FOOD & BEVERAGE LITIGATION UPDATE

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SHOOK HARDY & BACON

CONTENTS

FIRM NEWS

Shook Partner Arbitrates $32-Million Dispute over Pineapple Seeds

Shook Partner Bert Ocariz served as an arbitrator in a dispute between Fresh Del Monte Produce Inc. and Inversiones y Procesadora Tropical SA that concluded with an award of $32 million to Del Monte. *Del Monte Int'l GmbH v. Inversiones y Procesadora Tropical SA*, No. 20097/RD (Int'l Chamber of Commerce).

Del Monte argued that the Costa Rican pineapple producer had continued to cultivate its MD-2 pineapple after its contract lapsed in 2013. Ocariz and the other arbitrators found that although a 2002 settlement agreement held the MD-2 was in the public domain, the pineapple grower continued to use the same crops and seeds provided by Del Monte after the companies' contractual relationship had concluded. The award includes $26.1 million in damages, interest and attorney's fees as well as costs of $2.5 million.

LEGISLATION, REGULATIONS AND STANDARDS

TTB Proposed Wine Labeling Revisions

The Alcohol and Tobacco Tax and Trade Bureau (TTB) has proposed wine labeling revisions to address concerns about the accuracy of labeling information for wines that contain more than 7-percent alcohol by volume but are exempt from label approval requirements. According to TTB, the regulations that govern wine labeling include (i) 27 CFR 24, which requires wine containers to feature "the name and address of the wine premises where bottled or packed; the brand name; the alcohol content; the kind of wine; and the net contents of the container," and (ii) 27 CFR 4, which governs "the use of one or more grape variety names as a type designation, the use of type designations of varietal significance, the use of vintage dates, and the use of appellations of origin on wine labels," such as the use of American viticultural area (AVA) names. Wines not intended for interstate or foreign commerce, however, may apply for a certificate of exemption from label approval under Part 4.

The proposed rule would amend 27 CFR 24 to clarify that even wines with a certificate of exemption must comply with the appellation of origin rules laid out in 27 CFR 4. "Some wine industry members have contacted TTB with their concerns regarding the accuracy of label information on certain wines covered by certificates of exemption from label approval," states TTB, which also received a letter from congressional delegations in California, Washington, Oregon and New York. "Specifically, the wines in question are standard wines labeled with AVA names, but the wines do not appear to meet the part 4 requirements for using an AVA name."

As an example, TTB notes that a wine bottled and sold only in Illinois—and thus exempted from labeling approval—can currently use a "Napa Valley" designation, even though the wine does not meet Part 4's requirements for using an AVA name, that is, (i) "the AVA name must have been approved under 27 CFR part 9"; (ii) "not less than 85 percent of the wine must be derived from grapes grown within the boundaries of the viticultural area"; and (iii) "the wine must have been fully finished within the State, or one of the States, within which the labeled viticultural area is located (except for cellar treatments permitted by 27 CFR 4.22(c) or blending which does not result in an alteration of class and type under 27 CFR 4.22(b))."

As the TTB explains, "The revised rules would require that a standard grape wine that contains 7 percent or more alcohol by volume and is covered by a certificate of exemption from label approval may not be labeled with a varietal (grape type) designation, a type designation of varietal significance, a vintage date, or an appellation of origin unless the wine complies with the relevant part 4 provisions for that label information." *See TTB Press Release*, June 21, 2016; *Federal Register*, June 22, 2016.

NAS Examines Data Collection and Reporting in Obesity Trend Studies

At the behest of the Robert Wood Johnson Foundation (RWJF), the National Academies of Sciences, Engineering and Medicine (NAS) has issued a report examining "the approaches to data collection, analysis, and interpretation that have been used in recent reports on obesity prevalence and trends at the national, state, and local level, particularly among U.S. children, adolescents, and young adults." Titled *Assessing Prevalence and Trends in Obesity: Navigating the Evidence*, the report reviews the literature to date, providing "a framework for assessing and interpreting published reports," as well as "recommendations for improving future data collection efforts[] and filling data gaps."

