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FOOD & BEVERAGE LITIGATION UPDATE

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FIRM NEWS

McDonough Offers Perspectives to *Law360* About Food & Beverage Trends for 2015

Shook, Hardy & Bacon Agribusiness & Food Safety Co-Chair **Madeleine McDonough** was quoted in two January 2, 2015, *Law360* articles about various **legal**, **legislative** and regulatory issues expected to affect food and beverage manufacturers in the new year.

Given the September 2014 convictions of former Peanut Corp. of America owner Stewart Parnell and two other company executives on criminal charges stemming from a 2008-2009 *Salmonella* outbreak that sickened hundreds of people nationwide and was linked to nine deaths, McDonough speculated that similar misdemeanor prosecutions under the Park Doctrine could be on the rise.

"People are really watching all of the fallout from the Parnell situation and trying to keep that in mind in making sure they have appropriate procedures internally," McDonough told *Law360.* Under the Park Doctrine, food and drug company executives can be criminally prosecuted for product safety violations without any proof that the executives had any specific knowledge or participation in the alleged wrongdoing.

McDonough also predicted that state attorneys general and the plaintiffs' bar will continue to collaborate in filing putative class action proceedings that allege unfair and deceptive advertising and marketing practices. "Not only will it be government-sponsored litigation, but it will spin off into individual litigation, either basic tort cases or consumer fraud class action cases," she said.

As for ongoing regulatory and legislative initiatives affecting industry, McDonough said campaigns advocating taxation of sugar-sweetened beverages likely portend other state and federal initiatives on the horizon. "There are more and more control efforts brought by industry critics, and I think those have the potential to lead to litigation as well."

Shook Authors Discuss Purported Class Actions Against Food Cos. in *Law360*

Shook, Hardy & Bacon Agribusiness & Food Safety Partner **Jim Muehlberger** and Associate **Jara Settles** discuss the modern consumer protection landscape in a January 2, 2015, **expert analysis** published in *Law360*. Noting that food lawsuits "tend to garner significant notoriety," the authors focus on recent litigation against Whole Foods Market Inc. alleging that the health-food

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purveyor "benefited from misleading labeling claims on almond milk," which a third-party certified as free of ingredients made with genetically modified organisms (GMOs). *Richard v. Whole Foods Mkt. Cal. Inc.*, No. BC563304 (Cal. Super. Ct., Los Angeles Cnty., filed Nov. 7, 2014).

"In a long line of consumer protection putative class actions aimed at food companies, *Richard* is somewhat unique in targeting a retailer," explain Muehlberger and Settles. "In most situations, plaintiffs have targeted the manufacturers of food and beverage products they deem to be improperly labeled… As a retailer, Whole Foods likely had no hand in the labeling or certification of Blue Diamond's almond milk products."

With companies and retailers paying to defend against "the most minimal and theoretical infractions," the legal landscape now resembles caveat venditor: "Let the seller beware." As the authors conclude, "If the plaintiff in *Richard* is successful in extending liability to Whole Foods, a retailer, the floodgates of litigation will likely swing open in jurisdictions already inundated with food and beverage consumer protection lawsuits… When businesses face costly class actions and a devil's nightmare of compliance hassles, consumers ultimately bear the cost of litigation through increased prices."

LEGISLATION, REGULATIONS AND STANDARDS

FDA Responds to NRDC's Objections to Non-Nutritive Sweetener Advantame

Responding to objections submitted by the Natural Resources Defense Council (NRDC), the U.S. Food and Drug Administration (FDA) has **confirmed** its decision to allow the use of advantame as a non-nutritive sweetener and flavor enhancer in foods intended for human consumption. FDA apparently received 12 responses to its May 21, 2014, final rule on advantame, but only NRDC's submission met the requirements for agency consideration. In particular, NRDC cited five animal studies allegedly showing that aspartame affects the hypothalamus, arguing that aspartame and advantame are "structurally related."

