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FIRM NEWS

Cruz-Alvarez and Canfield Contemplate Class Actions Post-Scalia

In an article for the Washington Legal Foundation's *Legal Pulse*, Shook Partner Frank Cruz-Alvarez and Associate Rachel Canfield discuss the future of class actions in light of the passing of U.S. Supreme Court Justice Antonin Scalia. "In the specific area of class-action litigation, Justice Scalia repeatedly thwarted the plaintiffs' bar's efforts to encourage liberal interpretation of Rule of Civil Procedure 23 and broadly applied the preemptive effect of the Federal Arbitration Act (FAA)," they write. "His death and vacancy have generated much speculation about how the post-Scalia high court will address class actions and other related cases in the terms ahead."

Cruz-Alvarez and Canfield provide an overview of Scalia-authored opinions in class action appeals and discuss immediate effects of his death on the litigation environment, noting that one company candidly announced it would not seek certiorari in an antitrust class action because of Scalia's absence from the bench. Further, they note, certiorari was denied in *Direct Digital LLC v. Mullins*, "a case initially thought of as a front runner for review."

"Justice Scalia's passing and absence from the Court will have a profound impact on the process by which the Court selects and decides future class-action cases," Cruz-Alvarez and Canfield write. "While the current Court sits divided on such issues, confirmation of the next justice, regardless of his or her approach to business litigation issues, will undoubtedly have far reaching implications when it comes to class-action litigation."

LEGISLATION, REGULATIONS AND STANDARDS

FDA Issues Acrylamide Guidance

The U.S. Food and Drug Administration has issued guidance titled "Acrylamide in Foods" that finalizes a November 2013 draft on the topic. The document provides information about reducing acrylamide

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in potato-based, cereal-based and other foods as well as information to provide consumers on cooking packaged frozen french fries. *See Federal Register*, March 11, 2016.

FDA Delays Menu Labeling Enforcement

The U.S. Food and Drug Administration (FDA) has announced that two rules requiring calorie information to be listed on menus and menu boards in chain restaurants will not be enforced December 1, 2016, as initially planned, but will instead be delayed until one year after final guidance is issued. The announcement credits the omnibus appropriations bill enacted December 18, 2015, as cause for the delay. The agency is currently reviewing comments about related draft guidance issued in September 2015. *See FDA Statement*, March 9, 2016.

LITIGATION

Spanish Supreme Court Rejects Champagne Industry's Challenge to "Champín" Soft Drink

The Supreme Court of Spain has reportedly dismissed a challenge brought by the Comité Interprofessionnel Du Vin de Champagne alleging that Champín, a Spanish fruit-flavored soft drink, infringes the organization's protected-designation-of-origin rights. The organization asserted that Champín could be confused with Champagne, which may only describe sparkling wines made in that region. The court disagreed, finding that "Champín differs enough with respect to those products protected by the Champagne appellation that the phonetic similarity does not evoke the product." *See The Local*, March 10, 2016.

Court Denies Certification Again in Probiotic Yogurt Case

A California federal court has again denied certification in a putative consumer class action challenging Yakult USA's probiotic yogurt product for allegedly false digestive-health claims. *Torrent v. Yakult USA, Inc.*, No. 15-0124 (C.D. Cal., S. Div., order entered March 7, 2016). Additional information about the previous denial of certification appears in [Issue 589](#) of this *Update*.

In its prior denial, the court found the plaintiff was unlikely to purchase the product again, thus he lacked standing to pursue an injunction. Following this ruling, the plaintiff purchased Yakult at a store, then refiled his motion for class certification along with a sworn declara-

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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tion that “I intend to buy Yakult in California in the future.” The court found the refiled motion to be “an effort to manufacture standing in direct response to this Court’s prior ruling.” Allowing the plaintiff “to seek injunctive relief based on his recently-expressed intention to purchase Yakult in the future would permit him to fundamentally alter his theory of the case, and would allow him to relitigate issues that this Court has already ruled on.” Accordingly, the court denied the motion for certification.

Court Dismisses Nestlé Creamer Putative Class Action

A California federal court has dismissed a proposed class action against Nestlé USA, Inc. alleging that its Coffee-mate creamer products are mislabeled because they include partially hydrogenated oil (PHO), which contains *trans* fat, despite listing “og Trans Fat” on its labels. *Backus v. Nestlé USA, Inc.*, No. 15-1963 (N.D. Cal., order entered March 8, 2016).

The court first agreed with Nestlé’s argument that the plaintiff’s three use claims—those arguing that the company’s use of PHO makes it liable for damages to consumers—were preempted by the federal Food, Drug, and Cosmetic Act (FDCA) and the U.S. Food and Drug Administration’s (FDA’s) compliance schedule for removing *trans* fat from food by June 18, 2018.

The court then turned to the labeling claims, which Nestlé also argued were preempted by the FDCA, as amended by the Nutrition Labeling and Education Act, which established that a company must list the *trans* fat content of a product as zero grams if the true content is less than one-half of a gram. The court agreed, distinguishing the “og Trans Fat” labeling claim from the claim in a similar case, in which the defendants were held liable for damages for the claim that their product contained “No Trans Fat.” “In the context of the FDA’s regulations, the word ‘No’ has no meaning beyond its ordinary, dictionary definition, i.e., ‘not any,’ and ‘No’ cannot be used to list *trans* fat content in the nutrition box,” the court found. “In contrast, ‘og Trans Fat’ is explicitly defined as any quantity less than 0.5 gram, and, as discussed above, is a rounded value whose use in the nutrition box is mandated by the FDA.” Accordingly, the court dismissed the use and labeling claims, granting Nestlé’s motion to dismiss the case.

