FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

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LEGISLATION, REGULATIONS AND STANDARDS

FDA Revises Food Labels to Reflect Added Sugars, New Portion Sizes

The U.S. Food and Drug Administration (FDA) has announced revisions to the Nutrition Facts label designed to emphasize "the link between diet and chronic diseases such as obesity and heart disease." In addition to highlighting calories, servings per container and serving-size declarations through a combination of increased type size and boldface, the new labels will (i) require "added sugars" in grams and as a percent daily value, (ii) require Vitamin D and potassium values, and (iii) make Vitamins A and C optional.

Citing scientific research, FDA has updated several daily values and eliminated "Calories from Fat," but increased mandatory serving sizes to better reflect food consumption data. Food packages containing one to two servings that are typically consumed in one sitting must list calories and nutritional information for the entire packaged portion. Manufacturers must also use dual-column labels for 24-ounce sodas, ice cream pints and other foods and beverages that may be consumed in one or over multiple sittings.

"By law, serving sizes must be based on amounts of foods and beverages that people are actually eating, not what they should be eating," states FDA, which directs food manufacturers with more than $10 million in annual sales to implement the new labels by July 28, 2018. "How much people eat and drink has changed since the previous serving size requirements were published in 1993. For example, the reference amount used to set a serving of ice cream was previously ½ cup but is changing to ⅔ cup. The reference amount used to set a serving of soda is changing from 8 ounces to 12 ounces." *See FDA Press Release*, May 20, 2016.

Proposed Legislation Would Modernize Alcoholic Beverage Laws in New York

Gov. Andrew Cuomo (D-N.Y.) has proposed legislation that would revise the Alcoholic Beverage Control Law (Blue Laws) to modernize the manufacture and sale of alcoholic beverages in New York state. The new

rules would also consolidate licensing and reduce "burdensome fees for wineries, breweries, distilleries and cideries statewide."

In particular, the legislation would (i) lift restrictions on Sunday morning sales of alcoholic beverages at on-premises establishes; (ii) allow the New York State Liquor Authority to consider exceptions to the "Two Hundred Foot Law" that prohibits the dispensation of full liquor licenses to establishments within 200 feet of a school or place of worship; (iii) combine craft manufacturing licenses into one application to reduce the paperwork burden on small breweries, wineries and distilleries; (iv) authorize the sale of wine in growlers and allow customers to take home unfinished bottles of wine; (v) reduce fees for craft beverage salespeople; and (vi) reduce fees for small wholesalers.

"The new legislation builds on the progress made by the governor over the past five years, including enacting the Craft New York Act, to cut burdensome requirements on producers and ease restrictions regarding the marketing of craft products," states a May 18, 2016, press release. "Since 2011, the state has implemented a number of significant reforms and expanded programs to grow the craft beverage industry, including creating new farm-based manufacturing licenses, launching a $60-million statewide promotional campaign and hosting wine, beer and spirits summits across the state."

Health Canada Approves GE Salmon

Health Canada and the Canadian Food Inspection Agency have determined that AquAdvantage Salmon "is as safe and nutritious for humans and livestock as conventional salmon." Approving the genetically engineered (GE) salmon for sale in Canada, the two agencies cited a similar decision issued by the U.S. Food and Drug Administration in November 2015.

"Health Canada requires labelling for food products, including genetically modified foods, where clear, scientifically established health risks or significant changes to the nutritional qualities of the food have been identified and can be mitigated through labelling," concludes the agency. "In this case, given that no health and safety concerns were identified, there are no special labeling requirements for AquAdvantage Salmon." *See Health Canada News Release*, May 19, 2016.

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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LITIGATION

Court Refuses to Invalidate San Francisco SSB-Warning Law

A California federal court has denied the American Beverage Association's (ABA's) attempt to preliminarily enjoin the enforcement of a law requiring manufacturers of sugar-sweetened beverages (SSBs) to provide a warning about the alleged health risks associated with SSB consumption. *Am. Beverage Ass'n v. City of San Francisco*, No. 15-3415 (N.D. Cal., order entered May 17, 2016). Further details about the lawsuit appear in Issues 573, 586 and 592 of this *Update*.

The court first assessed the ABA's argument that the law would burden noncommercial speech in addition to regulating commercial speech, which would trigger the highest level of scrutiny. ABA members' communications to consumers are not limited to commercial speech, the organization argued, because they also publicize other messages, such as promotion for the Pride Parade and the Chinese New Year's Festival. The court disagreed, finding the amount of noncommercial speech affected was not substantial.

The court then reviewed whether the ordinance's warning is factual and accurate as required for government-compelled speech and found that the law would likely pass such an analysis. The court dismissed ABA's challenge to the language of the required warnings, including the message that SSBs "contribute" to tooth decay, obesity and diabetes; the ordinance "does not say that SSBs inevitably result in or will necessarily cause tooth decay," the court noted. "No reasonable consumer would likely construe the warning as specific to him or her; instead, a reasonable consumer would understand the warning is directed to the general public and the statement that SSBs are a contributing factor is to be viewed in the larger context of public health."