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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Given the various challenges presented by data collection—such as inconsistencies among data sources; insufficient sample size; discrepancies between measured and self-reported data index; and the limitations inherent in trend estimates and interpretations—NAS offers the Assessing Prevalence and Trends (APT) Framework to help stakeholders, policymakers and other "end users" compare various studies and reports. To this end, the framework directs these end users to (i) identify a goal or information need; (ii) assess publish reports to determine how population, methodology and analysis inform the interpretation of the estimate; and (iii) interpret their findings in light of their information needs and decision making.

"The assessment of obesity prevalence and trends estimates continues to change with technological, methodological, and statistical advancements. Some of the inconsistencies and limitations that currently exist in the literature represent prime opportunities for improvement and progress," concludes NAS, which also urges RWJF and other national groups to convene a cross-section of relevant stakeholders to set standards for data collection and reporting. "For this reason, the committee recommends that the research community design and conduct studies to strengthen the evidence base and improve methodological approaches to assessing obesity."

EFSA Launches Study of BPA's Effect on Immune System

The European Food Safety Authority (EFSA) has launched a new working group "to evaluate new scientific evidence on the potential effects of bisphenol A (BPA) on the immune system." Prompted by a Dutch National Institute for Public Health and the Environment report on new studies "describing pre- and perinatal effects of BPA on the immune system," EFSA's Panel on Food Contact Materials, Enzymes, Flavorings and Processing Aids plans to issue a scientific statement on BPA and immunotoxicity at its September 13-15, 2016, plenary meeting. *See EFSA News Release*, June 20, 2016.

EFSA Panel Recommends Further Assessment of Microplastics and Nanoplastics in Food

Responding to a request from the German Federal Institute for Risk Assessment, the European Food Safety Authority's (EFSA's) Panel for Contaminants in the Food Chain (CONTAM Panel) has published a statement on the presences of microplastics and nanoplastics in food, particularly seafood. According to the CONTAM panel, microplastics

range in size from 0.1 to 5,000 μm and are either manufactured to that size (primary microplastics) or fragmented (secondary microplastics). Nanoplastics, which range in size from approximately 1 to 100 nm (0.001–0.1 μm), "originate from engineered material or can be produced during fragmentation of microplastic debris."

After reviewing the scientific literature, the panel concludes that more work is needed to develop and standardize analytical methods for microplastics and nanoplastics "in order to assess their presence, identity and to quantify their amount in food." As the statement notes, "Occurrence data are limited. In contrast to microplastics no methods or occurrence data in food are available for nanoplastics… Based on a conservative estimate the presence of microplastics in seafood would have a small effect on the overall exposure to additives or contaminants. Toxicity and toxicokinetic data are lacking for both microplastics and nanoplastics for a human risk assessment."

"For microplastics and nanoplastics, occurrence data in food, including effects of food processing, in particular, for the smaller sized particles (< 150 μm) should be generated," states the CONTAM Panel. "Research on the toxicokinetics and toxicity, including studies on local effects in the gastrointestinal (GI) tract, are needed as is research on the degradation of microplastics and potential formation of nanoplastics in the human GI tract." *See EFSA News Release*, June 23, 2016.

LITIGATION

Court Vacates Organic Fertilizer Rule for APA Violation

A California federal court has invalidated an amended section of the Organic Foods Production Act that allowed organic producers to use compost materials containing synthetic fertilizers, finding the U.S. Department of Agriculture (USDA) violated the Administrative Procedures Act (APA) by failing to subject the amendment to public notice and comment before it took effect. *Ctr. for Envtl. Health v. Vilsack*, No. 15-1690 (N.D. Cal., order entered June 20, 2016). Details about the complaint appear in Issue 562 of this *Update*.

In 2011, USDA issued guidance on the agency's position allowing the use of fertilizer and compost containing unapproved synthetic materials in the production of organic food. The plaintiffs, three environmental groups, argued that the guidance was a legislative rulemaking—thus triggering requirements of public notice and comment under the APA—while

USDA asserted that it had merely clarified a preexisting rule, not changed it. The court sided with the environmental groups, finding the guidance meaningfully changed the approved substances allowed in organic compost and fertilizer, and accordingly vacated the rule and remanded the matter to USDA for compliance with the APA.

