FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

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LITIGATION

California Federal Court Dismisses Part of Chipotle GMO False Ad Suit

A California federal court has granted in part and denied in part a motion to dismiss a lawsuit alleging Chipotle Mexican Grill Inc. misleadingly advertises its food as free of genetically modified organisms (GMOs) despite allegedly selling flour and corn tortillas with GMOs, using GMO soy in its cooking oils and serving meat and dairy products derived from animals fed GMO feed. *Pappas v. Chipotle Mexican Grill Inc.*, No. 16-0612 (S.D. Cal., order entered August 31, 2016).

Chipotle argued that reasonable consumers would not "equate 'non-GMO ingredients' with ingredients not derived from animals that have eaten genetically modified feed." The plaintiff argued that the reasonable consumer standard was not applicable at the motion-to-dismiss stage in a fraud or deception case, but the court found that the standard could be used to hold the plaintiff's allegations to be implausible.

The court compared the plaintiff's meat and dairy allegations to a case in which a court found allegations that pasta was misleadingly advertised as "all natural" because the definitions of "all natural" cited by the plaintiff were not deceptive in the context of pasta. "Likewise, Plaintiff has failed to allege a plausible objective definition of the term 'non-GMO' that would deceive reasonable consumers in this context, or that reasonable consumers would share her interpretation," the court stated.

"Plaintiff does not provide a definition of the prefix 'non-' but defines GMO as a genetically modified organism, or 'any organism whose genetic material has been altered using [certain] genetic engineering techniques.' [] 'Non-' is defined by Merriam-Webster's Dictionary as: not, other than, reverse of, or absence of. Thus, non-GMO would mean not genetically altered, or in the absence of genetically altered organisms. Yet, Plaintiff claims she interpreted 'non-GMO' to mean not derived from animals that have consumed GMO-containing feed. Plaintiff does not allege that by eating feed with genetically modified ingredients, animals themselves become genetically modified organisms."

The court dismissed the plaintiff's allegations related to GMO animal feed but denied the motion to dismiss the allegations related to the GMO corn, flour and soy ingredients. Additional details on the complaint appear in Issue 598 of this *Update*.

Pizza Delivery Drivers Granted Class Certification in Tips Dispute

A Massachusetts federal court has granted certification to a class of former and current delivery drivers for Domino's Pizza Inc. who allege that they should have received the delivery charge paid by customers. *Mooney v. Domino's Pizza, Inc.*, No. 14-13723 (D. Mass., order entered September 1, 2016). The plaintiffs also asserted that they should have been paid minimum wage for "inside work" unrelated to deliveries, rather than the lower minimum wage for tipped workers.

The court focused on whether the plaintiffs' claims were common to all members of the class. Domino's and its franchisee argued the classification of the delivery fee as a service charge—which is to compensate employees for service and to be remitted to the employees under Massachusetts law—or an administrative fee "depends on the circumstances of each customer's encounter with the delivery fee," thus precluding commonality. The court disagreed, finding that "the plain language of the statute suggests that the inquiry is focused primarily on the employer's designation of the fee it charges and any written description of that charge, and not on the customer's individual circumstances or statements by an individual employee to a particular customer."

The court also considered whether the employees' wage claims for "inside work" were common to each member of the class, focusing on whether that work constituted more than 20 percent of the employees' time and whether the work was related to deliveries, the tipped aspect of their duties. The franchisee pointed to some "handyman-type work" one employee completed to argue that each class member's workload required individual examination and was not common to all class members. "This argument turns logic on its head," the court stated. "That drivers performed some additional work that [the franchisee and its owner] concede should have been paid at the minimum wage rate does not prevent these defendants from seeking to establish a defense that the other 'inside work'—such as 'answering phones, preparing food, assembling pizza boxes, and the like' []—was related to the delivery work." The court found that if Domino's and its franchisee failed to keep adequate records of the employees' tasks, the plaintiffs could use representative testimony from employees as common proof. "[T]hat some class

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members may have been engaged in different duties while working inside does not defeat commonality," the court held.

