FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

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FIRM NEWS

McDonough and Settles Detail Hershey False Ad Case for Food and Drug Law Institute

Shook, Hardy & Bacon attorneys **Madeleine McDonough** and **Jara Settles** have co-authored a **chapter** in the Food and Drug Law Institute's ***Top 20 Food and Drug Cases, 2014 and Cases to Watch, 2015***. They discuss the district court's decision in *Khasin v. Hershey*, in which a consumer challenged the confectioner's label claims of health value and antioxidant content in several products. McDonough and Settles detail factors in the court's rationale for dismissing most of the case, including a detrimental admission that the plaintiff did not rely upon the labeling when purchasing the products at issue. "*Khasin* highlights the importance of demonstrating actual reliance in putative consumer protection class actions," they explain. "After months of briefing and discovery, a simple conversation (in the form of a deposition) destroyed the vast majority of plaintiff's claims." The court later dismissed the rest of the plaintiff's claims as well. Details of the dismissal appear in Issue **560** of this *Update*.

LEGISLATION, REGULATIONS AND STANDARDS

U.S. Senate Democrats Call on GAO for Single Food Safety Agency Models

U.S. Sens. Dick Durbin (D-Ill.), Dianne Feinstein (D-Calif.) and Kirsten Gillibrand (D-N.Y.) are seeking a study from the Government Accountability Office (GAO) about the practicality of a single federal agency charged with oversight for food safety.

"Given concerns about the fragmented federal food safety system in the United States and potential lessons to be learned from consolidation efforts in other countries," the senators wrote in a June 23, 2015, letter,

"we request GAO's assistance in addressing the following questions: (1) What alternative organizational structures have been identified to streamline and consolidate the U.S. food safety system? (2) What are the costs and benefits associated with each alternative and what implementation challenges exist, if any? [and] (3) What lessons learned and best practices can be gleaned from other countries' efforts to consolidate their food safety functions and systems?"

In January 2015, the senators reintroduced with Rep. Rosa DeLauro (D-Conn.) **legislation** that would consolidate the duties currently managed by 15 different agencies to the oversight of a single food-safety authority. *See Press Release of Sen. Dick Durbin*, June 23, 2015.

NYC Pricing Investigation Targets Whole Foods' Pre-Packaged Foods

The New York City Department of Consumer Affairs (DCA) has alleged that Whole Foods Market, Inc. "routinely overstated the weights of its pre-packaged products—including meats, dairy and baked goods—resulting in customers being overcharged." According to a June 24, 2015, press release, DCA found mislabeled weights on 80 different types of products sold at New York City locations, with 89 percent purportedly failing to meet federal standards "for the maximum amount that an individual package can deviate from the actual weight."

"The overcharges ranged from $0.80 for a package of pecan panko to $14.84 for a package of coconut shrimp," claims the agency. "The fine for falsely labeling a package is as much as $950 for the first violation and up to $1,700 for a subsequent violation. The potential number of violations that Whole Foods faces for all pre-packaged goods in the NYC stores is in the thousands."

In particular, DCA noted that packages of nuts, berries, vegetables, and seafood were often labeled "with exactly the same weight when it would be practically impossible for all of the packages to weigh the same amount." The agency also cited similar issues uncovered by a 2012 investigation of California stores that led to a civil consumer protection case filed by city attorneys for Santa Monica, Los Angeles and San Diego. Additional details about the settlement of that case appear in Issue **528** of this *Update*.

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.

"It is unacceptable that New Yorkers shopping for a summer BBQ or who grab something to eat from the self-service aisles at New York City's Whole Foods stores have a good chance of being overcharged," DCA Commissioner Julie Menin is quoted as saying. "Our inspectors tell me this is the worst case of mislabeling they have seen in their careers, which DCA and New Yorkers will not tolerate. As a large chain grocery store, Whole Foods has the money and resources to ensure greater accuracy and to correct what appears to be a widespread problem—the city's shoppers deserve to be correctly charged."

Advocacy Group Seeks FTC Scrutiny of Whole Foods over Alleged Produce Mislabeling

The Wisconsin-based **Cornucopia Institute** has asked the Federal Trade Commission (FTC) to investigate labeling associated with Whole Foods Market, Inc.'s **Responsibly Grown** fresh produce rating system for potential consumer fraud and mislabeling.

