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LEGISLATION, REGULATIONS AND STANDARDS

FDA to Reevaluate Use of “Healthy” on Food Labels

The U.S. Food and Drug Administration (FDA) will reconsider how “healthy” may be used on food packaging following the evaluation of a citizen petition filed by Kind LLC. FDA previously challenged Kind’s use of “healthy” on its nut bars, which contain more fat than permitted due to the inclusion of nuts, and Kind changed its packaging accordingly but filed a petition for reconsideration of the issue. The existing guidelines were created during the 1990s and reflect accepted standards of that time, including a preference for foods low in fat without regard to the nature of the fat. FDA has now allowed Kind to use “healthy and tasty” on its packaging “only in text clearly presented as its corporate philosophy, where it isn’t represented as a nutrient content claim, and does not appear on the same display panel as nutrient content claims or nutrition information.” Further details about the dispute appear in Issues [562](#), [575](#) and [586](#) of this *Update*.

“In light of evolving nutrition research, forthcoming Nutrition Facts Labeling final rules, and a citizen petition, we believe now is an opportune time to reevaluate regulations concerning nutrient content claims, generally, including the term ‘healthy,’” a May 10, 2016, FDA [statement](#) explained. “We plan to solicit public comment on these issues in the near future.”

LITIGATION

Ninth Circuit Denies Rehearing of Costco “Natural” Water Suit

The Ninth Circuit Court of Appeals has affirmed a dismissal of a consumer lawsuit against Costco Wholesale Corp. alleging mislabeling claims against VitaRain Tropical Mango Vitamin Enhanced Water Beverage. *Maple v. Costco Wholesale Corp.*, No. 13-36089 (9th Cir., order entered May 9, 2016). The plaintiff had alleged the product was mislabeled because the product contains added caffeine, precluding the use of “natural” on the label. The district court dismissed the case

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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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because the plaintiff did not read the label before purchasing it; on appeal, the plaintiff asserted that he could amend the complaint to add “a subclass of plaintiffs who *did read* the relevant parts of the label.” Because he did not rely on the label, the plaintiff’s claim failed, and “the potential existence of other classes of which Plaintiff is *not* a member is irrelevant,” the court found. Further, the “district court abused its discretion by dismissing the action without prejudice,” the court held, and directed the lower court to enter a dismissal with prejudice.

Lawsuit Challenges Buy-One, Get-One Deal at Grocers

Consumers have filed a putative class action against Albertson’s Inc. and Safeway Inc. alleging the companies raise prices on meat during “buy one get one free” (BOGO) deals, resulting in consumers “actually paying for the meat that is sold as ‘free’ in these special sales.” *Stewart v. Albertson’s Inc.*, No. 16-15125 (Ore. Cir. Ct., Multnomah Cnty., filed May 4, 2016).

The complaint asserts the stores rotate BOGO offers on a number of meat products, including pork chops, chicken breast and beef sirloin, but offer the products at lower prices when they are not on special. Further, the stores “sell the same meat products at regular [loyalty card] prices that are lower than the BOGO prices. When they do this, Defendants sometimes sell the same product under different names.” The plaintiffs offer an example: “Safeway sold boneless, skinless chicken breasts to [loyalty card] members for \$1.99 per pound. At the same time, Safeway sold seasoned boneless, skinless chicken breasts for \$9.99 per pound in a Buy 1, Get 2 Free promotion.” In addition, “petite sirloin” is rebranded as “round tip steak,” “sirloin petite roast” or “beef sirloin petite steak boneless” when not part of a BOGO offer, the complaint alleges. These actions amount to alleged violations of Oregon consumer-protection law, the plaintiffs argue, and they seek class certification, an injunction and damages.

Caribou Coffee Faces Alleged TCPA Violations

A consumer has filed a proposed class action against Caribou Coffee Co. Inc. arguing the company violated the Telephone Consumer Protection Act (TCPA) by sending her “numerous unsolicited SMS text messages.” *Farnham v. Caribou Coffee Co. Inc.*, No. 16-0295 (W.D. Wis., filed May 5, 2016). The plaintiff asserts that Caribou sent her 50 text-message advertisements from March to May 2016 without her consent. For allegations of negligent and willful violations of TCPA, the plaintiff seeks statutory damages of \$500 per negligent violation and \$1,500 per willful violation as well as an injunction and class certification.

