FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 564 | MAY 8, 2015

SHOOK HARDY & BACON

CONTENTS

FIRM NEWS

Havelka and Settles Summarize Oral Arguments in SCOTUS Raisins Taking Case

In a May 8, 2015, *Law360* article titled "**For High Court, 2 Scoops of Raisins In This Case**," Shook, Hardy & Bacon Partner **Ann Peper Havelka** and Associate **Jara Settles** provide an overview of the arguments in a U.S. Supreme Court case challenging the U.S. Department of Agriculture's program requiring raisin farmers to set aside a portion of their yield to give to the federal government to aid in stabilizing the market. They document the questions and responses during oral argument, noting the issues that interested the justices, including Justice Stephen Breyer's point that compensation for the alleged taking may have been paid in the form of increased raisin prices and Justice Samuel Alito's concern over whether a similar program could be instituted for other products, such as cell phones or cars.

"Despite the government's defense of a decades-old price stabilization plan, the court's questioning during oral argument leaned toward the plaintiff," they conclude. "If the court's discussion from the bench is any indication, the reserve program may soon shrivel in the sun. Once the court has chewed over the arguments, the Hornes will have their answer after a decade of litigation."

Shook Partner Discusses "Meta" Class of Class Counsel After GMO-Rice MDL

In a May 5, 2015, ***Law360* analysis**, Shook, Hardy & Bacon Partner **Andy Carpenter** chronicles a "meta" class action against Riceland Foods, Inc., a party to multidistrict litigation (MDL) stemming from the use of genetically modified organism (GMO) rice, which several thousand rice farmers alleged had tainted the U.S. rice supply. After Riceland obtained a verdict in a cross-claim against Bayer and settled its portion of the MDL, class-action counsel and plaintiffs filed a lawsuit against the company to obtain compensation for their work, from which they argued Riceland benefited when it received a judgment from Bayer. Carpenter details the reasoning of the district court and the later affirmation from the Eighth Circuit, discussing issues of jurisdiction and choice of law.

LEGISLATION, REGULATIONS AND STANDARDS

Poultry Health Focus of Upcoming APHIS Meeting

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) is **convening** a public meeting of the General Conference Committee of the National Poultry Improvement Plan on July 23, 2015, in Salt Lake City, Utah. The group of industry and state agency representatives will reportedly discuss (i) approved tests and (ii) updates regarding avian influenza, *Salmonella* and *Mycoplasma*. *See Federal Register*, May 1, 2015.

"Nitrite in Combination with Amines or Amides" Under Consideration for Prop. 65 Listing

The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) has **asked** the Carcinogen Identification Committee (CIC) to further evaluate "nitrite in combination with amines or amides" for possible inclusion on the state's list of substances known to cause cancer under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65).

According to OEHHA, "nitrite is a natural constituent of fresh produce, including spinach and celery, and of fresh uncured meats," while "amines are organic compounds that contain a basic nitrogen atom with a lone electron pair" and "amides are organic compounds that can be formed from amines, and contain a nitrogen atom and an oxygen atom."

After announcing a February 7, 2014, proposal to list the chemical combination under Prop. 65, the agency received comments and scientific evidence supporting the measure but ultimately concluded that regulatory criteria "have not been met for the spectrum of chemicals covered by the broad class 'nitrite in combination with amines or amides.'" As a result, CIC will consider at a future meeting "whether nitrite in combination with amines or amides, or a subset of chemicals of this class, have been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer." *See OEHHA News,* May 6, 2015.

Shook 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.

For additional information about Shook's capabilities, please contact

Mark Anstoetter
816.474.6550
manstoetter@shb.com

Madeleine McDonough
816.474.6550
202.783.8400
mmcdonough@shb.com

If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd at mboyd@shb.com.

LITIGATION

"Handmade" Claim "Obviously Cannot Be Used Literally to Describe Bourbon," Court Finds

A Florida federal court has dismissed a lawsuit alleging that Beam Suntory Inc. and Maker's Mark Distillery falsely label their Maker's Mark® bourbon as "handmade" because they manufacture the product using a mechanized process. *Salters v. Beam Suntory, Inc.*, No. 14-659 (N.D. Fla., Tallahassee Div., order entered May 1, 2015). The plaintiffs "have been unable to articulate a consistent, plausible explanation of what they understood 'handmade' to mean in this context. This is understandable; nobody could believe a bourbon marketed this widely at this volume is made entirely or predominantly by hand," the court said.

