disclosures. However, the complaint alleges that USDA missed the July 29, 2017, deadline for completion of the study, risking delay of the intended July 2018 deadline for final implementation.

Seventh Circuit Rejects Subway Class Action Settlement, Remands For Dismissal

The U.S. Court of Appeals for the Seventh Circuit has rejected class certification and a settlement agreement in a lawsuit alleging Subway sells "Footlong" sandwiches that are sometimes shorter than 12 inches. *In re: Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. 16-1652 (7th Cir., entered August 25, 2017). "In their haste to file suit," the court noted, "the lawyers neglected to consider whether the claims had any merit. They did not." Additional details about this case appear in Issues 468, 487 and 582 of this *Update*.

The court found that the parties established in early discovery that the raw dough sticks the chain uses for baked bread portions were uniform in weight and that variations in final length were "wholly attributable to the natural variability in the baking process." In addition, meat and cheese toppings are standardized, "so the

length of the bread has no effect on the quantity of food each customer receives," the court said.

The plaintiffs shifted from a damages theory to a class claim for injunctive relief. Subway agreed to implement controls to try to ensure uniform bread length, but the court pointed out that the settlement "explicitly acknowledged" that even with controls in place, some bread would still not bake to a full 12 inches. "In sum, before the settlement there was a small chance that Subway would sell a class member a sandwich that was slightly shorter than advertised, but that sandwich would provide no less food than any other," the court said. "After the settlement—despite the new measuring tools, protocols and inspections—there's still the same small chance that Subway will sell a class member a sandwich that is slightly shorter than advertised." One objector appealed the trial court's approval of the settlement and certification of the class, arguing that the settlement did not benefit the class in any real way and thus was worthless.

The appellate court agreed, saying, "A class settlement that results in fees for class counsel but yields no meaningful relief for the class is 'no better than a racket' ... The settlement enriches only class counsel, and, to a lesser degree, the class representatives." The court reversed and remanded for dismissal of the consolidated actions.

Following the Seventh Circuit's rejection, the plaintiffs notified the lower court that they terminated the settlement agreement, stating, "The confidential information and documents were not made part of the public record, so the appellate court did not know their contents when the appellate court was reviewing the settlement. Plaintiffs believe the appellate court would have reached the opposite conclusion if the confidential information and documents had been in the public record. On remand, plaintiffs intend to have all of the confidential information and documents made part of the public record, and plaintiffs intend to pursue this litigation." *In re Subway Footlong Sandwich Mktg. and Sales Practices Litig.*, No. 13-2439 (E.D. Wis., filed August 29, 2017).

GMO Putative Class Action Targets Boar's Head

A consumer has filed a projected class action alleging Boar's Head Provisions Co. Inc. misleadingly markets its cheeses as "natural" despite containing genetically modified organisms (GMOs). *Forsher v. Boar's Head Provisions Co. Inc.*, No. 17-4974 (N.D. Cal., filed August 25, 2017). The complaint asserts that GMOs are "not natural" and that "consumers do not expect [GMOs] to be present in foods labeled 'natural'"; further, "reasonable consumers do not believe there are any differences between foods that are labeled 'natural' and those that are labeled 'organic.' Reasonable consumers believe that 'organic' foods do not contain GMOs, and that foods labeled 'natural' are likewise free of such substances." The plaintiff seeks an injunction, restitution, damages and

attorney's fees for alleged violations of state consumer-protection statutes as well as unjust enrichment and intentional misrepresentation.

In-N-Out, Smashburger Dispute "Triple Double" Mark

In-N-Out Burgers has filed a lawsuit alleging consumers are likely to confuse Smashburger's "Triple Double" hamburger with In-N-Out's "Double-Double," "Triple Triple" and "Quad Quad." *In-N-Out Burgers v. Smashburger IP Holder LLC*, No. 17-1474 (C.D. Cal., filed August 28, 2017). In-N-Out asserts use of the marks "Double-Double" and "Triple Triple" since the early 1960s to designate hamburgers and cheeseburgers. The complaint alleges that In-N-Out is "widely known for providing variations of its menu items to customize orders" and that customers regularly mix the menu names "to form names to customize orders, including 'Triple Double.'" Claiming trademark infringement, unfair competition and dilution under federal and state laws, In-N-Out seeks an injunction and damages. The chain has also filed a notice of opposition to Smashburger's application for registration for a "Triple Double" mark, claiming priority, likelihood of confusion and dilution by blurring.

Three Companies Join Tuna Price-Fixing Litigation

Dollar General Corp, Moran Foods LLC and Krasdale Foods, Inc. have filed lawsuits alleging that the makers of Bumble Bee, StarKist and Chicken of the Sea illegally conspired to fix prices for their products, echoing ongoing litigation alleging similar facts. *Dollar General Corp. v. Bumble Bee Foods LLC*, No. 17-1744 (S.D. Cal., filed Aug. 29, 2017); *Moran Foods LLC v. Bumble Bee Foods LLC*, No. 17-1745 (S.D. Cal., filed Aug. 29, 2017); *Krasdale Foods, Inc. v. Bumble Bee Foods LLC*, No. 17-1748 (S.D. Cal., filed Aug. 30, 2017). The plaintiffs seek compensatory damages and attorneys' fees. Nine putative class actions and related individual cases alleging price-fixing by the tuna companies were consolidated in multidistrict litigation in December 2015.

Thelonious Monk Estate Sues Brewery For "Brother Thelonious" Ale

The estate of Thelonious Monk has alleged that North Coast Brewing, maker of "Brother Thelonious Belgian Style Abbey Ale," violated the estate's trademark and publicity rights. *Monk v. North Coast Brewing Co. Inc.*, No. 17-5015 (N.D. Cal., filed Aug. 29, 2017). According to the complaint, the estate verbally granted the brewer the right to use Monk's name, image and likeness "for the limited purpose of marketing and distributing" the ale in exchange for the brewer's agreement to donate a portion of the

profits to the Thelonious Monk Institute of Jazz at the University of California, Los Angeles, but later revoked the rights in 2016. In addition to the beer labeling, the estate alleges North Coast has used the musician's name or likeness on merchandise, including cups, hats, hoodies or posters. Alleging trademark infringement, right of publicity and unjust enrichment, the estate seeks an injunction, profits attributable to the alleged violations, damages and attorney's fees.

OTHER DEVELOPMENTS

Ford, Domino's Partner To Deliver Pizza By Autonomous Vehicles

Ford Motor Company and Domino's Pizza Inc. have reportedly announced tests for a self-driving car that delivers pizza. The car will carry orders in external compartments that can be accessed by entering the last four digits of the customer's phone number. A safety driver, a Ford engineer and a Domino's employee will accompany the car during the testing process.

Additional information about the development of self-driving cars can be found in the *Autonomous and Connected Vehicles Update*, Shook's newsletter covering the legal and regulatory landscape of the autonomous vehicle industry.