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Former UC Davis Employees Sue Strawberry-Breeding Program

Two strawberry breeders formerly of the University of California, Davis have filed a lawsuit against the university targeting its strawberry-breeding program, which they argue is denying them the opportunity to license the breeds they helped cultivate. *Cal. Berry Cultivars LLC v. Regents of U. of Cal.*, No. 16-2477 (N. Cal., removed to federal court May 6, 2016). The scientists left the program in 2014 to start their own cultivation company with a former California secretary of food and agriculture. Their departure triggered a lawsuit from the California Strawberry Commission, which asserted the university was neglecting the program. The scientists now reportedly argue the university refuses to license—“on a non-exclusive basis at a reasonable royalty”—the plants to California Berry Cultivars to suppress competition, amounting to allegations of conversion, breach of contract, breach of faith, breach of fiduciary duty and unfair competition. Details about the settlement of the previous lawsuit appear in Issue [555](#) of this *Update*. See *Sacramento Bee*, May 3, 2016; *Courthouse News Service*, May 6, 2016.

OTHER DEVELOPMENTS

Dairy Groups Urge White House to Challenge WHO Guidelines Restricting Milk Consumption by Young Children

The National Milk Producers Federation, International Dairy Foods Association and U.S. Dairy Export Council have authored a May 9, 2016, [letter](#) to President Barack Obama (D), asking the White House to reject proposed World Health Organization (WHO) guidance that “would discourage consumption of nutritious dairy products by young children.” Slated for presentation at the 69th World Health Assembly on May 23-28, 2016, the [draft guidelines](#) seek to end the promotion of breast-milk substitutes, including all milk and fortified soy milk, intended for consumption by children younger than age 3.

Among other things, the proposal not only places restrictions on the marketing of foods for infants and young children, but also stipulates that “the messages used to promote foods for infants and young children should support optimal feeding and inappropriate messages should not be included.” The guidelines specifically preclude the indirect cross-promotion of breast-milk substitutes with other food products, as well as any message that is “likely to undermine or discourage breastfeeding, that makes a comparison to breast-milk, or that suggests that the product

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is nearly equivalent or superior to breast-milk.” Under the guidelines, companies would be prohibited from providing free samples of foods for infants or young children, or donating equipment, services or gifts to healthcare facilities or staff.

“Discouraging parents from providing their young children with milk, one of the most nutritious foods in the human diet, flies in the face of common sense,” argues the letter, which criticizes guidelines that would prohibit “common images such as a toddler enjoying strawberry yogurt, a one year old eating cubes of cheese or a two year old drinking a glass of milk.” As the dairy groups conclude, “Increased milk and dairy product consumption in recent years has helped improve nutritional outcomes for hundreds of millions of children around the world. This very positive trend should be further encouraged, not thwarted by ill-advised and unsubstantiated guidance from WHO.”

SCIENTIFIC/TECHNICAL ITEMS

Study Alleges Association Between Artificially Sweetened Beverages and Infant BMI

New research claims that the daily consumption of artificially sweetened beverages (ASBs) during pregnancy is associated with increased infant body mass index (BMI). Meghan Azad, et al., “Association Between Artificially Sweetened Beverage Consumption During Pregnancy and Infant Body Mass Index,” *JAMA Pediatrics*, May 2016. Using food-frequency questionnaire data from 3,033 mother-infant dyads enrolled in the Canadian Healthy Infant Longitudinal Development (CHILD) study, researchers reportedly determined that, when compared to children whose mothers did not consume ASBs during pregnancy, those born to the 5.1 percent of mothers who imbibed ASBs daily were twice as likely to be overweight at age 1.

“Infant birth weight was not affected, suggesting that maternal ASB consumption influenced postnatal weight gain rather than fetal growth,” explain the study authors. “These associations were independent of maternal BMI, diabetes, total energy intake, diet quality, and other known obesity risk factors. No comparable associations were identified for SSB [sugar-sweetened beverage] consumption.”

Based on their analysis, the researchers hypothesize that prenatal exposure to nonnutritive sweeteners (NNSs) is responsible for later weight gain, as opposed to sugar-sweetened beverages (SSBs), caffeine or

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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.

artificial colorings. The study notes that “the effects of ASB consumption were only seen in male infants, consistent with findings by Collison et al in which aspartame exposure commencing in utero was associated with excess weight gain in male but not female mice.” As the authors conclude, “Sex specificity has been reported for other obesogenic exposures in early life, with males being disproportionately affected by maternal smoking, antibiotic exposure, and formula feeding. This sexual dimorphism may be related to sex differences in gut microbiota, which contribute to host metabolism and weight gain. Our findings may support this intriguing hypothesis because NNSs have been shown to modify gut microbiota, although this has not yet been demonstrated for prenatal NNS exposure in humans.”

