

## FOOD & BEVERAGE LITIGATION UPDATE



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### FIRM NEWS

#### SHB Attorneys Discuss Food Labeling Litigation Based on Product Testing in *Law360*

Shook, Hardy & Bacon Agribusiness & Food Safety attorneys [Ann Havelka](#) and [Jeff Lingwall](#) provided an [analysis](#) of putative class action labeling claims against Salov North America and its Filippo Berio® brand of olive oil in a February 20, 2015, article for *Law360*. *Kumar v. Salov North America Corp.*, No. 4:14\_CV-02411 (N.D. Cal. Feb. 3, 2015).

The plaintiff in the case alleges that Salov's Filippo Berio® oil is deceptively labeled as "Imported from Italy," and that independent product tests on the "Extra Virgin" varieties indicate that they are of less-than-extra-virgin quality. According to Havelka and Lingwall, these ongoing olive oil proceedings offer food manufacturers "a cautionary example, both for traditional labeling issues and for the trend toward litigation based on product testing," making it all the more important for companies to be "prepared with their own test results, documented production standards and quality-control protocols" to ensure that all labeling claims can be substantiated. In addition to advocating periodic labeling audits and risk assessment, they also suggest evaluating what other standards, aside from U.S. Food and Drug Administration regulations, could be implicated by labeling claims and invite a cause of action.

### LEGISLATION, REGULATIONS AND STANDARDS

#### Dietary Guidelines Committee Submits Report to HHS and USDA

The 14-member committee charged with developing the federal government's "2015 Dietary Guidelines for Americans" has [issued](#) its report containing recommendations for promoting consumption of foods and beverages that assist in maintaining a healthy weight and preventing disease. The U.S. Department of Health and Human Services (HHS) and Department of Agriculture (USDA) are soliciting written comments about the committee's report as well as offering the opportunity to provide oral comments at a March 24, 2015, public meeting in Bethesda, Maryland.

Recommendations include following a diet low in saturated fat, added sugars and sodium, i.e., "less than 2,300 mg dietary sodium per day (or age-appropriate Dietary Reference Intake amount), less than 10 percent of total calories

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SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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from saturated fat per day, and a maximum of 10 percent of total calories from added sugars per day." The committee discourages consumption of sugar-sweetened beverages.

### OEHHA Announces Meeting to Discuss BPA Listing Under Prop. 65

The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) has [announced](#) a May 7, 2015, meeting of its Developmental and Reproductive Toxicant Identification Committee (DARTIC) to consider the addition of bisphenol A (BPA) to the list of chemicals known to the state to cause reproductive toxicity. Citing the availability of new epidemiological and toxicological data, DARTIC will assess "whether BPA has been clearly shown by scientifically valid testing according to generally accepted principles to cause female reproductive toxicity." OEHHA has also made available [hazard identification materials on BPA and female reproductive toxicity](#) and requested public comments by April 6, 2015.

After adding BPA to the list of reproductive toxicants under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) in April 2013, OEHHA delisted the substance following a court injunction. In January 2015, the court ruled that the agency could list BPA under Prop. 65 even if DARTIC did not include the substance on its own list, finding that "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." Additional details about the matter appear in Issue [550](#) of this *Update*.

## LITIGATION

### "Aunt Jemima" \$3-Billion Royalties Suit Against PepsiCo, Quaker Oats Dismissed

An Illinois federal court has dismissed with prejudice a suit brought by two purported heirs of Anna Short Harrington, the woman who portrayed Aunt Jemima from 1935 to the 1950s, against PepsiCo Inc., The Quaker Oats Co., Pinnacle Foods Group, and The Hillshire Brands Co. *Hunter v. PepsiCo Inc.*, No. 14-6011 (U.S. Dist. Ct., N.D. Ill., order entered February 18, 2015).

Harrington served as the face of the Aunt Jemima brand in commercials and public appearances for more than a decade pursuant to a contract which allegedly provided that she would receive a percentage of the proceeds and royalties for the use of her image. The plaintiffs brought 15 causes of action against the food companies, including deprivation of the right of publicity, breach of contract and violation of the International Convention on the Elimination of all Forms of Racial Discrimination.

