FOOD & BEVERAGE LITIGATION UPDATE
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SHOOK HARDY & BACON

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LEGISLATION, REGULATIONS AND STANDARDS

Sonoma County Passes Ban on GMO Crops

Voters in Sonoma County, Calif., have passed by a significant margin—55.9 to 44.9 percent— a ballot initiative that prohibits cultivation of genetically modified crops. Santa Cruz, Humboldt, Trinity, Marin and Mendocino counties have already passed similar measures. The Center for Food Safety reportedly helped draft Measure M, providing legal and scientific counsel over the last year. *See The San Francisco Chronicle*, November 9, 2016.

Soft Drink Taxes Gain Nationwide Traction

Four cities and one county have reportedly passed taxes on sugar-sweetened beverages (SSBs), joining Berkeley, California, and Philadelphia, Pennsylvania, in adopting measures purportedly designed to curb sugary-drink consumption. According to media sources, voters in Boulder, Colorado, passed a 2-cent-per-ounce excise tax on SSB distributors, while those in San Francisco, Oakland and Albany, California, passed a 1-cent-per-ounce levy on distributors. In Cook County, Illinois, the board of commissioners also voted in favor of a 1-cent-per-ounce SSB tax.

"The tide has turned on this issue, and momentum has swung in our favor," said Howard Wolfson, senior advisor to former New York City Mayor Michael Bloomberg. "I am confident in the months ahead more municipalities will seek to implement soda taxes to help their citizens, and we will be willing to help them as they do." *See The New York Times,* November 9, 2016; *Crain's Chicago Business,* November 10, 2016.

LITIGATION

Missouri Appellate Court Rejects "Ingredient List Defense"

A Missouri appeals court has reversed a lower court's dismissal of a lawsuit alleging Stonewall Kitchen, LLC misled consumers about its cupcake mix containing sodium acid pyrophosphate (SAPP), which the complaint contended precludes the company from marketing the mixes as "all natural." *Murphy v. Stonewall Kitchen, LLC*, No. 104072 (Mo. Ct. App., E.D., order entered November 8, 2016).

The trial court determined that because the ingredient list included SAPP, the plaintiff could not claim that Stonewall had failed to disclose its contents within the meaning of the Missouri Merchandising Practices Act (MMPA). Further, it found that the "all natural" description was inherently ambiguous with no clearly settled meaning. The appeals court disagreed, finding that the definition of "all natural" is a question of fact requiring further investigation during discovery.

"Furthermore, we expressly reject the notion that the 'ingredient list' defense asserted by Stonewall Kitchen defeats [the plaintiff's] claim as a matter of law," the court held. "The FDA does not require an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misrepresentations and provide a shield from liability for that deception. [] A reasonable consumer would expect that the ingredient list comports with the representations on the packaging. Furthermore, the manufacturer, not the consumer, is in the superior position to know and understand the ingredients in its product and whether the ingredients comport with its packaging. While the presence of an ingredient list may be relevant to Stonewall Kitchen's defense at trial, the 'ingredient list' defense cannot, as a matter of law, defeat an MMPA claim."

California Court Dismisses PHO Suit as "Frivolous," Preempted

A California federal court has dismissed a consumer's putative class action against AdvancePierre Foods, Inc. alleging the company both physically and financially harmed her by selling her a microwavable sandwich made with partially hydrogenated oil (PHO). *Hawkins v. AdvancePierre Foods, Inc.*, No. 15-2309 (S.D. Cal., order entered November 8, 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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The court agreed with AdvancePierre's argument that the U.S. Food and Drug Administration's June 2015 final determination removing PHO's status as a material generally recognized as safe for use in food implemented a June 2018 deadline for compliance to avoid allowing consumers to obtain damages for the use of PHO in the meantime. Under the Consolidated Appropriations Act of 2016 (CAA), "No partially hydrogenated oils as defined in the [Final Determination] shall be deemed unsafe . . . and no food that is introduced into interstate commerce that bears or contains a partially hydrogenated oil shall be deemed adulterated . . . by virtue of bearing or containing a partially hydrogenated oil until the compliance date as specified in such order (June 18, 2018)."

