FOOD & BEVERAGE LITIGATION UPDATE

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FIRM NEWS

Shook Attorneys Pen Bloomberg BNA Special Report on Discovery-Related Changes to the Federal Rules of Civil Procedure

Shook, Hardy & Bacon **Data and Discovery Strategies** attorneys **Jesse Weisshaar** and **Mark Cowing** analyze changes to the Federal Rules of Civil Procedure in a newly published *Bloomberg BNA: Digital Discovery & e-Evidence*® special report titled "Amendments to Discovery Rules: How Will You Be Affected?."

Providing a detailed overview of the amendments that took effect December 1, 2015, the **report** addresses rules pertaining to discovery in general as well as the discovery of electronically stored information.

The authors explore the practical implications of increased court involvement in the discovery process, discussing new provisions that emphasize proportionality and seek to facilitate "early, frequent and informed" cooperation between parties. They recommend that parties be prepared to "act sooner," "be specific" and "reassess preservation practices." As the report concludes, "[A]ll involved should be prepared to adjust their existing approaches to discovery to comply with the compulsory aspects of the Rules' amendments: (a) the reduction in time before parties and the courts begin addressing discovery-related matters; (b) the increased specificity required in objections and answers to discovery requests; and (c) the corrected (for some) and new standards for determining the scope of discoverable information and when sanctions for lost [electronically stored information] can be imposed."

LEGISLATION, REGULATIONS AND STANDARDS

Kind LLC Challenges FDA's "Healthy" Labeling Regulations

Kind LLC has filed a citizen petition to the U.S. Food and Drug Administration (FDA) challenging regulations governing the use of "healthy" on food labeling, arguing that specific nutrient levels in a product do not dictate whether it is "healthy."

The petition asks FDA to reevaluate its nutrient content claim regulations for consistency with current federal dietary recommendations and issue rules accordingly.

Kind filed the petition months after FDA issued the company a warning letter—and the company was targeted by a consumer class action on the same subject—about the use of "healthy" on Kind snack bars, which contain more than 1 gram of saturated fat due to their nut content. Additional details about the letter and subsequent lawsuits appear in Issues **562** and **575** of this *Update*.

NIOSH to Target Maritime Safety Issues

The National Institute for Occupational Safety and Health (NIOSH) has launched a Center for Maritime Safety and Health Studies. The new program will reportedly coordinate research and intervention studies across the agency for this "high-risk worker population." *See NIOSH eNews*, December 2015.

San Francisco Board of Supervisors Repeals SSB Ad Ban on City Property

The San Francisco Board of Supervisors has reportedly voted to repeal an **ordinance** prohibiting advertisements for sugar-sweetened beverages (SSBs) on city property in light of the U.S. Supreme Court ruling in ***Reed v. Town of Gilbert, Ariz.*** that struck down a comparable initiative restricting advertising on public property.

The ordinance was one of three passed by the municipal lawmakers in June 2015. The others (i) mandate health warnings on most billboards and ads for SSBs with 25 or more calories and (ii) prevent city departments and contractors from using city funds to purchase SSBs.

"We may have lost this particular battle, but the war rages on," Supervisor Malia Cohen was quoted as saying. "We didn't take down Big Tobacco overnight—we're not going to take down Big Soda overnight either."

The American Beverage Association filed suit against both advertising ordinances on First Amendment grounds, and its challenge of the mandated health warning is pending in federal court. *See Courthouse News Service*, December 1, 2015; *WLF Legal Pulse*, December 3, 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.

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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

California Supreme Court Allows Challenge to "Organic" Herbs

The California Supreme Court has held that a consumer may sue Herb Thyme Farms, Inc. alleging its herbs are improperly labeled as "organic," dismissing the farm's contention that the Organic Foods Production Act of 1990 blocks such claims. *Quesada v. Herb Thyme Farms, Inc.*, No. S216305 (Cal., order entered December 3, 2015). Details about previous court rulings concluding that the federal law preempted the action appear in Issues **347** and **509** of this *Update*.

The court found that, contrary to the farm's arguments, the federal statute does not prohibit consumers from seeking redress. "[T]he complaint here alleges Herb Thyme has engaged in fraud by intentionally labeling conventionally grown herbs as organic, thereby pocketing the additional premiums organic produce commands. The purposes and objectives underlying the Organic Foods Act do not suggest such suits are an obstacle; to the contrary, a core reason for the act was to create a clear standard for what production methods qualify as organic so that fraud could be more effectively stamped out and consumer confidence and fair market conditions promoted," the court held.

National Restaurant Association Sues NYC over Salt-Labeling Law

The National Restaurant Association (NRA) has petitioned a New York state court for a declaratory judgment stating that a New York City regulation requiring restaurants to post warnings on menu items high in sodium is arbitrary and capricious as applied. *Nat'l Restaurant Assoc. v. New York City Dep't of Health & Mental Hygiene*, No. 654024/2015 (N.Y. Sup. Ct., filed December 3, 2015).