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In the complaint, the plaintiffs asserted that they were Harrington's great-grandsons, but "[t]he only information about Plaintiffs' connection to Harrington provided by the amended complaint is an account of how Hunter received a photograph (now lost) of Harrington from his grandmother and of Plaintiffs' attempt to locate Harrington's grave in Syracuse, New York." The court found that the plaintiffs could not prove that they were authorized to act as executors of Harrington's estate, a conclusion supported by their motion for leave to obtain those rights. The court also accepted the defendants' arguments that (i) the statutes of limitations had run on many of the claims; (ii) some of the claimed causes of action, such as the alleged violation of the International Convention on the Elimination of all Forms of Racial Discrimination, were not actionable; (iii) the complaint lacked necessary elements for several claims, including the alleged trademark violations; and (iv) none of the facts in the complaint supported the argument that some of the defendants were at all liable for the causes of action. But because the plaintiffs had no standing to bring the claims, the court noted, detailed analysis of each cause of action was unnecessary. The court also found a motion for a time extension "to enter Surrogate's Court of Onondaga" to be "unintelligible," and dismissed the plaintiffs' request that the judge disqualify himself as unsupported.

### Settlement Reached in Papa John's Delivery Tax Dispute

According to a joint motion filed in Florida federal court, Papa John's International Inc. and a class of consumers have reached an agreement in a lawsuit alleging that the pizza company charged tax on delivery fees in violation of state law. *Schojan v. Papa John's Intl. Inc.*, No. 14-1218 (U.S. Dist. Ct., M.D. Fla., motion filed February 16, 2015).

The motion requested that the district court remand the case to state court because the federal court lacks jurisdiction under the Tax Injunction Act and stipulated that the parties "have reached an agreement in principle to settle this action in its entirety upon its remand to state court." The March 2014 complaint had alleged that Papa John's charged more than \$5 million in state tax on the more than \$74.5 million in delivery fees it had earned in Florida since 2010. The court certified a class of consumers and denied the pizza company's motion to dismiss in December 2014. Details on a similar putative class action filed in Illinois state court appear in Issue [524](#) of this *Update*.

### FTC Challenges Proposed Sysco-US Foods Merger

The Federal Trade Commission (FTC) has [filed](#) an administrative complaint arguing that a proposed merger of US Foods and Sysco would violate anti-trust laws, resulting in higher prices and diminished service for the companies' customers. *In re Sysco Corp.*, No. 9364 (FTC, filed February 19, 2015).

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The complaint asserts that a merger of Sysco and US Foods, the largest broadline foodservice distributors in the United States, would account for 75 percent of the national market for broadline distribution services. The sale of 11 US Foods distribution centers to another distributor would not counteract the significant competitive harm caused by the merger, FTC argues. "This proposed merger would eliminate significant competition in the marketplace and create a dominant national broadline foodservice distributor," Debbie Feinstein, the director of FTC's Bureau of Competition, said in February 19, 2015, press release. "Consumers across the country, and the businesses that serve them, benefit from the healthy competition between Sysco and US Foods, whether they eat at a restaurant, hotel, or a hospital." See *FTC Press Release*, February 19, 2015.

### Lawsuit Challenges Jim Beam's "Handcrafted" Claim

A consumer has filed a putative class action against Jim Beam Brands Co. and its owner Beam Suntory Import Co. alleging that the label indicating that the bourbon whiskey is "handcrafted" is misleading because the bourbon is produced with machines. *Welk v. Beam Suntory Import Co.*, No. 15-328 (U.S. Dist. Ct., filed February 17, 2015).

The complaint asserts that videos, photos and diagrams on Jim Beam's website show that its bourbon "is manufactured using mechanized and/or automated processes, resembling a modern day assembly line and involving little to no human supervision, assistance or involvement." The handcrafted claim leads consumers to purchase Jim Beam Bourbon falsely believing it to be of superior quality, so they are willing to pay a premium price, the complaint argues. The plaintiff alleges misrepresentation and violations of California's False Advertising Law and Unfair Competition Law, and he seeks class certification, an injunction, an order for Jim Beam to begin a corrective advertising campaign, restitution, damages, and attorney's fees. The firms representing the plaintiff also represent two consumers alleging similar claims against Maker's Mark, a premium brand of bourbon also owned by Beam Suntory. Details about that December 2014 complaint appear in Issue [548](#) of this *Update*.