But FDA disagreed with this reasoning, noting that although advantame is structurally related to aspartame, the two substances are "chemically different and metabolized differently in the human body." As a result, the agency did not consider the health effects of aspartame when reviewing the toxicological data for advantame. As the agency concluded, "NRDC's objection to the advantame final rule does not provide any new evidence or identify any evidence that we overlooked in our evaluation that would call into question FDA's determination of safety for advantame… Therefore, this objection does not provide a basis for us to reconsider our decision to issue the final rule on advantame." Additional details about the European Food Safety Authority's safety assessment of advantame appear in Issue **492** of this *Update*. *See Federal Register*, December 24, 2014.

Chemical Hazards, Foodborne-Illness Cost Estimates Chief Topics of Upcoming NACMPI Meeting

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) will **host** a January 13-14, 2015, public meeting of the National Advisory Committee on Meat and Poultry Inspection (NACMPI) at the Patriot Plaza III building in Washington, D.C. Topics of discussion at the meeting will include (i) FSIS's identification and management of chemical hazards within the National Residue Program (i.e., contaminants in meat, poultry and egg products); and (ii) the Economic Research Service's Cost Calculation Model, which provides federal agencies with peer-reviewed estimates of the costs of foodborne illness that can be used to evaluate the effects of federal regulation and inform policy considerations. *See Federal Register*, December 24, 2014.

NOP Clarifies Conservation Requirements for Organic Producers

The U.S. Department of Agriculture's National Organic Program (NOP) has **published** draft guidance clarifying the agency's interpretation of regulations that require organic operations to "maintain or improve the natural resources of the operation, including soil and water quality." Intended for accredited certifying agents and certified operations, the guidance provides examples of production practices that support the principles of natural resource and biodiversity conservation. It also describes (i) "the certified organic operator's responsibility to select, carry out, and record production practices that 'maintain or improve the natural resources of the operation'"; (ii) "the accredited certifying agent's responsibility to verify operator compliance with this requirement"; and (ii) "how domestic organic operations that participate in a USDA Natural Resources Conservation Service (NRCS) program and the NOP can reduce their paperwork burdens." The agency will accept comments on the draft guidance until February 27, 2015. *See Federal Register*, December 29, 2014.

LITIGATION

California Foie Gras Ban Struck Down

A California federal court has held that the state law prohibiting the sale of foie gras resulting from the force-feeding of ducks or geese is preempted by a federal law regulating the distribution and sale of poultry products. *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 12-5735 (U.S. Dist. Ct., C.D. Cal., order entered January 7, 2015). The Ninth Circuit previously affirmed a lower court's denial of a temporary injunction sought by the plaintiffs based on a failure to show a likelihood of success on the merits of their vagueness or commerce clause challenges. Additional information about the Ninth Circuit ruling appears in Issue **497** of this *Update*, and details about the U.S. Supreme Court's denial of certiorari to review that decision appear in Issue **542**.

The court first found that the plaintiffs had standing to challenge the ban despite that defendant Kamala Harris, in her capacity as state attorney general, had not personally threatened to enforce the law against them. It then compared the foie gras ban to provisions of the federal Poultry Products Inspection Act (PPIA), which expressly preempts states from imposing "[m]arking, labeling, packaging, or ingredient requirements (or storage or handling requirements . . [that] unduly interfere with the free flow of poultry products in commerce)." The state argued that the ban regulated a feeding process that occurs before the birds enter an establishment subject to federal inspection and covered by the PPIA. The court disagreed, finding that the force-feeding process was addressed in a separate provision, while the section at issue prohibited the sale of foie gras produced by that process. The section banning the sale, the court found, imposed an ingredient requirement prohibited by the PPIA, and thus, that section is preempted by the federal statute.

Ninth Circuit Vacates Injunction Denial in "Pur Pom" Case

Finding flaws in a lower court's likelihood of confusion analysis, the Ninth Circuit Court of Appeals has vacated the denial of an injunction sought by Pom Wonderful that would block the sale of Pur Beverages' "pur pom" energy drink. *Pom Wonderful v. Hubbard*, No. 14-55253 (9th Cir., order entered December 30, 2014).

