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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Seattle Approves Tax on SSB Distributors

The Seattle City Council has approved a tax on distributors of sugar-sweetened beverages (SSBs) proposed by the city's mayor. SSBs covered by the tax include sports, fruit, energy and soft drinks as well as flavored syrups commonly used in coffee drinks. Baby formula, medications, weight-loss drinks, fruit juice and diet soft drinks are exempt from the tax. *See Seattle Times*, June 5, 2017.

NAD Recommends Campbell Soup Change Prego® "Baby Expert" Ads

Responding to a challenge from Ragù®-maker Mizkan Americas Inc., the National Advertising Division (NAD) has recommended that Campbell Soup Co. change broadcast ads featuring toddlers as "life-long pasta experts," finding the ads are "puffery" and do not contain "a claim about the preferences of toddlers." The ads showed a split-screen with one child eating and one child refusing the food. Campbell Soup said the claim was substantiated by a "statistically significant" taste test conducted with subjects aged six or older comparing Prego® and Ragù® sauces, but NAD said the ads did not contain a provable claim that young children prefer one sauce over another.

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.

For additional information about Shook's capabilities, please contact

Mark Anstoetter
816.474.6550
manstoetter@shb.com

ASA Blocks Dairy Farm's Environmental Advertising

The U.K. Advertising Standards Authority (ASA) upheld a complaint arguing an advertisement for Arla Foods' organic milk was misleading because it included the statements "Good for the land" and "helping support a more sustainable future." ASA reviewed evidence the company provided about its organic farming methods but concluded that the dairy had failed to substantiate its claim that organic milk production has an "overall positive impact on the environment, taking into account its full life cycle." Accordingly, the agency ruled that the ad was misleading and told Arla not to make environmental claims about their products unless they could be substantiated.

Madeleine McDonough
816.474.6550
202.783.8400
mmcdonough@shb.com

OEHHA Hearing on Lead Levels In Candy Rescheduled for July 2017

California's Office of Environmental Health Hazard Assessment (OEHHA) has announced that a public hearing on "naturally occurring" lead levels in chili or tamarind candy has been rescheduled for July 6, 2017. Comments on the petition may be submitted by email or in writing by July 20, 2017.

Italians Dispute "Made in Italy" Definition in Food-Source Labeling Initiative

Italian food producers reportedly disagree on how to define whether a food product is "made in Italy" in accordance with the country's attempt to distinguish food produced in Italy, such as parmesan cheese or prosecco, from similar foods produced outside of the country. The dispute centers on whether foods manufactured in Italy using foreign ingredients may be labeled as "Made in Italy." According to *Reuters*, Parmesan and prosecco producers argue against such foods receiving the rights to use the label, while pasta-maker Barilla asserts that its foods are just as Italian because the company is Italian despite manufacturing about half of its pasta in plants outside of Italy. *See Reuters*, June 2, 2017.

LITIGATION

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.

Advocacy Groups Sue FDA for Menu Info Delay

The Center for Science in the Public Interest (CSPI) and National Consumers League have filed a lawsuit alleging the U.S. Food and Drug Administration's (FDA's) decision to delay implementation of rules requiring chain restaurants and food sellers to display nutritional information violated the Administrative Procedure Act. *Ctr. for Sci. in the Pub. Interest v. Price*, No. 17-1085 (D.D.C., filed June 7, 2017).

The plaintiffs allege that the agency "repeatedly delayed" the compliance date for the nutritional labeling rules, which were originally scheduled to take effect in December 2015. One day before the revised enforcement date in May 2017, FDA announced that compliance would be delayed until May 2018. The plaintiffs request that the court vacate the delay. Additional details on the delay announcement appear in Issue 633 of this *Update*.

"The Trump administration's delay of menu labeling ill serves consumers, who need and want better information about their food choices," CSPI Director of Nutrition Policy Margo G. Wootan said in a June 7, 2017, press release. "But the delay also ill serves the restaurant industry, which supports menu labeling and has already invested in new menus and menu boards. By siding with convenience stores and supermarkets over restaurant chains, the Trump administration is randomly sowing chaos."