### Ex-Licensee Allegedly Infringing on Barefoot Contessa Mark

Ina Garten, the chef who hosts Food Network's "Barefoot Contessa," and her company have filed a lawsuit against a seafood producer for allegedly infringing the Barefoot Contessa mark with its line of "Contessa Chef Inspired" frozen dinners. *Barefoot Contessa Pantry LLC v. Aqua Star (USA) Co.*, No. 15-1092 (U.S. Dist. Ct., S.D.N.Y., filed February 17, 2015).

Barefoot Contessa, the company that owns the trademarked name, agreed in 2012 to license the mark to unrelated entity Contessa Premium, a frozen-

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dinner manufacturer, on the condition that Garten and the company had strict control over the quality of the dinners produced and marketed under the Barefoot Contessa name. In April 2014, Contessa Premium sold its assets to OFI Imports, Inc. and its parent company, Aqua Star, according to the complaint. The day after the sale, Barefoot Contessa apparently terminated the license and refused to grant OFI a new license, “given OFI’s lack of experience in the frozen food business beyond seafood.” Barefoot Contessa allowed the company to sell its existing stock of products bearing the trademark, the complaint says, but forbid use of the mark on newly manufactured products. Barefoot Contessa alleges that OFI has continued to use the mark on frozen dinners produced after the license expired and has also manufactured dinners in packaging “virtually identical” to the trade dress of the previous product with a few small changes, including (i) changing “Barefoot Contessa” to “Contessa Chef Inspired,” (ii) replacing the photo of Garten with a photo of another brunette woman and (iii) replacing Garten’s signature (“Ina”) with “Enjoy,” written in the same font and style.”

Barefoot Contessa asserts 12 causes of action, including trademark and trade dress infringement, unfair competition and right of publicity. Garten and the company seek an injunction, destruction of the allegedly infringing products, compensatory and punitive damages, and attorney’s fees.

## LEGAL LITERATURE

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### Johns Hopkins’ Researchers Review Legal Actions Against Food Products Marketed to Youth

Researchers from the Johns Hopkins Bloomberg School of Public Health have authored an overview of litigation and governmental actions related to health claims on food and beverages marketed to children. Lainie Rutkow, et al., “Legal Action Against Health Claims on Foods and Beverages Marketed to Youth,” *American Journal of Public Health*, March 2015. By identifying 115 instances of legal action—including consumer class actions and governmental warnings—the authors review “lessons learned for policymakers, practitioners, and other stakeholders seeking to limit the untruthful or misleading marketing of foods and beverages to children.”

Those looking to challenge health claims “should first determine whether scientific evidence supports the claim,” the researchers said. In addition, plaintiffs should be selected carefully, they recommend, noting that they “may prefer, if possible, to bring a lawsuit in a state such as California, which has a well-developed body of law about deceptive and misleading advertising and marketing.” In addition, “it is critical to identify health claims for which legal action holds the greatest potential for public health impact,” the researchers

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argue, citing Ferrero SpA's changes in advertising practices resulting from litigation against Nutella as a "public health success." However, "most litigation will not yield similar results as a result of the nature of the allegedly deceptive claim, the success of defendants' motions to dismiss, or financial limitations among plaintiffs to continue pursuing the case."

### OTHER DEVELOPMENTS

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#### Lancet Publishes Six-Part Series on "Rethinking and Reframing" Obesity

A series of six articles published [online](#) February 18, 2015, by *The Lancet* reportedly "examines false dichotomies and proposes a reframing of obesity as a consequence of the 'reciprocal nature of the interaction between the environment and the individual,' where feedback loops perpetuate food choices and behaviors."

"Our understanding of obesity must be completely reframed if we are to halt and reverse the global obesity epidemic," Christina Roberts, who co-authored the first article in the series with [Kelly Brownell](#) and others, was quoted as saying. "On one hand, we need to acknowledge that individuals bear some responsibility for their health, and on the other hand recognize that today's food environments exploit people's biological, psychological, and social and economic vulnerabilities, making it easier for them to eat unhealthy foods."

