ISSUE 548 | DECEMBER 12, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

FDA Concludes Safety Assessment of BPA in Food Packaging

The U.S. Food and Drug Administration (FDA) has **updated** its online bisphenol A (BPA) information to reaffirm its conclusion that the substance is safe for approved food-packaging uses. According to the revised statement, agency experts in toxicology, analytical chemistry, endocrinology, epidemiology, and other fields completed "a four-year review of more than 300 scientific studies" without finding any information that would "prompt a revision of FDA's safety assessment of BPA in food packaging at this time."

"Based on FDA's ongoing safety review of scientific evidence, the available information continues to support the safety of BPA for the currently approved uses in food containers and packaging," said the agency. "FDA will also continue to consult with other expert agencies in the federal government, including the National Institutes of Health (and the National Toxicology Program), the Environmental Protection Agency, the Consumer Product Safety Commission, and the Centers for Disease Control and Prevention." *See BNA.com*, December 5, 2014.

FDA Seeks Non-Voting Industry Rep for Food Advisory Committee

The Food and Drug Administration (FDA) is **requesting** (i) nominations for a non-voting industry representative to serve on the Food Advisory Committee and (ii) statements from organizations interested in participating in the selection process for the non-voting committee member.

The Food Advisory Committee evaluates data and makes recommendations on such matters as food ingredient safety; food and cosmetic labeling; nutritional issues; and exposure limits for food contaminants. Organizations that want to participate in the process should express their interest in writing by January 7, 2015. Nomination materials must be received by the same date. *See Federal Register*, December 8, 2014.

Groups Urge FTC to Investigate Ring Pop Maker for Alleged COPPA Violations

Ten consumer organizations, including the Center for Science in the Public Interest and the Rudd Center for Food Policy and Obesity, have filed a Request for Investigation with the Federal Trade Commission (FTC) alleging that Topps Co., maker of Ring Pops, violated the Children's Online Privacy Protection Act (COPPA) by encouraging children younger than age 13 to post photos of themselves wearing the candy to social media.

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Topps apparently introduced the campaign, #RockThatRock, as a collaboration with "tween band" R5 to feature photos of Ring Pop wearers in the band's music video. Consumers could enter the contest by posting a photo to social media and appending the name of the campaign. The consumer groups allege that Topps aimed the contest at youth through its child-focused website, Candymania, and that the contest violated COPPA rules by collecting personal information—which, by statutory definition, includes photographs—from a child without giving notice and obtaining advance parental consent.

"This is a textbook study of how online marketers are so eager to use Facebook and other social media to promote their products to friends and even strangers, they ignore this key law designed to protect consumer privacy online. Companies such as Topps need to carefully review all their digital marketing practices to make sure they are adhering to COPPA, and also are marketing their products in a responsible manner," said Jeff Chester, executive director of the Center for Digital Democracy. "The FTC must do more, however, to ensure that COPPA is effectively enforced. It must devote more resources to protect the privacy of children, and begin examining contemporary digital data-driven practices more thoroughly." *See CDD Press Release*, December 9, 2014.

Supporters Concede Loss in Oregon GE Labeling Vote Recount

According to a news source, the organizations that supported an Oregon ballot initiative that would have required foods made with genetically engineered (GE) ingredients to be labeled as such have ended efforts to challenge a vote that narrowly defeated the measure. The groups apparently lost an emergency lawsuit seeking to include the ballots of some 4,600 voters who were rejected because the signatures on the vote-by-mail return envelopes did not match those on file. A court determined that the state's rules on matching signatures were neither unreasonable nor illegal. An automatic recount had been triggered because the ballot proposal was defeated by slightly more than 800 votes out of 1.5 million cast. Of the initial 13,000 ballots with signature problems, 8,600 responded and matched their signatures. The remaining 4,600 were rejected. *See Associated Press*, December 11, 2014.

EU Parliament & Council Reach Accord on GMO Cultivation

A "hand-shake" agreement between the European Union's Parliament and Council will reportedly end an ongoing dispute over member state control of internal food markets in relation to genetically modified organism (GMO) cultivation. European Commissioner for Health and Food Safety Vytenis Adriukaitis reportedly said, "The agreement, if confirmed, would meet member states' consistent calls since 2009, to have a final say on whether or not GMOs can be cultivated on their territory, in order to better take into account their national context and, above all, the views of their citizens."