Pom Wonderful sued Pur to prevent Pur from using the name "pur pom" based on a claim of trademark infringement, but a California federal court denied Pom Wonderful's motion for preliminary injunction, finding that Pom likely would not prevail because of distinct visual features on the products. The Ninth Circuit disagreed; it found significant similarities between the "POM" mark owned by Pom and the "pom" used by Pur, including a stylized "o" in each. "POM" and "pom" also sound the same and both refer to pomegranate flavoring or ingredients, the court noted. "Balancing the marks' many visual similarities, perfect aural similarity, and perfect semantic similarity more heavily than the marks' visual dissimilarities—as we must—the similarity factor weighs heavily in Pom Wonderful's favor," the court found. "Mistakenly weighing the marks' differences more heavily than their similarities, the district court clearly erred in finding that the similarity of the marks factor weighed against Pom Wonderful." It also pointed out that both companies are likely to use the same market channels and their products are highly similar, which increases the likelihood of confusion.

BPA to Rejoin Harmful Chemicals List in California

A California state court has lifted an injunction that barred bisphenol A (BPA) from placement on the list of reproductive toxicants mandated under Proposition 65, the 1986 law requiring warnings to the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity." *Am.*

Chemistry Council v. Office of Envtl. Health Hazard Assessment, No. 34-2013-00140720 (Super. Ct. Cal., Cnty. of Sacramento, order entered December 18, 2014). BPA joined the Prop. 65 list in April 2013, but a court granted the injunction barring its inclusion one week later.

The court assessed whether the Office of Environmental Health Hazard Assessment (OEHHA) abused its discretion in finding substantial evidence that the regulatory criteria to list BPA were met. It found the American Chemical Council's (ACC's) argument that an entry to the list must be supported by "clear evidence that the chemical is known, not merely suspected, to cause cancer or reproductive toxicity *in humans*" to be an interpretation that is incorrect, the court said. It noted that precedent supported OEHHA's argument that studies purporting to find a link between cancer or reproductive toxicity and the chemical in animals have been sufficient to support listing in the past. Further, OEHHA correctly "interprets its regulations to mean that, absent evidence to the contrary, effects observed in laboratory animals are assumed to be relevant to humans" based partly on a prior decision that suggested that "extrapolation from animals to humans is inappropriate only where evidence shows that experimental animals and humans differ from one another in 'physiologically significant ways.'" Accordingly, the court found that OEHHA did not abuse its discretion in supporting its listing only with evidence that BPA may be harmful to animals.

The court also dismissed the argument that OEHHA could not list BPA because the state's qualified experts, the Developmental and Reproductive Toxicant Identification Committee (DART-IC), reviewed the same evidence but did not list BPA on its own list. It agreed with OEHHA's argument that "the state's qualified experts listing mechanism and the authoritative body listing mechanism are separate and independent listing mechanisms. Under the statute, DART-IC's opinion does not control. OEHHA is mandated by law to list a chemical even after the state's qualified experts have declined to do so if the chemical meets one of the other listing requirements." OEHHA further did not abuse its discretion by disregarding the opinion of the primary author of the studies used to support BPA's listing, the court found.

Putative Class Action Alleging Olive Oil Mislabeling to Proceed

A California federal court has denied a motion to dismiss a putative class action alleging that Deoleo USA Inc., importer of Bertolli and Carapelli olive oils, misrepresented the quality of the oils as "extra virgin" despite being mixed with refined oil and using bottles insufficient to prevent sunlight and heat degradation. *Koller v. Med Foods, Inc.*, No. 14-2400 (U.S. Dist. Ct., N.D. Cal., order entered January 6, 2015).

Deoleo attacked the complaint for failing to supply the studies supporting the argument that "'imported 'extra virgin' olive oil often fails international and USDA standards' and that packaging olive oil in clear bottles can lead to rapid degradation of its quality," but the court dismissed the argument for being

premature to the pleading phase. Deoleo also asserted that while studies may support the proposition that the oil it imports may not meet extra virgin standards, the plaintiff could not show that the oil in the bottle he actually purchased did not meet those standards. The court agreed that the plaintiff's theory allowed for some of the olive oil sold to be extra virgin, but found that the exception was not fatal; if the plaintiff "succeeds in proving that the oil typically does *not* qualify as 'extra virgin,' then consumers likely would not pay a price premium for it, even if they knew some bottles might still qualify."