The court first found that the process of making Maker's Mark® bourbon is handmade in the original sense of the word because it is "distinguished from the work of nature," according to the ***Oxford English Dictionary*** definition. "In that sense all bourbon is handmade; bourbon, unlike coffee or orange juice, cannot be grown in the wild." The court then acknowledged that the modern definition has evolved to mean "made by hand," but "the term obviously cannot be used literally to describe bourbon," the court said. "One can knit a sweater by hand, but one cannot make bourbon by hand. Or at least, one cannot make bourbon by hand at the volume required for a nationally marketed brand like Maker's Mark. No reasonable consumer could believe otherwise."

The plaintiffs' other perceptions of "handmade," the court found, accurately described the production process of Maker's Mark®; the bourbon is made "from scratch and in small units" of no more than 19 barrels. The spirits company also asserted that the product is closely monitored by humans during the process, meeting the plaintiff's definition of requiring "close attention by a human being." The court also rejected the plaintiffs' argument that "handmade" meant without the use of machines, because they "suggest that 'handmade' means made with only some kinds of machines, not others. Thus the plaintiffs suggest the defendants use machines that are too big or too modern. One might wonder who benefits from small or old machines, but leaving that aside, it is hard to take from the word 'handmade' a representation about the age, or even the size, of equipment used in that process."

The court also dismissed the plaintiffs' assertion that the "handmade" claim was only meant to capitalize on the current uptick in craft beer sales. "One might question how the defendants knew when they adopted this term decades ago that this trend was coming. . . . But leaving this

aside, a general, undefined statement that connotes greater value, detached from any factual representation, is not actionable. One might as easily label a bourbon 'smooth' or say it is made with the same skill and care as has been used for decades." Accordingly, the court dismissed the complaint with prejudice.

Details about a putative class action alleging similar claims in California federal court appear in Issue **548** of this *Update*.

Red Bull False Advertising Settlement Approved

A New York federal court has reportedly approved an agreement between Red Bull GmbH and a class of consumers, settling allegations that Red Bull falsely advertised its product as providing more benefit than coffee provides. *Careathers v. Red Bull N. Am. Inc.*, No. 13-0369 (S.D.N.Y., order entered May 1, 2015); *Wolf v. Red Bull GmbH*, No. 13-8008 (S.D.N.Y., order entered May 1, 2015). The agreement allots $13 million to the 2 million claimants, of whom 60 percent will each receive $4.23 and 40 percent will each receive a four-pack of Red Bull energy drinks. The court cut the fees for plaintiffs' counsel down to about $3.4 million, or about $1.4 million less than they requested; the attorney's fees and class award were not linked, and the court apparently indicated that it would have preferred to lower the attorney's fees amount to increase the total consumer amount to accommodate the large number of claimants who joined the class after the settlement was proposed. *See Law360*, May 1, 2015.

Plaintiff Reaches Agreement with Skinnygirl in Margarita False Advertising Suit

Skinnygirl Cocktails, LLC and a consumer have filed a joint stipulation of dismissal in a lawsuit alleging that the company and its reality-TV-star founder, Bethenny Frankel, mislabeled its Margarita cocktail as "natural" despite containing the preservative sodium benzoate. *Langendorf v. Skinnygirl Cocktails, LLC*, No. 11-7060 (N.D. Ill., joint stipulation of voluntary dismissal with prejudice filed May 5, 2015). The joint stipulation comes after the court refused to certify the class in October 2014, finding that the plaintiff failed to show that the class was ascertainable and that the plaintiff was not a suitable representative for the class due to a personal relationship with her counsel. The stipulation does not indicate whether the parties reached a settlement. Additional information about the denial of class certification appears in Issue **544** of this *Update*.

Trans Fat Putative Class Actions Filed Against General Mills, Nestle

A California man has filed purported class actions against Nestle USA Inc. and General Mills Inc. claiming that both companies use *trans* fat in their products—specifically, General Mills' baking mixes and Nestle's coffee creamers—despite the availability of acceptable alternative ingredients without *trans* fat. *Backus v. Gen. Mills Inc.*, No. 15-1964 (N.D. Cal., filed April 30, 2015); *Backus v. Nestle USA Inc.*, No. 15-1963 (N.D. Cal., filed April 30, 2015).