5-Hour Energy® Plaintiffs Denied Class Certification

A federal court has denied class certification to plaintiffs in multidistrict litigation involving false advertising claims for 5-Hour Energy® drinks, finding they failed to allege that common issues predominate over individual ones, including a common definition of "energy." *In re 5-Hour Energy Mktg. and Sales Practices Litig.*, No. 13-2438 (C.D. Cal., order entered June 7, 2017). The plaintiffs could not establish the definition of "energy," the court found, because they defined it as "caloric energy" based on U.S. Food and Drug Administration dietary-supplement standards but did not show that consumers interpret "energy" the same way. In addition, plaintiffs in California, Missouri and New Mexico proposed a theory of liability based on underfilling, alleging that the product provided only 3.7 minutes of caloric energy instead of five hours, while plaintiffs in other states did not argue for the theory.

FDCA Preempts Underfilled Tuna Claims, Court Holds

A California federal court has granted a motion to dismiss a consolidated proposed class action alleging Trader Joe's underfilled its five-ounce cans of tuna, holding the plaintiffs' claims are preempted by the Federal Food, Drug and Cosmetic Act (FDCA). *In re Trader Joe's Tuna Litig.*, No. 16-1371 (C.D. Cal., order entered June 2, 2017). The plaintiffs commissioned the National Oceanic and Atmospheric Administration to test several varieties of Trader Joe's canned tuna, and the agency apparently determined that some cans were filled as much as 25 percent below the U.S. Food and Drug Administration (FDA) minimum. Additional information on one of the consolidated complaints appears in Issue 589 of this *Update*.

Trader Joe's argued that the weights listed on the labels were accurate and that the plaintiffs' claim was preempted by federal law because it was based on an alleged violation of FDA standards. The court agreed, finding the FDCA provides no private right of action to enforce FDA standards and regulations.

Appeals Court Reverses Dismissal of Whole Foods Overcharging Suit

The U.S. Court of Appeals for the Second Circuit has reversed a lower court's dismissal of a proposed class action alleging Whole Foods Market Group, Inc. overcharges for prepackaged foods. *John v. Whole Foods Mkt. Grp., Inc.*, No. 16-0986 (2nd Cir., order entered June 2, 2017). The plaintiff alleged that he routinely purchased prepackaged foods at two Whole Foods stores in Manhattan but learned that a New York City Department of Consumer Affairs (DCA) investigation had found systematic overcharging for some foods. Details on the lower court's dismissal appear in Issue 596 of this *Update*.

The Second Circuit held that the lower court dismissed the case prematurely because the plaintiff did not need to prove the accuracy of the DCA report or defend its methodology at the pleading stage; he was required only to plausibly allege that he overpaid for at least one product, which satisfies the "low threshold" required to plead injury in fact to establish standing. Accordingly, the appeals court reversed the decision and remanded the case to the trial court.

SCOTUS Denies Certiorari in Egg Cases

The U.S. Supreme Court has denied certiorari in a six-state coalition's attempt to block enforcement of a California law requiring egg-production facilities to provide hens enough space to extend their limbs and turn around. *Missouri v. Becerra*, No. 16-1015 (U.S., denial of certiorari entered May 30, 2017). The rule affects private egg producers within each state, but the U.S. Court of Appeals for the Ninth Circuit found that this interest did not convey standing upon the states. Additional details on the circuit court's decision appear in Issue 623 of this *Update*.

The high court also denied certiorari to Austin "Jack" DeCoster and his son Peter, who sought to appeal the prison sentences they received for their roles in a 2010 *Salmonella* outbreak that sickened thousands across the United States. *DeCoster v. United States*, No. 16-877 (U.S., denial of certiorari entered May 18, 2017). The men, former executives of Quality Egg LLC, were convicted of misdemeanor violations of the Federal Food, Drug, and Cosmetic Act, and the U.S. Court of Appeals for the Eighth Circuit upheld their convictions in July 2016. Additional details on the appeal appear in Issue 610 and information on the criminal charges appears in Issue 524.