Under the proposal, each EU country would have the authority to prohibit or restrict GMO cultivation for reasons other than food safety, including those

involving socioeconomic effects, environmental concerns and agricultural policy goals. Current law allows member states to petition the European Food Safety Authority to limit such cultivation, but they must present scientific evidence showing the product is not safe to consume.

A Green food safety spokesperson reportedly criticized the agreement, contending that it "leaves too many gaps, which could undermine the hand of those wanting to say 'no' to GMOs. Shifting to a 'renationalization' of decisions on GMO cultivation must be accompanied by a totally legally watertight basis for those countries wishing to opt out, otherwise it risks being a Trojan horse." *See Law360*, December 5, 2014.

LITIGATION

Court Refuses to Certify Class Alleging Mott's False Advertising

A California federal court has denied certification to a putative class action alleging that Mott's misleadingly labeled its apple juice as having "No Sugar Added" because the plaintiff failed to provide a feasible model for calculating damages. *Rahman v. Mott's LLP*, No. 13-3482 (U.S. Dist. Ct., N.D. Cal., order entered December 3, 2014). The court further refused to certify a liability class, finding it would not materially advance resolution of the case.

The court first assessed the proposed class definition. It found that the plaintiff and the proposed class met the requirements of numerosity, ascertainability, commonality, and adequacy; in addition, the court rejected the juice company's argument that the plaintiff was atypical because he is a Type 2 diabetic who closely reads nutrition labels. The court then discussed whether the plaintiff established that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Mott's argued that the plaintiff could not show that all potential class members relied on the "No Sugar Added" label in the same "idiosyncratic" way that he did, but the court rejected the argument as inapposite. It instead found that restitution would "likely involve demonstrating what portion of the sale price was attributable to the value consumers placed on the 'No Sugar Added' statement. Plaintiff has failed to show predominance as to damages because he has introduced no evidence showing that restitution 'damages [can] feasibly and efficiently be calculated once the common liability questions are adjudicated.'" Accordingly, the court denied class certification. Additional information on the case appears in Issues 511, 520 and 541 of this *Update*.

Maker's Mark Bourbon Not "Handmade," Putative Class Action Alleges

Two consumers have filed a putative class action in California federal court alleging that Maker's Mark® bourbon whisky is not "handmade," as the alcohol brand advertises, but is instead manufactured using "mechanized and/or automated processes" with "little to no human supervision, assistance or

involvement." *Nowrouzi v. Maker's Mark Distillery, Inc.*, No. 14-2885 (U.S. Dist. Ct., S.D. Cal., filed December 5, 2014).

Citing photos and a video tour of the distillery as evidence, the plaintiffs argue that because Maker's Mark® uses machines to make its product, its "handmade" claim and premium pricing amount to misrepresentation and violations of California's false advertising statute. They allege that they "purchased Maker's Mark whisky under the false impression that the whisky was of superior quality by virtue of being 'Handmade' and thus worth an exponentially higher price as compared to other similar whiskies." They seek class certification, an injunction requiring discontinuation of the "handmade" description, a corrective advertising campaign, damages, costs, and attorney's fees.

Insurance Co. Seeks Declaration to Avoid Possible "All Natural" Putative Class Action Payout

Months after a Florida federal court rejected a motion to dismiss a putative class action alleging that Bodacious Foods falsely labeled its cookies as "all natural," The Cincinnati Insurance Co. has filed a lawsuit seeking a declaration that the policy the food manufacturer holds with it does not cover costs stemming from the alleged false labeling. *The Cincinnati Ins. Co. v. Bodacious Food Co.*, No. 14-81515 (U.S. Dist. Ct., S.D. Fla., filed December 4, 2014).

The insurance company asserts that Bodacious's policy excludes coverage for the allegations of the putative class action, including (i) "'bodily injury' or 'property damage' which may reasonably be expected to result from the intentional acts of the insured"; (ii) "'personal or advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another"; and (iii) "'personal and advertising injury' arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." Cincinnati argues that Bodacious has indicated it believes the policy covers the claims of the underlying lawsuit, creating an actual controversy for the court to determine. Additional information about the underlying lawsuit appears in Issue 537 of this *Update*.

Oregon GE Alfalfa Farmers Challenge County Ban

Oregon farmers who grow genetically engineered (GE) alfalfa have filed a complaint seeking a declaration that a May 20, 2014, Jackson County ordinance banning GE crops in the county conflicts with state law, or, in the alternative, damages "as just compensation for the forced destruction of their property." ***Schulz Family Farms LLC v. Jackson Cnty.*, No. 14CV17636 (Jackson Cnty. Cir. Ct., Ore., filed November 18, 2014)**.