TTAB Refuses to Register Mark for Beer Logo with Empire State Building

Siding with the owners of the Empire State Building, the Trademark Trial and Appeal Board has refused to register a logo for "NYC Beer" featuring a drawing of the building. *ESRT Empire State Bldg. v. Liang*, No. 91204122 (T.T.A.B., order entered June 17, 2016). Claiming ownership of a trademark in a line drawing featuring the building, ESRT Empire State Building filed an opposition to Michael Liang's application to register a black-and-white image resembling the Empire State Building circled by a black ring and the words "NYC Beer." TTAB found that the image was likely to dilute ESRT's mark, finding that Liang's description in his application of "a building resembling the Empire State Building" belied his argument that the design could be a different building. Accordingly, the board refused to grant the trademark.

Julia Child's Estate Files Publicity Suit Against Airbnb

The Julia Child Foundation for Gastronomy and the Culinary Arts has filed a lawsuit against Airbnb Inc. alleging the home-sharing company used Child's name and likeness without permission in an advertised promotion. *Julia Child Found. For Gastronomy & Culinary Arts v. Airbnb Inc.*, No. 16-2626 (Cal. Super. Ct., Santa Barbara Cnty., filed June 22, 2016).

According to the complaint, Airbnb contacted the foundation in April 2016 requesting permission to use the famed American chef and author's name and likeness in an ad promoting a free night's stay at a French property Child and her husband had used as a summer home. "Consistent with Mrs. Child's longstanding and widely-known policy of politely refusing all requests to associate her name or image with commercial products and brands," the foundation denied the request, then discovered that Airbnb used her image in its marketing campaign anyway. The foundation seeks a preliminary and permanent injunction, damages and attorney's fees for the alleged misappropriation.

Snack Food Maker Target of Proposed Class Action Involving Preservatives-Free Claim

A consumer has filed a putative class action against Herr Foods Inc., maker of potato chips, popcorn and cheese curls products, alleging the company mislabels its foods as preservative-free despite containing citric acid. *Hu v. Herr Foods Inc.*, No. 16-3313 (E.D.N.Y., filed June 20, 2016). The complaint alleges Herr seeks "to capitalize on consumers' preference for natural products and the association between such products and a wholesome way of life" by labeling the products as free of preservatives, but the products contain citric acid, "a non-natural, chemically processed ingredient and preservative." For allegations of misrepresentation, breach of warranties and unjust enrichment as well as violations of New York consumer-protection statutes, the plaintiff seeks class certification, restitution, damages, an injunction and attorney's fees.

Slack-Fill Suit Targets Sour Patch Kids

A consumer has filed a putative class action against Mondelez International Inc., maker of Sour Patch Kids, alleging the company sells 28 pieces of candy in a non-transparent cardboard package capable of holding 50 pieces. *Izquierdo v. Mondelez Int'l Inc.*, No. 16-4697 (S.D.N.Y., filed June 20, 2016). The complaint asserts that Mondelez intentionally sells Sour Patch Watermelon in oversized packages in violation of state and federal law. For allegations of misrepresentation, fraud and unjust enrichment as well as violations of New York consumer-protection statutes, the plaintiff seeks class certification, damages, restitution, an injunction requiring more accurate packaging and attorney's fees.

OTHER DEVELOPMENTS

Former FDA Commissioner Examines Increasing DOJ Actions Against Food Companies

Former U.S. Food and Drug Administration (FDA) Commissioner for Foods David Acheson has authored an article warning food company officials to prioritize food safety in light of the U.S. Department of Justice's (DOJ's) increasing prosecutions against executives of food companies responsible for pathogen outbreaks. Acheson describes the Park Doctrine, which allows the government to seek misdemeanor convictions against company officials without requiring proof that the officials knew of or participated in the federal Food, Drug and Cosmetic Act violations.

Further, after a misdemeanor conviction, subsequent violations are automatic felonies.

"It is for all these reasons that it is critical that everyone in a food facility understand and follow all food safety practices, and that executives stay tuned in to everything going on in their operations—as they are ultimately responsible for every act that takes place," Acheson writes. "Additionally, while I caution against simply writing up a food safety plan in order to check off a [Food Safety Modernization Act (FSMA)] box, having that written plan—and implementing it, not only puts you in compliance with the FSMA rule, it can help protect against criminal sanctions by showing that you were taking steps to prevent adulteration."

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.