ISSUE 672 | April 27, 2018

FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

France Bans Meat and Dairy Terms for Plant-Based Foods

The French Parliament has reportedly voted to prohibit the use of meat and dairy terms to describe plant-based substitutes such as vegetarian sausage or vegan bacon. The measure follows a 2017 European Court of Justice ruling that plant-based products cannot be marketed with terms such as "milk" or "butter." Violations of the ban may lead to fines of up to €300,000.

Organic Egg Producer Petitions FDA To Label Eggs as Healthy

An organic egg producer has filed a citizen petition urging the U.S. Food and Drug Administration (FDA) to update the definition of "healthy" to be consistent with scientific evidence and the 2015-2020 Dietary Guidelines for America (DGA). Specifically, Pete and Gerry's Organics LLC asks FDA to amend the Food, Drug and Cosmetic Act to allow eggs, as single-ingredient foods, to bear the claim "healthy" and to amend FDA enforcement guidance to permit use of the term on eggs, which contain cholesterol in excess of the current limits.

M. Katie Gates Calderon

The petition states that FDA's current labeling guidelines are based on specific nutrient levels rather than overall nutritional quality of foods, while the DGA has shifted emphasis to overall dietary patterns. The 2015-2020 DGA does not suggest limiting cholesterol, based on American Heart Association and American College of Cardiology research that apparently found "no appreciable relationship between consumption of dietary cholesterol and serum cholesterol," according to the petition.

European Parliament Adopts Organic Food Rules

The European Parliament has adopted rules governing the certification and labeling of organic foods, including supply chain checks and updated standards for organic foods imported from non-EU countries. The rules also cover plant seeds, allowing producers to offer locally adapted traditional varieties for sale and use.

"Organic standards are already very high, but consumer confidence can best be strengthened when the rules are clear and comprehensible. The new regulation wil[l] certainly make a positive contribution here," MEP Martin Häusling said in a interview. "Moreover, many of the rules that give producers security are also beneficial to consumers. The annual process-oriented controls mean consumers can be sure companies are inspected regularly."

EC Approves Irish SSB Tax

Ireland's tax on sugar-sweetened beverages (SSBs) will take effect May 1, 2018, following a European Commission finding that the tax does not constitute state aid. According to a press release, "The Commission in its assessment found that soft drinks can be treated differently to other sugary products in view of health objectives. For example, the Commission took into account the fact that soft drinks are the main source of calories devoid of any nutritional value and thereby raise particular health issues. Furthermore, soft drinks are particularly liable to lead to overconsumption and represent a higher risk of obesity, also compared to other sugary drinks and solid food. On this basis, the

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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.

Commission concluded that the scope of the Irish sugar sweetened drinks tax and its overall design are consistent with the health objectives pursued and does not unduly distort competition."

USDA Seeking Nominations for Fruit and Vegetable Advisory Committee

The U.S. Department of Agriculture (USDA) has announced it will reestablish the Fruit and Vegetable Advisory Committee and seeks nominations for "a diverse group of members representing a broad spectrum of persons interested in providing suggestions and ideas on how USDA can tailor its programs" to meet industry needs. The agency intends to include growers and shippers; wholesalers and distributors; brokers; processors; retail and restaurant representatives; foodservice suppliers; representatives for organic and non-organic farmers markets; food hubs; state departments of agriculture; farmers' organizations; and trade associations. Written nominations must be postmarked on or before May 24, 2018.

Agencies Seek Comments on Agricultural Innovations, Trade

The U.S. Departments of Agriculture and State are accepting comments on the subjects discussed at the 2018 Food and Agricultural Organization of the United Nations (FAO) Informal North American Regional Conference. Subjects include "agri-food trade and global food security; gender equality and the empowerment of women; agricultural innovations; and FAO's work in emergencies and emerging threats."

LITIGATION

Plaintiff Alleges Clif Bars "Dangerously" High in Added Sugar

Plaintiffs in California and New York have filed a putative class action alleging Clif Bar & Co. "omits, intentionally distracts from, and otherwise downplays" the "high added sugar content" of Clif Classic and Clif Kid bars. *Milan v. Clif Bar & Co.*, No. 18-2354 (N.D. Cal., filed April 19, 2018). The complaint asserts that the bars contain high amounts of added sugar—"a chronic liver toxin"—and alleges that excess sugar consumption can lead to several conditions, including metabolic syndrome, Type 2 diabetes, obesity, high triglycerides and hypertension. The plaintiffs allege that Clif "employs a strategic marketing campaign intended to appeal to customers interested in healthful foods in order to increase sales and profits, despite that the high-sugar bars are detrimental to health." By emphasizing "nutritious" and "organic" ingredients as well as the lack of high-fructose corn syrup and genetically modified organisms, the company allegedly fails to disclose that Clif Classic and Clif Kid bars contain as much as 22 grams of sugar and that a single bar can contain up to 100 percent of the maximum recommended daily intake of added sugars, according to the plaintiffs. Claiming violations of California and New York's consumer-protection laws, the plaintiffs seek class certification, injunctive relief, corrective advertising, damages and attorney's fees.