Claiming that (i) neighbors had never complained about its GE crops, which are allegedly "more convenient and profitable to grow than conventional alfalfa," and (ii) the farm will have to tear out GE crops already planted and refrain from replanting conventional alfalfa for four years, the Schulz Family Farms alleges damages in excess of $2.2 million. Similarly, plaintiff James

Frink alleges that he will have to tear out already-planted GE alfalfa and "lose the benefit of the ten-year crop life if forced to tear out [the GE crop]" at an alleged cost of $2 million. The plaintiffs allege that the county ban conflicts with the state's Right to Farm and Forest Act, which purportedly limits the authority of local governments to "declare farming and forest practices to be nuisances or trespass."

Alleging facial invalidity, the plaintiffs request declaratory and injunctive relief and also claim that the county's mandatory harvest, destruction or removal of all GE plants is "a per se and/or physical taking" or a regulatory taking "that requires the provision of just compensation to the plaintiffs under the state and federal Constitutions." The plaintiffs further allege inverse condemnation.

Meanwhile, a coalition of conventional and organic farmers has reportedly called on the Jackson County commissioners to vigorously defend the lawsuit. According to a news source, a standing-room-only crowd made the request during a December 10 commissioners' meeting. Our Family Farms Coalition has also apparently asked the county to oppose any potential court injunction that would stay the county ordinance's implementation and enforcement. *See Mail Tribune*, December 10, 2014.

SCIENTIFIC/TECHNICAL ITEMS

BPA in Canned Goods Purportedly Raises Blood Pressure

Researchers with Seoul National University have published a study allegedly finding that people who drank soy milk from cans containing bisphenol A (BPA) exhibited a statistically significant increase in blood pressure. Sanghyuk Bae and Yun-Chul Hong, "Exposure to Bisphenol A From Drinking Canned Beverage Increases Blood Pressure," *Hypertension*, December 2014. Involving 60 adults older than age 60, the study tracked blood pressure and urinary BPA levels over the course of three visits, during which participants consumed soy milk from either two glass bottles, two cans or one glass bottle and one can. Not only did urinary BPA increase by approximately 1600 percent in volunteers who consumed canned soy milk as opposed to soy milk from glass bottles, but systolic blood pressure also increased by approximately 4.5 mm Hg.

"Because these results confirm findings from other studies, doctors and patients, particularly those with high blood pressure or heart disease, should be aware of the possible risks from increased blood pressure when consuming canned foods or beverages," one of the authors was quoted as saying. *See HealthDay.com*, December 8, 2014.

Prenatal Phthalate Exposure Allegedly Linked to Lower IQ Scores

A recent study has claimed that children born to women whose urinary phthalate levels during pregnancy were in the top quartile of their study cohort had lower intelligence-quotient (IQ) test scores at age 7 than their peers born to women in the quartile with the lowest exposure. Pam Factor-

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Litvak, et al., "Persistent Associations between Maternal Prenatal Exposure to Phthalates on Child IQ at Age 7 Years," *PLoS ONE*, December 2014.

According to Columbia University researchers, who analyzed data from 328 women and their 7-year-old children from the Columbia Center for Children's Environmental Health (CCCEH) longitudinal birth cohort, "child full-scale IQ was inversely associated with prenatal urinary metabolite concentrations of DnBP [di-n-butyl phthalate] and DiBP [di-isobutyl phthalate]." Using the fourth edition Weschler Intelligence Scale for Children, the study purportedly found "significant inverse associations… between maternal prenatal metabolite concentrations of DnBP and DiBP and child processing speed, perceptual reasoning and working memory; DiBP and child verbal comprehension; and BBzP [butylbenzyl phthalate] and child perceptual reasoning."

"The magnitude of these IQ differences is troubling," said senior author and CCCEH Deputy Director Robin Whyatt in a December 10, 2014, press release. "A six- or seven-point decline in IQ may have substantial consequences for academic achievement and occupational potential."

Based on these findings, the authors reportedly recommend that expectant mothers "take steps to limit exposure by not microwaving food in plastics, avoiding scented products as much as possible, including air fresheners, and dryer sheets, and not using recyclable plastics labeled as 3, 6, or 7." As lead author Pam Factor-Litvak elaborated, "While there has been some regulation to ban phthalates from toys of young children, there is no legislation governing exposure during pregnancy, which is likely the most sensitive period for brain development. Indeed, phthalates are not required to be on product labeling."

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