Allowing the plaintiff "to proceed on her state claims would contravene Congress's purpose in passing [the CAA], which was to prevent economic disruption and preclude lawsuits against food producers based on PHO content until the compliance date set forth in the Final Determination," the court held. "This purpose is demonstrated in legislative overviews of the 2016 CAA, which state that section 754 was drafted in response to concerns of market interference and is meant to prevent 'frivolous lawsuits.' The Court finds that Plaintiff's current action is one of the frivolous suits that Congress meant to preclude until 2018."

Former Wine Co. Owner Charged with Fraud for Mislabeling Grapes

A federal grand jury has indicted Jeffry Hill of Hill Wine Co. on charges that he sold wine falsely labeled as originating from Napa Valley in California. *United States v. Hill*, No. 16-CR-0454 (N.D. Cal., San Francisco Div., indictment entered November 1, 2016). The indictment accuses Hill of growing grapes outside the designated Napa Valley borders and selling the grape juice, bulk wine or bottled wine as made only from Napa Valley grapes, which apparently earned him more than $1.5 million. Hill also allegedly misrepresented the varietals of grapes he sold and created fraudulent bills of lading and inventory records.

The indictment asserts that Hill also concealed the true origins of the grapes from his employees by moving grapes between Hill Wine Co.'s three facilities and intercepting trucks shipping grapes to alter the paperwork indicating their origin or varietal. Hill faces eight charges of mail fraud and wire fraud.

Splenda® Manufacturer Files Trademark Suit Against Dunkin' Donuts

Heartland Consumer Products, producer of sucralose-based sweetener Splenda®, has filed a lawsuit against Dunkin' Brands, Inc. and its franchisees alleging the restaurant chain misleads its customers into believing it carries Splenda® while providing a different sweetener made in China. *Heartland Consumer Prods. v. Dunkin' Brands, Inc.*, No. 16-3045 (S.D. Ind., Indianapolis Div., filed November 7, 2016).

According to the complaint, Dunkin regularly purchased Splenda® from Heartland until April 2016, when it switched to a different sucralose sweetener. Heartland asserts that Dunkin employees continue to tell customers that the sweetener is Splenda even though the new sweetener is a "Chinese-made, off-brand sucralose." Heartland further argues that Dunkin appropriated its "Sweet Swaps" program by creating a Dunkin-branded "Smart Swaps" program. The complaint asserts that Heartland received multiple reports of consumer confusion, including one customer who reported that a Dunkin employee said Dunkin had "bought out Splenda." For allegations of trademark infringement, dilution, false designation of origin and unfair competition, Heartland seeks a corrective advertising campaign, an injunction and damages.

Vegetarian Sues Buffalo Wild Wings for "Meatless" Dishes Cooked in Beef Tallow

A New York consumer has filed a lawsuit against Buffalo Wild Wings, Inc. (BWW) alleging the company misleads vegetarian customers into believing the restaurant chain offers vegetarian fare when certain offerings are actually cooked in beef tallow. *Borenkoff v. Buffalo Wild Wings, Inc.*, No. 8532 (S.D.N.Y., filed November 2, 2016). The complaint asserts that BWW does not disclose its use of beef tallow in its menu descriptions, nutritional information or website, and further, the usage departs from the industry standard of non-beef cooking oil. The plaintiff seeks class certification, an injunction, compensatory and punitive damages, costs and attorney's fees for an alleged violation of New York's consumer-protection statute and unjust enrichment.

Putative Class Action Challenges Krispy Kreme's Raspberry, Maple and Blueberry Products

A consumer has filed a projected class action against Krispy Kreme Doughnuts, Inc., alleging the company's blueberry, maple and raspberry products are not made with the ingredients in their fruit-based names. *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 16-8338 (C.D. Cal., filed November 9, 2016). The complaint highlights health benefits apparently linked to raspberries, blueberries, maple syrup and maple sugar, asserting that Krispy Kreme charged a premium for its products to capitalize on those perceived health benefits while using imitation versions of the ingredients. The plaintiff also distinguishes the blueberry, raspberry and maple products from Krispy Kreme's lemon, strawberry and cinnamon apple products, because the latter group does contain its advertised ingredients, leading to further consumer confusion. For allegations of fraud, misrepresentation and violations of California statutes, the plaintiff seeks class certification, an injunction, damages and attorney's fees.