Consumers File TCPA Lawsuit Against Subway

Two consumers have filed a lawsuit against Subway Sandwich Shops Inc. and T-Mobile USA Inc. alleging the companies sent unsolicited text messages advertising an offer for a free sandwich without first obtaining written consent from the recipients. *Rahmany v. T-Mobile USA Inc.*, No. 16-1416 (W.D. Wash., filed September 6, 2016). The complaint asserts that the plaintiffs each received an unsolicited text on September 1, 2016, advertising a free 6-inch chicken sandwich from Subway, with a link to download the T-Mobile app for additional details. T-Mobile sent the message with an automatic telephone dialing system "with the consent and encouragement of Subway for the purposes of financial gain in a mutually beneficial relationship between those two companies," the plaintiffs allege. For alleged violations of the Telephone Consumer Protection Act (TCPA), the plaintiffs seek $500 per negligent violation and $1,500 per knowing or willful violation.

Texas Rangers Oppose Bacardi's Application for Stylized "T" Trademark

Rangers Baseball LLC filed then suspended an opposition to Bacardi & Co.'s application to register a trademark for a logo featuring the letter "T," stylized to feature points extruding from the middle of the character. Opposition No. 91229825 (USPTO, suspended September 2, 2016). The Texas Major League Baseball team filed its notice of opposition on August 31, 2016, arguing a likelihood of confusion, and then two days later filed a stipulation to suspend pending settlement negotiations. The Bacardi application seeks to trademark the stylized "T" as well as "Tang" for use on alcohol beverages for its spirit produced from tea leaves. The product is currently available only in China.

SCIENTIFIC/TECHNICAL ITEMS

Teens Allegedly Influenced by Soft-Drink Warning Labels

Researchers with the University of Pennsylvania Perelman School of Medicine's Center for Health Incentives and Behavioral Economics have authored a study claiming that adolescents are less likely to purchase sugary beverages that carry warning labels. Eric VanEpps and Christina Roberto, "The Influence of Sugar-Sweetened Beverage Warnings," *American Journal of Preventive Medicine*, September 2016.

The study asked 2,202 adolescents ages 12-18 to imagine selecting one of 20 popular 20-ounce beverages from a vending machine. This digital survey included 12 sugar-sweetened beverages (SSBs) that displayed (i) no warning label, (ii) a calorie label, or (iii) one of four labels warning that SSBs contribute to (a) "obesity, diabetes and tooth decay"; (b) "weight gain, diabetes and tooth decay"; (c) "preventable diseases like obesity, diabetes and tooth decay"; or (d) "obesity, Type 2 diabetes and tooth decay."

The results evidently suggested that "77 percent of participants who saw no label said they would select a sugary drink," but fewer participants chose an SSB in three of the four warning label scenarios. "Calorie labels increased adolescents' estimates of the calories in SSBs, as did two of four warning labels. Both calorie and warning labels led participants to subjectively evaluate SSBs to have more added sugar," state the study authors. "Finally, adolescents expressed that government-sponsored SSB warning labels would shift their beliefs about a beverage's healthfulness and would motivate them to consume fewer SSBs. In addition, the majority of respondents favored a policy to place warning labels on SSBs." The study was funded by the Robert Wood Johnson Foundation's Healthy Eating Initiative.

Rudd Center Claims "Smart Snack" Packaging Confuses Students

The University of Connecticut's Rudd Center for Food Policy and Obesity has published a study on student and parent perceptions of competitive foods and beverages sold in schools under the U.S. Department of Agriculture's Smart Snack nutrition standards. Jennifer Harris, et al., "Effects of Offering Look-Alike Products as Smart Snacks in Schools," *Childhood Obesity*, September 2016.

After soliciting feedback from 659 students ages 13-17 and 859 parents, the study authors report that students could not distinguish between products sold in stores and reformulated "look-alike" versions sold in schools unless the two were placed side-by-side. The study also notes that parents and students "tended to rate the look-alike and store versions of less nutritious snack brands as similar in healthfulness, whereas they tended to view the repackaged Smart Snacks that emphasized improved nutrition as healthier." In addition, most participants "inaccurately believed they had seen look-alike Smart Snacks for sale in stores" and rated schools selling look-alike Smart Snacks as less concerned about health, according to a concurrent press release.

"Kids think the healthier Smart Snacks they can buy in school are the same products that are sold in stores," Rudd Center Director of Marketing Initiatives Jennifer Harris is quoted as saying. "This is a great marketing tool. The snack makers get to sell their products in schools and at the same time market their unhealthy brands to kids every school day." *See UConn Today*, August 31, 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.