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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

ASA Upholds Complaint Against BrewDog Ad

The U.K. Advertising Standards Authority (ASA) has upheld a complaint against BrewDog Beer for a print ad and an outdoor poster ad that displayed "F–k You CO2. Brewdog Beer Is Now Carbon Negative" with the dashes obscured by a can of beer. ASA found that the poster ad "had been placed in accordance with guidelines on proximity to schools and religious buildings; that the ad had run during school summer holidays and that one local authority (Newcastle City Council) had been asked and considered the ad acceptable for use." However, the board found that the ad "was so likely to offend a general audience that such a reference should not appear in media where it was viewable by such an audience. We therefore concluded that the ad was likely to cause serious and widespread offence and was not appropriate for display in untargeted media."

ASA upheld the complaint as it pertained to an ad in a free newspaper as well but dismissed it in the context of *The Economist* and *The Week*, which "had to be actively purchased in a shop or by subscription."

"We acknowledged that most readers of Metro were adult. We considered that many would accept that the ad was using a play on words to make a statement about environmental issues as part of its marketing message. Nevertheless, as a widely available, free newspaper, the ad was untargeted," the decision stated.

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LITIGATION

EU Court Strikes Down France's CBD Ban

The Court of Justice of the European Union (CJEU) has prevented France from banning the marketing of cannabidiol (CBD) "lawfully produced in another Member State when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds." In its ruling, CJEU found that "CBD cannot be classified as a 'narcotic drug,'" and although France is "not required to demonstrate that the dangerous property of CBD is identical to that of certain narcotic drugs," the country "must assess available scientific data in order to make sure that the real risk to public health alleged does not appear to be based on purely hypothetical considerations. A decision to prohibit the marketing of CBD, which indeed constitutes the most restrictive obstacle to trade in products lawfully manufactured and marketed in other Member States, can be adopted only if that risk appears sufficiently established."

Consumers Allege "Hawaiian Host" Candy Name Misleads

Two consumers allege that Hawaiian Host Candies, "synonymous with Hawaii," are made in Gardena, California. *Toy v. Hawaiian Host Candies of L.A. Inc.*, No. 20-2191 (C.D. Cal., filed November 17, 2020). "Had Plaintiffs and other consumers known that the Hawaiian Host Products are not made in Hawaii, they would have paid significantly less for them, or would not have purchased them at all," the complaint alleges. The plaintiffs assert that the candy packaging intentionally misleads consumers with the candy name as well as statements such as "Hawai'i's Gift to the World," "Hawaiian Host products are made with aloha" and "Our classic confections reflect our deep connection to Hawai'i and are meant to be shared with others in the true spirit of Aloha." The packaging also includes the name of Hawaiian Host Inc. and a Honolulu address.

As further evidence, the complaint cites the company's social media feeds, which share images of Hawaii, and an interview with a former vice president of the company telling *Hawaii Pacific Business News* that the candy sold in Hawaii is produced in Hawaii but candy sold in the continental United States and internationally is produced in Los Angeles. The plaintiffs allege negligent misrepresentation and unjust enrichment as well as violations of California's, Nevada's and Colorado's consumer-protection statutes.

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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.

Kellogg Promotions Expire Early, Plaintiffs Allege

Two consumers have alleged that Kellogg Co. markets promotions on the packaging of its products that end before the shelf life of the product. *Seaman v. Kellogg Co.*, No. 20-5520 (E.D.N.Y., filed November 13, 2020). The complaint asserts that consumers rely on incentives listed on product packaging when deciding which product to purchase, but because the shelf life of the products extends beyond the expiration of the incentive, the products stay on store shelves longer than the length of the promotion and consumers purchase products relying on offers that they ultimately cannot use. “Where a shopper views a promotion such as described here, they will have no reason to scrutinize the fine print telling them when the promotion expires,” the complaint argues. “Reasonable consumers are not so innately distrustful of companies and expect that all aspect of consumable items, including promotions, are functional throughout their shelf-life.”

The plaintiffs argue that Kellogg could print fewer boxes with the promotional offer but “is incentivized to print more boxes with promotions than it will sell during the offer period because these offers increase sales of their products.” They list as an example an Eggo waffles offer for $5 off a purchase of three Crayola boxes that expired in September 2017 despite the waffles’ expiration date of October 2018. The plaintiffs seek class certification, injunctive relief, damages and costs for allegations of fraud, negligent misrepresentation and unjust enrichment as well as violations of North Carolina’s and New York’s consumer-protection statutes.

Toddler Formula Companies Hit with Lawsuits

Three similar lawsuits were filed against Target Corp., Gerber Products Co. and Mead Johnson & Co. alleging their “transition” formulas intended for 9- to 18-month-old children are misleadingly marketed as reviewed and monitored by the U.S. Food and Drug Administration to the same extent infant formulas are. *Gavilanes v. Gerber Prods. Co.*, No. 20-5558 (E.D.N.Y., filed November 15, 2020); *Gordon v. Target Corp.*, No. 20-9589 (S.D.N.Y., filed November 15, 2020); *Palmieri v. Mead Johnson & Co.*, No. 20-9591 (S.D.N.Y., filed November 15, 2020).

The complaints assert that the use of the infant formula nutrition panel on the back of the packaging “gives caregivers the impression that the Product is subject to the same scrutiny and

oversight as Infant Formula products," causing buyers to be "less likely to identify the added sugar in the Infant & Toddler Formula Product, in the form of corn syrup solids, absent from the Infant Formula product." The plaintiffs argue that "transition" formulas were introduced to "make up for declining sales of infant formulas" and are "practically identical to infant formula in that they are based on milk powder with added nutrients." Further, "Transition formulas use a statement of identity that uses the words infant and toddler interchangeably, even though the two groups have different dietary needs."

The complaints each allege fraud, negligent misrepresentation and unjust enrichment as well as violations of New York's consumer-protection statutes and the Magnuson-Moss Warranty Act.

Consumer Alleges "Slightly Sweet" Chai is Misleading

A consumer has filed a putative class action alleging that Kerry Inc.'s Oregon Chai products contain too much sugar to be labeled "slightly sweet." *Brown v. Kerry Inc.*, No. 20-9730 (S.D.N.Y., filed November 18, 2020). The complaint argues that the product's "most prominent claim, 'Slightly Sweet,' is an unlawful nutrient content claim that makes an 'absolute' or 'low' claim about the amount of sugar it contains." The product contains 11 grams of sugar and lists "organic dried cane sugar syrup" as the second ingredient on the ingredient list, and the complaint argues that the addition of milk or milk substitute as instructed by the packaging would result in a total of 20 grams of sugar per serving. The plaintiff alleges negligent misrepresentation, fraud and unjust enrichment along with violations of the Magnuson-Moss Warranty Act and New York's consumer-protection statutes.