Plaintiffs Allege Whole Foods Destroyed Documents in Yogurt MDL

Consumers in multidistrict litigation alleging that Whole Foods Market misrepresents the amount of sugar in its Greek yogurt have filed a motion requesting sanctions against the company, alleging that it destroyed samples of the yogurt at issue. *In re Whole Foods Mkt. Inc. Greek Yogurt Mktg. and Sales Practices Litig.*, MDL No. 2588 (W.D. Tex., motion filed March 4, 2016). The motion argues that Whole Foods “utterly failed in its legal duty to preserve relevant evidence in its custody and control” by destroying the yogurt and seeks details on the destruction to determine whether it was intentional and in bad faith.

Great Harvest Bread Co. Targets Panera’s Tagline as Infringing

Great Harvest Franchising, Inc. and two franchisees of Great Harvest Bread Co. have filed a lawsuit against Panera Bread Co., alleging the company has been using a tagline—“Food as it should be”—that infringes on Great Harvest’s trademarked slogan, “Bread. The way it ought to be.” *Great Harvest Franchising, Inc. v. Panera Bread Co.*, No. 16-0121 (W.D.N.C., Charlotte Div., filed March 10, 2016). Great Harvest established its tagline in October 2014 and registered the mark in December 2015, and it alleges that Panera began using its similar slogan in July 2015. The plaintiffs seek an injunction, destruction of infringing materials and damages for allegations of unfair competition, trademark infringement and false designation of origin.

Lawsuit Alleges Contaminated Dole Salad Led to Coma

A woman has filed a lawsuit alleging Dole Fresh Vegetables, Inc. sold salad mixes contaminated with *Listeria*. *Georgostathis v. Dole Fresh Vegetables, Inc.*, No. 16-0360 (S.D. Ohio, filed March 7, 2016). The woman asserts that after her mother ate the salad mix, she became infected with *Listeria* and felt extreme head and neck pain that ultimately caused her to become comatose. The complaint argues that the strain of *Listeria* in the plaintiff’s salad mix is “indistinguishable from the strain involved in the recent *Listeria* outbreak linked to Dole salad products produced at the Springfield, Ohio processing facility.” The outbreak has reportedly sickened nearly 30 people in the United States and Canada who were all hospitalized as a result of contracting *Listeria*. The plaintiff, who is represented by foodborne-illness attorney Bill Marler, seeks damages and attorney’s fees for allegations of negligence, product liability and violations of Ohio consumer-protection law and the Uniform Commercial Code.

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Appeals Court Affirms Dismissal of Libel Claim Against TV Station for D'Lites Report

A New York state appellate court has affirmed a lower court's ruling dismissing a lawsuit against a local Fox TV station that investigated and reported on the allegedly false health claims of D'Lites ice cream in two stores. *Prince v. Fox Television Stations Inc.*, No. 107129/2011 (N.Y. App. Div., 1st Dept., order entered March 8, 2016). The eight-minute "Shame Shame Shame" report informed viewers that the nutritional information advertised for a small serving did not correlate to the nutritional information of the ice cream served by two New Jersey stores; the owner of a D'Lites store—not one involved in the report—sued the station for libel. A lower court then dismissed the lawsuit; details appear in Issue [524](#) of this *Update*.

"To the extent that there were purported discrepancies in the measurements of sugar and carbohydrates in the test results of the samples sold in stores, plaintiff does not dispute that the servings as sold contained more of these components than the nutritional panel advertised, and thus the report remained substantially true," the court found. "For the same reasons, the report's statements that the ice cream was not diabetic-friendly were substantially true." Further, "any reasonable reader would understand that the statements that D'Lites ice cream was not healthy was an expression of opinion," the court found. "Because the report repeatedly disclosed the nutritional content of the ice cream, the reader was free to reach his or her own opinion regarding the health of the product." Accordingly, the court affirmed the lower court's dismissal.

SCIENTIFIC/TECHNICAL ITEMS

High Glycemic Index Allegedly Linked to Increased Lung Cancer Risk

A new study has allegedly linked a high dietary glycemic index (GI) and glycemic load—"markers of carbohydrate intake"—to an increased risk of lung cancer in non-smokers. Stephanie C. Melkonian, et al., "Glycemic Index, Glycemic Load, and Lung Cancer Risk in Non-Hispanic Whites," *Cancer Epidemiology, Biomarkers & Prevention*, March 2016.

Comparing data from newly diagnosed lung cancer cases to a group of healthy controls, the study authors reportedly found an increased risk for lung cancer among participants with dietary GI in the highest quintile, compared to those in the lowest quintile. In particular, their stratified analyses purportedly noted "a more profound, independent association

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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.



between dietary GI and lung cancer risk in individuals without traditional lung cancer risk factors.”

“Diets high in GI result in higher levels of blood glucose and insulin, which promote glucose intolerance, insulin resistance, and hyperinsulinemia,” explain the researchers. “This is only the second study to suggest an independent association between GI and lung cancer risk and the first study to suggest that GI may influence lung cancer risk more profoundly in specific subgroups, including never smokers, individuals with low levels of education (<12 years), and those diagnosed with certain histologic subtypes of lung cancer.”