Each complaint details the history and structure of partially hydrogenated oil (PHO), the products' source of artificial *trans* fat. Plaintiff Troy Backus argues that the scientific consensus on PHO advises that "consumers should keep their consumption of trans fat 'as low as possible'" because it allegedly causes cardiovascular disease, type 2 diabetes, cancer and other medical conditions. He also cites regulations limiting *trans* fats in California, New York City, Denmark and other jurisdictions as evidence that the substance is "inherently dangerous."

The plaintiff argues that the companies' "unfair, immoral behavior" violates California consumer-protection laws because they can earn higher profit margins by using PHO while competing manufacturers formulate their products with safer substances. The complaint also alleges that Nestle breaches an express warranty by advertising its creamer as containing "0g" of *trans* fat. Backus seeks class certification, restitution, an injunction, a corrective advertising campaign, damages, and attorney's fees in both complaints.

Consumer Group Alleges Lead Content in T.J. Maxx Balsamic Vinegar Violates Prop. 65

Consumer Advocacy Group, Inc. has filed a lawsuit against T.J. Maxx, its parent company and its food supplier alleging that they failed to provide a warning of lead content in a raspberry balsamic vinegar product in accordance with the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), the California law that requires warnings on the labels of products that contain substances known to cause cancer or reproductive harm. *Consumer Advocacy Grp. Inc. v. Olivier Napa Valley Inc.*, No. BC580857 (Cal. Super. Ct., Los Angeles Cnty., filed May 4, 2015).

The complaint asserts that because all "[v]inegar contains lead," the defendants should have known that the product was subject to Prop. 65 labeling requirements. Consumer Advocacy Group argues that it investigated the product and gave notice of the alleged violation to each defendant, the state attorney general, county district attorneys and city attorneys but none of the authorities commenced any action. The group seeks a permanent injunction mandating Prop. 65 warnings, penalties of $2,500 per day per individual exposure, costs and attorney's fees.

Industry Groups Appeal Injunction Denial in Vermont GMO-Labeling Case

The food industry groups challenging Vermont's statute requiring the labeling of food containing genetically modified organisms (GMOs) have filed a notice of appeal one week after a Vermont federal court denied their motion for an injunction to stop the law from taking effect on July 1, 2016. *Grocery Mfrs. Ass'n v. Sorrell*, No. 14-0117 (D. Vt., notice of appeal filed May 6, 2015). While the motion for a preliminary injunction failed, the court allowed the case to proceed. Additional information about the injunction denial appears in Issue **563** of this *Update*.

SCIENTIFIC/TECHNICAL ITEMS

Scientific Debate Heats Up over Safety of Grease-Resistant Chemicals

More than 200 scientists have signed a **statement** published in *Environmental Health Perspectives* that calls for limits on the use of certain water- and grease-resistant chemicals in industrial and consumer products. Describing these chemicals as "very persistent" once released into the environment, The Madrid Statement on Poly- and Perfluoroalkyl Substances (PFASs) claims that animal studies have apparently linked long-chain PFASs to "liver toxicity, disruption of lipid metabolism and the immune and endocrine systems, adverse neurobehavioral effects, neonatal toxicity and death, and tumors in multiple organ systems." In addition, the signatories point to a dearth of public information on short-chain alternatives or the current levels of PFASs in the environment.

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.

Citing these concerns, The Madrid Statement urges governments to restrict the use of PFASs, enforce labeling provisions and require industry to (i) "conduct more extensive toxicological testing," (ii) "make chemical structures public," (iii) "provide validated analytical methods for detection of PFASs," and (iv) "assume extended producer responsibility and implement safe disposal of products and stockpiles containing PFASs." Among other things, the contributors also request that chemical manufacturers make their data available to scientists, perform environmental monitoring and provide supply chains with safe disposal guidelines. According to the statement, product manufacturers should stop using PFASs "where they are not essential or when safer alternatives exist."

"Global action through the Montreal Protocol (United Nations Environment Programme 2012) successfully reduced the use of the highly persistent ozone-depleting chlorofluorocarbons (CFCs), thus allowing for the recovery of the ozone layer," claim the signatories. "It is essential to learn from such past efforts and take measures at the international level to reduce the use of PFASs in products and prevent their replacement with fluorinated alternatives in order to avoid long-term harm to human health and the environment."