According to a June 23, 2015, **letter** to the director of FTC's Bureau of Consumer Protection, Cornucopia is "concerned that Whole Foods has not met the standards set forth in its recently developed 'Responsibly Grown' produce rating system in violation of its stated guidelines, thus grossly misrepresenting the production practices utilized in growing some of the produce it offers for sale to its customers."

Cornucopia suggests that "expedited communication" with Whole Foods resulting in a consent agreement under which signage and labeling related to the rating program are immediately removed "might best serve the public rather than investing taxpayer resources in a time-consuming comprehensive investigation that might result in monetary fines or other penalties."

EFSA Investigates Long-Term Dietary Exposure to Chlorate

The European Food Safety Authority's (EFSA's) Panel on Contaminants in the Food Chain (CONTAM Panel) has issued a **scientific opinion** assessing the health risks of acute and chronic dietary exposure to chlorate, "a byproduct when using chlorine, chlorine dioxide or hypochlorite for the disinfection of drinking water, water for food production and surfaces coming into contact with food." At the request of the European Commission, the opinion considers the presence of chlorate

in both drinking water and food, setting "a tolerable daily intake (TDI) of 3 micrograms per kg (µg/kg) of body weight per day for long-term exposure to chlorate in food," with "a recommended safe intake level for a daily intake (called the 'acute reference dose') of chlorate of 36 µg/kg of body weight per day."

After reviewing data collected by the EFSA Evidence Management Unit, the CONTAM Panel identified drinking water as "the main average contributor to [] chronic dietary exposure," but singled out frozen food commodities as having "the highest levels of chlorate within each food group." In particular, the agency links chronic chlorate exposure to iodine deficiency in infants, toddlers and children younger than 10 years, the groups in which the highest exposure estimates exceeded the TDI. At the same time, however, the opinion notes that introducing "a maximum residue level (MRL) of 0.7 mg/kg for all foodstuffs and drinking water would only minimally reduce acute/chronic exposures and related risks."

"Long-term exposure to chlorate in food, particularly in drinking water, is a potential health concern for children, especially those with mild or moderate iodine deficiency," states EFSA in a June 24, 2015, news release. "But the total intake on a single day even at the highest estimated levels is unlikely to exceed the recommended safe level for consumers of all ages."

Barbados Imposes SSB Tax

The Government of Barbados has announced a 10-percent excise tax on the purchase of locally produced and imported sugar-sweetened beverages as of August 1, 2015. The Healthy Caribbean Coalition (HCC) lauded the action, citing consumption of sugary drinks as a major contributing factor to escalating rates of obesity and related health conditions such as diabetes, cardiovascular disease and cancer. *See Open Letter to HCC Membership*, June 16, 2015.

LITIGATION

SCOTUS Deems Raisins Program a Constitutional Taking

The U.S. Supreme Court has ruled that a provision in the Agricultural Marketing Agreement Act of 1937, a U.S. Department of Agriculture program that regulates U.S. production and sales of raisins, amounts to

a constitutional taking and requires just compensation to plaintiffs and other raisin farmers. *Horne v. USDA*, No. 14-275 (U.S., decided June 22, 2015). The decision focused on whether a taking of personal property (here, the raisins) fell under the Fifth Amendment of the U.S. Constitution, which requires just compensation and has historically applied to real property such as land.

The majority opinion, delivered by Chief Justice John Roberts, began by detailing the program, which required raisin farmers to turn over a portion of their crop yields each year to avoid oversaturating the market and causing a drop in raisin prices. The government then used those yields in social programs like school lunches or sold them overseas. The opinion then provided a history of takings and compared the program, holding, "The reserve requirement imposed by the Raisin Committee is a clear physical taking."

The court then turned to the question of whether giving the raisin farmers a contingent interest in the raisin crop after taking it could allow the government to avoid paying just compensation, finding that a *per se* taking and regulatory taking require different analyses that the government had confused. The opinion then found that "a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects" is, "at least in this case," a *per se* taking.