The plaintiff also argued in an amended complaint that Deoleo's marketing materials asserting that its oils are "imported from Italy" are false because the oils come from several countries besides Italy, including Greece, Tunisia and Australia. Deoleo challenged the amendment because, it argued, the plaintiff had mentioned the "best if used by" date—which appears on the back near a clarification of what countries the oil may originate—in its original complaint, so he had previously had the opportunity to plead that allegation and failed to do so. The court dismissed the argument, disagreeing that a mention of content on the back label was not an admission that the plaintiff had read the entire back label before purchase.

Settlement Reached in Kirin® False-Ad Lawsuit

Anheuser-Busch Cos. has reportedly settled a consumer class action alleging that Kirin® beer is represented as a Japanese import even though the products sold in the United States are brewed with domestic ingredients in California and Virginia. *Suarez v. Anheuser-Busch Cos*., No. 2013-33620-CA-01 (Fla. Cir. Ct., 11th Jud. Cir., settlement preliminarily approved December 17, 2014).

The October 2013 complaint alleges that Kirin's labeling falsely implied that its products remained imported despite a 1996 agreement between the Japanese company and Anheuser-Busch to manufacture the beer in the United States and a 2006 deal that gave Anheuser-Busch the brand's marketing and sales responsibilities. The complaint alleges that the packaging includes, in fine print, a statement clarifying that the beer is "[b]rewed under Kirin's strict supervision by Anheuser-Busch, in Los Angeles, CA and Williamsburg, VA," but that the statement is not visible to consumers before purchase. Under the proposed settlement agreement, consumers will receive 50 cents per six-pack and $1 per 12-pack of 12-ounce bottles as well as 10 cents per individual bottle or can, up to $50 for households with proofs of purchase or $12 for those without. Anheuser-Busch agreed to feature the clarifying statement more prominently on the bottles and add it to consumer-facing packaging, and it will stop describing the beer as imported. Class counsel will reportedly receive an award of $1 million. *See Law360*, January 5, 2015.

Operations Manager of Halal Co. Midamar Pleads Guilty

Philip Payne, the former operations manager of Halal-food company Midamar Corp., has pled guilty to a charge of conspiracy to make and deliver false certificates and writings stemming from Midamar's export of beef to Indonesia and Malaysia purportedly prepared in accordance with Islamic law. *U.S. v. Payne*, No. 14-cr-0143 (U.S. Dist. Ct., N.D. Iowa, request for approval filed January 7, 2015). In his plea agreement, Payne admitted that Midamar attempted to meet the rise in Halal-meat demand by supplying kosher beef slaughtered by rabbis without any oversight from a Muslim slaughterman.

Several executives at Midamar have been charged with making false statements on export certificates, committing wire fraud and laundering money, allegations to which founder William B. Aossey Jr. and two of his sons pled not guilty in December 2014. A trial on those charges is set for February 17, 2015.

Insurer Sues to Avoid Coverage for Templeton Whiskey's Alleged Mislabeling

Society Insurance has filed a lawsuit in Iowa federal court seeking a declaration that its policy does not require it to defend or indemnify Templeton Rye Spirits in a putative consumer class action alleging that the whiskey distiller falsely represented its products as made from a Prohibition-era recipe. *Soc'y Ins. v. Templeton Rye Spirits LLC*, No. 15-0005 (U.S. Dist. Ct., S.D. Iowa, filed January 5, 2015).

The underlying lawsuit asserts that Templeton claims its whiskey is made in a "small batch" from a Prohibition-era recipe that was a favorite of Al Capone's, but that the product is actually distilled at an MGP Ingredients, Inc. factory in accordance with a stock MGP recipe. Society seeks a judicial declaration that Templeton's insurance policy, which Society argues covers only damages based on bodily injury, property damage or personal and advertising injury, will not require Society to indemnify a settlement or judgment against Templeton. The insurance company argues in the alternative that if the court finds that the policy agreement does cover the putative class action's allegations, they either fall into a specific policy exclusion or are outside the policy period because Templeton began its alleged false representation before the policy took effect.

