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SPOTLIGHT

GMA Conference Panels Explore Trends in Class Actions, Organic Production

Litigation, increasing online grocery shopping and consumer concerns regarding product ingredients were hot topics at the 2018 Grocery Manufacturers Association (GMA) conference. Founded in 1908, GMA comprises more than 250 food, beverage and consumer product companies—collectively, consumer packaged goods (CPG) companies—and works as an advocate for its members and the industry.

Many of the event's panels focused on recent developments affecting the industry and expected trends going forward, including panels on Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) issues, the litigation landscape for CPG companies and pet food litigation issues. Shook Partners Jim Muehlberger and Naoki Kaneko presented with Courtney Ozer, Assistant General Counsel – Litigation for Unilever United States, on trends in class action litigation, noting a continued focus on natural claims—including more claims filed regarding consumer products like lotions, soaps and home care products—and trends stemming from an increased consumer focus on sustainability and transparency regarding production methods. Partner Lindsey Heinz was featured on a panel discussing legal issues related to organic products. Some issues of interest included the barriers to increasing the acreage of organic farming in the United States and

friction between the U.S. Department of Agriculture and the National Organic Standards Board.

Several speakers discussed the increasing number of attorneys who send demand letters in high volumes to CPG companies in order to obtain small settlements. This trend is troubling for a number of reasons, including the extortive nature of the practice, the lack of transparency both with the attorneys who send the letters and the companies who pay to settle these issues, and the trap that making such payments creates by incentivizing more demand letters. One panel discussed the issue and called on members to find an innovative way to combat demand letters, suggesting perhaps an industry push to fully litigate these issues instead of settling claims to minimize costs and business disruption.

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LEGISLATION, REGULATIONS & STANDARDS

FDA Announces Education Campaign For Nutrition Facts Label

The U.S. Food and Drug Administration (FDA) has announced the launch of a "major educational campaign for consumers" about changes to the Nutrition Facts label on food products. The campaign will include educational videos, social media outreach and "user-friendly" websites to help consumers understand the relationship between their daily dietary choices and the risk of chronic disease. FDA will also provide guidance to industry on label updating. The announcement included information on new guidance on added sugars for producers of honey, maple syrup and certain cranberry products; guidance on serving sizes; and final guidance on what evidence FDA reviews on various non-digestible carbohydrates that may be added to food and labeled as fiber. The agency also indicated that it will evaluate industry petitions related to non-digestible carbohydrates.

NRDC Petitions New York to Regulate PFOA and PFOS in Drinking Water

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.

The Natural Resources Defense Council (NRDC) has asked the New York health department to establish enforceable maximum contaminant levels (MCLs) for PFOA and PFOS in public drinking water. In its 65-page petition, NRDC detailed the results of a year-long study of state drinking water sources, including purported findings of elevated levels of the chemicals in eight communities and blood serum concentrations ten times the national average in one city. NRDC argues that "in the absence of federal safeguards," New York should act to (i) establish a MCL below 10 parts per trillion; (ii) study the potential harms of feeding infants with formula mixed with water or the consumption of contaminated water by breastfeeding mothers or pregnant women; and (iii) conduct comprehensive health assessments of residents in communities found to have elevated PFOA or PFOS concentrations in drinking water sources.

HHS and FDA Release BPA Study for Peer Review

The National Toxicology Program, part of the Public Health Service of the U.S. Department of Health and Human Services (HHS), has issued for peer review a draft research report of a two-year study of the effects of bisphenol A (BPA) on rats. According to a press release issued by the U.S. Food and Drug Administration (FDA), the study was conducted by senior scientists at FDA's National Center for Toxicological Research as part of a collaborative effort by FDA and the National Institutes of Health to investigate concerns about possible developmental effects of relatively low exposure to BPA. FDA reports that it found "minimal effects" of BPA on rats but identified areas that "may merit further research, such as the increase in occurrence of mammary gland tumors at one of the five doses." FDA also noted that its "comprehensive review" of the report supports the agency's determination that currently authorized uses of BPA are safe for consumers.

