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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

FDA Warns Snyder's-Lance About Iron Content Labels

The U.S. Food and Drug Administration (FDA) has sent a warning letter to Snyder's-Lance, Inc. about the iron content of its Lance Toast Chee Crackers. The letter indicates that FDA conducted surveillance sampling purportedly showing that the company's single-serve cracker packages contained about half of the "10% Daily Value for iron" listed on the product label. The original sample showed 51.7 percent of the amount claimed and the "check" sample showed 57.2 percent, according to the letter. Levels below 80 percent of the amount declared on the label violate federal law, FDA stated. In addition, the bar code "was intervening with" the nutrition label, and the label did not declare the street address of the firm as required unless it appears in a city or telephone directory.

Fifth Generation to Discontinue Tito's Taste-Test Ads After NAD Challenge

Fifth Generation, Inc. will reportedly discontinue advertising asserting that its Tito's Handmade Vodka scored higher in taste tests than four of its competitors. Absolut Spirits Co. challenged the advertising claims before the National Advertising Division (NAD), arguing that the tests were completed before 2010 and are therefore outdated. Further, Absolut argued, the challenged ads implied that the taste tests occurred as comparisons between the five brands rather than five independent tests that were not conducted concurrently. In lieu of offering substantiation, Fifth

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Generation opted to permanently and voluntarily discontinue the claims.

LITIGATION

Lawsuit Alleging Champagne Misrepresentation to Continue

A Québec court has allowed to proceed a consumer's lawsuit alleging Sunwing Vacations Inc. misrepresented its "Champagne Service" because it served sparkling wine produced outside of the Champagne region of France. *Macduff v. Sunwing Vacations Inc.*, No. 2017 QCCS 4540 (Québec Super. Ct., entered October 11, 2017). Sunwing argues that it uses the terms "champagne service" and "champagne vacation" to denote the level of service its hospitality packages provide rather than referring to a specific beverage served to customers. According to Canada's *National Post*, about 1,600 potential class members have joined the lawsuit since it was filed.

Errington Cheese to Avoid Prosecution for Child's Death

Scotland's Crown Office reportedly will not prosecute Errington Cheese for the death of a three-year-old linked to an outbreak of *E. coli* in 2016. A March 2017 Health Protection Scotland report apparently found Errington's unpasteurized Dunsyre Blue cheese to be the "likely" source of the outbreak and the cause of the child's death. The Crown Office reportedly concluded that the child died from complications of an *E. coli* infection, but it decided not to pursue criminal action. After the outbreak, a local council government banned the sale of some of Errington's artisanal sheep's-milk cheese, and the company reportedly plans to challenge the ban in early 2018.

Court Allows ECJ Lawsuit to Proceed

A California federal court has allowed to proceed a putative class action challenging the use of "evaporated cane juice" (ECJ) on Late July Snacks LLC's product labels on the grounds that the Sherman Act does not require reliance on allegedly deceptive misrepresentation. *Swearingen v. Late July Snacks LLC*, No. 13-4324 (N.D. Cal., entered October 16, 2017). The plaintiffs alleged

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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.

that Late July Snacks, which sells chips and cracker snacks, misled consumers by listing ECJ instead of sugar as an ingredient. The court held that because the plaintiffs had narrowed the class allegations to include only California purchasers and had standing to sue not only on products they purchased but "substantially similar" products named in the complaint, the matter could proceed on the Sherman Act and other state law claims. The court dismissed a claim for an injunction, holding that the plaintiffs had failed to allege they planned to buy the snacks again.

The court previously stayed the case and requested information from the U.S. Food and Drug Administration on whether it would issue guidance on the use of ECJ as a term.

No "Piggyback" Standing in Putative Cookie Class Action, Court Rules

An Illinois federal court has dismissed part of a putative class action against Lenny & Larry's Inc., holding that the plaintiffs lack standing and that the application of 50 differing state laws is "unmanageable on a class-wide basis because those states' laws conflict in material ways." *Cowen v. Lenny & Larry's Inc.*, No. 17-1530 (N.D. Ill., entered October 12, 2017). The complaint alleged that Lenny & Larry's advertises "The Complete Cookie" as "Plant-Based Protein to Build Lean Muscle," labeling the cookies as vegan, non-GMO, kosher, dairy-free and soy-free without artificial sweeteners or sugar alcohols. The four-ounce cookie is advertised as containing 16 grams of protein, but the plaintiffs allege that independent testing showed the actual protein content of each cookie can vary from four to nine grams.

The court held that the named plaintiffs could not establish they had sustained an injury from cookie flavors they had not purchased. "[T]he Seventh Circuit's position that plaintiffs cannot 'piggy-back on the injuries of the unnamed class members' in order to acquire standing 'through the back door of a class action' is clear," the court stated, dismissing those claims. The court also dismissed three state law claims, finding the defendant's "in-depth analysis of the many ways in which the laws of the states that comprise the proposed classes conflict" demonstrated that the "'essential requirements to establish a claim and the types of relief available' vary significantly." The plaintiffs were given leave to amend.

Texas Appeals Court Holds House-Brand Beer Labels Not Protected Commercial Speech

A Texas appeals court has held that Mark Anthony Brewing cannot produce and label a house-brand beer for TGI Friday's restaurants because state law prohibits "overlapping" relationships among alcohol manufacturers, distributors and retailers. *Texas Alcoholic Beverage Comm'n v. Mark Anthony Brewing, Inc.*, No. 16-0039 (Texas Ct. App., entered October 13, 2017). The Texas Alcoholic Beverage Commission (TABC) rejected Mark Anthony Brewing's application for approval of the beer labels, which it created as part of a licensing agreement with TGI Friday's, on the grounds that Texas' "tied-house" statutes prohibit such business relationships. Specifically, TABC found, the agreement violated the part of the administrative code providing that "[n]o application for a label shall be approved which indicates by any statement, design, device, or representation that the malt beverage is a special or private brand brewed or bottled for, or that includes the name, trade name, or trademark of any retailer permittee or licensee."

Arguing that the labels were commercial free speech, Mark Anthony Brewing filed a declaratory judgment action to determine the validity and constitutionality of the state law. A district court ruled in the brewer's favor, concluding that the labels related only to lawful activity and were protected under the First Amendment. The appeals court reversed, holding that the speech was unlawful because it allowed TGI Friday's the oversight and control of Mark Anthony Brewing's product, which is expressly barred by the Texas law and therefore not subject to constitutional protection.

Ghirardelli Packages Short Consumers on Chocolate, Plaintiff Alleges

A putative class action plaintiff has filed a lawsuit alleging that Ghirardelli Chocolate Co. puts fewer chocolates in packages of individually wrapped, single-serving chocolate squares than the number advertised on labels. *Brungard v. Ghirardelli Chocolate Co.*, No. 17-5873 (N.D. Cal., filed October 12, 2017). The plaintiff asserts that he bought chocolates in 10-, 17- and 40-count bags in various flavors "many times over several years" and allegedly found "one less individually-wrapped square in the packages he purchased." According to the complaint, Ghirardelli told the plaintiff that the contents were based on weight rather than the printed servings on the label. Claiming violations of the California Consumer Legal Remedies Act, unfair business practices, unjust enrichment, consumer fraud, negligent misrepresentation, intentional misrepresentation and false advertising, the plaintiff

seeks class certification, damages, injunctive relief, restitution and attorney's fees.