MEDIA COVERAGE

NPR Tracks Trademark Friction in Craft Brewing Market

A January 5, 2015, post on *NPR's* "The Salt" blog reports that trademark disputes have come to a head in the craft brewing market, where more than 3,000 companies compete for a dwindling number of pithy beer names. Although many brewers work to resolve issues outside the courtroom, there has also been an increase in litigation alleging trademark violations focused

on overlapping product names, font styles and label designs. In some cases, brewers that have used beer names for decades have come under fire from new companies looking to trademark them. In particular, the article notes that many hop-related puns—such as "Hopscotch" and "Bitter End"—are currently used on more than one product.

"American trademark law lumps breweries together with wineries and distilleries, making the naming game even more chancy," concludes *NPR*. "Even imagery can be trademarked and protected in court."

New York Times Claims New GE Techniques Allow Companies to Skirt Regulation

According to a January 1, 2015, *New York Times* article by Andrew Pollack, the advent of new technologies has created a loophole in federal regulations for companies looking to market genetically-engineered (GE) crops. Noting that new techniques do not involve the transfer of genetic material from other species, use bacterium to insert foreign materials or rely on viruses to manipulate plant DNA, Pollack writes that the U.S. Department of Agriculture (USDA) lacks the authority to regulate these GE crops under its current mandate to protect against plant pests, including insects or pathogens. Although consumer watchdogs have warned that all GE crops could have unforeseen ecological consequences, proponents have argued that easing regulatory burdens will lower barriers to market entry and allow smaller companies to participate in product development.

"Regulators around the world are now grappling with whether these techniques are even considered genetic engineering and how, if at all, they should be regulated," notes the article, pointing to genome-editing technologies and so-called cisgenic crops, "which are developed using conventional genetic engineering but with the insert genes from the same species as the crop." As Pollack concludes, "[C]ompanies using the new techniques say that if the methods were not labeled genetic engineering, novel crops could be marketed or grown in Europe and other countries that do not readily accept genetically modified crops."

SCIENTIFIC/TECHNICAL ITEMS

Animal Study Claims HFCS "More Toxic Than Table Sugar"

A University of Utah study has reportedly claimed that female mice fed fructose and glucose monosaccharides in proportions similar to the amount of high-fructose corn syrup (HFCS) in human diets "had death rates 1.87 times higher than females on [a] sucrose diet" and "produced 26.4% fewer offspring." James Ruff, et al., "Compared to Sucrose, Previous Consumption of Fructose and Glucose Monosaccharides Reduces Survival and Fitness of Female Mice," *The Journal of Nutrition*, March 2015. Funded by the National Institutes of

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Health and the National Science Foundation, the study apparently builds on 2013 research concluding that "when mice were fed either a diet with 25 percent calories in the form of added fructose and glucose monosaccharides or 25 percent calories from starch, females died at twice the normal rate and males were a quarter less likely to hold territory and reproduce."

Although the new study did not find any differences in male mice fed fructose/glucose monosaccharides as compared to those fed sucrose, the authors noted that this result could mean that HFCS and table sugar are equally detrimental to male mice. The study relied on house-type mice who were fed healthy diets with 25 percent of total calories coming from added fructose/glucose monosaccharides or sucrose, then released into mouse barns "to compete for food, territory and mates for 32 weeks."

"This is the most robust study showing there is a difference between high-fructose corn syrup and table sugar at human-relevant doses," said the study's lead author. "[W]hen the diabetes-obesity-metabolic syndrome epidemics started in the mid-1970s, they corresponded with both a general increase in consumption of added sugar and the switchover from sucrose being the main added sugar in the American diet to high-fructose corn syrup making up half our sugar intake." *See University of Utah News Release*, January 5, 2015.

Meanwhile, the Corn Refiners Association (CRA) has contested the importance of the results. "Sucrose (table sugar) and HFCS are nutritionally equivalent and comprised of roughly 50% fructose and 50% glucose," a CRA spokesperson was quoted as saying. "Fructose and glucose form a covalent bond in table sugar as opposed to HFCS. However, this difference is inconsequential. According to the [U.S. Food and Drug Administration], 'Once one eats (sucrose), stomach acid and gut enzymes rapidly break down this chemical bond.'" *See CRA Statement*, January 5, 2015.

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