Vietnam Asks WTO For Consultation on U.S. Catfish Import Restrictions

Alleging unfair trade restrictions, the Vietnamese government has asked the World Trade Organization (WTO) to consult with the United States to discuss limitations on catfish imports. Vietnam alleges that a recent move to shift import inspections from the U.S. Food and Drug Administration to the U.S. Department of Agriculture subjects shipments of Vietnamese catfish (*Siluriformes Pangasius*) to unfairly stringent food safety rules. Vietnam argues that it has "objectively demonstrated" that its food safety standards "achieve the appropriate level" of safety demanded by the United States. If the requested consultations do not achieve a quick resolution, WTO may authorize Vietnam to ask for a formal adjudication.

USDA, HHS Seek Public Comments on 2020-2025 Dietary Guidelines

The U.S. Departments of Agriculture (USDA) and Health and Human Services (HHS) have requested public comment on topics and questions to be included in the review of scientific evidence supporting the development of the 2020-2025 Dietary Guidelines for Americans. Comments will be accepted through March 30, 2018.

ASA Upholds Challenges to Ads for Alcohol, Chewing Gum

The U.K. Advertising Standards Authority (ASA) has upheld two challenges to television ads, one for Aldi Stores Ltd. and one for The Wrigley Co.'s Extra chewing gum, ruling that neither can be aired again.

In the Aldi ad, "Kevin the Carrot," an advertising mascot, was used to advertise alcohol beverages in a parody of "The Sixth Sense." The ad began with Kevin saying, "I see dead parsnips," and featured a voice-over explaining, "Kevin was feeling a little bit tense. He thought there were spirits. He had a sixth sense. As it turned out, his instincts were right. There were a few spirits that cold Christmas night." Throughout the ad, various alcohol beverages appear. The ad was challenged on the grounds that the ad was likely to appeal to minors because the main character was a child's toy. Aldi argued that the ad was part of its 2017 holiday

parody series in which Kevin played parts in several films, most of which were adult in nature or appeal, and the use of the character was intended to be humorous. Clearcast, a non-governmental organization that pre-approves most British television advertising, also found that the overall theme of the campaign was likely to have general appeal to adults and that it was acceptable to feature Kevin in the ads, given appropriate scheduling restrictions that would not place it during or near children's programming. However, ASA upheld the challenge, finding Kevin to be "childlike" and, given that the mascot's stuffed toy was popular with young children, the ad was likely to appeal to those under 18. ASA told Aldi that its future ads for alcohol could not appeal to minors.

An ad for Wrigley's Extra drew a challenge because it showed a young woman chewing gum while she prepared to take a penalty kick in a soccer game. The complainants argued that the ad "condoned or encouraged [the] dangerous practice" of chewing gum while playing sports. Noting "several reported incidents of people choking on gum whilst playing sports," ASA concluded that showing the unsafe behavior could be dangerous for children who might emulate it. ASA told Wrigley it could not show people chewing gum while playing sports in any future advertising.

LITIGATION

Court Denies Kellogg's Motion to Dismiss Pringles Suit

A federal court in California has denied a motion to dismiss a putative class action alleging false advertising of Kellogg Co.'s Pringles Salt & Vinegar chips, finding the plaintiffs adequately pleaded all elements of the complaint, including reasonable customer confusion and claims under state consumer-protection laws. *Allred v. Kellogg Co.*, No. 17-1354 (S.D. Cal., entered February 23, 2018). The court rejected Kellogg's arguments that the plaintiff failed to prove that the company uses artificial flavoring and that the suit was filed as a means to test whether their "guess" was correct during discovery. The court found that the plaintiffs specified "in great detail the distinction between the natural and artificial versions of the ingredients from how they are

made to how they are distinguished on a label. Moreover, Allred did allege which version Kellogg uses in its products."

The court also found that the plaintiffs adequately pleaded a violation of the Sherman Law by alleging Kellogg did not label its ingredients as artificial, successfully establishing a predicate legal violation for a claim under California's Unfair Competition Law (UCL). The plaintiffs may also proceed with an "unfair" claim under the UCL, the court held, because their allegations focus on the confusion as to whether the product contains the natural or artificial versions of flavoring ingredients. The court further held that the plaintiffs had both Article III standing and standing for injunctive relief because they sufficiently pleaded a threat of future injury.