Finally, the court was not convinced that the warnings will cause irreparable harm to goodwill and reputation while the law is enforced. "Many consumers are likely to be familiar with the high sugar content of soft drinks and other SSBs, and many are aware of potential weight gain due to calories therefrom and risk of tooth decay," the court stated. "And Plaintiffs may engage in counterspeech to combat the asserted harm, not only in the advertisement containing the warning itself but also through other means and media." Further, the plaintiffs' argument that delaying enforcement is in the public's interest failed "because of the weakness of their First Amendment claim on the merits. Moreover, as indicated

above, the public interest weighs in favor of the City, as the City is taking legitimate action to protect public health and safety."

Oregon Court Strikes Down GMO Crops Ban

An Oregon state court has invalidated a local ban on cultivating genetically modified organisms (GMOs), holding that the ordinance contradicts state law preventing local anti-GMO rules. *White v. Josephine Cnty.*, No. 15-23592 (Ore. Cir. Ct., Josephine Cnty., order entered May 16, 2016). The plaintiff challenged the law after he rented land within Josephine County then learned he could not grow his crops there under a May 2014 ordinance prohibiting GMO-crop cultivation.

Intervenors in the case challenged the standing of the plaintiff, who described himself as a GMO sugar-beet farmer. According to the court, the intervenors argued that "the plaintiffs are posing as GMO farmers so that large chemical companies through them can attack the local ordinance." The court disagreed, finding ample evidence to grant the plaintiff standing.

Turning to the content of the ordinance, the court held that the state statute preempted the local law. "[T]he conflict could not be more clear that the County's GMO ordinance and [the state law] are incompatible," the court found. "The state law says that the localities may not legislate in this area, and the voters of Josephine County have attempted to legislate in the exact same area. It is impossible to read the two enactments in harmony; so that the local ordinance must give way."

CSPI Targets Cheez-Its® in False Advertising Suit

A class of consumers in New York and California, represented by the Center for Science in the Public Interest (CSPI), has brought suit in the Eastern District of New York seeking restitution, actual and punitive damages, and injunctive relief against the Kellogg Co. for allegedly misbranding its Cheez-It® "Whole Grain" snack crackers.

The complaint alleges that Cheez-It® "Whole Grain" crackers contain only a small amount of whole grain, but that the product packaging is designed in such a way as to mislead consumers to believe that the product is produced primarily with whole grains. The class contends that the primary ingredient is enriched flour, however, the product package states conspicuously the words "Whole Grain" on five of the six packaging panels. And when purchasing the crackers, lead plaintiffs sought a product that was predominantly whole grain. The complaint further

alleges that the class members would not have purchased the Cheez-It® "Whole Grain" crackers if they were aware of the allegedly low whole-grain content and suffered damages as a result of the allegedly false and misleading labeling.

Proposed Class Action Challenges Alleged Slack Fill in "Go-Paks"

A consumer has filed a putative class action against Mondelez International Inc. alleging the company's "Go-Paks," packages of "mini" or "bite" versions of Nabisco cookie and cracker products, contain more than 25 percent slack fill in violation of California law. *Bush v. Mondelez Int'l Inc.*, No. 16-2460 (N.D. Cal., filed May 5, 2016). The "Go-Paks," including Mini Chips Ahoy!, Mini Oreo and Ritz Bits varieties, are sold in opaque cups that do not indicate the quantities inside, the complaint asserts. The plaintiff argues that he relied on the cup's size as a representation of the product he would be receiving and he would not have purchased the product had he known about the amount of slack fill. For alleged violations of California consumer-protection statutes as well as breach of warranties, negligent misrepresentation, fraud and unjust enrichment, the plaintiff seeks class certification, an injunction, actual and punitive damages, attorney's fees and costs.

OTHER DEVELOPMENTS

NAS Report Finds No Evidence of Human Health Risk from GE Crops

The National Academy of Sciences, Engineering and Medicine (NAS) has published a report finding "no substantiated evidence of a difference in risks to human health between currently commercialized genetically engineered (GE) crops and conventionally bred crops, nor did it find conclusive cause-and-effect evidence of environmental problems from the GE crops."

Authored by the NAS Committee on GE Crops: Past Experience and Future Prospects, the report considers more than 900 research publications and 700 public comments, as well as feedback from 80 diverse speakers at three public meetings and 15 webinars. Concentrating on widely available GE crops such as insect-resistant *Bacillus thuringiensis* (Bt) crops and glyphosate-resistant crops, the report also notes that there is no evidence from U.S. Department of Agriculture data to suggest that GE crops have not yet increased yields for cotton, maize or soybeans.

As a result of these findings, the committee recommends that federal agencies focus on product-based safety testing as opposed to process-based regulations that differentiate between GE and conventional-breeding techniques. Because new technologies continue to blur the line between techniques, the report specifically calls for a tiered safety assessment that uses as criteria "novelty (intended and unintended), potential hazard, and exposure."

"Regulating authorities should be proactive in communicating information to the public about how emerging genetic-engineering technologies or their products might be regulated and how new regulatory methods may be used," states the report brief. "They should also proactively seek input from the public on these issues. Policy regarding GE crops has scientific, legal, and social dimensions, and not all issues can be answered by science alone."

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.