Among other things, the series' fourth article, "Child and adolescent obesity: part of a bigger picture," asserts that the "food industry has a special interest in targeting children. Not only can the companies influence children's immediate dietary preferences, but they also benefit from building taste preferences and brand loyalty early in life, which last into adulthood. Furthermore, the food and beverage industries as a whole have a financial investment in creating overweight."

Actions championed by the series' authors include developing an International Code of Marketing to Children and initiating a "cohesive multi-stakeholder approach to the creation of public demand for policy actions to prevent obesity" similar to such campaigns addressing tobacco use. See *The Lancet Press Release*, February 18, 2015.

### SCIENTIFIC / TECHNICAL ITEMS

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#### Consumer Reports Study Assesses Alleged 4-MEI Cancer Risk

A joint study by *Consumer Reports* and the Johns Hopkins Center for a Livable Future claims that 4-methylimidazole (4-MEI) exposures "associated with average rates of soft drink consumption pose excess cancer risks exceeding

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one case per 1,000,000 exposed individuals, which is a common acceptable risk goal used by U.S. federal regulatory agencies.” Tyler Smith, et al., “Caramel Color in Soft Drinks and Exposure to 4-Methylimidazole: A Quantitative Risk Assessment,” *PLOS One*, February 2015. Researchers apparently used ultrahigh-performance liquid chromatography-tandem mass spectrometry to estimate 4-MEI concentrations in 12 beverages purchased in California and New York City, then assessed exposure levels based on data obtained from the National Health and Nutrition Examination Survey, California Environmental Protection Agency Office of Environmental Health Hazards Assessment (OEHHA) and U.S. Census Bureau.

In addition to ranking 4-MEI concentrations by brand, product and geographic location, the study authors calculated the lifetime average daily dose and lifetime excess cancer risk and burden for consumers. Their results allegedly indicate that “routine consumption of certain beverages” was associated with 4-MEI exposures that exceed the no significant risk level (NSRL) set by California under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), which requires warning labels on beverages with 4-MEI concentrations greater than 29 µg/day.

“Even considering the impact of Proposition 65 on 4-MEI concentrations in beverages, it is worth noting that the NSRL established by OEHHA corresponds to a risk of one cancer per 100,000 people exposed,” the authors argue. “Given that a sizable fraction of the U.S. population consumes these beverages, and high consumption by some persons, a substantial cancer burden may persist even if exposures are reduced to the NSRL nationally. Accordingly, federal regulation to eliminate unnecessary 4-MEI exposures may be needed. [A Food and Drug Administration] intervention, such as maximum levels for 4-MEI in beverages, could be a valuable approach to reducing excess cancer risk attributable to 4-MEI exposure in the U.S. population.” See *ConsumerReports.org*, February 18, 2015.

### Study Examines Influence of Cartoon Media Characters on Children’s Diets

After conducting a systematic review of studies examining the impact of brand mascots and cartoon media characters on children’s diets, Virginia Tech and Duke University researchers have claimed that “familiar media character branding appears to be a more powerful influence on children’s preferences, choices and intake of less healthy foods compared with fruits or vegetables.” V.I. Kraak and M. Story, “Influence of Food Companies’ Brand Mascots and Entertainment Companies’ Cartoon Media Characters on Children’s Diet and Health: A Systematic Review and Research Needs,” *Obesity Reviews*, February 2015. The results also apparently indicated that “an unfamiliar cartoon media character may increase children’s appetite, preference for, choice and intake of health of fruits and vegetables compared with no character branding.”

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Adapted from a paper commissioned by the Robert Wood Johnson Foundation's Health Eating Research program, the review summarized "11 published experimental studies involving children aged 2-11 years" while noting some limitations, including small and heterogeneous sample sizes. As a result, the authors identified a need for "a theoretically grounded conceptual model and larger and more diverse samples across settings to produce stronger findings for mediating and moderating factors."

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### FOOD & BEVERAGE LITIGATION UPDATE

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.

SHB 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.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