Court Dismisses Slack-Fill Suit Against Fannie May

An Illinois federal court has dismissed without prejudice a putative slack-fill class action against chocolatier Fannie May Confections Brands, Inc., ruling the plaintiffs provided only "bare-bones" factual allegations and failed to allege a violation of the Federal Food, Drug and Cosmetic Act that would allow their state law claims to avoid preemption. *Benson v. Fannie May Confections Brands, Inc.,* No. 17-3519 (N.D. Ill., entered February 28, 2018). The court also dismissed the plaintiffs' claim for injunctive relief, finding they lacked standing because they failed to adequately allege a risk of future harm. "[A]lready aware of Fannie May's alleged deceptive practices, Plaintiffs cannot claim they will be deceived again in the future," the court held.

In addition to the products they did purchase—Fannie May's Pixies and Mint Meltaways—the plaintiffs also alleged that packages of eight other chocolate candies contained slack fill and brought the action on behalf of consumers who purchased those as well. The court held that the plaintiffs lacked standing to bring those claims because they had "not shown that the Non-Purchased products are substantially similar to the products they purchased . . . As Fannie May points out, and the exhibits to the complaint confirm, the Products are all substantially different in size, ingredients, and in many cases, their packaging."

TTAB Rules “White Sangriiia” Merely Descriptive

The Trademark Trial and Appeal Board (TTAB) has ruled that Pan American Properties Corp. cannot register “White Sangriiia” as a trademark because both terms, as well as their combination, are “merely descriptive.” *In re Pan American Props., Corp.*, No. 86556214 (T.T.A.B., entered February 26, 2018). TTAB also rejected the company’s argument that the term was “fanciful or suggestive.” Although Pan American Properties referred to its previous registration of the “fanciful” term “Gasolina Sangriiia” for prepared cocktails in its appeal, TTAB noted that neither the company nor the examining attorney included the registration in the application record before the appeal was filed, and TTAB refused to take judicial notice of “registrations residing in the Office.” Finally, TTAB found insufficient evidence to prove the term “sangriiia” had acquired distinctiveness; even if Pan American Properties had provided enough evidence to prove five years of sales, the board held, that period is not long enough to meet the “very high burden” of proving distinctiveness for a “highly descriptive” mark.

SCIENTIFIC / TECHNICAL ITEMS

Journal Retracts Another Brian Wansink Paper

Preventive Medicine has issued a retraction of a 2012 study conducted by Brian Wansink, director of the Cornell University Food and Brand Lab, that purported to find that children were more likely to eat vegetables if the foods were given “attractive” names. The journal made corrections to the article in early February 2018 but retracted it after one of the study’s funders identified an additional error in how its grant was cited. The study is reportedly the sixth of Wansink’s publications to be formally retracted. Cornell began a formal investigation into Wansink’s research practices in late 2017.

MEDIA COVERAGE

USA Today Reports on Cattle Ranchers' Fight to Define "Meat"

With companies creating plant-based foods that look and taste like real meat—and even getting product placement in grocery meat cases—*USA Today* reports that U.S. cattle ranchers are disputing the categories of the products developed and sold by these companies, including Impossible Foods and Beyond Meat. The United States Cattlemen's Association has filed a petition with the U.S. Department of Agriculture (USDA) calling for the agency to establish beef labeling that would limit the use of the terms "beef" and "meat" to products derived from animal sources and inform consumers about the difference between such products and "alternative protein sources." The petition is reportedly aimed not only at "plant-based meat" substitutes such as tofu but also at "clean meat" grown in a lab from animal stem cells.

The firm Allied Market Research reportedly predicts that plant-based meat businesses could sell $5.2 billion worth of products by 2020. About 60 percent of U.S. consumers claim to be reducing their consumption of meat. *USA Today* quoted Jessica Almy, policy director at the Good Food Institute, as saying meat substitute products are "the beginning of a very, very big trend in the food industry."