Jack Daniel's Alleges Rival Infringed Trademarks, Trade Dress

The maker of Jack Daniel's has filed suit against two Texas companies alleging they infringed the Tennessee whiskey's trademark and trade dress by selling a line of whiskies in similarly shaped bottles with similar labeling. *Jack Daniel's Props., Inc., v. Dynasty Spirits, Inc.*, No. 18-2400 (N.D. Cal., filed April 20, 2018). The complaint alleges that Tennessee whiskey has been sold under the Jack Daniel's mark "continuously since 1875, except during Prohibition" and is sold in a "square bottle with angled shoulders, beveled corners, and a ribbed neck, a black cap, a black neck wrap closure with white printing bearing the OLD NO. 7 mark, and a label with a white on black color scheme bearing the JACK DANIEL'S mark depicted in arched lettering at the top of the label [] and the word 'Tennessee' depicted in script." The competitor whiskies "all feature a square bottle with angled shoulders, beveled corners and a ribbed neck," and the rival's Lonehand Whisky "also features a black cap, a black neck wrap

closure, and a black label … with the word 'whiskey' in script, and the words 'Tennessee Sour Mash' in the lower portion of the label."

The complaint also asserts that the defendants asked retailers to display the competitors' products "adjacent" to Jack Daniel's and to use promotional materials that employ elements of the protected trade dress. Moreover, it alleges that Lonehand Whisky was "[c]ompared to Jack Daniels by a store employee (but at a bargain price!)." Alleging trademark and trade dress infringement, dilution of trademarks and trade dress, false advertising and unfair competition, the plaintiff seeks injunctive relief, destruction of marketing and production materials, accounting of profits, damages and attorney's fees.

Vintner Alleges Colorado Wine Industry Development Fee is Illegal Tax

A vintner has filed a lawsuit alleging Colorado's "wine development fee," charged to wholesalers, is an unconstitutional excise tax. *Vineland Corp. v. Colorado*, No. 18-30199 (Colo. D.C., filed April 24, 2018). Since 1990, Colorado has imposed a 10-year renewable excise tax of one cent per liter on all vinous liquors sold in the state. In 1992, the state passed the Taxpayers Bill of Rights (TABOR), which mandated advance voter approval for extension of expiring taxes; in 1997, the legislature amended the 1990 act, renaming the excise tax a "wine development fee." The plaintiff seeks declaratory judgment that the fee is "an impermissible attempt to extend an expiring tax without voter approval, and that this attempt to rename an excise tax surcharge [] without such voter approval is a violation of TABOR." Further, the plaintiff seeks injunctive relief, attorney's fees and a refund of all fees paid in the past four fiscal years plus simple interest at the rate of 10 percent on "all Wine Development Fees collected from the time of the 'initial conduct,' that is, first collection, of the Wine Development Fees in July, 2000."

Consumer Challenges Salt & Vinegar Flavor

Kellogg Co. faces a putative class action alleging its Salt & Vinegar Pringles are mislabeled as containing "No Artificial Flavors" because the nutrition label identifies two artificial ingredients. *Marotto v. Kellogg Co.*, No. 18-3545 (S.D.N.Y., filed April 20, 2018). The complaint asserts that although both sodium diacetate and malic acid can occur in nature, the sodium diacetate used in the product is "a synthetic industrial chemical manufactured in a chemical refinery from carbon monoxide and industrial methanol" while the malic acid is "d-1-malic acid . . . manufactured in petrochemical plants from benzene or butane." Alleging unfair and deceptive business practices, false advertising and misrepresentation, the plaintiff seeks class certification, corrective advertising, damages and attorney's fees.

In March 2018, a federal court in California refused to dismiss a similar lawsuit against Kellogg, finding the plaintiffs had adequately pleaded reasonable customer confusion.

Court Denies Dr Pepper's Motion to Dismiss Ginger Ale Suit

A Missouri federal court has denied Dr Pepper Snapple Group Inc.'s motion to dismiss a putative class action alleging Canada Dry Ginger Ale is falsely labeled because it does not contain ginger. *Webb v. Dr Pepper Snapple Grp. Inc.,* No. 17-0624 (W.D. Mo., entered April 25, 2018). The plaintiff alleged that although the labeling, packaging and marketing of the product includes the statement "Made from Real Ginger," independent laboratory testing found no detectable ginger in the beverage. The lawsuit echoes similar putative class actions filed in California. The Missouri court rejected all of Dr Pepper Snapple Group's arguments, finding the plaintiff had adequately pleaded each of the seven counts alleged, including violation of the Missouri Merchandising Practices Act, fraud and intentional misrepresentation.