Court Dismisses Shareholder Suit Against Chipotle

A Colorado federal court has dismissed a shareholder derivative action against Chipotle alleging the company's officers and directors of food-safety oversight failed to take action to prevent outbreaks of foodborne illness. *Gubricky v. Ells*, No. 16-2011 (D. Colo., order entered June 7, 2017). The plaintiff claimed the defendants had failed to implement and enforce effective food-safety procedures, monitor compliance with food-safety laws or commit necessary resources to store audits and risk assessment after a series of foodborne-illness outbreaks. The complaint further alleged that the board failed to take action or offer sick employees paid leave until 2015, seven years after the outbreaks began.

In a shareholder derivative suit, plaintiffs must plead "with particularity" why demanding the corporate board to take corrective action would be futile, the court said, but the plaintiff failed to plead facts specific to each director establishing a "substantial likelihood of personal liability." The plaintiff must allege that "that the board *consciously* failed to implement any sort of risk monitoring system or, having implemented such a

system, *consciously* disregarded red flags signaling that the company's employees were taking facially improper, and not just ex-post ill-advised or even bone-headed, business risks," the court found, but the complaint included "nothing approaching this level of specificity."

Nutella Wins Palm Oil Ad Dispute

Ferrero SpA, maker of Nutella®, has reportedly won a dispute in the Brussels Court of Appeal over a rival's advertising that claimed its similar product was healthier because it does not contain palm oil. Ferrero sued Belgium's Delhaize Group after the "Choco" maker launched an ad campaign claiming its "certified without palm oil" spread was healthier and environmentally sustainable. The court held Delhaize made illegal and unproven comparisons in its environmental and health claims about palm oil and ordered the company to end the campaign. The court also barred Delhaize's use of the word "chocolate" on Choco labels because the product does not contain chocolate. *See 7 Sur 7*, June 2, 2017.

Lollipop IP Lawsuit Survives Motion to Dismiss

A New York federal court has denied a motion to dismiss a patent infringement and trade dress suit filed by candy maker The Topps Co. alleging that a competitor copied its Juicy Drop lollipop. *The Topps Co. v. Koko's Confectionery & Novelty, Inc.*, No. 16-5954 (S.D.N.Y., order entered June 7, 2017). Topps alleged that Koko's Squeezy Squirt Pop copied a design that allows the user to spray a lollipop with flavored liquid using a two-chamber mechanism; further, Koko's used a similar logo, font and color on the packaging and similar names for the candies' flavors, the complaint asserted. The court's decision followed oral arguments over whether the positioning of the chambers of the mechanism relative to the user was infringing. Topps' attorney reportedly told the court, "It can't be the law that just because you hold it at 90 degrees, it's not an infringement." *See Law360*, June 6, 2017.

Blogger Challenges Food Network's "Snow Globe Cupcake" Recipe

A pastry chef and food blogger has filed a copyright-infringement lawsuit against the owner of Food Network, alleging the channel copied her video tutorial for "Snow Globe Cupcakes." *LaBau v.*

Television Food Network G.P., No. 14-4077 (C.D. Cal., filed June 1, 2017). Elizabeth LaBau, owner of a website that provides recipes and tutorials for desserts, asserts that she created a tutorial for making edible snow globes using gelatin sheets and balloons in 2015, and the post caught enough attention for the cupcakes to become her "signature recipe." In November 2016, she created a tutorial video explaining how to create the Snow Globe Cupcakes, then learned in December 2016 that Food Network had published a similar video illustrating how to prepare the cupcakes. "The Food Network video copied numerous copyrightable elements of Plaintiff's work precisely, including but not limited to choices of shots, camera angles, colors, and lighting, textual descriptors, and other artistic and expressive elements of Plaintiff's work," the complaint alleges. LaBau seeks an injunction, damages and attorney's fees for an allegation of copyright infringement.