The complaint compares the regulation to the city's 2012 attempt to prohibit sales of soft drinks in cups larger than 16 ounces, alleging that the New York City Board of Health is merely "looking to grab headlines as the purveyor of 'first in the nation' health initiatives, notwithstanding that, in truth, its sodium regulation is illogical, unlawful, and more likely to mislead consumers about sodium health than help them."

NRA argues that the regulation, which took effect December 1, 2015, is "riddled with arbitrary exclusions and exemptions that are unrelated to the stated purpose of the rule," because it only applies to food service establishments or vendors that have more than 15 locations nationally. The mandate also excludes unprepared foods sold at grocery stores, the complaint asserts, despite that "[t]wo-thirds of dietary sodium comes from grocery items, not from restaurants at all."

The complaint also challenges the thresholds set forth in the statute, arguing that the limit of 2,300 reflects an "increasingly controversial view about sodium consumption" and distinguishes sodium from toxic substances that require warnings such as lead paint. Further, "[t]he Sodium Mandate provides that the Icon must appear next to any menu item, or combination offered, that contain 2,300 milligrams or more of sodium per discrete serving unit," the complaint explains. "In addition, if any option on a menu item results in a combination meal with 2,300 mg of sodium or more, or if any possible version of a menu item contains 2,300 mg of sodium or more, the Icon must be used next to the item. These definitions and requirements result in a confusing use of the Icon and render the Sodium Mandate more misleading to consumers than helpful." NRA also points out that using the same threshold for single menu items and entire meals can further confuse consumers.

"Once again, the board has acted without any legislative guidance and improperly sidestepped the people's representatives on the City Council," Angelo Amador, NRA's regulatory counsel, said in a December 4, 2015, press release. "Its actions, as with the beverage ban before it, are arbitrary in their scope, reach and application."

Pepperidge Farm Asserts Trademark Infringement Against Trader Joe's Crispy Cookies

Pepperidge Farm, maker of Milano® cookies, has filed a trademark infringement lawsuit against Trader Joe's Co. alleging the retailer's Crispy Cookies emulate the shape and configuration of Milano® cookies. *Pepperidge Farm, Inc. v. Trader Joe's Co.*, No. 15-1774 (D. Conn., filed December 2, 2015).

In addition to the similarity between the cookie products, Pepperidge Farm alleges that the packaging of Crispy Cookies is similar as well. Although Crispy Cookies packaging depicts the cookies in a fluted paper tray—as Milano® cookies are sold—Trader Joe's actually packages the

cookies in a plastic tray inside the external packaging. Pepperidge Farm cites Google search results for "'Trader Joe's,' 'cookie' and 'Milano'" as evidence that consumers have also noted the similarities between the two products. Pepperidge Farm seeks declarations of infringement, permanent injunctions, damages and attorney's fees.

United States Criticizes WTO's Affirmation That "Dolphin-Safe" Tuna Labels Discriminate Against Mexico

The World Trade Organization's (WTO's) Appellate Body has affirmed an April 2015 ruling that U.S. tuna regulations discriminate against Mexico by requiring "dolphin-safe" labels reflecting the methods used to catch the fish that protect against capture of the mammal. In response to the appellate ruling, the United States criticized the decision as focusing on points that Mexico had not challenged and were merely "hypothetical" and an "academic exercise."

"Panels and the Appellate Body should not make their conception of the 'perfect' measure the enemy of all the possible good ones," according to the U.S. **statement** provided during the meeting of the WTO Dispute Settlement Body on December 3, 2015. "In pursuing legitimate objectives, Members should not be held to the impossible standard of designing and applying a measure that corresponds exactly to the one that a panel or the Appellate Body would have designed to achieve the legitimate objective at issue. Regulators design measures to address facts, risks, and situations actually presented, not premises and hypothetical scenarios."

MEDIA COVERAGE

Brockovich Champions GMO Labeling In *Time* Magazine Editorial

Environmental activist Erin Brockovich uses the U.S. Food and Drug Administration's (FDA's) recent determination that genetically engineered salmon is safe for human consumption and requires no labeling as such to rally consumers into action against genetically modified organisms (GMOs) in a December 1, 2015, **opinion piece** in *Time*.

"The biotech industry and the FDA have hijacked not only our basic rights as consumers, but also our fundamental human rights in the face of corporate monopolization of our food supply," Brockovich said. "They are jeopardizing our health and the environment more than ever

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.

before. When will the government agencies put in place to protect us stop servicing the bottom line of corporations?"

Brockovich briefly reviews the findings of various agencies and organizations worldwide, ultimately imploring readers to "help spark a larger conversation about the food we are eating in this country" by voicing their GMO-related concerns to federal lawmakers.