Comparing a previous case, the chief justice noted, "Raisins are not like oysters: they are private property—the fruit of the grower's labor—not 'public things subject to the absolute control of the state.' [] Any physical taking of them for public use must be accompanied by just compensation." The court overturned the Ninth Circuit's inconsistent opinion and refused to remand the case for further litigation. "[T]he Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government's effort to take their raisins," Chief Justice Roberts wrote. "This case, in litigation for more than a decade, has gone on long enough."

Shook attorneys **Ann Peper Havelka** and **Jara Settles** summarized the oral arguments in the case in an **article** for *Law360*, and additional details on the case appear in Issues **552** and **562** of this *Update*.

France's Constitutional Council to Hear Challenge to BPA Ban

France's administrative supreme court, Conseil d'Etat, has ruled that PlasticsEurope's challenge to the country's ban on bisphenol A (BPA) in food-contact materials can be heard in its Constitutional Council because the legal question presented is new. The plastics group argued that the opinion from the French Agency for Food, Environment and Occupational Health and Safety that the 2012 prohibition cited as justification was inadequate because it was a "danger study" rather than an "evaluation of risks." The Constitutional Council now has three months to rule on the case. *See Bloomberg BNA*, June 19, 2015.

Anheuser-Busch Settles Beck's® False Origin Suit

Anheuser-Busch has settled a class action alleging that the company misrepresented Beck's® beer as brewed in Germany after a 2012 move to a St. Louis brewing facility. *Marty v. Anheuser-Busch Cos., LLC*, No. 13-23656 (S.D. Fla., preliminary approval entered June 23, 2015). The uncapped settlement will provide payouts to U.S. purchasers of bottles or packages of Beck's® since May 2011, with a $50 limit for households with proofs of purchase and $12 limit for those without. Anheuser-Busch will include the phrase "Brewed in USA" or "Product of USA" on the bottles, boxes and website for at least five years. Plaintiffs' attorneys will receive $3.5 million. Details about a similar lawsuit Anheuser-Busch settled about the origin of Kirin® beer in January 2015 appear in Issue 550 of this *Update*.

Class Certified in Fat-Free Cheddar Cheese "Natural" Lawsuit

A California federal court has certified a class of consumers challenging the "natural" label on Kraft's fat-free cheddar cheese product but limited the class only to consumers who relied on that labeling when purchasing the product. *Morales v. Kraft Foods Grp., Inc.*, No. 14-4387 (C.D. Cal., order entered June 23, 2015). The complaint had asserted that artificial coloring in the product precluded Kraft from labeling the cheese as "natural."

The court found that the proposed class met the numerosity, commonality, typicality and adequacy of representation standards, then focused on whether the common issues predominate over any individual issues. Kraft argued that the plaintiffs could not show that every member of

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.

the proposed class relied upon the "natural" representation because the term "natural" may mean different things to different people. The court disagreed but noted that Kraft could make that argument later in the legal process.

Kraft also challenged the ascertainability of the class, arguing that without purchase records, the parties would be unable to determine the potential class. The court was unpersuaded, noting that without self-identification of class members, class actions for products with "modest" retail prices would rarely be ascertainable, which is inconsistent with the purposes of the class action. Accordingly, the court certified the class, but limited membership to those who can swear that they were misled by the "natural" representation when purchasing the product.

"Natural" Capri Sun Contains Artificial Ingredients, Putative Class Action Alleges

A consumer has filed a putative class action alleging that Capri Sun®, a product of Kraft Foods Group, is misleadingly represented as "natural" because it contains citric acid and "natural flavor." *Osborne v. Kraft Foods Grp., Inc.*, No. 15-2653 (N.D. Cal., filed June 12, 2015). The complaint asserts that citric acid is created synthetically through the fermentation of glucose, while "natural flavor" is made of "unnatural, synthetic, artificial and/or genetically modified ingredients," so neither ingredient should be part of a "natural"-labeled product. Kraft charged a premium for Capri Sun® based on that label, the plaintiff argues, and deceived consumers into relying upon that label misrepresentation when purchasing. She seeks class certification, an injunction, damages and attorney's fees for alleged negligent misrepresentation and violations of California's consumer-protection statutes.